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# Germany

## Transfer of Business

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### Trigger point

In the event of a Transfer of a Business which retains its identity, the contracts of employment of employees who are assigned to the business or part of the business transferring will automatically be transferred to the Transferee, unless the employees exercise their right to object to the transfer.

### Obligations

There is an obligation to:

- (i) inform every employee in writing about the transfer and his/her right to object to the transfer;
- (ii) inform the Works Council and, if applicable, the Economic Committee and the Spokesperson Committee; and
- (iii) in certain circumstances, negotiate a reconciliation of interests and social plan with the Works Council.

### Timing

There is no prescribed timeframe for the information to be provided to the Works Council, but it must be provided in sufficient time to allow for meaningful consideration of the information.

The information letter to the employees should be sent to each individual employee one month prior to the Transfer of a Business, as employees will have one month from the date they receive the letter to object to the transfer of their employment.

If there is an organizational change (see below), the consultation process may take around three months.

### Representatives

The requirement is to inform the representatives of the Works Council and, if applicable, the Economic Committee and the Spokesperson Committee.

### Information/Notification

There are two main information and notification obligations:

- (i) **Information to employees:** The following information must be provided to employees in writing:
  - (a) the reason for the transfer;
  - (b) the proposed date of the transfer;
  - (c) the legal, economic and social implications of the transfer for the employees; and
  - (d) details of any measures envisaged being taken in relation to the employees.

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- (ii) **Information to the Works Council:** There are no specific requirements relating to the information to be provided to the Works Council. In practice, it is advisable to provide the Works Council with the same information as that given to individual employees.

## Consultation

Generally, the Transfer of a Business in and of itself will not require consultation with the Works Council as this will not be considered to be an “operational change” under German law.

However, if the Transfer of a Business will result in or is connected to:

- (i) the transfer of a material part of the business; or
- (ii) operational changes such as a shutdown, relocation, merger, or fundamental change to the organization,

the Transferor is obliged to:

- (i) inform the Works Council of the operational change;
- (ii) where redundancies are proposed as part of a Transfer of a Business, negotiate a reconciliation of interests with the Works Council (a “**Reconciliation of Interests**”). This will focus on the reasons for the proposals, the number of people who will be affected, the process that will be followed and the manner in which any redundancy calculations will be made; and
- (iii) where redundancies are proposed as part of a Transfer of a Business, negotiate a social plan with the Works Council (a “**Social Plan**”). This will focus on redundancy packages.

If negotiations with the Works Council are not successful, the Reconciliation of Interests and the Social Plan can be referred to a conciliation committee, where negotiations continue. The conciliation committee will make a binding decision on the Social Plan, but not on the Reconciliation of Interests. If the negotiation of the Reconciliation of Interests before the conciliation committee fails, the proposed changes can still be implemented.

If no Works Council is established, there is no obligation to consult or reach an agreement with affected employees.

Depending on the circumstances of the operational change, the process of negotiating a Reconciliation of Interests and a Social Plan can take several months, but in many cases the process lasts approximately three months.

The integration of a business or material parts of a business into the Transferee’s business may also constitute an operational change of the bigger business. The same may apply where only a part of a business is transferred and this transfer results in a split of the existing business. In those

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circumstances, the Transferee is also obliged to inform and to consult with any Works Council in its business.

### **Veto rights**

If the information process in connection with an operational change is not carried out properly, the Works Council can obtain an injunction to suspend the operational change. This can prevent the proposed Transfer of a Business from occurring (to the extent that the transfer is connected to the operational change) until the appropriate legal processes have been carried out.

### **Penalties**

If the transfer is, or is connected to, an operational change, failure to comply with the information, consultation and negotiation obligations can result in an administrative fine for both the affected employer and its managing directors of up to €10,000. Failure to negotiate a Reconciliation of Interests can result in severance payments of up to 18 months' salary per affected employee. Failure to properly inform the transferred employees on the Transfer of a Business extends the right of the employees to object to the transfer of their employment until such right is forfeited on grounds of good faith, which typically applies after seven years.

### **Other**

The Transferor and/or Transferee must comply with any additional process prescribed in any applicable CBA.

Although German labor law generally does not require that documents are prepared in German, there is a general consensus that employees must be able to understand all implications of employment related documents and so it is advisable for information to be provided in German.

### **Impact of Share Sale**

The above process does not apply on a Share Sale. On a Share Sale, employees will remain employed by the same entity under the same terms and conditions on completion. However, if at least 50 percent of the shares in the company are sold and an Economic Committee (*Wirtschaftsausschuss*) or, in the absence of such committee, a Works Council, is established, such employee representative body must be informed of the identity of the purchaser, and, if different the Transferee, the economic rationale, the timeline, and any effect of the Share Sale on the employees.

### **Intra-Group Transfers**

The same requirements apply in the event of an Intra-Group Transfer.

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# Germany

## Redundancies

### Collective Redundancies

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#### Threshold

A collective redundancy process is triggered where an employer proposes to make redundant, within a 30-day period:

- (i) more than five employees in an operational unit which regularly employs between 21 and 59 employees;
- (ii) more than 25 employees, or 10 percent of the workforce, in an operational unit which regularly employs between 60 and 499 employees; or
- (iii) more than 30 employees in an operational unit which regularly employs at least 500 employees.

#### Obligations

There is an obligation to:

- (i) inform and consult with the Works Council regarding the proposed redundancies and ways to avoid the redundancies; and
- (ii) after completion of the consultation process, notify the local employment agency.

If there is no Works Council in place, only the employment agency needs to be notified. There is no obligation to inform or consult with the affected employees themselves.

In most cases, a collective redundancy will constitute or be part of an operational change (within the meaning prescribed by the Works Constitution Act). If this is the case, there is also an obligation to:

- (i) inform the Works Council of the operational change;
- (ii) negotiate a reconciliation of interests with the Works Council (a **“Reconciliation of Interests”**). This will focus on the reasons for the proposals, the number of people who will be affected, the process that will be followed and the manner in which any redundancy calculations will be made; and
- (iii) negotiate a social plan with the Works Council (a **“Social Plan”**). This will focus on redundancy packages.

If no Works Council is established, there is no obligation to consult with or reach an agreement with affected employees.

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Independent of an operational change and the conclusion of a Reconciliation of Interests, the Works Council must be informed prior to the issuing of termination notices to individual employees. This information generally must contain the reason for the dismissal (including any social selection among employees) and the respective employee's age, length of service, job position, marital status, number of dependent children, any known disability, the notice period and the envisaged time frame in which the termination notice is proposed to be sent to the employee.

## Timing

Depending on the circumstances of the collective redundancy, the process of negotiating a Reconciliation of Interests and a Social Plan can take several months. In many cases, the process takes approximately three months.

The notification to the employment agency must not be made earlier than the 15th day following the date on which the Works Council is informed.

Once the Works Council has been informed of the redundancies, the employer must wait at least one week before sending notices of termination to employees.

The dismissals generally cannot become effective until one month after the date the local employment agency is notified. The local employment agency can approve a shorter period and can also delay the dismissals for up to two months.

## Representatives

The appropriate representatives for information and consultation will be the Works Council.

## Information/Notification

There are three main notifications:

- (i) **Notification to the Works Council:** The following information must be provided in writing to the Works Council:
  - (a) the reasons for the proposed redundancies;
  - (b) the number and the job titles of the employees whose roles are proposed to be made redundant;
  - (c) the number and the job titles of all employees regularly employed in the affected operational unit;
  - (d) the proposed timing for the redundancies;
  - (e) the selection criteria to be used in identifying those to be made redundant; and
  - (f) the basis for calculation of any severance payments.

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If the collective redundancy also constitutes an operational change of the affected operational unit, the Works Council must also be informed of the details of the operational change. If no Works Council is established, there is no obligation to provide information to the employees instead.

- (i) **Notification to the employment agency:** A notification of a mass dismissal must be submitted to the local employment agency before notices of termination are sent to the individuals. The notification should include the same information as provided to the Works Council, and amended to reflect any changes agreed through consultation with the Works Council. The employment agency must be provided with the final opinion of the Works Council on the collective redundancy or any concluded Reconciliation of Interests instead.
- (ii) **Notification to the employees:** Each employee must be provided with a notice of termination signed on behalf of the employer in handwriting. The original signed notice must be sent to each employee - a scanned copy is not sufficient.

## Consultation

Where the collective redundancy constitutes or is part of an operational change, there is an obligation to negotiate a Reconciliation of Interests and a Social Plan with the Works Council. The number of consultation meetings required will vary depending on the extent of the measures and the number of employees affected.

## Penalties

Failure to comply with the information and consultation obligations (including the notification to the employment agency) may result in the employees claiming that the notices of termination are invalid.

If the collective redundancy also constitutes an operational change of the operational unit, the Works Council can apply for an injunction to suspend the implementation of the collective redundancy until the employer has carried out the appropriate procedure. In addition, any failure to inform the Works Council of the planned operational change can result in an administrative fine for both the employer and its managing directors of up to €10,000. A failure to comply with the obligation to negotiate a Reconciliation of Interests can also result in severance payments for the affected employees.

An employee who has at least six months' service and is employed in a business with more than ten employees can bring an unfair dismissal claim before the labor courts to challenge any notice of termination, even if the requirements for collective redundancy are met. Under the Protection against Unfair Dismissal Act, a justified reason for a dismissal is required which may be based on: (i) personal grounds (e.g., ongoing sickness), (ii) breach of contract, or (iii) operational reasons.

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**Other**

The employer must comply with any additional process prescribed in any applicable CBA.

Although German labor law generally does not require that documents are prepared in German, there is a general consensus that the Works Council can refuse documents in other languages, and so it is advisable for information to be provided in German. Any documents to the employment agency must be in German.

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## Individual Redundancies

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<b>Threshold</b>	<p>Where the threshold for a collective redundancy is not met.</p> <p>If individual redundancies result in or are part of an “operational change” of the affected operational unit within the meaning prescribed by the Works Constitution Act, the rules for collective redundancies apply (including the requirement for negotiation of a Reconciliation of Interests and Social Plan). This report assumes that individual redundancies will not result in or be part of an “operational change”.</p>
<b>Obligations</b>	<p>There is no prescribed process to be followed in the case of individual redundancies where there is no Works Council. In practice, the employer need only issue a termination notice in writing, giving the applicable notice. In the event a Works Council exists, the Works Council must be informed about the proposed dismissal.</p>
<b>Timing</b>	<p>There is no prescribed timeframe for the process if no Works Council exists. If a Works Council exists, the mandatory information to be provided to the Works Council triggers a waiting period of one week. Notices of termination cannot be sent to employees until at least the end of this one-week period.</p>
<b>Representatives</b>	<p>Any existing Works Council must be informed about the proposed dismissals. In the absence of an existing Works Council, there is no requirement to elect representatives.</p>
<b>Information/Notifications</b>	<p>There are two notifications:</p> <ul style="list-style-type: none"><li>(i) <b>Information to Works Council:</b> Where there is an existing Works Council, it must be provided with the following information (recommended in writing):<ul style="list-style-type: none"><li>(a) the reason for the dismissal (including any social selection among employees);</li><li>(b) the employee’s age, length of service, position, marital status, number of dependent children and any known disability;</li><li>(c) the employee’s notice period; and</li><li>(d) the proposed timeframe for termination.</li></ul></li><li>(ii) <b>Notice to employee:</b> The employee must be provided with a notice of termination signed on behalf of the employer in wet-ink. The wet-ink signed notice letter must be delivered to the employee — a scanned copy is not sufficient.</li></ul>



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**Consultation**

There is no mandatory obligation to consult with employees, but it is advisable if a termination agreement is to be reached.

**Penalties**

Failure to comply with the requirement to notify an existing Works Council in a complete and correct manner will void the termination notice given to the employee.

An employee who has at least six months' service and is employed in a business with more than ten employees can challenge any notice of termination because of unfair dismissal in a labor court proceeding even if requirements for collective redundancies and individual redundancies with respect to works council information are met. Under the Protection against Unfair Dismissal Act, a justified reason for a dismissal is required which may be based on: (i) personal grounds (e.g., ongoing sickness), (ii) breach of contract, or (iii) operational reasons.

**Other**

The employer must comply with any additional process prescribed in any applicable CBA.

Although German labor law generally does not require that documents are prepared in German, there is a general consensus that the Works Council can refuse documents in other languages, and so it is advisable for information to be provided in German.

Specific rules may apply to the dismissal of certain categories of employee, depending on which category they belong to.