

The spoken word applies

## Information and consultation - The view of employers' organisations

Speech by

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TAIEX Seminar on Safeguarding of Employee's Rights in  
the Event of Transfers of Undertakings

Place: Sofia, Bulgaria  
Date: 28 September 2004, 11:30 a.m.

Ladies and Gentlemen,

First of all, I would like to express my thanks for your invitation to speak at this meeting and to contribute the opinion of an employers' organization to the today's discussion about employees' information and consultation rights according to the Directive 2001/23/EC of March 2001.

My name is Sven Balders. I am a lawyer working for the Confederation of German Employers' Associations (BDA) in the Employment & Labour Law Department.

The BDA represents the interprofessional and the interregional interests of German employers in the social policy field. It is thus the spokesman of German employers in this field vis-à-vis the

government, parliament, trade unions, the public and international organisations. The current president is Dr. Dieter Hundt, an entrepreneur himself.

Our main tasks are services to our members (information, advice, coordination) and to influence politics. The BDA represents employers' interests in the self-administration bodies at the Federal level of the social security system and sends honorary judges to the German Federal Labour Court and the German Federal Social Court. The BDA also is the representative body of German employers on an international level within the field of its competence, especially with regard to the European Union and international organisations, such as ILO and OECD.

The BDA is a private organisation financed by membership fees on a voluntary basis. The members of the BDA represent all branches of the German economy. Present membership includes 54 branch associations and 14 interprofessional regional or state associations. Through these direct member associations, a further 1,000 employers' associations, either regional interprofessional or regional branch associations, are indirectly members of BDA. Thus, the BDA represents German employers, who employ about 80 percent of German workers and employees in private business.

I will subdivide my views on information and consultation into three parts:

- First of all, I want to give you a short overview about how the directives on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses have been implemented into German law - as you know, Directive 2001/23/EC is only an editorially revised version of the former Directive 98/50/EC of July 1998 by which the first directive concerning the transfer of businesses, Directive 77/187/EEC of February 1977, had been substantially amended. Maybe, this overview could also be useful to hear from the great differences between the implementation of the Directive into each member state's law, as Ms Maxime-Lecleire explained to you

yesterday how the Directive has been implemented into French law.

- At the second part, I will go into the implementation of Article 7 of the Directive 2001/23/EC which refers to information and consultation.
  
- Finally, I will conclude with a comment on the implementation of Article 7 of the Directive into German law from an employers' organisations' point of view and want to give alternative proposals how the Directive could have been implemented a better way and how the transformed German law should be revised.

First let me mention, that I hope that the Bulgarian legislator will learn from the obscure and

bureaucratic way of implementation of the Directive into German law - especially with regard to the implementation of Article 7 of the Directive concerning information and consultation - and, therefore, will do it a better way than the German legislator did!

In Germany, protective legislation for employees plays a major role in the acquisition of businesses and participations. Accordingly, when planning a transaction, the employer has always to consider the impact of such laws. In this respect, Section 613a of the German Civil Code (BGB) is the key legal provision in the transfer of a business.

Section 613a BGB is largely based on the mentioned three Directives 77/187/EEC, 98/50/EC and 2001/23/EC. Its purpose is to protect employees by retaining their workplaces

unchanged. It also provides for the continued existence of the works council and the employee representative bodies.

Corporate acquisitions differ according to the object and the form of the transfer. The transferee can either acquire the shares in a company (share deal) or some or all of its assets and liabilities (asset deal). In a pure share deal, the company's identity is preserved; the transferee takes over the target company, with all its rights and obligations. No special protective legislation for employees is necessary in this case, because the employment relationships remain unchanged. In the case of an asset deal, on the other hand, Section 613a BGB applies if the sale of a business or part of a business is involved. Under this provision, the employment relationships pass from the transferor

to the transferee. For example, if a company sells the entire assets of a certain production site to an transferee who wishes to continue with the production at that site, the consequence would be that all employees working there will pass to the transferee, who must continue to employ them.

Any dismissals due to the transfer of the business are invalid. Section 613a BGB applies not only to asset deals, but also to transformations of companies under the German Transformation Act.

A flood of court decisions have been occasioned by Section 613a BGB, due to the fact that the provision is not comprehensible in and of itself. A business or part of a business is not an item that is normally transferred as such through a legal transaction. For every business transfer it is therefore necessary to examine whether the

transferred items constitute a business within the meaning of Section 613a BGB. If so, the employment relationship will pass from the transferor to the transferee.

In order for employment relationships to be transferred from the transferor to the transferee in a transfer of a business as defined by Section 613a BGB, a business or part of a business must pass over to a new proprietor by virtue of a legal transaction.

The case law of the German Federal Labour Court, in accordance with the European case law, defines a business or part of a business as a “long-term economic unit”. The term “unit” is defined according to the model of the European Court of Justice as an organized totality of persons and

things for the purpose of carrying out economic activity with its own objectives. The determining factor will be whether the transferee has taken over the organization of work underlying the business.

A determination of whether an economic unit within the meaning of the case law has been transferred is based on the following seven criteria:

- Type of business or company involved;
- Transfer of tangible assets;
- Transfer of intangible assets (customer lists, know-how, etc.);
- Assumption of the personnel or part of the personnel (key employees) by the transferee;

- Transfer of customers;
- Similarity between activities before and after the transfer;
- Duration of any interruption of activity.

These criteria determine whether a transfer of business has taken place within the meaning of Section 613a BGB. It is also sufficient if only a part of a business is transferred. A part of a business is an organizational subdivision of an overall business.

In addition to a transfer of business, Section 613a also requires a change in the proprietor of the business. The decisive factor here is a change in the proprietor's legal personality. A change in the proprietor is not necessarily contingent upon a

change in ownership of the business assets; it is sufficient if merely the right of use is transferred. Thus, a leaseholder is deemed to be the proprietor of the business if it runs the business in its own name.

Finally, Section 613a requires that a business or part of a business pass over to a new proprietor by virtue of a legal transaction and not by law. A transfer by legal transaction can be effected by sale, lease or gift.

If these criteria are met, as a legal consequence of Section 613a BGB, the employment relationships will pass over to the transferee. The transfer of business will comprise the employment relationships that are attributable to the transferred business or part of business. Section 613a BGB

does not cover managing directors of limited liability companies, or members of the management board of stock corporations. Also former employees and retirees who still have claims under the company pension plan are not included in the transfer of the employment relationships; Section 613a BGB pertains only to the active employees.

Under Section 613a BGB, the transferee succeeds to the rights and duties arising from the existing employment relationships. The contractual relationship as a whole passes over to the transferee; In other words, there is a substitution of the contractual party on the employer's side. This means that the transferee must fulfil all obligations arising from the transferred employment

relationships, as if he were the original contracting party.

With effect from 1st of April 2002 Section 613a BGB has been amended according to the revision of Directive 98/50/EC by Directive 2001/23/EC.

Since that date the transferee or the transferor have been obliged to inform each individual employee before the transfer of the business in writing or at least a form similar to written form (Section 126a BGB), regarding:

- the date or proposed date of the transfer;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for the employees; and

- the intended measures to be taken with respect to the employees (Section 613a para. 5).

As a German exceptional, the employees are entitled to object to the transfer of their employment relationships from the transferor to the transferee within one month after they have been informed as described (Section 613a para. 6).

The time period of one month only starts to run after the employees have been completely informed. Otherwise the employees have a non-limited right to object to the transfer of their employment relationships. Essentially, this right has been developed by case law of the German Federal Labour Court on the assumption that forcing a new employer upon the employees against their will would be in violation of their

basic rights under the German Constitution. If an employee exercises his right to object, his employment relationship will remain with the transferor. If it is not possible for the transferor itself to retain the employees, perhaps because the entire business has been sold, he can dismiss the objecting employee on operational reasons.

The exercise of the right to object can lead to serious problems if the transferor has retained part of the business. In that case, he cannot simply dismiss the objecting employees. Since these employees are within the purview of the German Protection Against Unfair Dismissals Act, they can only be dismissed after a so-called “social selection” has been carried out to determine the degree to which employees enjoy protection against dismissal under that Protection Against

Unfair Dismissals Act due to social factors.

According to the mentioned Act these social factors are seniority with the company, age, number of dependents or a seriously handicap. If the transferor cannot retain the objecting employees, it may be necessary to carry out the so-called “social selection” between the objecting employees from the transferred part of the business and those employees who are not affected by the transfer of business at all. If it becomes evident that an objecting employee is, due to social factors, more in need of protection, that employee may oust employees in another part of the transferor’s business. In any case, pursuant to the holdings of the German labour courts, if the objecting employee has no reasonable basis for his position, he need not be included in the social

selection. In any case, dismissals in such cases carry inherent serious risks for the transferor.

Section 613a para. 4 BGB contains a prohibition of dismissals. That is, a dismissal is invalid if it is “due to” the transfer of part of a business.

According to the understanding of the German case law, a dismissal is declared “due to” the transfer of business if this was the motive for the dismissal. The intent of this prohibition on dismissals is to prevent the circumvention of provisions that safeguard labour and employment standards. On the other hand, dismissals on other grounds, e.g., relating to the employee’s conduct or for operational reasons, are permissible. Thus, the transferor can carry out efficiency measures to make the business more sealable. Such a dismissal, then, would not have been “due to” the transfer of

business. However, making such a distinction can be difficult in individual cases.

In the case of a pure transfer of the whole business, the works council as the employees' representation body at plant level has no codetermination rights. Section 111 of the German Works Constitution Act provides that in companies with more than 20 employees, the employer must inform the works council of plans to implement any operational changes in the works that would be of material disadvantage to the employees. However, a transfer of business in and of itself is not an operational change within the meaning of Section 111 of the German Works Constitution Act, thus not subject to codetermination. If the transfer of business is accompanied by an operational change (split-up,

merger of businesses), codetermination rights may exist. The transfer of part of a business, on the other hand, is generally a split-up of the business and thus would be an operational change subject to codetermination (Section 111 sent. 2 no. 3). Insofar, the works council's codetermination rights, the right to negotiate a conciliation of interest and a social plan, must be respected.

A transfer of business itself generally has no effect on the works council as a governing body or on its members. If only part of a business with a works council is transferred, the entire works council will pass over. Under certain circumstances, affected works council members must resign from the works council of the transferor's business. They would then be replaced by substitute members (Section 24, 25).

Having shortly summarized the complex system of information and consultation and the safeguarding of employees' rights in the event of transfers of businesses under German law let me now describe the views of German employers on information and consultation and on the implementation of Article 7 into German law.

German employers cooperate very well with the employees' representation bodies at plant level and also with the employees' representatives at company level. In Germany, the system of codetermination and participation of employees is regulated by various laws which are implemented at different levels:

- at plant level by the Works Constitution Act of 1972, revised in 2001, and the Act on

Spokesmen Committees of Managerial Staff  
of 1988

- at company level by the Works Constitution Act of 1952, the Act concerning Codetermination by Employees within the Supervisory and Management Boards of Companies in the Coal, Iron and Steel Sectors of Industry of 1951 and the Codetermination Act of 1976.

The system of codetermination and participation of employees originated in the 1920s and was re-established and considerably extended at the beginning of the 1950s. Neither its development nor scope can be seen separately from the overall socio-economic background of Germany. This is

why its transfer into a different national context is virtually impossible.

Basically, the principle of codetermination and participation of employees is undisputed in Germany and is acknowledged by employers.

Every regulation, however, has to respect the demarcation line which for reasons of the constitution and the economic order is drawn by the necessity that shareholders or owners are ensured of the power to make ultimate decisions.

Such a demarcation line in case of information and consultation rights in the event of transfers of businesses is drawn by the necessity to keep the system of transfers of businesses flexible.

Otherwise, if a transfer of a business or a part of a business becomes a bureaucratic obstacle and to

risky for a transferor or a transferee due to employees which would not have been informed completely in the meaning of Section 613a para. 5 BGB and, therefore, would be able to object to the transfers of their employment relationships months or years later potential investors might think twice about acquiring businesses, forming prospering new undertakings and creating new jobs and, at least, might refrain from an investment for that reasons.

Therefore, BDA harshly criticizes the amendment of Section 613a within the framework of the implementation of Directive 2001/23/EC for various reasons:

- Whereas Article 7 of the Directive requires individual employees to be informed only

where there are no employee representatives, the German implementation also requires individual employees to be informed in undertakings which have a works council.

- Furthermore, the employees concerned are entitled to object to the transfer of their employment relationship within a month of receiving the information. The objection may be addressed to the transferor or the transferee. However, Article 7 of the Directive does not provide an employees' right to object, either any other Article of the Directive does. In a decision of 1988, the European Court of Justice stated out explicitly that the first directive, the 1977/87/EEC Directive, does not provide for an employee's right to object to the transfer of his employment relationship. In the

other member states' employment laws, also a right of the individual employee to object to the transfer of their employment relationship is absolutely unknown. However, the German legislator laid down a right to object, because in his view the right of information and consultation would be related to the right to object, therefore a combined provision would be necessary. But this supposed relation of the right for information with the right to object is seen by the German legislator only but not by the Directive. Article 7 does not content any employee's right to object.

- To combine the right to be informed with a right to object, the German legislator had to go far beyond the requirements according to the Directive. The Directive provides for

individual employees having a right to be informed in small businesses only in which a employee representation does not exist through no fault of their own. However, Section 613a, para. 5 BGB provides a right to be informed for any individual employee without any restriction.

- Beside the fact, that the implementation of Directive 2001/23/EC is a typical example for German bureaucracy, the amendments of Section 613a BGB concerning information and consultation content high operational risks for both of the employers - the transferor and the transferee. Just think of a medium-sized undertaking employing altogether 200 employees which sources out a part of the business 50 employees at which are employed.

If the 50 employees concerned are not correctly informed according to the requirements under Section 613a, para. 5 BGB, which are of an identical wording as the requirements mentioned in Article 7, para. 6 of the Directive, the employees could object to the transfer of their employment relationships years later. Employees objecting could be primarily relevant in cases of insolvency. In case of the transferee's insolvency some or many employees may object to their transfer of their employment relationship and may notify their return to their former employer, the transferor. Then, in most cases the transferor would have to give notice without having any work for the employees within the notice period. As already described, there

could also be problems of the so-called “social selection”, in addition, the works council could be entitled to deal for a new reconciliation of interests or a new social plan.

- Whereas Article 7 of the Directive does not provide for any obligation of the transferor or transferee to inform the employees in writing or in a form similar to written form, the amendment of Section 613a BGB does. This obligation again raises up time and money of the employer a lot which he necessarily have to invest in such written information since before the implementation the employees could have been informed just by word of mouth.

- Furthermore, according to German constitution law there exist basic doubts concerning the way of the Directive's implementation into German law. Maybe, under German constitution law the German legislator was not allowed to implement the criteria for information according to Article 7 para. 6 into German law directly. Because under a general principle of German constitution law, the so-called "Bestimmtheitsgebot", statute law has to be laid down precisely enough in a way, that the addressee of the provisions can gather which acting is relevant to the law and which is not. Therefore, the German legislator was obliged to fulfil the mentioned requirements according to Article 7, para. 6 of the Directive. It is

nearly impossible for employers to meet the requirements, when not knowing which kind of information in detail they have to inform the employees about and to which extent - just think of transfers, where numerous regulations of binding collective bargaining agreements or works council agreements exists both in the business of the transferor and in the business of the transferee.

- Finally, you generally have to ask if the German implementation meets the famous general constitutional principle of the separation of state powers into the legislative body, the executive forces and the jurisdiction. According to this fundamental constitutional principle, the legislation may not burden the courts with the task to make law. Instead, the

legislative body has to put most concrete abstracts as possible. But if you read the much too generalized wordings in Section 613a, para. 5 BGB the biggest part of implementation and fulfilling of the Directive and its' meanings has still to be done by the courts. But courts have actually other tasks than to laid down law, because they rule individual cases only, also their administration is much to small to do research on general questions of law or the implementations of directives and the implementation's consequences. Therefore, case law generally could lead to uncertainties about one's legal position - in our case: uncertainties for the transferor and the transferee.

On the other hand and beside the fact of the direct implementation of Article 7 para. 6 into German law, you have to grant the German legislator that the information and consultation rights according to Article 7 could not have been implemented into German law directly for other reasons, too.

Because a direct implementation of the Directive into German law would have made no sense. If you would have implemented the Directive directly into German law, there would have been only an obligation to inform the works council in businesses with more than 20 employees, since in Germany, in businesses with more than 20 employees only the works council has rights of codetermination in case of operational changes.

On the other hand, a right of the individual employees to be informed in case of transfer

would exist in businesses with less than 5 employees only, in which under German law a works council could not be constituted. Therefore, in businesses with 6 employees up to 20 employees whether the works council would have a right of codetermination nor the individual employees would have been entitled to get information - it is evident, that such a result would not have made sense.

Nevertheless, the German legislator would have met the objectives of the Directive the better and would have implemented the Directive more in accordance with the system, if he would have created a general right for information and consultation of the works council according to Article 7, para. 1 and 2 of the Directive. Only in case, that no works council could be constituted, a

subsidiary right of the individual employee to be informed would have been appropriate. In any case, the German legislator has to amend Section 613a BGB in that way, that the right to object is void latest three months after the transfer of the business.

Of course, BDA's critique on the German implementation has to be seen against the background of the various information and consultation laws in Germany already existing, about which I already told you, so that the standard of employees' information and consultation in Germany is already very high in general, not only in the event of transfers of businesses. It is such a high standard, that insofar correctly the German government does not see any need for implementation of Directive 2002/14/EC

of March 2002 concerning the establishment of a general framework for informing and consulting employees in the European Community. The German government correctly argues, that the requirements of the Directive 2002/14/EC are already fulfilled by German codetermination law.

With regard to the practical experience of German employers with the Directive's implementation into Section 613a BGB, let me conclude with a suggestion to the Bulgarian legislator: "Yes to employees' information and consultation, but No to over-implementation and over-regulation!" -

The legislator should keep an eye on implementing the Directive within the objectives of the Directive - of any directive. Transferor and transferee need to know concretely about which facts they should have to inform the employees about, therefore, the

requirements of the Directive better should be fulfilled by the legislator and an 1:1-transformation of Article 7 of the Directive should be avoided. The implementation also should consider the advantages of a flexible businesses' transfer system which keeps Bulgaria interesting for Bulgarian and foreign investors in the future!

Thank you for you attention!