Relocation: an old problem in search of new answers

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Foreword

In the summer of 2021, while many people were still on holiday, 422 workers of the GKN establishment in Campi Bisenzio in the province of the Italian city of Florence received a letter communicating their dismissal. GKN, a multinational enterprise (MNE) of the automotive sector with several sites in Europe and beyond, had decided to relocate the Campi Bisenzio production to other companies in the group. This decision surprised the workers of the Tuscan establishment since GKN had not previously manifested any crisis; on the contrary, several investments had been made to modernise the production in the factory. The workers therefore decided to protest against the decision to relocate on the grounds that it was mainly intended to increase the MNE's profits.

Workers of several other factories affected by relocation processes became involved. Their protests drew public attention to the issue of relocation and forced jurists to discuss the adequacy and the effectiveness of the national and European legal framework. Can a company relocate its production abroad just to increase its earnings? Can workers be dismissed because their employer has decided to move its production to another country to boost its own profits? Moreover, can a company be relocated even if, as in the GKN case, it has received public funds to improve and ameliorate its production processes?

We realised from the start that in Europe the labour law debate focuses mainly on the need to mitigate the negative consequences of relocation for employment and to ensure economic support for the workers affected. Other fundamental aspects remain in the background: the role of trade unions and workers' representatives during the relocation process, the reasons that legitimate the decision to relocate, the squandering of public funds granted to companies relocated abroad, and the many other negative consequences of relocation on the environment and the industrial and social goals targeted by public policies. Why is the labour law debate so parcelled up? Does the focus on unemployment benefits and other economic support to the dismissed workers conceal the ineffectiveness of other instruments to prevent relocation and mitigate its effects?

We have therefore decided to investigate the national measures regulating relocation. Should an employer justify a decision to relocate production abroad? Which procedures have to be respected by a company that decides to relocate? Do trade unions and workers' representatives have a role in these procedures? Which remedies and sanctions apply in cases of infringement of these procedures? All these questions obviously imply the need to first clarify what is meant by 'relocation', as the uncertainty about this concept is one of the reasons for the failure of its regulation.

Given our interest in the effectiveness of the current legal framework, our analysis starts with reconstructing the main cases of relocation. We look at what has happened in these cases, which measures have been enforced, and what the outcomes have been for the workers involved.

Another critical aspect concerns public policies on relocation. Do Member States use their public funds to attract companies onto their territory or to prevent relocation abroad?

Can a company be relocated even if it has benefitted from public funds? What controls are set up by a State that has supported a company to avoid its relocation?

These questions emphasise that relocation often takes place inside the European Union, with the different labour costs present in different Member States being exploited. Relocation is in fact a consequence of the freedom of movement guaranteed to companies by the European Treaties. In the absence of a European economic and fiscal policy, this can entail a waste of public funds. In addition, relocation can affect the European policies aimed at reducing inequalities among different European regions. It is therefore important to understand if and how EU law deals with these issues. Does EU law limit relocation when involving companies receiving public funds? Which measures are implemented to make sure that European cohesion programmes are not threatened by relocation?

The European Institutions have recently developed a broad debate on open strategic autonomy. Facing the disruption of global supply chains caused by the Covid-19 pandemic and the Ukrainian war, the European Commission has started to reshape its relations with neighbouring countries, supporting reshoring processes and friend-shoring policies while launching ambitious programmes such as the Green Deal, the just transition and digitalisation. Since relocation can severely threaten these programmes, it is relevant to explore which measures (if any) have been set up by the European Union to prevent predatory behaviour, in other words, that which is mainly aimed at locating the production where public subsidies are available.

The contributions collected in this volume try, if not to answer the numerous questions listed above, at least to start addressing them, thereby promoting a debate on issues that in our opinion have been largely ignored in current reflections on relocations. More generally, this volume aims to raise a debate on relocation that stems from the rebuttal of the current remedial approach that considers relocation as an inevitable aspect of capitalism. On the contrary, we think that relocation can – and should – be regulated at national and European level to avoid its negative effects, not only on employment and working conditions but also on the environment and public policies. For this reason, it is of paramount importance to better understand which legal measures currently regulate relocation and their (in)effectiveness, and to start reflecting on which legal tools should be developed to avoid the heavy costs for the Member States, the people and the environment that unregulated relocation can entail.

The editors would like to express their deep gratitude to the European Trade Union Institute (ETUI) for agreeing to publish this volume, and to Nicola Countouris for invaluable help in conceiving, discussing, revising and editing each chapter. We also offer warm thanks to Alain Supiot for co-writing with Nicola a meaningful and illuminating introduction, and to all the authors for having more than fulfilled the difficult tasks we demanded of them.

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Chapter 4
Cross-border relocations of businesses and parts of businesses: the situation in the Federal Republic of Germany

Wolfgang Däubler

1. The economic background

1.1 The internationalisation of the German economy

The German economy is highly internationalised; this is a result not only of the export and import of goods, but also of the large number of direct investments (participating interests of at least 25 per cent) in other countries. According to findings by the Deutsche Bundesbank, even back in 2016 the total number of foreign undertakings (jointly) controlled by investors from Germany amounted to 27 594. These undertakings employed 5.272 million people and generated a turnover exceeding 2 billion euros. In late 2021, foreign direct investments by German undertakings totalled 1 426 billion euros, compared to only 615 billion euros of foreign direct investments in Germany (Bundesbank 2023).

Furthermore, the total number of foreign employees working in the Federal Republic of Germany was 3.470 million in June 2017 (BfA 2017). By September 2020, this figure had increased to 4.36 million, accounting for 12.9 per cent of all employees subject to social insurance contributions in the Federal Republic of Germany (BfA, n.d.). Until March 2023, there was a further increase up to 5.21 million (Arbeitsagentur 2023).

These data make clear the international integration of the German economy, but do not provide any indication of the number of German direct investments abroad – or foreign direct investments in Germany – accounted for by 'relocations'. Another open question is the extent to which foreign employees in Germany have been seconded to the country as part of relocation measures, or whether they are simply immigrants, for example EU workers taking advantage of the right to freedom of movement. Even if relocation measures accounted for only a small proportion of the internationalisation processes overall, their quantitative magnitude would still be significant.

1.2 Reasons for foreign investments

A German undertaking may be motivated by various factors when carrying out foreign investments. The main reasons include smaller production costs and, in particular, a lower level of wages. In addition, a further goal that is often pursued is greater proximity to the market; anyone with 'boots on the ground' is able to sell to the market more easily, and sometimes even advertise the products in question as 'Made in X country'.

Eastern Europe is the target region for many relocations from Germany, with its countries accounting for 50 per cent of the total; of those 50 per cent, 23 per cent involve Czechia and 12 per cent Hungary. Relocations from Germany to China account for 27 per cent of the total, and relocations to 'other countries' account for 23 per cent, with Latin American countries accounting for the majority of this figure (PA Consulting Group 2005).

There has been an awareness for some time that the relocation of businesses or certain business functions abroad not only provides an opportunity to minimise costs but also entails risks. Examples of these risks include coordination problems between the business units, poorer product quality, or the fact that wage costs may rise significantly in the host country as well (as has been the case especially in China).[1]

1.3 Forms of relocation

1.3.1 Transfers of businesses and other forms

As a general rule, relocations do not involve a business or part of a business being dismantled in Germany and re-established in the same way at the new location, for example in Czechia. Instead, they involve a certain function such as 'creation of the final product' or 'manufacture of Component X' or 'sales' being performed at the new location, and the corresponding businesses or parts of businesses in Germany being shut down at the same time. Depending on the field in question, the transport of machinery and the recreation of the same organisation would be extremely costly. Further advantages of founding a new undertaking abroad include the fact that known problems can easily be corrected, and that adjustments can be made more effectively to the circumstances in the host country. What is more, employees do not, as a general rule, display any enthusiasm whatsoever for shifting their primary place of residence to a different country; they might happily visit many different countries as a tourist, but that does not mean that they are willing to move to a different milieu permanently or for many years, particularly if this involves learning a new language.[2]

Exceptions from this general principle can be identified in individual cases, particularly in areas close to a border when the location in the other country is commutable by employees from their current place of residence with a minimal amount of effort. Three such cases are documented in past decisions by the German courts: two successful relocations of businesses to Switzerland and Austria respectively, and one relocation to France that foundered on resistance by the workforce.

1. See Kinkel 1996, for a treatment of the subject that is still relevant, and Scarcelli 2017, for a Swiss study in a similar vein.
2. Secondments abroad mostly involve executives and specialists rather than entire workforces (Globalization Partners 2021).

1.3.2 Exception 1: transfer of a business to Switzerland

In the first case, the employer employed 30 individuals at a location in Germany's South Baden area. Twenty-two of these employees worked on the manufacture and sale of flap valves, in particular for the pharmaceutical industry (hereinafter Business Area V).[3] The employer company belonged to a group that was based in Switzerland. In October 2008, the group's top management notified the executive board of the employer company that the operations of Business Area V would be discontinued. Twenty of the employees who worked there were dismissed immediately. The employer company then sold the plant, machinery and tools used for production and assembly in Business Area V to a Swiss company that belonged to the same group. In December 2008, they were disassembled and transported to the Swiss buyer, and then reassembled on site. The projects that were in progress at the time were also transferred to the Swiss company. Suppliers and customers were told that the business activities of Business Area V would be concentrated at the Swiss company from 1 January 2009 onwards, and that the latter had also acquired all the contracts.

Eleven of the dismissed employees received an offer from the employer company to continue working at the Swiss group member's location. Six of them accepted the offer, not least because the Swiss location was only 59 km away from the previous location and could therefore be reached by car in under an hour. Five of the dismissed workers refused the offer, including the plaintiff in the proceedings before the Federal Labour Court, who asserted that there were no grounds for a dismissal on operational grounds since his area of work had not ceased to exist; instead, the business would continue to be operated in Switzerland.

Although the local labour court rejected the dismissal protection action as ill-founded, it was granted by the Regional Labour Court of Baden-Württemberg and by the Federal Labour Court. According to these latter, the business had indeed been transferred. In their opinion, there was no significant geographical distance that might awaken doubts as to whether the identity of the business had persisted. They furthermore stated that the cross-border nature of the circumstances in question was irrelevant. They found that, according to the rules of private international law, the applicable law on employment contracts is determined according to the permanent place of work; in this case, therefore, German law and thus Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)) applied. In their opinion, it was irrelevant that the applicable employment law might change when transferring the employment relationship to the Swiss buyer, since the very existence of the business transfer rendered void the basis for the dismissal.

3. For further details and on the argument that follows, Federal Labour Court, judgment of 26 May 2011 – 8 AZR 37/10 – NZA 2011, p. 1143.

1.3.3 Exception 2: transfer of a business to Austria

Dismissal protection proceedings relating to a relocation to Austria resulted in a less positive outcome for the employee bringing the action.[4] In autumn 1997, a footwear manufacturer based in Offenbach near Frankfurt am Main had defaulted on its payments, resulting in the institution of bankruptcy proceedings. The receiver dismissed all of the employees on 31 March 1998, with the notice period provided for by Section 113 of the German Insolvency Code (*Insolvenzordnung*).

Previously, on 23 December 1997, an undertaking based in Austria had purchased the trademark of the bankrupt footwear company as well as the warehouse. It had also acquired semi-finished footwear products (around 35 000 pairs of 'shanks') from the contract manufacturing businesses in Bosnia and Hungary. Additional assets were added in March 1998, and later it was explicitly announced that part of the business would continue to operate.

The plaintiff was given notice of dismissal on 30 December 1997. According to the customary principles of dismissal protection law, only the circumstances that applied at the time when notice of the dismissal was given are relevant in terms of justifying the dismissal.[5] The later events were therefore to be disregarded. In the Federal Labour Court's opinion, the purchase that had been carried out in 1997 had not resulted in a transfer of the business; at the time, the only possible option was a closure of operations, justifying the dismissal. It was therefore not necessary for the Federal Labour Court to examine in further detail the problem of a cross-border business transfer.

1.3.4 Exception 3: transfer of a business to France

A further case related to a relocation to France.[6] A PVC manufacturer in Berlin had found itself in financial difficulties, decided to close down its operations, and dismissed its employees. Within a relatively short time, it had succeeded in selling all of its machinery, including the know-how and distribution rights, to a French company based in Lyon. A dismissal protection action had been brought by the dismissed employees. In the case adjudicated by the Federal Labour Court, the plaintiff had stated that he did not wish to move to Lyon and continue working, but instead reserved the right to lodge an application for dissolution of the employment relationship in due course in exchange for a severance payment under Section 9 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz* (KSchG)). The local and regional labour courts had granted the dismissal protection action because a business transfer had taken place but a closure had not. The Federal Labour Court dismissed the action, however, stating that

4. On this point and the argument that follows, see Federal Labour Court, judgment of 16 May 2002 – 8 AZR 319/01 – NZA 2003, pp. 93 et seq.
5. Federal Labour Court, judgment of 6 June 1984 – 7 AZR 451/82 – NZA 1985, 93; Federal Labour Court, judgment of 30 May 1985 – 2 AZR 321/84 – NZA 1986, 155; Federal Labour Court, judgment of 28 February 1990 – 2 AZR 401/89 – NZA 1990, p. 727.
6. On this point and the argument that follows, see Federal Labour Court, judgment of 20 April 1989 – 2 AZR 431/88 – NZA 1990, 32 = AuR 1990, p. 331.

it was not necessary to rule on the question of whether a business transfer had, in fact, taken place. In its opinion, since the plaintiff was not willing to continue working at the new location, and since the undertaking had discontinued its business in Berlin, there was, in any case, no longer any opportunity for the plaintiff's employment to continue. Also worthy of interest is the Federal Labour Court's finding that there was no reason to suppose, based on the submissions of both parties, that even a single member of the Berlin workforce had continued to work in France.

1.4 Additional considerations

It should be apparent from the above overview of relocation in a practical context that Section 613a BGB applies only in rare exceptions. It follows that the Transfers of Undertakings Directive[7] is more or less irrelevant in terms of cross-border relocations, at any rate in Germany. This is in marked contrast to the fact that the Directive and Section 613a BGB (which transposes it) play a central role when it comes to purely domestic matters. The investigation below therefore starts by querying the extent to which the Directive might conceivably have a significantly greater scope, among other things, in relation to cross-border matters (Section 2 below), if it were interpreted differently or amended.

A further question to be investigated relates to the issue of whether any provisions of German law other than Section 613a BGB open up the possibility of granting protection to employees affected by a relocation. The first area of interest in this connection concerns the rules on the reconciliation of interests and the social compensation plan, which apply in every undertaking where a works council has been elected. A second area of interest relates to the means by which the affected individuals can take action against the loss of their jobs under the law on wage agreements and industrial disputes, and which have been recognised in past decisions by the courts (Section 3 below).

The final problem that must be investigated concerns the extent to which the threat of relocation influences collective negotiations. Particular reference will be made to the OECD Guidelines for Multinational Enterprises, and consideration will also be given to the extent to which the EU could introduce the ban enshrined in these guidelines and flesh it out with binding obligations (Section 4 below).

7. Directive 2001/23/EC of the Council of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82/16), amended by Directive (EU) 2015/1794 of 6 October 2015 (OJ L 263/1).

2. The legal framework for the (cross-border) transfer of a business

2.1 Problems relating to the application of Section 613a BGB

Section 613a BGB is the subject of an extremely comprehensive range of past decisions by the German labour courts, and it would be impossible to delineate the current legal framework fully while disregarding them. These past decisions have been adopted solely in response to domestic cases, but this is not necessarily an obstacle to demanding their consistent application and further development in respect of cross-border matters as well. A conflict-of-law question – when German employment law should apply and when foreign employment law should apply – arises in this connection (Section 2 below).

The fact that the substance of Section 613a BGB is, to a large extent, dictated by the EC Directive means that an interpretation consistent with the Directive is to be chosen in case of doubt. Given that the wording and purpose of the Directive can sometimes be ambiguous, this has frequently resulted in the involvement of the ECJ, whose decisions have had a lasting influence on how Section 613a BGB is administered. At the same time, past decisions by the German courts virtually never fall back on Article 8 of the Directive, which permits more favourable national provisions.

2.1.1 Purpose and scope of the provision

Section 613a BGB is intended to safeguard the rights accrued by affected employees. As far as employment contracts are concerned, this takes place in paragraph 1, first sentence, without any apparent restriction. According to paragraph 1, second sentence, any collective agreements become part of the employment contracts and continue to have binding force for at most one year, after which a worsening of the contractual position is possible. The affected parties are also no longer involved in the further development of the wage agreements. According to Section 613a(1), third sentence BGB, the wage agreements will cease to apply on a binding basis prematurely if a new wage agreement between the employee and the buyer becomes applicable.

By way of contrast to the Directive, Section 613a makes no explicit reference to worker representation as such. At the same time, however, it is undisputed that such representation must be maintained in the event that an entire business is transferred. If only one part of the business is taken on, the works council of the original business is granted a transitional mandate pursuant to Section 21a(1) of the Works Constitution Act (*Betriebsverfassungsgesetz* (BetrVG)).

Pursuant to Section 613a(4), employees may not be dismissed 'due to' the transfer of the business. According to Section 613a(5), they are to be notified by the previous owner of the business or by the buyer about the transfer and its consequences. In accordance with Section 613a(6), each individual affected is entitled to object to the transfer of the employment relationship. This must take place within a reflection period of one month, which, however, commences only after the relevant information has been provided in full.

The purpose of these provisions is to ensure that existing employment relationships are initially preserved undiminished, in spite of the change in employer. At the same time, however, this does not rule out the possibility that the employee's position may worsen because they are no longer involved in the development of wage agreements. What is more, an employee will also not always be able to oppose an employer's proposal to waive certain rights after a year, even if those rights were previously guaranteed under a wage agreement.

Furthermore, the provisions of Section 613a BGB also apply if an 'entity' is privatised or if the public authorities assume responsibility for an activity that has previously been carried out privately.[8] Pursuant to Article 1(1)(c), second sentence, of the Directive, the transfer of administrative functions from one authority to another is not covered by the scope of the Directive. After some initial uncertainty, the scope of Section 613a BGB was, in principle, extended by the Federal Labour Court to cover cases of this kind as well[9], but special rules typically apply in this connection.

If the purchase relates not to operating resources ('asset deal') but to shares in the employer company ('share deal'), the employment relationship remains formally unaffected, since there is no change in the employer's legal identity. The same applies if – in the case of a limited partnership (*Kommanditgesellschaft* (KG)), for example – both the personally liable shareholder and also the limited partner are replaced. If there is no 'transfer', there is normally no need for a corresponding application of Section 613a(1) BGB.

It is, however, conceivable that the purchase might result in an undertaking being spun off from a group, meaning that the rights under group works agreements require protection by way of analogy to Section 613a(1), second sentence, BGB. Furthermore, a 'need for change' on the buyer's part may arise in a manner comparable to the purchase of a business; the buyer may wish to phase out social security benefits, downsize the workforce or alter working procedures. If a conferred right to object is exercised on the basis of the buyer's wishes, does this constitute an adequate economic reason within the meaning of Section 308(4) BGB? The Federal Labour Court has rejected a corresponding application of Section 613a(4) BGB to date, since it takes the view that Section 613a was intended to close a loophole in the area of dismissal protection, but was not tied in with economic facts.[10]

From this perspective, the view put forward by the Federal Social Court (19 June 1979 – 7 RAr 2/78 – DB 1979, 2430) and by the Federal Fiscal Court (5 March 1970 – V R 33/69 – DB 1970, 1360), namely that a change of employer is present if all the shareholders have been replaced, is therefore irrelevant in the context of Section 613a

8. The following example is taken from ECJ 26 September 2000 – C-175/99 – AP No. 30 re. EEC Directive 77/187: activities relating to the advertising of a tourist resort and the provision of information about the resort were previously carried out by a charitable organisation and were then transferred to the municipality so that they could be handled on an in-house basis.
9. Federal Labour Court 25 September 2003 – 8 AZR 421/02 – AP No. 261 re. Section 613a BGB; Federal Labour Court 27 April 2000 – 8 AZR 260/99 – juris.
10. Federal Labour Court 12 July 1990 – 2 AZR 39/90 – AP No. 87 re. Section 613a BGB.

BGB. No consideration was given to the fact that Article 1(1)(a) of Directive 2001/23/EC explicitly refers to the transfer of 'undertakings' as well as businesses, meaning that it was also necessary to examine an interpretation consistent with the Directive.[11]

The German Transformation Act (*Umwandlugsgesetz* (UmwG)) contains special rules covering the most important instances of universal succession. If the owner of the business changes in this connection, Section 613a BGB continues to apply. Cases of inheritance are not directly covered, and the same is true of the 'accrual model' that has been developed in practice.[12]

2.1.2 Acquisition of a business or part of a business

Since 1972, the Federal Labour Court had assumed that only the acquisition of tangible and intangible operating resources is relevant in the context of Section 613a BGB; according to the Court, these resources are the 'basis' for the activities of the individual employees. By way of contrast to the approach taken in the area of works constitutions, the Court ruled that these employees did not themselves belong to the business, and that it was not possible to take into account employment relationships in terms of both the facts of the case and the legal consequences.[13] According to the Court, plots of land, machinery and similar were of paramount importance in the manufacturing sector, whereas the primary focus in the services sector was on intangible assets such as licences, customer relations, the undertaking's public 'image' and the potential purchasers, with the special expertise of individual employees potentially also playing a role.

In its much-cited *Christel Schmidt* decision[14], the ECJ chose a different approach and posited that the transfer of part of a business could be deemed to have taken place even if only a certain business function (cleaning services in this specific case) had been transferred to a third party; in its opinion, it was not of decisive importance whether operating resources had been acquired.

In its *Ayse Süzen* decision (presumably in response – among other things – to the fierce criticism expressed in the legal literature), the ECJ clarified that purely 'functional' succession was not sufficient; it was necessary for an 'economic entity' to be transferred to the buyer, which was defined as 'an organised grouping of persons and assets

11. For a corresponding application of Section 613a BGB, see Zwanziger and Yalcin 2020.

12. For example, the company S. AG (a joint-stock company (*Aktiengesellschaft*, AG)) wishes to incorporate a subsidiary into the 'parent company' again without needing to complete the 'onerous' procedure under Section 613a or the Transformation Act. The subsidiary has the legal form of a limited liability company and limited partnership (*Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft*, GmbH & Co KG). The sole shareholder in the (personally liable) GmbH is another subsidiary, which also has the status of a limited partner. The GmbH transfers its share in the limited partnership to the parent, i.e. S. AG; the employer is still the limited partnership. Following a certain period of time, this other subsidiary then also ceases to be a limited partner (a move permitted by the partnership agreement of the limited partnership), meaning that its share in the joint-stock company (the sole remaining shareholder) increases. This is an extremely imaginative structure, to which Section 613a BGB must be applied on a *mutatis mutandis* basis.

13. For a summary, see Federal Labour Court 21 January 1988 – 2 AZR 480/87 – AP No. 72 re. Section 613a BGB.

14. ECJ 14 April 1994 – C-392/92 – DB 1994, 1370 = NZA 1994, p. 545.

facilitating the exercise of an economic activity which pursues an objective specific to it.'[15]

This marked a vitally important turning point, particularly in the case of cross-border relocations; if the mere acquisition of a function were to be used as a basis, as in the *Christel Schmidt* decision, most if not the vast majority of scenarios would be covered. If, however, the subsequent decisions handed down by courts are taken as a basis (as has been the case to date), an 'economic entity' in the form of an organisation must be transferred to the buyer, and this condition is met by relocations only in exceptional cases.

In terms of legal policy, it would be a good idea to alter the text of the Directive to bring it into line with the original ECJ case law, since a revision of the latter is not to be expected in view of this longstanding practice.

2.1.3 Acquisition by legal transaction

There can be no question of a business having been transferred pursuant to Section 613a BGB unless the owner has been replaced. Such a replacement does not take place if individual shareholders or all of the shareholders are replaced in a partnership or a civil law company. It is irrelevant whether the acquiring entity belongs to the same group. The operative date for the transfer of the business is the acquisition of decision-making powers ('leadership powers') by the buyer on the latter's own responsibility.

It is irrelevant whether the business or part of the business is available to the buyer in such a way that the buyer is free to decide on its use. Even if 'independent commercial use' of this kind is excluded, this in no way affects the existence of a business transfer and, therefore, the application of Section 613a BGB.[16] It is unnecessary for the buyer to continue the economic entity as such; the buyer can also integrate it into its existing business.[17]

2.1.4 Legal consequences

(i) Continued existence of the employment relationship

According to Section 613a(1), first sentence, BGB, the automatic consequence of the business or part of the business being acquired is the transfer of employment relationships to the buyer, with no substantive changes. If the suspension of all rights and obligations was agreed on the grounds that the employee was sent abroad for four years on the basis of a special agreement, a 'latent' employment relationship of this

15. ECJ 11 March 1997 – C-13/95 – DB 1997, 628 = NZA 1997, p. 433, confirmed by ECJ 10 December 1998 – C-173/96, C-247/96 – NZA 1999, p. 189 – Hidalgo; since then established case law.
16. For example, ECJ 15 December 2005 – C-232/04 and others – NZA 2006, p. 29 (Güney Görres) correcting past decisions by the German courts.
17. For example, ECJ 12 February 2009 – C-466/07 – NZA 2009, p. 251 – Klarenberg, also correcting German case law.

kind is also transferred. The buyer retains its predecessor's status as employer in every respect, and the relevant completed periods of service remain valid.

Many employment contracts refer to wage agreements 'in their currently applicable version'. In the case of contracts concluded after 1 January 2002, a clause of this kind is regarded as 'constitutive' in the sense that it establishes a further basis for the application of wage agreements, which remains in place even after the transfer of a business; this offers a much better safeguard than Section 613a(1), second sentence, BGB, because the employee in question plays a role in the negotiation of later wage agreements.[18]

According to past decisions by the Federal Labour Court[19], statutory dismissal protection as such is not 'carried over'. If, after the transfer, the seller or buyer operates only a small business within the meaning of Section 23(1) KSchG with 10 employees or fewer, the dismissal protection ceases to apply. It is also accepted that, pursuant to Section 112a(2), first sentence, BetrVG, it is not necessary to agree on a social compensation plan if a business or part of a business has been bought by a 'new founder' and the latter carries out major workforce reduction measures within four years. The grandfathering arrangement therefore also displays shortcomings in this respect.

(ii) Worker representation

If the entire business is transferred, the works council also remains in office. This principle is not laid down anywhere in German law but is generally recognised in the final analysis. Article 6(1)(1) of Directive 2001/23/EC provides on a mandatory basis for the preservation of the 'status and function' of the worker representatives; on transparency grounds alone, the German legislator should have clarified this explicitly. Works agreements also continue to apply in such cases.

If only one part of the business is transferred, the works council is granted a 'transitional mandate' pursuant to Section 21a BetrVG in respect of the transferred part of the business, covering all co-determination rights, but limited to six months as a basic principle. The works council is also obliged to organise a works council election in the part that has been split off; members of the works council who are employed in the part of the business being transferred remain in office. According to past decisions by the Federal Labour Court, works agreements as such continue to apply provided that the part of the business continues to be operated by the buyer as a separate business. If this is not the case, they are incorporated into the employment contracts pursuant to Section 613a(1), second sentence, BGB, or replaced by the collective agreements concerning the same subject matter that exist in the new business pursuant to Section 613a(1), third sentence, BGB.

(iii) Continued application of wage agreements and works agreements

Instances where collective agreements automatically continue to apply once the buyer

18. For the fundamental arguments, see Federal Labour Court 29 August 2007 – 4 AZR 767/06 – NZA 2008, p. 364.
19. Federal Labour Court 15 February 2007 – 8 AZR 397/06 – NZA 2007, p. 739.

has taken control do not raise any problems. This is frequently true in the case of works agreements but tend to be the exception for wage agreements. If a group wage agreement applies, it is conceivable that the buyer might also belong to the employers' association, or that the wage agreement might have been declared generally binding and that the buyer belongs to the same sector. If a company wage agreement applies, continued application under the law on collective agreements is only relevant as a possibility if the buyer explicitly signs up to the wage agreement or acquires the seller's legal status.[20]

In the absence of such continued application under the law on collective agreements, the 'default rules' of Section 613a(1), second to fourth sentences, BGB take effect. According to these latter, wage agreements and works agreements are integrated into the substance of the employment contract and, as a basic principle, must not be amended to the employee's detriment until at least one year has passed. Contracts that are nevertheless amended would be ineffective under Section 134 BGB.

Pursuant to Section 613a(1), third sentence, BGB, the principle of continued effectiveness as a mandatory component of employment contracts does not apply if the parties to the relevant employment contract are both bound by a new wage agreement or a new works agreement that regulates the same matters. In the case of wage agreements, this is true only if – on the employer side – the same trade union is also responsible for the new business, or the employees have moved to the trade union that is responsible for this business. If the new wage agreement is not binding in nature, Section 613a(1), fourth sentence, BGB states that the parties to the employment contract may make reference to it, but the employee does not, however, need to accept an agreement of this kind.

(iv) Prohibition on dismissals

The automatic entry of the party buying the business into the employment relationships must not be undermined through the termination by the previous owner of some or all of these relationships 'on behalf of the new boss'. This possibility is explicitly excluded by Section 613a(4), first sentence, BGB, which was introduced in 1980. Although this can be regarded as a stand-alone prohibition on dismissal, which also covers employment relationships in small businesses, the grandfathering arrangement that is established as a result is limited. Since Section 613a(4), second sentence, BGB allows the employer to terminate the employment relationship for other reasons, past decisions by the courts state that the transfer of the business must be the 'underlying reason' for the termination, and not merely the immediate cause.[21] The employer must prove that this was the case, which will only rarely be possible.

Instances where the employer assumes that the business has been shut down whereas the employee believes that the business has been transferred are of much greater relevance in practice. The employer must provide evidence of the reason for the dismissal in such

20. Federal Labour Court 29 August 2001 – 4 AZR 332/00 – AP No. 17 re. Section 1 of the German Wage Agreements Act (*Tarifvertragsgesetz*, TVG), reference to wage agreement; Federal Labour Court 20 June 2001 – 4 AZR 295/00 – AP No. 18 re. Section VI TVG, reference to wage agreement.

21. Federal Labour Court 28 April 1988 – 2 AZR 623/87 – AP No. 74 re. Section 613a BGB.

cases, that is, an intention to shut down the business, which places the employee in a significantly better position (see also Section 1.3.2 above for further details).

2.1.5 Notification of affected parties and right to object

Section 613a(5) BGB requires that employees affected by the transfer of a business be notified of the essential aspects of this procedure, which are listed in the text of the law; a secondary obligation under the employment contract is thus codified. The underlying purpose is to provide the employee with an adequate level of knowledge to decide whether to exercise his or her right to object pursuant to Section 613a(6) BGB, or whether to entertain the possibility of other consequences. The 'text form' prescribed by Section 126b BGB, that is, including faxes and emails, is sufficient according to the law. The provision of information through a verbal exchange, for example at a works meeting, would not be sufficient, however. The notification obligation applies to both the seller and the buyer; at the same time, however, it is deemed sufficient if both jointly provide the employee with the necessary level of information.

The notification must take place before the transfer according to the wording of the act, but it can also be carried out on an ex-post basis. The month-long deadline for exercising the right to object starts to run only when the notification is performed correctly. If the information provided by the seller and the buyer is contradictory in respect of the aforementioned points, a distinction must be made; notification will not typically be deemed to have been carried out correctly, since the employee cannot be expected to make his or her own enquiries in order to resolve the contradiction. In certain exceptional cases, however, the incorrect information is only provided at a later date, after the relevant notification has been carried out correctly and the month-long deadline triggered by this notification has elapsed.

Pursuant to Section 613a(6), the employee has the right to object to the transfer of the employment relationship to the buyer. The employee should not be forced to accept the unwanted imposition of a particular employer. In this respect, the individual has a right to influence the legal relationship and can exercise this right through unilateral statements of intent that must be communicated to the other party to be effective. As in the case of dismissal, once this right has been exercised, it is no longer possible to retract it unilaterally, since the other parties involved will have adapted to the situation brought about as a result. The 'normal situation' under law is restored only if the employee and the old and new employers agree that the objection should be ineffective. As a unilateral legal transaction, the objection is not subject to conditions, but avoidance on the grounds of malicious deceit pursuant to Section 123 BGB is naturally possible.[22] The objection must be in writing and must therefore be signed by the employee or an authorised representative. At the same time, however, the word 'objection' does not need to be used; it is sufficient for the employee to express the fact that he or she does not wish to work for the buyer.

22. It is inadmissible for the employee to make the objection contingent upon the possibility that 'the buyer makes dismissals on operational grounds within one year'. Avoidance on the grounds of malicious deceit is, however, possible if the employee had been told that the new jobs were 'dead certain', but a dismissal took place after six months.

In the event that the notification is not carried out or is carried out incorrectly, the month-long deadline does not start to run; this means that it is possible to give notice of an objection for some time after the transfer of the business, providing the employee with additional options. There is no absolute maximum deadline. The right to object can only be forfeited, which presupposes a longer period of time and arrangements made by the employer with the expectation that the employee is no longer likely to exercise this right ('element of time' and 'element of circumstance'). The Federal Labour Court left open the question of whether an 11-month period is sufficient for the element of time; the simple fact of continuing to work for the buyer is also not sufficient to create a basis of trust.[23]

Only employees who still have the possibility of working for the seller have the option of exercising the right to object, since otherwise the likely outcome is a dismissal on operational grounds by the former employer. If the latter carries out workforce reduction measures and social factors are considered, the objecting party must be involved in the same way as the remaining employees. This party may not be dismissed on the basis of the argument that he or she did not take up an employment opportunity.[24]

The right to object can also be exercised jointly by the affected employees, because an individual right cannot be lost as a result of others making use of their corresponding powers.[25] The fact that pressure is exerted on the counterparty as a result is in the nature of things and has also been accepted by the Federal Labour Court in connection with, among other things, the right to object. A limit exists only in the form of an abuse of rights; such a case would be present if the joint action were aimed at preventing any transfer of the business at all rather than a specific transfer, or if an attempt were made to achieve an improvement in working conditions.

2.1.6 Continuing liability of the former employer

In and of itself, the transfer of the entire employment relationship would indemnify the seller against all the employee's claims. This seems unjust, and the employee would also be forced to accept a debtor that might be less solvent that its predecessor. Section 613a(2) BGB therefore stipulates that the seller is liable as a joint and several debtor alongside the buyer for all obligations arising before the transfer date but only becoming payable within one year of this date. The same also applies to claims that had already become payable by the previous employer.

2.1.7 Transition agreements

Section 613a BGB guarantees a minimum level of protection but does not stand in the way of more favourable contractual arrangements. Provisions of wage agreements that relate to the 'transition' of employees to a new employee are therefore also possible. The courts also adjudicated on a case in which the seller of part of a business, in a

23. Federal Labour Court 14 December 2006 – 8 AZR 763/05 – NZA 2007, pp. 682 and 686.
24. Federal Labour Court 31 May 2007 – 2 AZR 276/06 – NZA 2008, p. 33.
25. Federal Labour Court 30 September 2004 – 8 AZR 462/03 – NZA 2005, p. 43, also on the following argument.

works agreement, granted the 'outsourced' employees the right to return in the event that they could no longer remain employed by the buyer on operational grounds.[26] It is also conceivable that the agreement concerning the purchase of the business or the part of the business might contain provisions that work to the advantage of the affected employees, and which these latter can cite pursuant to Section 328 BGB.[27]

2.2 When does the foreign element under Section 613a BGB apply?

If we base our initial considerations on the current interpretation of Section 613a BGB and the Transfer of Undertakings Directive, we reach the following conclusions.

Although a business can be deemed to have been transferred even if the former location and the new location are in two different countries, it is necessary in such cases for the business or the part of the business to retain its identity over the course of the relocation. Particularly in the case of service businesses, this presupposes that a significant number of the workforce 'tag along', or in other words are prepared to continue working at the new location. In such instances, Section 613a BGB applies in any event if the change of business owner precedes or coincides with the relocation.[28] This is also attributable to the fact that Section 613a BGB forms part of the German employment contract statute.[29]

As soon as the new location becomes the 'customary place of work', the relationship is governed by the law on employment contracts of the relevant country under Article 8(2) of the Rome I Regulation, or in other words a 'change of statute' takes place. The contrary applies only if the applicable law under Article 8(1) of the Rome I Regulation was contractually agreed; in such cases, the arrangement that was previously made continues to hold. Amendments are, however, still possible if there is a change in the mandatory provisions that are to be observed regardless of the chosen legal system; the mandatory labour rights standards of Country A are replaced by those of Country B.

If the change in statute or change in mandatory law results in the loss of rights, a conceivable course of action might be to regard the buyer as being obliged to make up for this loss through a contractual agreement with the employee, which does not cause any insurmountable problems, either in Germany or in other legal systems. This applies, in particular, if the law of the host country contains a rule equivalent to Section 613a BGB or the Transfer of Undertakings Directive; if it is assumed under both legal orders that the transfer of a business must not cause a deterioration in the status quo that had previously been established, a situation where precisely this effect could be achieved by 'daisy-chaining' two legal systems would be incomprehensible. Nevertheless, it must be admitted that there is no prejudice against doing so in the past decisions by the labour courts. A conceivable fall-back solution under German law might involve the adoption

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26. Federal Labour Court 19 October 2005 – 7 AZR 32/05 – NZA 2006, p. 393.

27. See the case Federal Labour Court 20 April 2005 – 4 AZR 292/04 – NZA 2006, p. 281.

28. Federal Labour Court 16 May 2002 – 8 AZR 319/01 – AP No. 237 re. Section 613a BGB; Federal Labour Court 26 May 2011 – 8 AZR 37/10 – AP No. 409 re. Section 613a BGB.

29. Federal Labour Court AP No. 31 on private international law and employment law.

of a social compensation plan to compensate for or mitigate the disadvantages suffered as a result of the change in statute, and so on.[30]

If the employees refuse to go to the new location and continue working there, the transfer of the business fails. The employees may do so by giving notice of their refusal from the outset, since their employment contract does not cover a 'reassignment' of this kind.[31] Equally, however, they may exercise their right to object under Section 613a(6) BGB.

In practice, not relocating together with the business is the absolute rule, either because employees are prevented from moving either by family and social links, because they regard the 'migration' as an enormous step or because they lack any experience at all of keeping their head above water in a society perceived as totally foreign.

Section 613a and the Transfer of Undertakings Directive are irrelevant in such instances; this would be the case even if the scope of the term 'transfer of a business' was much broader and covered every functional succession.

In all of these cases, the business in Germany is shut down, and the question that must be answered thus relates to the means available under German law to prevent the relocation or to ensure that it takes place in a socially acceptable manner.

3. Measures to prevent a relocation

3.1 *Options for action by the works council*

3.1.1 Reconciliation of interests and social compensation plan

If a business is shut down (either wholly or in part) or the circumstances meet the criteria for another change in the business under Section 111, third sentence, BetrVG, the works council has two further rights alongside an entitlement to comprehensive information.

Firstly, it can engage in negotiations with the employer regarding the business decision as such. In such instances, both sides must endeavour to achieve a reconciliation of interests, and involve the conciliation committee if necessary. This committee is, however, limited to issuing recommendations, since the employer remains free to take a decision on the merits.

Secondly, the works council can request the conclusion of a social compensation plan, which should 'compensate for or mitigate' the economic disadvantages suffered by the employees as a result of the change in the business. This frequently (but not exclusively) involves severance payments. By way of contrast to the reconciliation of interests, the

30. For further details, see Däubler 1994. For a detailed examination of the problem as a whole, see Deinert 2013.

31. For example, in a case involving a relocation from Berlin to Lyon, Federal Labour Court 20 April 1989 – 2 AZR 431/88 – NZA 1990, p. 32.

social compensation plan is enforceable; if necessary, the conciliation committee must decide by a majority vote.

3.1.2 Closure or limitation of the business

Closure presupposes that the employer deliberately dissolves the business organisation, and that the employer's decision is permanent. This also applies in cases where production is to be continued abroad, but the employees wish to stay in Germany. No areas of doubt arise in this connection.

If only one part of a business or a certain business function is relocated, doubts can arise as to whether a limitation of the business has taken place. Let us examine first the relatively straightforward case where the production capacity of a business or a 'significant part of a business' is decreased as a result of the removal of machinery, and the employees who have become 'superfluous' are dismissed. Yet the Federal Labour Court has also correctly identified a limitation of business in cases where a significant number of employees have been dismissed without any change to the operational facilities; the social protection purpose of Section 111 et seq. BetrVG also covers this case.[32]

Benchmarks for assessing when a sufficient number of employees has been affected are based on the provisions of Section 17 KSchG on mass dismissals, whereby the latter term is taken from the relevant EC directive. In the case of large undertakings, however, where the thresholds under Section 17 KSchG would be reached relatively quickly, it is furthermore necessary for at least five per cent of the workforce to be affected.[33] This legal situation remained the same, in principle, following the adoption of the German Employment Promotion Act of 1985 (*Beschäftigungsförderungsgesetz* (BeschFG)), but this Act removed the automatic link between the change to the business and the social compensation plan. According to Section 112a(1) BetrVG (which was newly introduced at the time), a social compensation plan is to be adopted only if the number of employees who have to leave the business is higher than the number referred to in Section 17 KSchG. What must be considered, however, is that this applies only if the planned change to the business involves 'only' the dismissal of employees – if means of production are also removed (which will typically be true in the case of relocations), the general principles apply.

Under these circumstances, a more serious problem is likely to be that there is no obligation under Section 112a(2) BetrVG to adopt a social compensation plan if the change to the business is carried out during the first four years after the undertaking was founded. The intended purpose of this provision is to facilitate start-ups; at the same time, however, 'start-ups' resulting from restructuring measures, demergers, for example, are excluded from the outset, since they do not create any new jobs. The same applies if two companies found a third company and then transfer certain businesses or parts of businesses to the latter.

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32. Federal Labour Court 15 October 1979 – 1 ABR 49/77 – AP No. 5 re. Section 111 BetrVG 1972.

33. Federal Labour Court 2 August 1983 – 1 AZR 516/81 – AP No. 12 re. Section 111 BetrVG 1972.

3.1.3 Negotiations on a reconciliation of interests

The 'consultation' between the employer and the works council prescribed in Section 111, first sentence, BetrVG can result in an agreement on the planned change to the business; for example, the works council gives its consent to the closure because it will affect fewer employees than feared. Opinions differ on the actionability of this 'reconciliation of interests', which relates to the employer's decision as such, but it is typically thought to be actionable.[34]

Furthermore, Section 113(1) BetrVG unambiguously states that the employer must pay severance pay if the agreement reached is deviated from without a compelling reason and employees are dismissed as a result. As a basic principle, the reconciliation of interests does not constitute a works agreement, however; instead, it represents another collective agreement under the law on works constitutions.

If a reconciliation of interests cannot be achieved during the negotiations, both the works council and the employer can ask the Executive Board of the Federal Employment Agency to mediate. If neither do so or if the attempt to mediate is unsuccessful, Section 112(2) BetrVG states that either side can consult the conciliation committee, with the aim of pursuing further negotiations and attempting to reach an agreement (Section 112(3) BetrVG). If this too fails, the employer remains free to take the decision considered appropriate; when doing so, the employer is bound neither by the works council's ideas, by its own previous offers nor by any mediation proposals whatsoever.

In spite of this very one-sided weighting, there is no reason to underestimate the importance of negotiations concerning the reconciliation of interests. If the employer fails to exhaust all the options, including those available as part of the proceedings before the conciliation committee, severance pay may need to be paid under Section 113 BetrVG.[35] More importantly, however, the works council is granted the right to prohibit the employer (by way of temporary injunctions) from carrying out dismissals on operational grounds until the reconciliation of interests procedure has been completed, with or without an agreement.[36] This ensures that the entitlement to negotiate granted to the works council is prevented from becoming a right to a theatrical performance.

3.1.4 The right to decide jointly on the social compensation plan

Section 112(1), second sentence, BetrVG defines the social compensation plan as an 'agreement regarding the compensation or mitigation of any economic disadvantages suffered by the employees as a result of the planned change to the business'. It relates solely to the social and personnel-related consequences that result from an employer's decision that can no longer be called into question in and of itself. The

34. Evidence in Däubler 2022.

35. Federal Labour Court 18 December 1984 – 1 AZR 176/82 – NZA 1985, p. 400.

36. Hamburg Regional Labour Court 8 June 1983 – 6 TaBV 9/83 – DB 1983, p. 2369; Frankfurt Regional Labour Court 30 August 1984 – 4 TaBVGa 113/84 – DB 1985, p. 178; Munich Regional Labour Court 22 December 2008 – 6 TaBVGa 6/08 – AuR 2009, p. 142; for additional evidence, including in respect of regional labour court decisions to the contrary, see Däubler, op. cit.

social compensation plan and the reconciliation of interests are negotiated in the same procedure, with one very significant difference: if the employer and the works council cannot reach an agreement, even with the involvement of the conciliation committee, this committee determines the content of the social compensation plan independently. It follows that the vote of the neutral chairperson holds significant weight. The works council thus holds a right of co-determination to this extent, but only to this extent. By way of contrast to what is typically the case in relation to the reconciliation of interests, the social compensation plan grants the individual employee actionable claims against the employer, since, pursuant to Section 112(1), third sentence, BetrVG, it has the effect of a works agreement. A subsequent 'deviation' is therefore not possible, even for compelling reasons, and dismissal is an option at most in the case of long-term benefits.

To a large extent, the content of the social compensation plan determines whether the change to the business results in serious, irreversible declines in employees' standard of living, or whether – at the other extreme of the scale – they will come through the crisis entirely unscathed. The starting point for calculating benefits is the disadvantages suffered by the employees in question as a result of the change to the business. The goal of the social compensation plan is to provide full compensation, unless the undertaking's financial situation only permits 'mitigation'. The Federal Labour Court[37] allows the parties involved to decide freely as to whether they wish to orient themselves more towards compensation or mitigation; any such mitigation must, in any case, be 'tangible', however ('minimum allocation'). The social compensation plan would otherwise have failed to serve its purpose and would be unlawful. Below, we examine benefits granted under social compensation plans to employees who have lost their jobs, since compensation payments made in response to changes in working conditions are of less relevance in the present context.

In the event of dismissals or other forms of job loss, a severance payment is typically set. This is particularly important because German law – unlike many other foreign legal systems – makes no provision for automatic severance payments by the employer in the event of dismissals. Calculating the level of payments is a very challenging task, since the extent to which an individual is affected can vary widely; an in-demand specialist might perhaps even welcome a 'change of scenery' and find an equivalent or even better job, whereas an older colleague or a colleague with a disability might never be able to find employment again. The workaround applied in practice is a broad-brush approach based on age and length of service, with monthly remuneration typically used as a reference variable. One widely used formula multiplies age by years of service and then divides the product by a divisor of between 30 and 120; the lower the divisor, the better the social compensation plan. Older employees are significantly given preferential treatment compared to younger employees, but the Federal Labour Court[38] has ruled that this does not constitute inadmissible age-related discrimination[39].

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37. Federal Labour Court, 24 August 2004 – 1 ABR 23/03 – NZA 2005, p. 302.

38. Federal Labour Court 5 November 2009 – 2 AZR 676/08, NZA 2010, p. 457, note 27.

39. For example: Employee X is 45 years old and has been employed by the company for 15 years; the product of these figures is 675. Under a 'moderate' social compensation plan (a divisor of 110), the individual in question will receive 6.1 monthly salaries as a severance payment, whereas under a 'good' social compensation plan (a divisor of 40), the individual will receive 16.875 monthly salaries.

A basic allowance of, for example, 3000 euros is also frequently set for each employee who has spent at least one year working for the company. Persons with disabilities are entitled to compensation in view of the disadvantages they face on the labour market, and the status of single parents must also be taken into account when calculating overall benefits in order to avoid sex-based discrimination, since otherwise women will be worse off.

A compensatory payment that makes up the difference between short-time allowance and unemployment benefits on the one hand, and net remuneration on the other hand, may also play a major role, and lends itself in particular to situations involving employees who are fast approaching retirement age.

Provision is also made not only for moving costs, but also for retraining and further training costs. In addition, consideration can be given to many other benefits that are justified in terms of the goal pursued by the social compensation plan, for example compensation for loss of the job and the advantages acquired over the course of the employment relationship, as well as 'transition and provision' payments for the period after the change to the business has been carried out.[40] In my opinion, the intangible interests of the employee – who loses a significant portion of his or her former social environment together with his or her occupational livelihood – should also be taken into account when calculating the severance payment, but should not otherwise qualify as 'disadvantages' to be compensated.

A 'ceiling' is placed on the content of the social compensation plan by the concept of compensating for economic disadvantages as well as by the need for it to be 'economically viable for the undertaking'. If necessary, the conciliation committee decides what this means; factors to be considered in this connection include the pressures to which the undertaking willingly exposes itself in other contexts.

If a social compensation plan is adopted only on the basis of a ruling by the conciliation committee, that is, by a majority decision, account must be taken of Section 112(5) BetrVG. The planned benefits should 'typically take into consideration the circumstances of the individual case' and must factor in the relevant employees' prospects on the labour market. The volume of the social compensation plan that is calculated must not be such as to jeopardise the continued existence of the undertaking or the remaining jobs. Furthermore, employees who refuse a suitable job within the business, undertaking or group should be excluded from the benefits. Finally, the social compensation plan must not impinge upon individual rights; the right to severance payments must not be conditional on the employee refraining from lodging a dismissal protection action[41], and an arbitration clause must not block access to the labour courts[42].

The employer is free to promise an additional severance payment alongside the social compensation plan if the individual in question accepts the dismissal and refrains from

40. For example, Federal Labour Court 13 December 1978 – GS 1/77 – AP No. 6 re. Section 112 BetrVG 1972.
41. Federal Labour Court 20 June 1985 – 2 AZR 427/84 – NZA 1986, p. 258.
42. Federal Labour Court 27 October 1987 – 1 AZR 80/86 – NZA 1988, p. 207.

initiating court proceedings. However, any such payment may correspond to only a fraction of the severance payments under the social compensation plan.[43] According to the most recent decisions handed down by the Federal Labour Court[44], an arbitrary proportion of the funding available can be allocated to these 'turbo bonuses' unless the social compensation plan no longer even comes close to fulfilling its function of mitigating economic disadvantages.

3.1.5 Transfer social compensation plan

Ever since the conclusion of an 'employment plan' in 1985 at the Grundig company, there has been increasingly widespread acknowledgement of the fact that the severance payments and compensation benefits provided for in social compensation plans are not sufficient in times of mass unemployment, when the opportunity to find an appropriate job again, even if this takes some time, becomes much more important. These issues are addressed by 'transfer social compensation plans', which provide for qualification programmes for the individuals affected. Undertakings were originally also obliged to develop new products and open up new markets (under what was referred to at the time as 'employment plans'), but this proved to be difficult to implement in practice.

At present, the employment authorities can facilitate further training and retraining measures by granting 'transfer short-time allowances' under Section 111 of Volume III of the German Social Code (*Sozialgesetzbuch* III (SGB III)) or approving subsidies under Section 110 SGB III for social compensation plan measures of a sort likely to promote the 'integration' of the individuals in question. These individuals are frequently moved over to a transfer company on the basis of a 'tripartite contract' between the employee, the employer and the transfer company.

3.1.6 Job guarantees

A phenomenon sometimes observed in practice is that agreements designed to grant enforceable rights are reached in respect of employer decisions. One particularly common example is a job guarantee that applies for a limited period of time, and that is offered, for example, in return for the works council's agreement to a partial closure or a reduction in non-wage remuneration. An arrangement of this kind is a fully fledged contract, irrespective of the general approach taken to the actionability of the reconciliation of interests. Section 113 BetrVG does not apply on an exclusive basis in the sense that stronger commitments would not be possible on the employer's side. There is no evidence whatsoever of such an encroachment on the freedom of the employer and the works council to conclude contracts; pursuant to Section 111 et seq. BetrVG, the works council is also responsible for matters of this kind on a functional level. If a different decision were sought, it would furthermore be necessary to opt for a roundabout route based on the inclusion of job guarantees in employment contracts.

43. Federal Labour Court 15 February 2005 – 9 AZR 116/04 – NZA 2005, p. 1117.
44. Federal Labour Court 7 December 2021 – 1 AZR 562/20 – NZA 2022, p. 281.

3.1.7 Sanctions against employers who refuse to cooperate

If, by way of derogation from Section 111, first sentence, BetrVG, an employer decides not to consult the works council about a reconciliation of interests and instead carries out the planned change to the business regardless, this may turn out to be a very expensive mistake; in such cases, Section 113(3) BetrVG provides for all employees who lose their jobs as a result of the employer's actions to receive a severance payment in accordance with Section 10 KSchG (which applies to unlawful dismissals). The nature of the job loss is irrelevant in this context; employees will be covered even if they – at the employer's behest – conclude a termination agreement or give notice themselves.[45]

This right can cover up to 12 months' pay, or up to 18 months' pay in the case of older employees; it arises solely with regard to the works council's transferred right of co-determination, and does not prevent the works council from still demanding the conclusion of a social compensation plan at a later date.

It is noteworthy that Section 113 BetrVG, notwithstanding its 'punitive nature', applies even if no blame can be apportioned to the employer[46], for example if the employer merely entered into negotiations with the works council too late or failed to consult the conciliation committee.[47] The punitive nature of Section 113 BetrVG, however, loses most of its impact if the works council successfully concludes a social compensation plan at a later date, because the compensation for detrimental effects is offset in full against the benefits provided for them.[48] Although derogations from the above are possible, for example as a result of a ruling by the conciliation committee, successes of this kind are achieved by employers only very rarely.

3.2 Courses of action open to the trade union

Negotiations on the reconciliation of interests and the social compensation plan do not affect the courses of action open to the trade union. It follows indirectly from Section 112(1), fourth sentence, BetrVG that wage-bargaining systems and negotiations on the reconciliation of interests and social compensation plan stand side by side. The trade union can therefore conclude a wage agreement that provides for benefits granted by the employer that go far beyond anything achievable through the social compensation plan.

No employer will freely decide to make such concessions. Instead, the question that arises is whether the trade union members, and beyond that a large proportion of the workforce, are willing to go on strike. This is not typically the case, because many workforces in Germany do not turn to the downing of tools as an accepted form of conduct. Usually, however, it is to be expected that a 'workaround' solution involving a

45. Federal Labour Court 8 November 1988 – 1 AZR 687/87 – NZA 1989, p. 278.
46. Federal Labour Court 8 June 1999 – 1 AZR 831/98 – NZA 1999, p. 1168.
47. Federal Labour Court 18 December 1984 – 1 AZR 176/82 – NZA 1985, p. 400.
48. Federal Labour Court 20 November 2001 – 1 AZR 97/01 – NZA 2002, p. 992.

wage agreement will be suggested at some point during the negotiations on the social compensation plan. If this is a serious possibility from the employer's viewpoint, it can be supposed that the latter will demonstrate a greater willingness to compromise during the negotiations.

If employees are willing to down tools in a specific case, there are typically no legal impediments to a strike according to past decisions by the courts.[49] In the aforementioned scenario, the trade union had demanded three years on full pay for the dismissed workers, and that the employer should cover any retraining costs not shouldered by the employment authorities. The Federal Labour Court found that it was not for it to examine the appropriateness of the demands, and the parties involved were free to act in this area. A strike is always lawful if its aim is to mitigate the impacts of a business being shut down. According to the Federal Labour Court, even the fact that the planned relocation would be rendered commercially senseless if the strike demands were granted does not make it an inadmissible encroachment on the right to entrepreneurial freedom. Whether it is also permissible to strike in favour of a wage agreement that prohibits the relocation, that is directly aimed at correcting an entrepreneurial measure, remains open to debate; in this specific case, the trade union had taken the precaution of not making any such demand.

There is one exception to these principles: if a wage agreement that has not been terminated and that regulates the shutting down of a business is already in place, a strike about the same issue would violate the industrial peace obligation. Cases of this kind almost never occur in practice, however.

Strikes called to protect jobs by preventing undertakings from 'moving away' to a different EU Member State also raise no concerns from the perspective of EU law. According to the ECJ's case law, the encroachment on the right to freedom of establishment involved in such cases is justified.[50] It might conceivably be counter-argued that a strike cannot achieve much if the business in question is to be shut down in any case. Against this has to be set the fact that there are quite a few cases where work continues because the foreign location is not yet available (or not yet fully available). Other workforces not affected by the relocation can furthermore down tools in a solidarity strike, thereby exerting effective pressure[51]; this is, at any rate, possible at any time within a group.

If an undertaking makes certain promises to the trade union, for example, retaining a minimum number of jobs or continuing to manufacture a certain product at a certain location, such promises are binding as a basic principle. If the employer announces an intention to do otherwise or even acts on this intention, a temporary injunction can be applied for in order to force the employer to remain faithful to the contract and deliver on the commitments entered into.[52]

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49. Federal Labour Court 6 December 2006 – 4 AZR 798/05, NZA 2007, p. 987.
50. ECJ 11 November 2007 – C-438/05, AuR 2008, 33 – Viking. For further details, see Kania 2010.
51. Federal Labour Court 19 June 2007 – 1 AZR 396/06 – NZA 2007, p. 1055.
52. Lower Saxony Regional Labour Court 18 May 2011 – 17 SaGa 1939/10 – AiB 2011, p. 481.

Such agreements are, however, not typically concluded in response to threats of a strike. The more usual situation is where the employer, with a view to reducing wage costs in Germany, seeks to conclude a company-based wage agreement that is significantly below the level of the industry-wide agreement, and in return grants certain minimum guarantees or co-decision rights for certain issues to workforces.[53] Agreements of this kind are also conceivable in connection with relocations.

3.3 European Globalisation Fund

In the event that large numbers of employees are laid off, funding can be applied for under the European Globalisation Adjustment Fund for Displaced Workers (EGF), which has existed since 1 January 2007 and has an annual pot of up to 500 million euros. For many years, the legal basis was Regulation (EC) No. 1927/2006 of the European Parliament and of the Council of 20 December 2006, which was fundamentally revised by Regulation (EC) No. 546/2009 of 18 June 2009 (OJ L 167/26). It is currently governed by Regulation (EU) 2021/691 of the European Parliament and of the Council of 28 April 2021 on the European Globalisation Adjustment Fund for Displaced Workers (EGF) and repealing Regulation (EU) No. 1309/2013 (OJ L 153/48).

Pursuant to Article 4(2) of the Regulation, funding presupposes that a certain number of employees are dismissed within a certain period. More specifically, Article 4(2) reads as follows:

> '(2) In the case of major restructuring events, a financial contribution from the EGF shall be provided where one of the following circumstances applies:
>
> (a) the cessation of activity of at least 200 displaced workers or self-employed persons, over a reference period of four months, in an enterprise in a Member State, including where that cessation of activity applies to its suppliers or downstream producers
> (b) the cessation of activity of at least 200 displaced workers or self-employed persons, over a reference period of six months, particularly in SMEs, where all operate in the same economic sector defined at NACE Revision 2 division level and are located in one region or two contiguous regions defined at NUTS 2 level or in more than two contiguous regions defined at NUTS 2 level provided that there are at least 200 workers or self-employed persons affected in two of the regions combined
> (c) the cessation of activity of at least 200 displaced workers or self-employed persons, over a reference period of four months, particularly in SMEs, where all operate in the same or different economic sectors defined at NACE Revision 2 division level and located in the same region defined at NUTS 2 level.'

53. For further details of wage-bargaining practices, see in particular Däubler 2016.

Previous versions had presupposed 500 dismissals.

The EGF is not intended to top up severance payments under social compensation plans or to finance the restructuring of undertakings. Instead, its sole aim is to fund active labour-market policy measures, in particular initial and further training and mobility allowances.

The only known cases in Germany involve the companies *BenQ* and *Heidelberger Druckmaschinen*. The transfer company set up in the case of *BenQ* received a subsidy of 12.8 million euros for the further training programmes it implemented, allowing it to continue its activities for an additional five months. *Heidelberger Druckmaschinen* received over 8 million euros to allow it to put in place further training and job search programmes. The funding ceiling was originally 50 per cent of the programme costs, but can now be up to 85 per cent. Nevertheless, there is no evidence that Germany has submitted any further applications. It is extremely difficult to conjecture why this might be so, because the literature on employment law certainly makes reference to this co-financing option.

4. Threats of relocation

Reports are often heard from the field of the threat of relocation being dangled during negotiations with the works council and the trade union. Straight out threats are rare; instead, a reference might be made to the 'economically unavoidable need' to switch to a location with lower wage costs, for example.

Such an approach nullifies the basis for the right to strike or, more generally speaking, the right to negotiate of the trade union, and thus represents a disproportionate encroachment on the fundamental right under Article 9(3) of the German Basic Law (*Grundgesetz* (GG)), although there are no past cases adjudicated by the German courts that uphold this principle. An approach of this kind also represents a breach of the OECD Guidelines on Multinational Enterprises, according to which such threats are explicitly prohibited. If the threat is made to a works council, the latter can apply for injunctive relief on the grounds that its activities have been obstructed.[54] This option is, however, used only in cases where there is no serious threat of a relocation, because it would be associated with major drawbacks for the employer itself.

5. Conclusions

From the analysis of the different legal measures to regulate relocation in Germany, three main conclusions can be inferred.

First, the Transfer of Undertakings Directive and Section 613a BGB, which transposes its provisions, apply very rarely in Germany in the case of cross-border relocations,

54. Leipzig Labour Court 5 September 2002 – 7 BVGa 54/02 – NZA-RR 2003, p. 142.

because there is no transfer of an independent economic entity. An extension to include cases of simple functional succession would significantly expand the scope of application without altering the status quo in any way, since it is typically unlikely that employees will be willing to relocate their entire lives to another country. Therefore, the transfer of undertakings rules do not appear to be fit to mitigate the negative consequences of relocation on employment and workers' conditions.

Secondly, German legislation provides for the possibility of making relocations abroad contingent upon substantial severance payments. Works councils and trade unions have available to them the courses for action required in this connection. However, in the case of businesses without a works council or an active trade union branch, these rights exist only on paper. A conceivable solution for such cases might involve a minimum severance payment provided for by law. Therefore, from a legal policy perspective, it would be useful to discuss the suggestion that undertakings that relocate jobs should be obliged to pay a levy to a fund tasked with creating new jobs.

Finally, legally binding instruments, above and beyond the OECD Guidelines on Multinational Enterprises, should be put in place to prevent potential relocations being used as a threat during negotiations. In fact, threats of relocation affect both the right to strike and the right to negotiate of the trade union, and thus represents a disproportionate encroachment on the fundamental right under Article 9(3) of the German Basic Law (*Grundgesetz* (GG)).

References

Arbeitsagentur (2023) Monatsbericht zum Arbeits- und Ausbildungsmarkt. https://statistik.arbeitsagentur.de/Statistikdaten/Detail/202305/arbeitsmarktberichte/monatsbericht-monatsbericht/monatsbericht-d-0-202305-pdf.pdf?__blob=publicationFile&v=1

BfA (2017) Arbeitsmarkt für Ausländer (Monatszahlen). https://statistik.arbeitsagentur.de/Statistikdaten/Detail/201712/analyse/analyse-d-arbeitsmarkt-auslaender/analyse-d-arbeitsmarkt-auslaender-d-0-201712-pdf.pdf

BfA (n.d.) Arbeitsmarkt für Ausländer - Deutschland (Monatszahlen). https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=25122&topic_f=analyse-d-arbeitsmarkt-auslaender

Bundesbank (2023) Bestandsangaben: Kapitalverflechtung mit dem Ausland. https://www.bundesbank.de/de/statistiken/aussenwirtschaft/direktinvestitionen/bestandsangaben-772320

Bundesbank (n.d.) Direktinvestitionen und Auslandsunternehmenseinheiten (FATS). https://www.bundesbank.de/de/statistiken/aussenwirtschaft/direktinvestitionen/-/bestandsangaben-

Däubler W. (1994) Der Erwerb deutscher Betriebe durch ausländische Unternehmen: Arbeitsrechtliche Rahmenbedingungen, in Heinze M. and Söllner A. (eds.) Arbeitsrecht in der Bewährung: Festschrift für Otto Rudolf Kissel zum 65. Geburtstag, Beck.

Däubler W. (2016) Tarifverträge zur Unternehmenspolitik? Rechtliche Zulässigkeit und faktische Bedeutung, Bund Verlag. https://www.hugo-sinzheimer-institut.de/faust-detail.htm?sync_id=HBS-006720

Däubler W. (2022), in Däubler W., Klebe T. and Wedde P. (eds.) BetrVG. Betriebsverfassungsgesetz: Kommentar für die Praxis mit Wahlordnung und EBR-Gesetz, 18th ed., Bund Verlag, Sections 112, 112a paragraphs 23 and seqq. and 52 and seqq.

Deinert O. (2013) Internationales Arbeitsrecht: Deutsches und europäisches Arbeitskollisionsrecht, Mohr Siebeck.

Globalization Partners (2021) Guide to international employee relocation. https://www.globalization-partners.com/de/blog/guide-to-international-employee-relocation/

Kania M. (2010) Betriebsverlagerungen ins Ausland als Weg aus der Krise?, ZESAR, 3, 112-118.

Kinkel S. (1996) Wer Produktion ins Ausland verlagert, verschenkt Verbesserungspotentiale im Inland: Flexibilität und Produktivität sind angesichts des Arbeitsplatzabbaus bei Produktionsverlagerungen kritisch zu hinterfragen, Fraunhofer-Institut für System- und Innovationsforschung. https://www.isi.fraunhofer.de/content/dam/isi/dokumente/modernisierung-produktion/erhebung1995/pi2.pdf

OECD (2011) OECD-Leitsätze für multinationale Unternehmen, OECD Publishing. http://dx.doi.org/ 10.1787/9789264122352-de

PA Consulting Group (2005) Report, Zeitschrift für Bilanzierung, Rechnungswesen und Controlling. https://rsw.beck.de/cms/?toc=BC.960&docid=137679 (12.9.2022)

Scarcelli (2017) Die Fertigung im Ausland hat auch Nachteile, Swissinfo.ch, 17.05.2017. https://www.swissinfo.ch/ger/heimkehr-der-produktion_usa-und-italien-vorreiter-bei-der-rueckfuehrung-von-produktionsstaetten/43187380

Zwanziger B. and Yalcin U. (2020), in Däubler W., Deinert O. and Zwanziger B. (eds.) KSchR: Kündigungsschutzrecht: Kündigungen und andere Formen der Beendigung des Arbeitsverhältnisses, 11th ed., Bund-Verlag, Section 613a BGB paragraph 9.

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