Legal Update Labour and Employment

Decisions concerning the development of the term „Part of an Undertaking“ in Section 613a of the German Civil Code (Bürgerliches Gesetzbuch – BGB)

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Section 613a of the German Civil Code is one of the most decisive provisions of German and European employment law because it has numerous, far-reaching legal implications for the transferee of a business. The possibility that a transfer will be considered a transfer of an undertaking pursuant to section 613a of the German Civil Code when the means of production and/or labor force are transferred is always one of the main factors that must be considered when assessing the risks of such a transaction. The general consensus in this connection is that section 613a of the German Civil Code covers both the transfer of undertakings as well as the transfer of independent parts of undertakings (autonomous business units). This is particularly problematic both in respect of outsourcing and insourcing because simply the fact that individual activities are (re)allocated to or taken over by a third party may under certain circumstances amount to the transfer of an undertaking. As a result, all of the employees involved are then deemed by law to have been transferred to the potential transferee, and their previous employment contracts, including all agreed working conditions, retain their validity. In light of this, the conditions under which the transfer of an autonomous business unit will be treated as the transfer of an undertaking within the meaning of section 613a of the German Civil Code has become a hotly debated question in legal journals and the relevant national and European case law.

The “Klarenberg Decision” of the European Court of Justice (ECJ)

The ECJ‘s decision in the „Klarenberg“ case (ECJ, Judgment of 12 February 2009 – C-466/07) created quite a furor. Prior to this decision, the position according to the case law of the Federal Labor Court was that the courts would only assume that there was a transfer of a part of an undertaking if the transferee continued to operate it as an autonomous business unit post-transfer. If, on the other hand, the „cards were reshuffled“ or the part of the undertaking transferred was so fully integrated into the transferee‘s organizational structure that it could no longer be described as an autonomous business unit after the putative transfer, the courts would not consider it a

transfer of an undertaking within the meaning of section 613a of the German Civil Code. The ECJ rejected this view in its „Klarenberg" decision and held that a transfer of a part of an undertaking can also take place, even if the transferee does not preserve the organizational autonomy of the unit transferred. In the case decided by the ECJ, the re-engaged employees had been integrated into the transferee's existing organizational structure. They also performed activities for it in relation to products that were not connected with the putative transfer. An employee who had not been re-engaged brought an action claiming there had been a transfer of a part of an undertaking.

There were strong objections to the ECJ's „Klarenberg" decision in the German legal community because the principles which the Federal Labor Court had previously applied were considered in largest part sound and preferable. They had been aimed at protecting employees against transfers of organizational entities in a manner that would result in the transferee's business organization and structure absorbing them for its production processes, without assuming some or all of the employees' contracts. However, according to those principles, such absorption would only occur where the transferee continued the business activities or continued to operate the parts of the business taken over as an autonomous business unit. The European Court of Justice understands the protective purpose of Directive 2001/23/EC, which section 613a of the German Civil Code transposes into German law, differently to the Federal Labor Court as only requiring „the retention by the transferee of a functional link of interdependence, and complementarity" between the various elements of production transferred. Thus, even according to the ECJ's most recent case law, the complete dissolution of the unit transferred within the transferee's organization such that its previous structure is no longer recognizable would still not be regarded as a transfer of an undertaking pursuant to section 613a of the German Civil Code. Nevertheless, the retention of the „specific organization of the various elements of production which are transferred" is not a precondition for the assumption of a transfer of an undertaking. The ECJ's case law basically results in a great deal of legal uncertainty, which will make it difficult to eliminate the risk of a deemed transfer of an undertaking through changes to the organization of the operating resources or workforce by the potential transferee.

The Federal Labor Court's response

Following the ECJ's ruling, the Düsseldorf Higher Labor Court held that there had been a transfer of an undertaking, even though the business unit transferred in fact no longer constituted a transferable business unit for the purposes of the transferee. The Federal Labor Court decided on appeal from the Düsseldorf Higher Labor Court, however, that, even taking into account the ECJ's case law, there had been no transfer of an undertaking because what had been transferred to the transferee had not even constituted a transferable business unit for the purposes of the transferor (Judgment of 13 October 2011 – 8 AZR 455/10). According to the decision of 13 October 2011, a transferable business unit only exists „where there is an organized grouping of persons and/or assets facilitating the exercise of an economic activity which pursues a specific objective and such grouping is sufficiently organized and autonomous" (Press Release No. 78/11 of the Federal Labor Court). Thus the Federal Labor Court does not directly contradict the ECJ's opinion as far as the necessity for the transferee to retain the business unit's organizational structure post-transfer is concerned. Instead it shifts the focus to the issue of whether the transferor in fact had a sufficiently autonomous and thus transferable business unit within the meaning of section 613a of the German Civil Code. In this context, close attention must be paid to the necessary organizational autonomy of the transferred business unit when operated by the transferor.

Evaluation and consequences in practice

The ECJ's 2009 decision in the „Klarenberg" case introduced a high degree of uncertainty for businesspeople with respect to takeovers of parts of an undertaking. According to that decision, if the transferee changed the organizational structure, this would not preclude the occurrence of a transfer of an undertaking as long as it nevertheless continued or could continue to use the functional link between the various elements of production transferred. It thus became extremely difficult for a potential transferee to estimate to what extent it would have to „break up" a business unit post-transfer in order to effectively avoid the risk of a transfer of an undertaking pursuant to section 613a of the German Civil Code. The ECJ has in any case established that the transferee will not be able to destroy the previous organizational autonomy simply by allocating additional tasks to the employees that were not performed by the business unit transferred. Instead the ECJ ruling requires the functional link between the elements transferred to be severed or destroyed in such a way that the transferee cannot use them to pursue an identical or analogous economic activity. In practice this means that the reorganization or integration of a purchased business unit will not be enough to prevent its being treated as the transfer of part of an undertaking pursuant to section 613a of the German Civil Code.

However, the subsequent decision of the Federal Labor Court in this matter, the final text of which is not yet available, is informative. According to the press release issued on 13 October 2011, it is necessary in this context to examine „whether the assets transferred by the transferor constitute for its purposes an operational grouping sufficient in itself to provide services characterizing the business's economic activity, without recourse to other significant assets or other parts of the business". This would at least seem to indicate that the Federal Labor Court intends to counter the extremely relaxed requirements which the ECJ imposes on transferees in respect of the retention of the organizational structure acquired by placing more stringent controls on the existence of a transferable business unit.

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