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TOPIC 2

INDUSTRIAL LAW AND THE DECENTRALIZATION OF PRODUCTION

PARTIAL NATIONAL REPORT GERMANY

Stv. Before. the KArbG Professor Dr. C.W. Hergenröder 17.10.2005

A. Problem definition

At the beginning of the twentieth century large enterprises in economical of organizational regard made attentive on itself by the fact that they obtained positive results by concentration of their production on economic level outstandingly. A role of the pioneer within this range came without a doubt to the manufacturing methods in the workshops of Henry Ford, whose imitation made in the years between 1945 and 1973 the process of the industriellen for mass production possible. Henry Ford set already 1913 on the assembly-line production around in this way more reliable to be able to realize faster and in the result more economically the production of automobiles. This industrialized mass production was at that time revolutionary and so successful that later for enterprises, which were in similar way able large numbers of items to manufacture the term „fordist "– of the enterprises became related.

In recent time to the Aufrecherhaltung of the mass production due to that constantly than more with difficulty proving market situation the need developed itself to further cost saving and/or cost-efficient production. Numerous ones large and medium-size enterprises decided to operate their production and development as well as different other fields of activity no more than unit to decentralize but their organization. They separate parts of their production from cost reasons - partially connected with the need to approach new sales markets by operational readiness level and/or around competition advantages better or more effective operational sequences use to reach to be able - or page out whole ranges of the selling, the advertisement or also the product development. This „post office fordist "- enterprises partly leave thereby these ranges under their direct control or transfer them completely to other enterprises, by about these departments outsourcen. Pretty often a misalignment of whole production lines or substantial parts of it takes place into cheap wage countries so mentioned, in order to obtain or at all at the market to remain competitive be able in this way via the final product a higher profit in this connection. Particularly the automobile industry lets engines manufacture accordingly for example abroad, in order to then import and build into Germany into the vehicles these. Pretty often the term of the globalization becomes related in this connection.

Under company law the enterprise strategies mentioned are carried out by enterprise or part of the enterprise purchases, fusions, splitting off or transfers of property. Possible can also, such objectives by employee hiring be attained by Networking, outsourcing as well as the establishment of holding companies or the conclusion of Franchiseverträgen and the formation of Joint venture. Besides Einkaufsgemeinschaften and consortia are created, in order to be able to acquire for production necessary raw or Vorprodukte by negotiating quantity discounts more economically.

The subject of this representation will be less it to analyze the organization possibilities under company law for the proceedings mentioned than pointing rather the basic conditions out pertaining to labor law, which of the enterprises concerned are to be considered when their planning. Both on the consequences in individual-contractual and in collective-legal regard will have to be been received. This emphasis consciously pertaining to labor law of the remarks requires it, the regulation most relevant in connection with enterprise participation and – transmissions for the employee protection to light up the regulation § 613 A BGB more near. By this legal regulation the German legislator considered concerning the employee protection in connection with such procedures to community-legal defaults.

In front set are, like it legal methodology order, first the relevant guidelines, which are to facilitate the decision over it, under which conditions and in which constellations the facts § 613 A BGB, i.e. being present an operating transition, are given. Then in a second step with the legal consequences, which an operating transition in this sense follow, will only have to be dealt. A further emphasis of the remarks will concern the problem, in which way representativeses for the employees are to be taken part in the context of the decentralization of production, in particular in which form it a requirement on an instruction

and information, not only in connection with an operating transition in the sense § 613 A BGB, has.

There long not everyone of the already briefly addressed enterprise strategies an operating transition in the sense § 613 A BGB represents, is it indicated to light up in the required shortness further legal criteria which are able to ensure a protection of the interests of employee. In this connection is to be returned also to the ever more popular becoming Franchising and pertaining to labor law the problem definitions resulting thereby on level. In a short outline will be locking to represent, which point of view the trade unions in Germany for the question of the decentralization of production to have taken and in which way and under which conditions organized employee combinations for the protection of the employees to make strong to be able itself.

B. Enterprise strategies

The amount of those enterprises, which decide itself to want to be received in the future with other enterprises a co-operation is generally described as increasingly, although neither on national, on more European, still on international level to continuous data acquisitions can be fallen back, which could occupy this phenomenon. For the first time in the summer 2003 a such large-scale study was accomplished in the area of the European union [1][1], whatever confirms the past assumptions now empirically. This investigation turned among other things to enterprises from the processing trade, the building and guest trade, the trade as well as transmission of news and traffic [2][2].

This Ad hoc inquiry in Germany, France, Sweden, Denmark and Portugal put out among other things that "an outstanding meaning is attached „to the outsourcing. By this the paging about operational tasks and functions are understood on external enterprises. One of the crucial considerations, which is behind the outsourcing to stand, that many enterprises would like themselves to concentrate in the future more on tasks of core, in order to be able to carry out a more efficient function in this way. The outsourcing concerns predominantly from the main business separable spheres of activity, to which above all activities relating to crafts, predominantly mental work belong as for instance to engineer activities as well as the data processing. Same applies to on the right of and tax divisions, which in the past above all larger enterprises afforded, which transfer it now however to specialized enterprises [3][3]. These separating take place in the service range predominantly to domestic enterprises, while particularly in the producing trade a misalignment takes place abroad.

An example from recent time is the signing of an outsourcing contract between the German bank and IBM in December 2002. The paging concerned the continental-European computing centers of the German bank, whereby IBM took over these computing centers and server locations. A further example is the Outsoucingvertrag between HEWLETT-PACKARD and the Carl Zeiss AG. HP services took over extensive services for infrastructure and application management to 1 November 2004 for 6 years.

In connection with the outsourcing abroad occasionally two further conceptualnesses are brought into the discussion. On the one hand it is „the Offshoring ", with which the misalignment of parts of the enterprise is addressed into that far distant foreign country, approximately to Asia. On the other hand it concerns „the Nearshoring ", which contains the misalignment of parts of the enterprise abroad neighbouring. The automobile industry and the IT-industry have special portion of these strategies of the misalignment of parts of the enterprise abroad distant or also neighbouring. First mentioned oriented itself already immediately after political paging in Europe predominantly abroad Eastern European. To call the VOLKSWAGEN company, which shifted substantial parts of production into the Slowakei, among other things to Bratislava, is here only exemplary. In particular the IT-industry shifts

[1][1] Ad Hoc questioning over enterprise co-operation by euro act, publishes April 2004 by the Federal Statistical Office.

[2][2] Fn. 1 P. 7 f.

[3][3] Fn. 1 P. 13.

above all ranges of the user software development, preferably into the Indian and asiatic area.

By the outsourcing the delivering enterprise loses the possibility of being able to take on this division legally influence. Nevertheless to that extent a completely substantial economic dependence between the enterprises involved exists, why by contractual agreements is tried to reduce this possibility lacking of the influencing control.

A further enterprise strategy, which leads to a participation of several enterprises, exists in the education of strategic alliances. Here it concerns temporary unions of different enterprises, in order a certain project using special know-how and the division of costs in the area of the research or the selling to carry out to be able [4][4]. The advantage for the enterprises involved is in the fact that they can act here equally and act to that extent instruction-free of their respective partner. Legally independently are also the members of a consortium. Such is formed for the execution of a larger project and separates afterwards after its completion. Competition advantages can be reached also by the formation of a cluster. It concerns a union of several enterprises in form of a network, whereby itself for instance suppliers, producers and research establishments in spatial proximity together-found and thus able are to make developing synergies for itself usable. Everyone of the enterprises involved can be limited with it to its core authority and keep house by appropriate specialization more effectively. The enterprises are legally independent also here, are not however nevertheless in a not insignificant economic dependence. Legally independently also a joint venture is enterprise, which comes by financial participation of several societies. Beside pure capital by the enterprises involved also know-how, licenses, production plants and the like are brought in. In the European enterprise landscape these enterprise co-operation play however an only very subordinated role [5][5]. A joint venture established in Europe is, in order to call an example, the Fujitsu Siemens of computer, which developed from an ever hälftigen participation of the Japanese Fujitsu of company and the Siemens AG.

C. basic conditions pertaining to labor law for the decentralization of production

I. § 613 A BGB as basis of the employee protection

Both for employees and for those employer enterprises take part of importance are above all such decentralization measures, which accompany with an operating transition. It concerns all those constellations, in which an enterprise or a division receives a new owner. The fate of the work contracts as such, that of the conditions of work - also so far these are collective-legally regulated - and the adhesion both the Erwerbers and the seller opposite the employees concerned were regulated in § 613 A BGB. Beyond that the standard grants a protection such that it excludes notices because of an operating transition and all employees concerned grants to contradict the transition of its employer-employee relationships.

§ 613 A BGB decreases/goes back in his current version to Europeanlegal defaults. These are in particular the guideline 77/187/EEC version consolidated of 5.3.1977, the guideline 98/50/EEC of 29.6.1998 as well as of them in the guideline 2001/23/EEC of 22.3.2002. Sense and purpose § 613 A BGB are it to ensure an inventory protection for those employees which of an operating or a division transition are concerned.

Again to § 613 A BGB by the law for the change of the sailor law and other laws of 23.3.2002 [6][6] was introduced the paragraphs 5 and 6. As previously mentioned only § 613 A exp. 5 BGB decreases/goes back to Europeanlegal defaults. The right to object out § 613 A exp. 6 BGB is addressed also in the consolidated version of the guideline 2001/23/EEC in no way. For its standardization it was relevant for the legislator that it with that will humans, the free choice of the job as well as the fundamental right of the employee on free development of the

[4][4] Immenga/Mestmäcker, GWB, 3. Edition 2001, § 1 GWB Rdnr. 427.
[5][5] Fn. 1 P. 16.
[6][6] Law for the change of the sailor law and other laws of 23.3.2002 BGBl. I P. 1163.

personality (kind 1 to work 2, 12 GG), when compatible not be regarded can, these to obligate for an employer which he did not select freely [7][7].

II. RIGHT-BUSINESS TRANSITION OF AN ENTERPRISE OR A DIVISION

Connecting factor for the employee protection in the German right is being present an operating or a division transition. § its, when such a operating transition is to be affirmed, does not give 613 A to exp. 1 BGB a reference point for concretizing. Therefore the decision, in which constellations and under which conditions an operating transition is given, is based predominantly on the iurisdiction of the BAG as well as that of the EuGH.

An operating or a division transition in the sense § 613 A of the exp. 1 P. 1 BGB is present if a legal transaction leads to a business owner change. To the requirement of the transition due to a legal transaction to that extent relevant meaning does not come, when thereby excluding the single right follow-up one addresses, therefore a transition due to a total right follow-up in principle for the applicability § 613 A BGB leads. An operating or a division transition in the way of the total right follow-up is given for example if the entrance into the position takes place as a business owner due to succession or transformation-legal procedures. For latter variant it is marked that § 324 UmwG for the cases of the fusion, splitting and the transfer of property the regulations § to 613 A of the exp. 1, 4 to 6 BGB for applicable explain, if an exception was thus regulated to the addressed principle. This reference to § 613 A BGB is to be regarded after predominant view as an argument reference [8][8], why § also in the cases specified in § 324 UmwG only then application finds 613 A BGB, if the conditions of an operating transition are fulfilled. Likewise no application finds § 613 A BGB if the transition of an enterprise or a division can be attributed to law or another sovereignty act [9][9].

As far as the transition operating or of the division must be based on a legal transaction, it is however not necessary that between the past owner and the Erwerber of the enterprise directly contractual or other legal relations exists. Also this law interpretation is result of constant iurisdiction both the EuGH [10][10] and the BAG [11][11], to defeat not least in order the attempts to create evasion facts. For this reason being present a legal transaction is to be affirmed already if for instance the premises of a Gaststättenbetriebs are used by a new tenant. Here it is not necessary for the affirmation of the applicability § 613 A BGB that between the old and the new tenant contractual relations exists. This appears in particular appropriate for practice-oriented reasons, since in the appropriate cases the new and the old tenant do not know each other frequently, but everyone alone with the owner of the real estate negotiates. In the thing it is however insignificant regarding the protection needyness of the employees whether the owner of the real estate operated the restaurant before or did this third due to a lease.

III. OPERATING TERM § 613 A BGB

As far as the conceptualness „of the legal transaction is sufficiently described “as a condition for facts thereby, the legal problems, which the judicial decisions in the predominant number on tatbestandlicher side dedicate themselves, in completely different regard exist. For the applicability § 613 A BGB and thus the intervention of the protection regulations, with which

[7][7] BT-pressure. 14/7760 P. 20.

[8][8] *BAG* of 25.5.2000 AP No. 209 too § 613 A BGB; ErfK/*price* 5. Aufl. 2005 § 613 A BGB Rdnr. 178; MünchKomm/Mueller *Glöge* 4. Volume §§ 611-704, EFZG, TzBfG, KschG 4. Aufl. 2004 § 613 A BGB Rdnr. 218; **A.A.** *Kressel* BB 1995, 925, 928.

[9][9] *BAG* of 26.8.1999 AP No. 197 too § 613 A BGB; of 5.10.1993 AP No. 42 too § the 1 BetrAVG Zusatzversorgungskassen.

[10][10] *EuGH* of 26.9.2000 AP No. 30 on EEC guideline No. 77/187.

[11][11] *BAG* of 25.1.2001 AP No. 215 too § 613 A BGB; of 13.11.1997 AP No. 169 too § 613 A BGB; of 13.11.1997 AP No. 169 too § 613 A BGB.

will still have to be dealt, it is to be examined in each individual case at the very front whether a division or operation changed over to another owner.

As far as a business owner change a condition for the applicability § 613 A BGB is, it requires first of all a clarifying, when „an enterprise “or „a division “is present in the sense mentioned. The German right knows essentially two operating terms. On the one hand it is the general, also definition relevant in the labor management relations right: Afterwards an enterprise is an organizational unit, in which the employer pursues a work-technical purpose, which may not only be exhausted in the satisfaction of the internal requirement using personal, neutral and immaterial means [12][12].

For the operating term in the sense § however another definition is indicated 613 A BGB, since turning off to the neutral and immaterial means the inventory protection aimed at by § 613 A BGB and it at the basis lying guidelines becomes not fair. Thus also the guideline turns 2001/23/EEC not only to the enterprise, but explains it in accordance with kind 1 exp. off 1 A applicable to the transition of „enterprises, enterprises or divisions and/or enterprise to another owner “for. Apparently the guideline thereby is very many far calm as the wording § 613 A BGB. For this reason also the EuGH turns off less to a definition operating or of the division, but asks the special purpose accordingly whether between sellers and Erwerber one ignores „economical unit “. The conceptualness of the economical unit is therefore in constant iurisdiction [13][13] [a] crucial criterion whenever it concerns whether an operating transition took place or not. For completely outweighing view it is required beyond that that it concerns an economically functional unit, which is continued under keeping of its identity by the new legal entity [14][14]. The BAG defines the enterprise in the sense § 613 A BGB just like the EuGH therefore deviating from the general operating term in such a way that an organized whole from persons and things is present to the practice of gainful occupation with own objective [15][15]. Further the BAG does not consider only the possibility to continue the enterprise directly lasting of being able, sufficient [16][16]. Crucial it is rather that this also actually happens [17][17]. The moreover one it is necessary that the economical unit is put on in the long term [18][18]. With this criterion it is excluded that such projects are subject to the operating term, which take place only uniquely as for instance the Catering on a training course meeting. However the limited activities are to be differentiated from that temporarily noticed tasks. With the latters it can very probably concern an economical unit, since these activities can be furnished also at expiration of the agreed upon period further. To think is here approximately to several times and here the orders for cleaning also been from the EuGH to to examine still which can be addressed or also the operation of a hospital cafeteria.

The definition beginnings mentioned find both for operating and for division transitions application. Thus for the affirmation against the transition of a division no smaller demands are made. It is necessary also to that extent that its identity ignores protecting economical unit [19][19]. With this it must concern an organizational subdivision such that you can be attributed within the overall organization a partial purpose [20][20], which can exist in a bare

[12][12] *BAG* of 29.1.1987 AP No. 6 too § the 1 BetrVG 1972; of 7.8.1986 AP No. 5 too § the 1 BetrVG 1972.
[13][13] *BAG* of the 13.11.1997AP No. 169 too § 613 A BGB; of 13.11.1997 AP No. 170 too § 613 A BGB
[14][14] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 6.
[15][15] *BAG* of 12.11.1998 AP No. 186 too § 613 A BGB.
[16][16] *BAG* of 18.3.1999 AP No. 189 too § 613 A BGB.
[17][17] *BAG* of 12.11.1998 AP No. 186 too § 613 A BGB.
[18][18] *EuGH* of 20.11.2003 AP No. 34 on EEC guideline No. 77/187; of 19.9.1995 AP No. 133 too § 613 A BGB.
[19][19] *BAG* of 5.2.2004 NZA the 2004, 845, 847; from 8.8.2002 NZA the 2003, 315; of 26.8.1999 AP No. 196 too § 613 A BGB.
[20][20] *BAG* of 13.2.2003 No. 24 too § 611 BGB organ representatives; of 18.4.2002 AP No. 232 too § 613 A BGB.

auxiliary function [21][21]. It is crucial that this part already had a kind own partial identity in the total structure with the seller [22][22].

IV. TRANSITION THE IDENTITY PROTECTING ECONOMICAL UNIT

1. Test criteria

As far as it is essential the fact that an economical unit changes the owner is further necessary for the evaluation of an operating transition that this protects its identity. Also in this connection each decision extracts itself from a generalizing evaluation. Rather a view which can be made always in individual cases is indicated, which includes all relevant circumstances [23][23]. After the iurisdiction of the EuGH [24][24] and the BAG [25][25] in this connection in particular seven test criteria are of importance, on the basis those being present its identity protecting economical unit are too determined.

It acts

- around the kind of the enterprise or enterprise concerned,
- the any transition of the material operational funds such as buildings and mobile goods as well as their value and meaning
- the assumption of the immaterial operational funds and the existing organization,
- the continued employment the main voucher shank (a part of the personnel substantial after number and special customer) by the owner,
- the assumption of customers and suppliers' relations,
- the degree of the similarity before and after the transition performed activities
- as well as the duration of a possible interruption of these activities.

Besides the BAG determines in constant iurisdiction that the term of the unit not when bare activity may be understood. Rather itself a transitionable unit can even from further characteristics, as for instance the personnel, the high-level personnel, the Labor Organization, which operating methods and the provided operational funds exist [26][26].

For the affirmation of an operating or a division transition is it, and this is to be emphasized, no condition that the test criteria are all together fulfilled. Rather acts it itself thereby only around reference points, to which dependant on the industry, in which on an operating transition is to be decided, different weight comes and those may not be regarded detached by the individual case [27][27].

2. Meaning of the assumption of operational funds

Thus it shows up that the assumption of material and immaterial operational funds can particularly be in the producing trade a relevant criterion for it, whether an operating transition

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[21][21] *BAG* of 18.4.2002 AP No. 232 too § 613 A BGB; of 9.2.1994 AP No. 105 too § 613 A BGB.

[22][22] *BAG* of 17.4.2003 AP No. 253 too § 613 A BGB; from too § the 1 KSchG 1969 notice operatingcaused 5.12.2002 AP No. 126; of 8.8.2002 NZA 2003, 315 = EzA BGB § 613 A No. 209; of 16.5.2002 AP No. 237 too § 613 A BGB; of 26.8.1999 AP No. 196 too § 613 A BGB; of 11.12.1997 AP No. 172 too § 613 A BGB; of 13.11.1997 EzA the BGB § 613 A No. 166; of 11.9.1997 AP No. 16 on EEC guideline No. 77/187; from 24.4.1997 NZA the 1998, 25.

[23][23] *BAG* of 25.5.2000 AP No. 209 too § 613 A BGB.

[24][24] *EuGH* of 20.11.2003 AP No. 34 on EEC guideline No. 77/187; of 11.3.1997 AP No. 14 to EEC guideline No. 77/187.

[25][25] *BAG* from 5.2.2004 NZA the 2004, 845; of 8.8.2002 NZA 2003, 315 = EzA BGB § 613 A No. 209; of 25.5.2000 AP No. 209 too § 613 A BGB; of 16.5.2002 AP No. 237 too § 613 A BGB; of 13.11.1997 AP No. 170 too § 613 A BGB; of 13.11.1997 AP No. 169 too § 613 A BGB; of 22.5.1997 AP No. 154 too § 613 A BGB.

[26][26] *BAG* from 5.2.2004 NZA the 2004, 845.

[27][27] *EuGH* of 11.3.1997 AP No. 14 to EEC guideline No. 77/187; *BAG* from 5.2.2004 NZA the 2004, 845; of 22.5.1997 AP No. 154 too § 613 A BGB.

took place or not. In view to this criterion it is to be first marked that the operational funds do not have to be located by any means in the property of the former owner or for instance the Erwerbers. Crucial it is, particularly in the context of the order new assignment that the means will leave to the Erwerber for self-economical use, so that these can be added to him also as own [28][28]. Such is accepted, if the client places operational funds to the contractor to the processing of the order to order and, this is the crucial, those operational funds it the contractor makes possible additional economic advantages from the use of these operational funds to pull, and/or these according to own desire to use to be able. The BAG answered this in the negative for instance in the continuation of an order for guard under use of already existing safety devices [29][29].

Recently however the EuGH in a decision [30][30] attached to far less meaning over the continuation of a hospital cafeteria this criterion. Here the court stated first that with the food supply in the hospital were occupied it personnel and the patients as well as the distribution of the meals around an activity do not act, which was dependant on the manpower essentially. Because to certain extent inventory, as for instance the entire large and small kitchen devices as well as the dishwasher and the premises, energy and water had been taken over. Besides the EuGH assumed the Erwerber had taken over substantial flow charts of the former operator for the continuation of the order. Although self-its own use of the left operational funds was apparently not given due to the bindingness of the operational funds to the order, the EuGH affirmed an operating transition. Same could apply approximately to the continuation of an on-board restaurant in a Fernreisezug.

In it it shows up in special way that in particular also the further use of the business premises and the operational funds as well as the continuation of Kundenbeziehungen, which constitute the patients as well as that there in the hospital cafeteria necessarily employee personnel, for which a being present of an operating transition and with it the identity protecting unit can speak. In which measure now the criterion of the hiring of the taken over operational funds becomes insignificant the self-economical use, leaves itself to say with difficulty. The judgment of the EuGH makes however clear that the affirmation of an operating transition is posed always to a view of individual case and also the continuation of brought in flow charts and the use of existing conditions can justify the transition of an economical unit. On the other hand it is to be determined in view in the cases of the lease of the regaling premises that alone their assumption cannot justify the acceptance of an operating transition, so for instance, if the new tenant liked to offer eastern food in new Ambiente [31][31] for example instead of German house man food in the future. Here it stands, differently than in the case the hospital cafeteria, particularly in the foreground that the customer master of the former tenant as well as possibly also its cooks will not have a meaning for the new owner of the premises.

Finally it is to be marked in all clarity regarding the assumption of operational funds that alone their assumption - about that of LKWs or other machines - cannot justify an operating transition, since these do not make alone a continuation possible of the operating purpose [32][32]. Applies for something else in these cases certainly if existing orders for transportation are continued.

3. Operating transition in operational fund-poor enterprises

That the assumption of materials for itself can be alone no yardstick for decision over it whether an operating transition is present or shows up not, particularly in such enterprises, which are dependant on the worker of the coworkers as well as their know-how on

[28][28] *BAG* of 22.1.1998 AP No. 174 too § 613 A BGB; of 11.12.1997 AP No. 171 too § 613 A BGB.
[29][29] *BAG* of 22.1.1998 AP No. 174 too § 613 A BGB.
[30][30] *EuGH* of 20.11.2003 AP No. 34 on EEC guideline No. 77/187.
[31][31] *BAG* of 10.9.1997 AP No. 16 on EEC guideline 77/187.
[32][32] *BAG* of 26.8.1999 AP No. 196 too § 613 A BGB.

operational funds than rather less. In the appropriate industries the economical unit demanded by the iurisdiction can be represented by an organized whole by employees [33][33].

Particularly within the service range the question arises, to what extent the assumption from employees leads 613 A BGB to an operating transition in the sense §. This applies above all because § at first sight the acceptance permits 613 A BGB that the transition of the employer-employee relationships, therefore the continued employment of employees of the seller, is to be arranged on the legal consequence side. Caught fire this problem within the range of the business space cleaning service. An operating transition was here affirmed if the Erringer of an order for cleaning does without the assumption of the finery materials, but almost takes over all cleaning forces, which in the result in the same areas as before their work to furnish to be supposed.

The EuGH and the BAG affirm an operating transition in connection with the continued employment of cleaning forces in those cases, in which the Erwerber transferred a **part of the** personnel [34][34], **substantial** after **number and special customer**. When from a part of the personnel substantial at number and special customer can be proceeded, is certainly a further itself together of the lining up problems of the operating transition. The EuGH and following the view it took the BAG to it that this is anyhow then the case, if the Erwerber takes over that part of the personnel, the past owner had used which purposefully for the execution of a certain activity and their assumption makes it for the Erwerber possible straight, this activity in same way to continue [35][35]. Given is this criterion unquestionably if all employees are taken over and succeeds maintaining the Labor Organization as well as the operating methods. However is this requirement in opinion of the BAG regarding the guarantee of a getting and a bringing service in a hospital yet are not sufficient done, if 75% of the personnel are taken over [36][36]. On the other hand the BAG accepted a part of the employees substantial after number and special customer if 85% of the personnel turn into [37][37]. However one will not be able to regard this indication as upper limit. Rather a smaller weight can come to the number of taken over employees if substantial know-how carrier - for instance from the management – with the Erwerber and these continue working thereby into the position are put, which accomplished tasks as an organizational unit further to settle to be able [38][38].

V. DEMARCATION TO THE BARE FUNCTION FOLLOW-UP

To define is the operating transition of the bare function follow-up. The latter does not represent a straight operating transition in the sense § to 613 A BGB. It is given if a contractor continues only the activity as such [39][39] without it takes over for example operational funds or parts of the staff. If it avails itself however of the latters, an operating transition can be affirmed [40][40]. Under the keyword of the function follow-up becomes large between the order follow-up (one is already extracted from the past implementing enterprise there transferred into stranger of hands paged out setting of tasks and third for the execution), the order assumption (an enterprise occurs the tasks already assigned during an existing order relationship between the client and the past contractor with their agreement as new contractors) and the first foreign assignment of work-technical tasks differentiated. Correct way belongs here also the order cancelling, if activities paged out so far are thus extracted from the assigned enterprise and accomplished now by the client. In all these

[33][33] *BAG* of 13.11.1997 AP No. 169 too § 613 A BGB; of 11.9.1997 AP No. 16 on EEC guideline No. 77/187.

[34][34] *EuGH* of 20.11.2003 AP No. 34 on EEC guideline No. 77/187; from 10.12.1998 NZA the 1999, 189; *BAG* of 11.12.1997 AP No. 172 too § 613 A BGB.

[35][35] *EuGH* of 24.1.2002 AP No. 32 on EEC guideline No. 77/187; of 25.1.2001 AP No. 31 on EEC guideline No. 77/187; of 11.3.1997 AP No. 14 on EEC guideline No. 77/187; *BAG* of 11.12.1997 AP No. 172 too § 613 A BGB.

[36][36] *BAG* of 10.12.1998 AP No. 187 too § 613 A BGB.

[37][37] *BAG* of 11.12.1997 AP No. 172 too § 613 A BGB.

[38][38] *BAG* from 14.5.1998 NZA the 1999, 483.

[39][39] *EuGH* of 20.11.2003 AP No. 34 on EEC guideline No. 77/187; *BAG* of 11.12.1997 AP No. 171 too § 613 A BGB.

[40][40] *BAG* of 22.1.1998 AP No. 173 too § 613 A BGB.

cases the question arises whether the factual characteristics of an operating transition are fulfilled. Typical examples are the assignment of guard or orders for cleaning and/or the paging of work areas on another enterprise in the way outsourcing. A condition for the acceptance of a bare function follow-up within this range might be however in view to the principles already represented that neither necessary know-how nor neutral operational funds still another part of the personnel substantial after number and special customer are taken over.

A bare function follow-up accepted the BAG [41][41] in circumstances, in which a swimming teacher changed the employer, however in the same natatorium also first the same group of swimming cared for. The BAG implemented for this that the group of swimming was no Labor Organization in the sense pertaining to labor law and thus no economical unit, since the participants of the group of swimming were members at the former employer of the teacher it however not its employees was. It was irrelevant that the Schwimmunterricht took place further in the same natatorium, which was located in the property of the country. Those resounds for self-economical use had not been left. Whether this argumentation can be still durable regarding the latter point after the decision of the EuGH already addressed for the continuation of a cafeteria, is doubtful, however is to be agreed the decision in the result, since it lacked an organizational unit pertaining to labor law the transition.

VI. OPERATING QUIET PUTTING AS EXCLUSION CRITERION

An operating transition is not possible if the enterprise is shut down. As soon as an enterprise was finally shut down, think-necessarily also no more economical unit exists, which is capable of of an owner change. This actually trivial conclusion presupposes however that a demarcation between bare resting of an enterprise and its actual quiet putting can properly take place. Going by for being present an operating quiet putting provided that a serious and final intention of the employer is given, the operating and production community in the long term or at least for an indefinite to dissolve economically not insignificant period [42][42]. For example if a mode business is continued nine months after attitude of each sales sale, can not be proceeded from an operating transition, therefore the transition of an economically functional unit, any longer [43][43]. The demarcation becomes relevant the operating quiet putting also in those constellations, in which the entire enterprise is shifted by the sale to another place. It is then an indication for an operating quiet putting and not for an operating transition, if at the new operating place the operating association is actually and legally dissolved and the enterprise at this place with an essentially new staff is continued [44][44]. Nevertheless if an operating transition is present after all that despite misalignment of the operating place, the employer-employee relationships ignore strength of law on the Erwerber, which then in application of the general principles pertaining to labor law on it is dependant that the employees concerned of the contribution of its work at the new location agree, otherwise one is dependant the Erwerber on the means of the change notice.

VII. TIME OF THE OPERATING TRANSITION

For the applicability § 613 A BGB and thus the validity of the relevant protection regulations relevant the time is that, in which the past owner transfers the responsibility for the enterprise to the transferred unit on the Erwerber. Concretizing this time stands not for the arrangement

[41][41] *BAG* of 5.2.2004 NZA the 2004, 845, 847.

[42][42] *BAG* of 13.2.2003 AP No. 24 too § 611 BGB organ representative No. 24; from too § the 1 KSchG 1969 notice operatingcaused 10.10.1996 AP No. 81; of 19.5.1988 AP No. 75 too § 613 A BGB; of 28.4.1988 AP No. 74 too § 613 A BGB.

[43][43] *BAG* of 22.5.1997 AP No. 154 too § 613 A BGB.

[44][44] *BAG* of 16.5.2002 AP No. 237 too § 613 A BGB; of 12.2.1987 AP No. 67 too § 613 A BGB.

of the parties taken part in the operating transition, but determines themselves alone according to the actual circumstances [45][45], specified above.

VIII. CONSEQUENCES FOR ENTERPRISE RESTRUCTURING

After the principles mentioned the following can be held regarding procedures under company law finally: Not when business owner change is to be regarded it, if shares will only transfer or the composition of an unincorporated firm change, so for example with entrance of a partner into a private firm or with replacing and/or exchange of all partners. As long as the identity of the employer remains protected opposite its employees despite changes in the partner existence, it is as person majority at the unincorporated firm or as a legal entity, changes in the in-plant personnel structure a role do not play.

Against it if an employer brings its enterprise as Sacheinlage into a society, then an owner change is present. That is obvious at societies with own juridical personality (AG, GmbH), applies however likewise to unincorporated firms (OHG, kg, society of the civil right). Because legal entities are afterwards the partners in their joint solidarity. Besides the BGH [46] [46] awarded the legal capacity to the society of civil right, so that the GbR can appear now also as an employer in right traffic. The business owner change is based in these cases also on a legal transaction, however the bringing in partner makes a commitment not in relation to (not developed yet) the society, but to the other partners. That does not oppose however the at least similar application § 613 A BGB.

Even if the partners dissolve the old society and transfer the enterprise to a society formed again by the Erwerbern, intervenes § 613 A BGB. Same must apply, if the personnel composition of the partners does not change. The form-changing transformation of the legal entity after §§ 190 FF. UmwG does not represent an owner change, since the legal entity changes only in its kind of the juridical personality, a substrate carrier allocation change so mentioned lies not before [47][47].

With splitting procedures it depends crucial on whether the identity of the legal entity of the respective enterprise or division changes. That is not with splitting of enterprises within an enterprise the case, probably however during the transmission of an enterprise or a division on another company enterprise. Same applies to the legal Verselbständigung of the abgespaltenen enterprise or division [48][48].

An operating transition can likewise take place via the complete or partial integration of two enterprises of enterprises of a company [49][49]. In the same way the unification of parts of the enterprise can represent in the context Joint of a venture of two companies, depending upon its arrangement in individual cases, in particular if apart from the bare capital unification also production processes are brought in together with know-how carriers, an operating transition in the sense § 613 A BGB.

For the in practice most important case the following principles can outsourcing be set up. First it is to be always examined whether the tasks within the range which can be paged out are exercised using substantial materials. If this is the case, then alone the assumption can be this for execution necessary materials a substantial indication for the fact that an operating transition is present. Taken place however the order execution less under to demand operational funds than rather essentially via manpower, then only then an operating transition and a function follow-up are not only present, if is taken over a part of the staff substantial after number and special customer. Besides the assumption of immaterial

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[45][45] *EuGH* from 26.5.2005 NZA the 2005, 681.

[46][46] *BGH* of 29.1.2001 AP No. 9 too § 50 ZPO.

[47][47] ErfK/*price* (Fn. 11) § 613 A Rdnr. 44.

[48][48] To the fragmentation of a uniform enterprise in operating and possession company more near *BAG* of 19.1.1988 AP No. 70 too § 613 A BGB. See also *BAG* of 12.11.1998 AP No. 188 too § 613 A BGB.

[49][49] *EuGH* from 2.12.1999 NZA the 2000, 587.

operational funds, as for instance from licenses, will play utility models, registered trade marks and patents to the manufacturing of certain goods for the evaluation a crucial role. These are then a relevant criterion, which speaks for the transition operating or of a division [50][50]. In this range not least also the transition of a selling authorization to the Erwerber is an indication for the fact that an operating transition is present [51][51].

Regarding the further mentioned above enterprise strategies, as for instance the strategic alliances, the formation of consortia and the creation of a cluster it remains implementing that it to that extent - if it remains only in the co-operation of different enterprises - which will not be present conditions of an operating transition, since it lacks a business owner change.

D. protection of the employees with operating transitions

As already addressed employees, which are affected by an operating or a division transition, are, in special way protection-needily. § 613 A BGB try to carry calculation. In the following is therefore on the fate of the work contracts of the employees concerned to deal protection against dismissal-legal aspects as well as with adhesion-legal consequences.

I. TRANSITION OF THE EMPLOYER-EMPLOYEE RELATIONSHIP

If an operating transition is present, then exp. steps 1 P. 1 BGB of the Erwerber into the rights in accordance with § 613 A and obligations from that at the time the transition existing employer-employee relationships in and/or, differently expressed, the employer-employee relationships ignore strength of law on the Erwerber. For the employees concerned this has as a consequence that they experience in this way first an inventory protection. If it would not come to a transition of the employer-employee relationships, the employees would see themselves further opposite to their past employer, which sold possibly all its operational funds, therefore no more employees to begin can, which must lead in the consequence inevitably to operatingconditioned notices of the employees concerned.

1. Entrance into the rights and obligations from the employer-employee relationship

In the thing the transition of the employer-employee relationship leads to a change of the Contracting Party on employer side, contents of the same remains unaffected thereby. The rights and obligations of the employer-employee relationship in the sense § 613 A of the exp. 1 P. 1 BGB cover all individual-contractual agreements. The entrance of the Erwerbers has for the employee among other things as a consequence that all periods of limitation continue to run without prejudice to the employer change. On the other hand the Erwerber must be able to be held out if necessary that the employee already protected as fixed in the tariff set periods of exclusion opposite the past employer and this away-works also opposite it.

The employee has the same requirements for payment including all special allowances granted so far against the new employer. Claims of one of the past owner, also erdiente, granted company pension scheme go on the Erwerber over [52][52]. The Betriebserwerber must be able to be taken into account in the context of legal waiting periods as for instance for the payment continued payment after § 3 exp. 3 EFZG or the general protection against dismissal in accordance with § 1 exp. 1 KSchG seniority at the past employer [53][53]. Same applies to wage increases, which presuppose a certain duration of seniority.

To the rights, which the Erwerber attains by the operating transition, all requirements of the past owner count against individual employees. To think is here approximately to enrich-legal

[50][50] *BAG* of 28.4.1988 AP No. 74 too § 613 A BGB.
[51][51] *EuGH* of 7.3.1996 AP No. 9 on EEC guideline No. 77/187.
[52][52] *BAG* of 24.3.1977 AP No. 6 too § 613 A BGB; of 29.11.1988 AP No. 7 too § the 1 BetrAVG operating sale.
[53][53] *BAG* of 27.6.2002 AP No. 15 too § the 1 KSchG 1969 waiting period.

balance requirements or claims for damages [54][54]. In the same way the Erwerber is justified with the time of the operating transition, all organization rights, which were entitled up to then to the seller, to exercise. Accordingly the Erwerber an employee can express contract obligation injuries, which this had committed still with the seller, because of the notice or give a warning.

2. Not of the operating transition seized contractual relations

§ 613 A exp. 1 P. 1 BGB arranges the entrance of the new owner into all rights and obligations from the employer-employee relationship. Thus it is certain that such treaty systems, which exist independently of the work contract between the employee and the past business owner remain unaffected by it. This concerns in particular employer loans. To that extent for example the new owner does not become creditor of the demands for loan [55][55]. Likewise given authority - as for instance a power of attorney - does not ignore, since they are arranged only on occasion the employer-employee relationship, however no rights from the same is [56][56].

Same concerns in principle likewise share options. Also here it is strict between the work contract and that from it option contract which can be differentiated, which grants a requirement on the grant of share options to the employee, to be separated. This applies in the opinion the BAG anyhow if the share options, as in the predominant number of the cases, are granted to the company upper company i.e. from third. It is not in the opinion the BAG impossible that share options on work-contractual level are granted. An assumption going by does not give it however, the question depends in the long run always on the concrete individual case. The requirement on the grant of the share options does not ignore therefore regularly in accordance with § 613 A exp. 1 P. 1 BGB on the Erwerber, since it does not concern a requirement out of the employer-employee relationship [57][57]. Same will have to apply probably if the employer grants the share options. By appropriate yardsticks also the forfeit clauses contained often in the option contracts are to be judged. In these becomes sense in accordance with. regulated that the requirements from the option contract purge, as soon as the employee from the enterprise and/or the company group separates. Such clauses are the subject of the option contract and therefore in principle not after civil pertaining to labor law and but after generally principles for judging. A differentiating argument with this topic would blow up here the framework [58][58]. Nevertheless it can be held as yardstick that such forfeit clauses are in principle effective and do not oppose them the regulation § 613 A BGB.

A large question is, to what extent practice-ripe option rights can be subject to the purge. That § 307 BGB might probably oppose. Beyond that it is to be considered that the purge of the share options in the result leads to the reduction of the income of the employees concerned. In this connection it is considered whether an obligation to pay compensation of the Erwerbers results from the principles for the disturbance of the implicit basis of contracts. To that extent there are suggestions to use the principles of the iurisdiction for the effectiveness of a contradiction reservation regarding voluntarily carried out special allowances. The BAG assumed in this connection the fact that components of the remuneration can be placed only to the extent under a free revocation when thereby in the core range of the employer-employee relationship is not intervened. If this is the case, the save area of the change notice was hurt regarding the legal validity of a one-sided change of conditions of work after § 2 KSchG. When the borders of the effectiveness of a revocation

[54][54] MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 100.
[55][55] *BAG* of 21.1.1999 – 8 AZR 373/97 - nv.
[56][56] MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 92.
[57][57] *BAG* of 12.2.2003 AP No. 243 too § 613a BGB.
[58][58] Deepening for this *farmer/Göpfert/of stone outer stone back* ZIP 2001, 1129 FF.; *Willemsen/Mueller Bonanni* ZIP 2003, 1177 FF.

reservation are reached, not yet the case depends is to be on the individual case, however at 15% [59[59]].

3. Continuing validity of collective-legal regulations

According to kind 3 exp. 3 of the guideline 77/187/EEC keeps the Erwerber the conditions of work up to the notice or the expiration of the same and/or up to the entry into force, agreed upon in a Kollektivvertrag, upright or up to the application of another Kollektivvertrags in the same measure, as they were intended in the Kollektivvertrag for the seller. The member states can limit this period of the maintenance, if this than one year does not amount to less. This regulation was continued last in kind 3 exp. 3 of the guideline 2001/23/EEC. Same Europeanlegal defaults the legislator wanted to carry through § for 613 A exp. 1 P. 2 to 4 BGB calculation.

Apart from the individual-contractually agreed upon conditions of work in principle also the rights and obligations which are based on collective-legal basis exist after the operating transition away. The appropriate legal arrangement is necessary, because collective agreements are not a component of the employer-employee relationship and therefore the Erwerber into these not when debtor occurs 1 P. 1 BGB in accordance with § 613 A exp. To note it is however that § 613 A exp. 1 P. 1 BGB finds to application if the collective agreements strength of singlecontractual reference application find. The collective agreements taken to that extent in purchase continue to apply in the principle singlecontractually.

In accordance with § 613 A exp. 1 P. 2 BGB are transformed normative valid regulations, which decrease/go back to a collective agreement or an employment agreement, into the individual employer-employee relationship. They become thereby directly contents of the employer-employee relationship between the new owner and the employee to the extent and regulation content, which they had at the time the operating transition. They continue to apply thus statically. The contractual part of the collective agreement, that, which concerns only the relationship of the Tarifvertragsparteien among themselves, is therefore not seized by § 613 A exp. 1 P. 2 BGB. Likewise excluded from the transformation regulations of the collective agreement, which do not concern themselves with the rights and obligations of the employees, are like it for example with labor management relations-legal standards the case are [60[60]].

The range of application § 613 A of the exp. 1 BGB is not limited thereby on collective agreements and employment agreements. In the way of the guideline-conformal interpretation § 613 A exp. find 1 P. 2 to 4 BGB on all collective agreements application. To call are to that extent for example company and total employment agreements as well as guidelines after the speakers' committee law or service agreements after the federal personnel agency law. The regulation content § 613 A of the exp. 1 P. 2 BGB is not however only limited to the receipt of the status quo due to the transformation. Additionally through § 613 A exp. 1 P. 2 BGB a large protection is going by granted, when the transformed regulations of the collective agreement may not be changed within a yearly for the disadvantage of the employees.

The law places the rules in front mentioned as principle. Actually however it concerns thereby only catching facts. Exp. 1 P. 3 BGB applies for something else in accordance with § 613 A, and this is to be examined always at the very front, if the new owner and the employees concerned by the operating transition are bound to a collective agreement. On sides of the employees this strength membership in the responsible trade union can (§ 3 TVG) or in the way of the general commitment explanation via the Federal Ministry for economics and work in agreement with a committee consisting of ever three representatives

[59[59]] See first *BAG* of 15.11.1995 AP No. 20 too § the 1 TVG of collective agreements: Lufthansa; of 21.4.1993 AP No. 34 too § 2 KSchG 1969; of 07.10.1982 AP No. 5 too § 620 BGB partial notice; as well as to the entire problem deepening with further proofs *Willemsen/Mueller Bonanni* ZIP 2003, 1177 FF….

[60[60]] MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 135.

of the central organizations of the employers and the employees (§ 5 TVG) are done. In these cases the collective agreement is not transformed, but exists normative that is called directly and compellingly further. Comparable applies, if the Erwerber and the ignoring employees are directly bound to a collective agreement existing with the Erwerber [61][61]. To a separation of the collective agreement by another collective agreement, valid with the seller, it can come also if between the employee and the new owner its applicability in accordance with § 613 A exp. 1 P. 4 alto. 2 BGB is not agreed upon and the Erwerber or the employee concerned are tariff-bound.

As already addressed apply collective agreements, which had been taken with the seller by an agreement in purchase, in principle in accordance with § 613 A exp. 1 P. 1 BGB singlecontractually further. This can to consequence to have that with the Erwerber on this changed over unionized organized employee and outsider, to which the collective agreement strength of singlecontractual reference applied differently it is treated. While for the latter collective agreement applies further dynamically, the continuing validity for tariff-bound employees would be static after § 613 A exp. 1 P. 2 BGB. To that extent however the interpretation of the singlecontractual reference can lead with outsiders to another result. If the past business owner was tariff-bound and singlecontractually in the context of a so-called „small dynamic reference clause “if the application of the collective agreement valid for the enterprise straight was agreed upon, is to be assumed it concerns thereby an equalization agreement, which should guarantee that the outsider is treated like the tariff-bound employees [62][62]. If this is the case, the collective agreement taken in purchase continues to apply with the Erwerber also to the outsider statically. For something else applies however in principle then, if the past employer were not tariff-bound or were not taken in the work contract a collective agreement in purchase, at which the employer was not bound. Here it will not concern regularly an equalization agreement, why it remains with the use of § 613 A exp. 1 P. 1 BGB [63][63].

An exception of the inventory protection arranged in § 613 A exp. 1 P. 1 BGB regulates § 613 A exp. 1 P. 4 BGB. Afterwards transformed collective agreements, which have a lasting effect at the time the operating transition only after § 4 exp. 5 TVG, may be amended also before expiration of a yearly for the disadvantage of the employees. This is to that extent consistently, because these collective regulations lost their compelling effect at the time mentioned already and § 613 A BGB only receive the right position of the employees concerned, not however to improve is [64][64].

The saying finds in the principle also for employment agreements application. Thus an existing employment agreement continues to apply individual-contractually if it does not experience a normative continuing validity. Normative an employment agreement continues to apply if the operating identity remains existing with the Erwerber. This is not certainly then possible, if only one division turns into, since the identity of the enterprise is not protected here. An employment agreement insists then on individual-contractual level in accordance with § 613 A exp. 1 P. 2 BGB with the inventory protection already addressed away [65][65]. If the employment agreement has a lasting effect at the time of the operating transition in accordance with § 77 exp. 6 BetrVG, it can be amended despite the transformation still before expiration of a yearly, since § no good position of the employees intends 613 A BGB also to that extent. Likewise individual-legally far valid employment agreement by an employment agreement with the Erwerber in accordance with § 613 A exp. 1 P. 3 BGB can

[61][61] *BAG* of 25.9.2002 AP No. 26 too § the 1 TVG reference to collective agreement; of 1.8.2001 No. 225 too § 613 A BGB; of 21.2.2001 AP No. 20 too § 4 TVG; MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 139 mwN.

[62][62] *BAG* of 26.9.2001 AP No. 21 too § the 1 TVG reference to collective agreement; of 25.9.2002 AP No. 26 too § the 1 TVG reference to collective agreement.

[63][63] See to the multilayered details also in connection with the distinction of small and large dynamic reference clauses *Hergenröder* anniversary publication 50 years BAG (2004) P. 713 FF.

[64][64] *BAG* of 1.8.2001 AP No. 225 too § 613 A BGB.

[65][65] MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 149.

be replaced, if it regulates the same article and in the taken over enterprise applies. It does not find then the separation, however the Günstigkeitsprinzip application [66][66].

II. CONTRADICTION OF THE EMPLOYEES

1. Bases of the right to object

The employee can prevent the transition of the employer-employee relationship however also by own initiative. The German right grants to that extent a right to object to each person employed concerned. In accordance with § 613 A exp. 6 P. 1 BGB can contradict the employee the transition of the employer-employee relationship within a monthly after entrance of an instruction after § 613 A exp. 5 BGB. Such a right to object was already before introduction § 613 A of the exp. 6 BGB by the law for the change of the sailor law and other laws of 23.3.2002, [67][67] which to 1.4.2002 into force stepped, confirmed in constant iurisdiction of the BAG [68][68].

The EuGH this iurisdiction of the BAG had explained accepted, it however incompatible with kind 3 of the guideline 77/187/EEC for, if an employee contradicts only individual consequences of the transition – for instance the release of the old employer of its commitments opposite the employee – [69][69]. A contradiction can take place therefore also according to now valid law situation only regarding the entire employer-employee relationship. German legislator put standardization right to object consideration zurunde that it with that humans, who to free choice of the job as well as the right to free development of the personality of the employee (kind 1 would commit 2, 12 GG) was not compatible, to the work for an employer to these which he did not select freely [70][70]. It is to be assumed the standard giver wanted to adapt in this way the law situation of the constant iurisdiction of the BAG [71][71] and the EuGH [72][72] and thus in the long run also a regulation of the instruction closed in itself and of these dependant right to object to arrange. At the same time lay legislation the tendency to create clarity within which time frame the employees of its right to object, concerned by an operating or a division transition, use must make. Differently than the constant iurisdiction of the BAG [73][73], existing up to then, which following the period for filing suit regulated in §§ 4 and 7 KSchG for asserting the inefficacy a notice one contradiction period of the employee of the operating transition, concerned of three weeks since knowledge, granted, plans the now valid law situation that the contradiction must take place against the transition of the employer-employee relationship within a monthly after entrance of the instruction by means of the operating transition according to the condition § 613 A of the exp. 5 BGB. With the right to object it concerns a on one side receipt-needy

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[66][66] *BAG* of 14.8.2001 AP No. 85 too § 77 BetrVG 1972.

[67][67] BGBl. I P. 1163.

[68][68] *BAG* of 30.10.2003 AP BGB § 613 A BGB No. 262; of 25.1.2001 AP BGB § 613 A No. 215; of 18.3.1999 AP KSchG1969 § 1 social selection No. 41; of 19.3.1998 AP No. 177 too § 613 A BGB; of 22.4.1993 AP No. 102, 103 too § 613 A BGB; of 21.5.1992 AP No. 96 too § 613 A BGB; fundamentally *BAG* of 2.10.1974 AP No. 8 too § 613 A BGB (regarding a division); of 21.7.1977 AP No. 8 too § 613 A BGB (regarding the sale of the whole enterprise).

[69][69] Unclearly *EuGH* of 5.5.1988 EAS RL 77/187/EEC kind 3 No. 5 = EzA § 613 A BGB No. 89 with notes Berger *Delhey/Gaul*; approving with the restriction mentioned then Urt. of 16. 2,1992 AP No. 97 too § 613 A BGB; as well as *EuGH* of 24.1.2002 EAS RL 77/187/EEC kind 1 No. 23; of 12.11.1998 EAS RL 77/187/EEC kind 1 No. 16 times. 38 = EzA § 613 A BGB No. 168.

[70][70] BT-pressure. 14/7760 P. 20

[71][71] Fundamentally *BAG* from 2.10.1974 AP No. the 1 to § 613 A BGB (regarding a division); of 21.7.1977 AP No. 8 too § 613 A BGB (regarding the sale of the whole enterprise); of 21.5.1992 AP No. 96 too § 613 A BGB; of 22.4.1993 AP No. 102, 103 too § 613 A BGB; of 19.3.1998 AP No. 177 too § 613 A BGB; of 18.3.1999 AP KSchG1969 § 1 social selection No. 41; of 25.1.2001 AP BGB § 613 A No. 215; of 30.10.2003 AP BGB § 613 A BGB No. 262.

[72][72] *EuGH* 16.12.1992 AP No. 97 too § 613a BGB.

[73][73] See only *BAG* of 19.3.1998 AP No. 177 too § 613 A BGB; 22.4.1993 AP No. 103 too § 613 A BGB.

declaration of intention. As organization right it is condition hostile, cannot be exercised thus not under a reservation.

2. The instruction as a condition of the beginning of the contradiction period

As already marked the right to object can be noticed only within one period from one month to entrance of the instruction. To get straight it is that the informing obligation, which is not arranged of the predominant view as genuine right obligation [74][74], for the operating transition as such consequences has. This takes place independent of it, whether the instruction, with whose details immediately is to be dealt it took place or not. Also the instruction is not a condition for the practice of the right to object. This can be exercised rather independently of it by each employee. However an incorrect instruction is able the way to the contestation of the contradiction because of bad-cunning deception in accordance with § 123 BGB opens. On the other hand a completely substantial right security can be in as much caused by an early instruction before the operating transition by the seller and/or the Erwerber of the enterprise or division as within a monthly after entrance the instruction for all involved ones is clear, whose employer-employee relationship with the enterprise or division turns into and which remains with the seller.

The instruction stands thereby in the long run in close relationship with the contradiction period. In order to be able to set these on, the instruction must be written first of all in text form. This presupposes it in accordance with § 126 b BGB that the explanation in a document or on other to the durable would show suitable way in characters is delivered, the person of the explaining calls and the conclusion of the explanation by reproduction of the name signature or is made differently recognizable. Thus it is sufficient for example, if the instruction takes place for instance in the Intranet, via E-Mail or at the black board. This is recommendable nevertheless not, since the Erwerber and the seller in a judicial argument carry the burden of proof going by, when the entrance of the instruction took place at the employees concerned. For this reason it is advisable to make the instruction by delivery of a document and to document the delivery accordingly. The appropriate letter does not require its own signature of the explaining, a in-scanned name sign, which shows the person of the explaining, is to that extent sufficient necessarily. The consequences of an incorrect and/or incomplete instruction are substantial: Up to the border to each employee concerned then a temporally unlimited right to object is entitled to the forfeiture. The on the right of and planning uncertainty accompanying with it both the seller and the Erwerbers, which must count at any time on a contradiction of an employee, are considerable.

For this reason in the bibliography already controversially one discusses, which requirements are to be placed on the circumstance and time moment which can be presupposed for a forfeiture which can be judged in accordance with § 242 BGB. The time moment requires that the holder of a right did not pursue its right longer time. Besides the conclusion must to be pulled be able for the affirmation of the circumstance moment from the behavior of the entitled one that it will make no more use from its right and the obligated one furnished itself on that and with consideration of the entire circumstances on it to furnish itself was allowed [75] [75]. Already the determination of the time moment causes substantial difficulties, there a maximum period of six months [76][76], suggested in the legislative procedure, and/or of three months [77][77] law did not become. Partially in the bibliography an orientation is endorsed on the period for the permission of late complaints during the protection against dismissal process in accordance with § 5 exp. 3 P. 2 KSchG, as the maximum period of six months,

[74][74] So *Willemsen/Lembke* NJW 2002, 1159, 1161 f.; *Hauck* anniversary publication for light courage pointing man (2005) P. 551; *Meyer* BB 2003, 1010, 1014; *Franzen* RdA 2002, 258, 262; **A.A.** *Bauer/of stone outer stone back* ZIP 2002, 457, 458.

[75][75] Palandt/*Heinrichs* 64. Aufl. 2005 § 242 Rdnr. 87 FF….

[76][76] BT-pressure. 14/8128 P. 4 and 6.

[77][77] BR-pressure. 831/1/01 P. 2.

standardized herein, is to mark the time frame of the forfeiture [78][78]. In view to the described law emergence this appears however problematic. Correct way one will probably have to assume the time moment in each individual case requires anyhow a special evaluation and the period of six months does not represent an upper limit going by that a contradiction must being regarded after longer time than incurred the loss [79][79]. Characterized by substantial difficulties is also the problem, when the described circumstance moment can be regarded as given. In an opinion the circumstance moment is to be affirmed to be able, if the employee concerned furnishes its work despite an obvious employer change further and the Erwerber as its new employer accepted. For this it could speak that the BAG before standardization § 613 A of the exp. 6 BGB the unreserved continue working at the new employer as agreement of the employee for the transition of his employer-employee relationship judged [80][80]. Against this aspect it is however rightfully stated that she is not to be brought the informing obligation with the sense and purpose in agreement. § 613 A exp. 5 BGB aim at the straight comprehensive information of the employee about the new employer and this right of information may not not over the detour of the forfeiture be gone around. For this reason the circumstance moment can be fulfilled only then if the employee makes unmistakably clear „"that it as its new contracting party accept the new owner [81][81]. When this is the case, must be likewise decided in each individual case. Before this background is not enough thus the bare continue working out, on the contrary one will have to require special circumstances as for instance expressions of the employee or the like concerned, in order to be able to affirm a forfeiture.

3. Details for the instruction of the employees

A. Europeanlegal defaults

The German legislator went with the informing obligation opposite all employees concerned by the operating transition beyond the defaults kind 7 exp. 6 of the guideline 2001/23/EEC. In it only an instruction of such employees is intended, which are active in an enterprise, in which independently of the will of the employees no representatives for the employees exists. The German legislator considered it however necessary that an instruction had to take place also in enterprises, in which it - directly for what reasons - to no work council choice came. Each employee concerned is to be informed directly and from first hand about the operating or division transition [82][82].

Already the law reason refers to which legal situation would have been the result one-conversion of the guideline. A duty to supply information in relation to the representatives for the employees in enterprises with more than 20 employees would insist only then, if the close conditions § 111 BetrVG were present, on which in the following to be been received will still have. Only then the work council from an operating transition is to be informed to from labor management relations-legal view.

In enterprises with an employee number of 5 to 20 employees, therefore in enterprises, which after § 1 BetrVG are work councilable, in which meanwhile no work council was selected, an instruction of the employees for the reason to separate would have had, because in these independently of the will of the employees no work council does not exist. In such enterprises if a work council would have been selected, an instruction of the representatives for the employees could have taken place if necessary in application §§ of the 2, 74 BetrVG, which is not sufficient however as it were for the Europeanlegal defaults.

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[78][78] *Farmer/of stone outer stone back* special hatchet. to NZA 2003 number 16, 72, 75; *Gaul/petrol* railways 2002, 634, 637.

[79][79] In this sense ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 96; *Hunter* ZIP 2004, 433, 444; *Willemsen/Lembke* NJW 2002, 1159, 1160.

[80][80] In addition first *BAG* of 25.5.2000 AP No. 10 too § 613 A BGB under reasons of I 2 b with note *Birk*; as well as *farmer/of stone outer stone back* ZIP 2002, 457, 464, *Grobys* BB 2002, 726, 730.

[81][81] *Franzen* RdA 2002, 258, 267.

[82][82] BT-pressure. 14/7760 P. 19; *Hunter* ZIP 2004, 433, 434; *Worzalla* NZA 2002, 353; Krit. in addition *farmer/of stone outer stone back* ZIP 2002, 457, 460 f; *Willemsen/Lembke* NJW 2002, 1159, 1161.

An instruction according to the employee to the Europeanlegal defaults would have been possible all that only in such enterprises, which usually less than 5 employees employ [83][83], since independently of the will of the employees no work council exists only here.

b. Correctness of the instruction

aa) only a correct and complete instruction in accordance with § 613 A exp. 5 BGB starts the contradiction period of one month after their entrance in accordance with § 613 A exp. 6 BGB. The informing obligation meets both the seller and the Erwerber of the enterprise or division. Both can accomplish or this by a uniform explanation make the instruction together separately from each other. In each case the parties have itself over it to reasonable to which extent they want to inform about which things and supply themselves mutually with appropriate information. The latter applies above all if about such things one informs, which either only the seller is able to judge or only the Erwerber. Like that it for instance the seller will be possible regularly not to inform over in the future in prospect taken measures with the Erwerber in accordance with § 613 A exp. 5 No. 4 BGB. Concerning this therefore either equal the Erwerber will inform or an appropriate reference to the seller will give, which afterwards informs the employees. The instruction by the seller works also regarding the Erwerbers opposite the employee concerned as fulfilling. To that extent Gesamtschuldnerschaft exists in the sense §§ of the 421 FF BGB, which makes double information dispensable by the seller and the Erwerber.

To take place the instruction has ausweislich the law wording before the operating transition. However it is not impossible with the fact that also still after the transition of this obligation can be sufficient. But sense and purpose of the instruction speak. This is to give the possibility to the employees concerned of setting the practice of the right to object to a sufficient information situation and of weighing the pro and cons in this connection. Can be considered to that also with an instruction after operating transition, above all because then the right to object can take place still within a monthly after entrance of the instruction.

The German legislator adhered concerning the informing catalog § 613 A of the exp. 5 BGB literally to the defaults of the guideline 2001/23/EEC. Afterwards is over the time or the planned time of the transition, the reason for the transition, the legal, to inform economic and social consequences of the transition for the employees and the measures considered regarding the employees.

bb) the instruction might prepare few problems in the actual one over the time or the planned time of the transition in accordance with § 613 A exp. 5 No. 1 BGB. This will result regularly from the agreements existing to that extent.

First difficulties result however in connection with the instruction over the reason for the transition in accordance with § 613 A exp. 5 No. 2 BGB. To indicate is here first the legal reason, therefore about that the transition is based on an enterprise purchase or a splitting off. Additionally to require one must probably in the view on the fact that this conceptualnesses says to the few employees somewhat that the substantial procedures are mentioned, which hide themselves behind the respective legal model. Superelevated demands hieran as for instance long explanations of legal or economic kind are not to be made regardless of its. Additionally it is partly demanded that economical background the

[83][83] To this aspect deepening *Franzen* RdA 2002, 258, 260 f.…

operating transition are described [84][84]. In no case the informing are held, secrecy-worthy Betriebsinterna as for instance the purchase price or the like admit to give [85][85].

CC) Some uncertainty might prepare the instruction over the legal, economic and social consequences of the transition for the employees in accordance with § 613 A exp. 5 No. 3 BGB for the reason, because the wording is so far that the arrangement of the borders of the informing obligation only from iurisdiction practice to result in to have itself. Also a view into the law reason offers first only a small starting point going by, which must be made the the subject of the instruction to that extent. Afterwards are the consequences addressed in § 613 A exp. 1 to 4 BGB to describe [86][86]. As far as thereby first a basis is formulated, what is to be taken up as minimum, the fixing of the boundaries must orient itself in the other direction at the sense and purpose of the instruction. This consists in particular of preparing for the employees a sufficient information basis for the practice of their right to object. From this also the further fundamental consideration can be derived that the bare rendition of the legal text from § 613 A exp. 1 to 4 BGB to the instruction cannot likewise meet the requirements. On the other hand the sense and purpose mentioned do not order also that each individual employee concerned can stress an instruction, approximately in form of an individually tailored advice. The latter results from the legal text, which requires to that extent an instruction of all employees concerned, certainly as whole, [87][87].

To the legal consequences, over which is to be cleared up, it belongs at the very front that due to the operating transition the new owner occurs the rights and obligations of the employer-employee relationships. In this connection it is to be for example also mentioned that the past time of seniority continues to apply also with the new owner. Enumerating of all rights and obligations from the employer-employee relationship is not necessary. Nevertheless it might be recommendable, at least fundamental or in the past particularly contentious topic areas, for instance handling existing employer loans to address effects on part-time work for elderly people contracts or seniority [88][88]. If the operating transition accompanies with a shifting of the job, might have to be informed in each case about the location of the new working place. It is to be marked to that extent that the obligation addresses itself for the contribution of the work always, straight also after an operating transition, after contents of the employer-employee relationship and is not covered perhaps therefore the occupation to another work place of the instruction right of the Erwerbers, which is dependant then on the general means pertaining to labor law, as for instance change or operatingconditioned notice.

Likewise it is to be referred in the instruction to the legally granted protection against dismissal such that a notice is ineffective because of the operating transition in accordance with § 613 A exp. 4 P. 1 BGB, but notices for other reason in accordance with § 613 A exp. 4 P. 2 BGB remain permissible. In this connection with the fact it will if necessary also have to be dealt that a general protection against dismissal will not exist according to the regulations

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[84][84] APS/*Steffan* 2. Aufl. 2004, § 613 A BGB Rdnr. 208; *Nehls* NZA 2003, 822, 824; probably *Willemsen/Lembke* NJW 2002, 1159, 1162; *Grobys* BB 2002, 726, 727 recommends such a proceeding in view of the to that extent open legal situation; *Farmer/of stone outer stone back* ZIP 2002, 457, 461 endorse the alternative indication of the legal or of the economic reason for the transition; MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 107 requires not those of the legal, but only the economical background, not the economic causes of the transition; Palandt/*Putzo* (Fn. 76) § 613 A BGB Rdnr. 43 demands additionally the motives of any kind.

[85][85] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 85; *Gaul/petrol* railways 2002, 634, 635; *Grobys* BB 2002, 726, 727; *Hauck* special hatchet. to NZA 2004 number 18, 17, 24; *Hunter* ZIP 2004, 433, 439; *Willemsen/Lembke* NJW 2002, 1159, 1162 f.; *Worzalla* NZA 2001, 353, 354.

[86][86] BT-pressure. 14/7760 P. 19.

[87][87] MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 107; ErfK/price (Fn. 11) § 613 A BGB Rdnr. 85; *Farmer/of stone outer stone back* ZIP 2002, 457; *Gaul/petrol* railways 2002, 634, 635; *Hunter* ZIP 2004, 433, 440; *Nehls* NZA 2003, 822, 824; *Willemsen/Lembke* NJW 2002, 1159, 1163.

[88][88] *Farmer/of stone outer stone back* ZIP 2002, 457, 462; ders. Special hatchet. to NZA 2003 number 16, 72, 74; *Hunter* ZIP 2004, 433, 440; *Worzalla* NZA 2002, 353, 355, recommends, to take up all ranges of topics addressed in § 2 exp. 1 NachwG to the instruction.

of the protection against dismissal act with the owner - approximately for lack of sufficient size of company in the sense § 23 KSchG - [89][89].

Necessary in particular also an instruction is concerning the Fortgeltung of collective-legal standards. Face of the complexity of the legal problems [90][90], existing in this connection, is not necessary instruction going into the individual details. It is to that extent sufficient, if - depending upon to what extent it is possible it is informed - about the fact that the existing collective-legal standards strength of reciprocal Tarifgebundenheit continue to apply however invariably after general principles as such or that they are transformed in accordance with § 613 A exp. 1 P. 2 BGB into individual-contractual agreements and as such to only continue statically. Besides it is to be dealt with the fact that in latter constellation a change may not take place for the disadvantage of the employees within a yearly after the transition of law because of. As the third variant it is to be pointed out in the context of the instruction that it will come to a displacement of the collective-legal standards by such standards existing with the Erwerber in accordance with § 613 A exp. 1 P. 3 BGB, whereby naturally about is to be informed which collective agreement it in particular concerns. To note it is however that a general instruction is not sufficient over the existing possibilities of the fate of the collective-legal standards. Rather, straight must be dealt in the case that a displacement of such standards will take place, with the work-temporal, financial and other changes. The three existing variants can be called next to each other, because regularly not all employees are tariff-bound and a sufficient instruction of all employees concerned can be achieved only in this way [91][91]. Whether beyond that also all cases of the Fortgeltung of singlecontractually agreed upon references to collective agreements must be enumerated, appears in view of the complexity of this topic area doubtfuly. Nevertheless one will probably have to require that about the fact it is informed that taken in these cases in principle only a static continuing validity in purchase of the collective agreement on individual-contractual level takes place and only when being present a tariff change clause for instance into shape of a large dynamic reference the applicability of the as fixed in the tariff standards valid with the Erwerber is possible [92][92].

Also is to be dealt with the adhesion of the past employer and the Betriebserwerbers. To that extent it is to be implemented in the informing writing that the Erwerber occurs the adhesion for existing and for requirements developing in the future with it. Simultaneous it is to be informed about the fact that the seller is responsible for the requirements developed with it, even if they become due after operating transition only before expiration of a yearly (§ 613 A exp. 2 BGB), however then only timely-proportional. If with the Erwerber an insolvency procedure is accomplished, is over it to also clear up [93][93]. To the informing obligation regulated in § 613 A exp. 5 No. 3 BGB belongs also that about the purge by share options of the employees one informs.[94][94]

It appears at first sight amazing that by the completely outweighing opinion it is accepted that an instruction is considered dispensable over the right to object, which straight on basis is to take place evenly that instruction [95][95]. Also the attempt is partly undertaken to regard the right to object than a legal consequence of the transition in the sense § 613 A of the exp. 5

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[89][89] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 85; *Farmer/of stone outer stone back* ZIP 2002, 457, 463; *Hunter* ZIP 2004, 433, 441.

[90][90] See in addition *Hergenröder* in anniversary publication 50 years BAG (2004) P. 713 FF….

[91][91] *Farmer/of stone outer stone back* ZIP 2002, 457, 462; *Hunter* ZIP 2004, 433, 441; *Worzalla* NZA 2002, 353, 355.

[92][92] See in addition *Hergenröder* in anniversary publication 50 years BAG (2004) P. 713 FF.

[93][93] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 85; *Farmer/of stone outer stone back* ZIP 2002, 457, 463; ders. Special hatchet. to NZA 2003 number 16, 72, 74; *Hunter* ZIP 2004, 433, 441; **A.A.** *Grobys* BB 2002, 726, 728.

[94][94] *Willemsen/Lembke* NJW 2002, 1159, 1163.

[95][95] *Old person castle/Leister* NZA 2005, 15, 20; *Hunter* ZIP 2004, 433, 438, 442; *Farmer/of stone outer stone back* ZIP 2002, 457, 463; MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 108; *Willemsen/Lembke* NJW 2002, 1159, 163.

No. 3 BGB [96][96]. Nevertheless must here, as also within other ranges of private law the premise it applies that that, to which strength of law a right is entitled does not need to be instructed concerning this, if it is standardized not expressly - as for instance in § 355 exp. 2 P. 1 BGB -. This confirms also systematics of the guideline 2001/23/EEC. In kind 3 exp. 1 RL 2001/23/EEC is expressly recognized that the employer-employee relationships with the operating transition to the Erwerber turn into. Nevertheless with no word the right to object of the employees is brought up for discussion and this arrived also in knowledge of the transition of the employer-employee relationships not into enumerating the few points for instruction in kind 7 exp. 6 guideline 2001/23/EEC. Accordingly also in the law reason it is pointed out that the regulation § of the exp. 6 BGB of the right clarity and right security serves 613 A and also regarding the constant iurisdiction of the EuGH and the BAG, which before its normative anchorage had already recognized the right to object in the way of the right advanced training to the legal text was taken up. Also one will not be able to understand the right to object as a legal consequence of the transition in the sense § 613 A of the exp. 5 No. 3 BGB. Such a consequence of the transition is rather that in accordance with § 613 A exp. occurs 1 P. 1 BGB of the Erwerber the rights and obligations from the employer-employee relationship. The right to object however is based on the discussed realization that it is not to be zuzumuten to the employee that it itself this legal consequence unconditionally in addition-give has and it is therefore granted to seize the initiative around these to prevent.

dd) In the law reason as measures considered regarding the employees (§ 613 A exp. 5 No. 4 BGB) measures for further education were called in connection with planned conversions of production, restructuring or other actions, which concern the vocational development of the employees, [97][97]. For this personnel reductions aimed at might belong also with the Erwerber. A condition for the instruction is in each case that these measures are in the stage of a concrete planning. As long as this time was not reached, also an instruction is dispensable [98][98].

ee) so far with the managing remarks the attempt undertaken is to point a march direction out regarding the extent of the instruction requires it further specifying the yardstick, at which the instruction has to take place. As already determined, the instruction before the operating transition has to take place. From it it results completely inevitably that the information is based regularly on a certain prognosis. This concerns above all the considered measures in the sense § 613 A of the exp. 5 No. 4 BGB, in addition, the legal, economic and social consequences of the transition in the sense § 613 A of the exp. 5 No. 3 BGB. Accordingly has for information obligated its knowledge, conceptions, of letting expectations and planning flow into the instruction. They must inform the employees concerned by the transition in the context of a subjective determining, whereby to that extent on the one hand on the time of the entrance of the instruction and on the other hand to the level of knowledge both the seller and the Erwerbers is to be turned off [99][99]. This can apply certainly only regarding such aspects of the instruction enumerated in § 613 A exp. 5 BGB, which are based apparently on a prognosis, because they are not foreseeable at the time the information. In particular by this the instruction is not to be counted regarding the planned time as well as the reason of the operating transition. Same applies regarding the instruction over the legally arranged consequences of the operating transition in accordance with § 613 A exp. 1 to 4 BGB.

III. PROTECTION AGAINST DISMISSAL

Apart from the inventory protection in shape of the transition of the employer-employee relationship in accordance with § 613 A exp. 4 S. BGB may not be quit to the employees

[96][96] *Worzalla* NZA 2002, 353, 355.

[97][97] BT-pressure. 14/7760 P. 19.

[98][98] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 85; MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 110; *Willemsen/Lembke* NJW 2002, 1159, 1163; *Worzalla* NZA 2002, 353, 355.

[99][99] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 88; MünchKomm/Mueller *Glöge* (Fn. 11) § 613 A BGB Rdnr. 106; *Grobys* BB 2002, 726, 728; *Meyer* BB 2003, 1010, 1012.

concerned by an operating transition because of the transition of an enterprise. This is consistent for the reason, when not so that that its employer-employee relationship turns into on the Erwerber strength of law, this is helped the employees concerned it however immediately because of the operating transition well-informed can. Same applies regarding a possible notice by the seller. The exclusion of the right to give notice regarding the operating transition extends both to the tidy and to the extraordinary notice. Also not only the completion, but also the change notice is addressed here for the transformation of individual conditions of work. It concerns thereby its own notice prohibition, which does not have for condition that the regulations are applicable over the general protection against dismissal of the KSchG. A notice expressed against the notice prohibition is ineffective in accordance with § 134 BGB.

However the right, which consist employer-employee relationship of other reasons to well-informed also when being present an operating transition, remains § 613 A exp. 4 P. 2 BGB. This has the consequence that a notice is effective if it is carried by a material reason outside of the operating transition. The operating transition can represent then the outside cause of the notice, however it may not be after constant iurisdiction of the BAG the basic reason of the notice [100][100]. To it it is missing for example if the expressed notices lead to a rationalization, which the operating transition only made possible and otherwise the enterprise would have had to be shut down [101][101]. If a notice takes place in the concrete intention of quiet-adding the enterprise however the business owner changes finally his resolution and sells he the enterprise, becomes the notice not afterwards in accordance with § 613 A exp. 4 BGB ineffectively. To that extent alone the time of the notice explanation is relevant [102][102].

A notice of the seller, who this expresses after operating transition opposite a contradicting employee for operatingconditioned reasons, does not take place likewise because of the operating transition. Also here the operating transition in the broader sense may be the cause for the operatingconditioned notice, the crucial reason of their necessity been based however less on the operating transition as such, than rather on the contradiction of the employee against the transition of its employer-employee relationship and the whereabouts of the same taken place thereby with the seller. Jedwede possibility of employment for the remaining employee is missing to the latter due to the operating sale, so that it can express a operatingconditioned notice for this reason after general principles.

§ also a notice of the seller does not fail to 613 A exp. 4 BGB on, who is expressed, in order to only prepare the enterprise for an operating transition. Here those constellations, in which the potential Erwerber would like to transfer an enterprise in principle, are addressed it however only with a certain number of employees a continuation of the enterprise to make are able. A crucial condition for the effectiveness of such a notice is however that on sides of the Erwerbers a concrete reorganization concept or a similar Erwerberkonzept is present, which takes off itself from the general desire to want to reduce the number of employees [103] [103]. Purpose § 613 A BGB are not to be extended despite missing possibility of employment of the Erwerbers the employer-employee relationship artificially.

IV. ADHESION OF THE SELLER OPPOSITE THE EMPLOYEES

Consequence of the transition of the employer-employee relationship to the Erwerber in accordance with § 613 A exp. 1 P. 1 BGB is that the Erwerber becomes also debtor of existing demands of the employees. So that connected the fundamental risk results for the employees that they get a less efficient debtor put on, who is responsible for at the time of the operating transition the still open demands. From this protection need in § 613 A exp. 2

[100][100] *BAG* of 26.5.1983 AP No. 34 too § 613 A BGB; of 19.5.1988 AP No. 75 too § 613 A BGB.
[101][101] *BAG* of 18.7.1996 AP No. 147 too § 613 A BGB.
[102][102] *BAG* of 16.5.2002 AP No. 237 too § 613 A BGB.
[103][103] *BAG* of 20.3.2003 AP No. 250 too § 613 A BGB; of 26.5.1983 AP No. 34 too § 613 A BGB.

BGB a gradated adhesion system was taken up, whatever considers to the interests of the seller in a temporal restriction of its adhesion. Afterwards the seller in the external relationship as well as the Erwerber is responsible as a total debtor for requirements from employer-employee relationships, which are not yet terminated at the time the operating transition. A condition for the adhesion of the seller is however the fact that the requirements already developed before the operating transition and before expiration of a yearly since the operating transition become due or at this time was already due [104][104]. As far as the demands become due after the operating transition only, however, cling the seller in accordance with § 613 A exp. 2 P. 2 BGB developed already before only proportionately according to at the time the operating transition the assessment period run off, in which for instance the requirements of an operational age precaution were erdient [105][105] or the seller an appropriate return, usually in the shape received from worker of the employee. The legal regulation concerns alone the adhesion in the external relationship, which will not abbedungen by the Erwerber and the seller can. Nevertheless it is left to them, as they agree upon the adhesion regulation in the interior relationship.

By the adhesion of the seller not to be seized requirements, which develop only after the operating transition and become due.

E. PARTICIPATION RIGHTS OF REPRESENTATIVESES FOR THE EMPLOYEES

In the following it is to be followed to the question to what extent entrepreneurs, who restructure the Produktionsabläufe, on which participation of existing representativeses for the employees and/or must to which extent they these are dependant consider.

I. Consulting rights of the work council in accordance with §§ 111 FF. BetrVG

As already suggested a participation of the work council must take place with the operating transition both with the seller and with the Erwerber if the Vorraussetzungen § is given to 111 BetrVG. In this connection it is to be noted primarily and completely in principle that the operating transition is not as such an operating change in the sense of the standard text, compellingly necessary for the applicability §§ of the 111, 112 BetrVG, [106][106]. Argumentatively to the fact it is spoken that § an final control system represents 613 A BGB to that extent and an employee protection going beyond it is not necessary [107][107]. This principle does not exclude however that the conditions can be fulfilled in individual cases also in connection with an operating transition. § 111 BetrVG intervenes always if in an enterprise with usually more than 20 employees profound changes take place in the Labor Organization. If this is the case, the save area §§ of the 111 is FF. BetrVG - if necessary also beside that § 613 A BGB - opens and thus a participation of the work council indicated.

1. Rights of codetermination releasing facts

Thus the quiet putting or restriction of the whole enterprise represents or from substantial divisions on the occasion of an operating transition an operating change after § 111 P. 2 No. 1 BetrVG, whereby this facts can be fulfilled also by a personnel reduction. The latter must concern however a substantial division. Is to be fallen back to the upper limits specified in § 17 exp. 1 P. 1 KSchG. Therefore substantial divisions are concerned, if in enterprises with usually more as 20 and as 60 employees more are quit less less as 5 employees, in enterprises with usually at least 60 and as 5000 employees 10% in the enterprise regularly

[104][104] *BAG* of 24.6.2003 AP No. 63 too § 242 BGB operational exercise.

[105][105] *BAG* of 22.6.1978 AP No. 12 too § 613 A BGB.

[106][106] *BAG gs* of 4.12.1979 AP No. 6 too § 111 BetrVG 1972; *BAG* of 17.3.1987 AP No. 18 too § 111 BetrVG 1972.

[107][107] Erfk/*Kania* (Fn. 11) § 111 BetrVG Rdnr. 10;

busy employee or however more than 25 employees or in enterprises with usually at least 500 employees of at least 30 employees.

If the Erwerber shifts the enterprise or division, are fulfilled to 111 P. 2 No. 2 BetrVG when being present the further conditions the facts §. The upper-judicial iurisdiction affirms this about if an enterprise is to be shifted in the center of a large city at 4.3 km removed outskirts of a town [108][108] or within a large city 5.5 km [109][109].

An operating change after § 111 P. 2 No. 3 BetrVG is to be affirmed, if the Erwerber integrates the taken over enterprise into another enterprise or a splitting of an existing enterprise takes place, whereby it depends crucially on the change of the organization of the line apparatus accompanying with it. Straight one with fusions and splitting procedures after the transformation law or during a division sale is necessary thereby a work council participation. It is still to a large extent unsettled whether about, how it is with the personnel reduction the case a fixing of the boundaries must take place going by that it concerns substantial divisions, therefore whether the fragmentation or does not cause the fusion of smallest divisions the right of codetermination of the work council. The BAG rejected it so far to consult here the limit values § 17 exp. 1 of the P. already discussed 1 KSchG concretizing [110][110].

If a fundamental change of the operational organization, the operating purpose or the equipment is connected with an operating and/or a division transition, intervenes § 111 P. 2 No. 4 BetrVG. Above all the reorganization of competencies within an enterprise, which takes place due to the introduction of flatter hierarchies or outsourcing [111][of 111] individual fields, can mean a change in this sense, because thereby the core range of the operational organization is changed.

Also the introduction of fundamentally new work methods with the Erwerber or, following a division sale with the seller can release a participation right of the work council in the enterprise of the Erwerber and/or the seller in accordance with § 111 P. 2 No. 5 BetrVG.

2. Consequence of the participation obligation

The participation right of the work council in accordance with § 111 BetrVG obligates the employer first to inform the work council about the forthcoming measures. The instruction must be so comprehensive that the work council can make itself alone on their basis a comprehensive understanding of the measure as such and also their effects [112][112]. In order to ensure this, on the one hand the economic and social reasons are to be stated by the employer, which justify the considered changes and on the other hand these are by would give appropriate suitable documents to state. Differently than with the instruction of the employees already addressed the employer has, as far as it is necessary to submit also such appraisals and reports which contain business and trade secrets [113][113]. In all other respects the instruction must be accomplished compellingly before implementation of the operating change. Besides the employer with the work council has to advise and in accordance with § 112 BetrVG try the planned changes to agree upon a reconciliation of interests or negotiate a social plan.

A reconciliation of interests treats thereby the question whether, when and in which way an operating change is to be accomplished. It cannot be forced by the work council. The subject of the reconciliation of interests is it to prevent the implementation of the operating change completely or to reduce at least their extent as such. Such regulations can contain for

[108][108] *BAG* from 17.8.1982 AP No. the 11 to BetrVG 1972 § 111.
[109][109] *Frankfurt* from the 1987, 292 *WAS APPROPRIATE for* 28.10.1986 AiB.
[110][110] *BAG* of 10. 12. 1996 AP No. 110 to BetrVG 1972 § 112.
[111][111] *ArbG peppering castle* 30. 8. 2000 AiB 2001, 3; *ArbG Munich* 22. 2. 2000 AiB 2000, 766; 02.
[112][112] *Fitting* 22. Aufl. 2004 § 111 BetrVG Rdnr. 111.
[113][113] *Fitting* (Fn. 113) § 111 BetrVG Rdnr. 111.

example the time of the operating change and/or the dismissal of employees or the closer arrangement of qualification measures. In direct contrast to it stands the social plan, whose conclusion can be forced in principle by the work council without reservation, if necessary by the engagement of the arbitration board. The law in § 112 A BGB prescribes special requirements in form of certain threshold values to the forcing bar only if the operating change exists alone in a personnel reduction. This is to adjust or reduce the economic disadvantages of the employees resulting from the operating change. In addition the social plan is an employment agreement [114][114], why it, differently than the reconciliation of interests, opposite which employees seized by it a direct and compelling effect (§ 77 exp. 4 P. 1 BetrVG) grants them unfolded and a direct requirement on fulfilment of the promises transacted there.

The informing and duty of counselling after § 111 BetrVG exist, as soon as the employer made concrete planning for an operating change. Background of this close aspect is that instruction and consultation are to prevent or reduce unfavorable effects on the employees, what is think-necessarily impossible, if the instruction takes place after execution of the measure.

By the employer a reconciliation of interests is not tried, to have employees, which are affected by the operating change and suffer in any form of disadvantages, in accordance with § 113 exp. 3 BetrVG an individual requirement on a compensation or a disadvantage reconciliation. To that extent it is to be noted that the requirements are very high to the execution of the attempt of a reconciliation of interests. It is not sufficient that the employer makes only an offer, which this - for what reasons also always to the work council - rejects. In order to avoid the requirements mentioned of the employees, it is rather held to call on its part the arbitration board before which up to the determination of the failure of the negotiations with the work council is to be negotiated [115][115]. This legal situation is necessary reconciliation for the fact that the reconciliation of interests is not forcable by the work council. Consequently that the employer threatening disadvantage balance requirement of individual employees is an argument intended of law because of, so that the employer strives in appropriate way around the conclusion of a reconciliation of interests.

II. INFORMING OBLIGATIONS OPPOSITE THE RESTAURANT COMMITTEE

If in the enterprise of the seller or the Erwerbers concerned in each case an economic committee exists, who employed in accordance with § 106 exp. 1 P. 1 BetrVG in enterprises with usually more than 100 constantly employees to be formed is, this is to be likewise informed in accordance with § 106 exp. 2 BetrVG from the operating transition to. The BAG [116][116] is the view that the employer change accompanying with the operating transition is an other procedure and/or an other project in the sense § 106 exp. 3 No. 10 BetrVG, which can affect the interests of the employees of the enterprise substantially and therefore the instruction of the economic committee make necessary. The instruction must be able to exert so in time to take place also here that it is possible for the restaurant committee, by suitable suggestions still influence on planning regarding the considered projects [117][117]. This view corresponds also to kind 7 exp. 1 P. 2 of the guideline 2001/23/EEC, according to which the seller is obligated to convey to the representatives of his employees the information in time before the execution of the transition.

Certainly doubts remain whether the information of the economic committee is sufficient for the guideline defaults, since this committee is not to be summarized possibly under the term „of the workers' delegates “. Kind 2 exp. 1 lit. C of the guideline refers only to the legislation

[114][114] *BAG* of 18.12.1990 AP No. 85 too § 99 BetrVG 1972; of 29.11.1978 AP No. 7 too § 112 BetrVG1972; of 27.8.1975 AP No. 2 too § 112 BetrVG1972.
[115][115] *BAG* of 18.12.1984 AP No. 11 too § 113 BetrVG 1972.
[116][116] *BAG* of 22.1.1991 AP No. 9 too § 106 BetrVG 1972.
[117][117] *BAG* of 22.1.1991 AP No. 9 too § 106 BetrVG 1972.

and practice in the member states and is a little helpful therefore. From the wording kind 7 in the draft directive 1974 is to be inferred however that by one „“only such person's groups are to be understood representatives for the employees, which are destined opposite the employer as the perception of the interests of the employees. The task of the economic committee consists 1 P. 2 BetrVG in accordance with § 106 exp. meanwhile alone of supporting co-operation between entrepreneurs and work council by advising economic affairs with the entrepreneur and the work council constantly informed about it. It becomes active thereby as an auxiliary body of the actual workers' delegates [118][118]. If necessary one could derive out § 106 exp. 1 P. 2 BetrVG a indirect right of information, which becomes partly fair the requirements of kind 7 of the guideline 2001/23/EEC at least. Certainly stays § 106 BetrVG beyond that behind the community-legal defaults of the guideline. Like that institutionalizing of an economic committee is limited after § 106 exp. 1 P. 1 BetrVG on enterprises with usually more than 100 employees. The member states are authorized according to kind 7 exp. 5 of the guideline 2001/23/EEC to exclude small firms from the obligations kind 7 as it is presupposed that a representatives for the employees can be formed at all. A mehrköpfiger work council is to be already furnished however after § 9 P. 1 BetrVG in enterprises with more than 20 employees entitled to vote. In addition § 106 BetrVG do not grant to the work council the right to consultation, necessary according to kind 7 exp. 2 of the guideline.

III. FURTHER INFORMING OBLIGATIONS

Straight latter point of face addresses one of the substantial problems of the instruction of a representatives for the employees in the context of an operating transition. The instruction in accordance with § 111 BetrVG presupposes that at least 20 employees are busy usually in the enterprise. The Vorraussetzungen is considerably more qualified still to an instruction of the economic committee, such can, as shown, at all only starting from a regular employee number of more than 100 be formed. Thus the question results whether in work councilable enterprises (§ 1 BetrVG) with less than 20 usually busy employees likewise - from a person (§ 9 BetrVG) existing - the work council to be belonged must and whether beyond that even in larger enterprises a general informing obligation independently of being present the conditions §§ of the 111 FF. BetrVG or the existence of an economic committee to take place must. This is rightfully endorsed from the basic idea of the labor management relations right, i.e. the requirement of trusting co-operation out §§ 2 exp. 1, 74 exp. 1 BetrVG and § 92 BetrVG [119][119].

F. protection of employees outside of an operating transition

Also outside of the range of application § 613 A BGB can have enterprise restructuring and/or the simplification and pool of Produktionsabläufen or know-how positive effects on the protection against dismissal-legal status of the employees. The general protection against dismissal for employees exists first in accordance with § 23 KSchG in principle only in enterprises with usually more than 10 employees [120][120]. To the here valid general operating term initially already one referred. Straight if small businesses with usually 10 and fewer employees with other enterprises co-operate, can come it to the fact that these form an enterprise of several enterprises, whereby then all transact in the enterprise employees together be counted must, why the threshold value of 10 in the rules employed in this way employees be easily exceeded can. In the consequence then all enjoy in this enterprise transact employees, equal which employer they belong to, the general protection against

[118][118] *BAG* of 18.11.1980 AP No. 2 too § 108 BetrVG 1972; of 18.7.1978 AP No. 1 too § 108 BetrVG 1972.

[119][119] ErfK/*price* (Fn. 11) § 613 A BGB Rdnr. 128.

[120][120] With the characteristics of the inventory protection for employees, which already under the law situation before that 1.1.2004 had the protection against dismissal, is not to be dealt here particularly. See in addition MünchKomm/*Hergenröder* (Fn. 11) § 23 KSchG Rdnr. 16 FF.

dismissal of the KSchG. Rechtsinstitut of a common enterprise of several enterprises was expressly recognized by the German legislator in § 1 exp. 1 P. 2, exp. 2 BetrVG and § 322 UmwG. A condition for being present such an common enterprise is it that expressly or at least konkludent agreed upon uniform organization and line exist one [121][121]. This means that the use of personnel, immaterial and material operational funds must take place purposefully by means of a line apparatus [122][122]. An indication relevant for the existence of such an agreement is the uniform practice of substantial employer functions in the personnel and social range [123][123].

Only so far the conditions mentioned are fulfilled, can the co-operation of several enterprises positive effects for the employees in notice-legal regard draw. For this reason for example the employees are to be assigned only in principle in each case to that getting thing or only the subsidiary companies in a company group. The BAG refuses rightfully in constant iurisdiction one computation-reached through [124][124]. Nevertheless a common enterprise of several enterprises can be given in individual cases when being present the conditions mentioned also in the company group.

Under the same conditions a common enterprise of mehrer enterprises can lead to the fact that this becomes work councilable in accordance with § 1 exp. 1 P. 2, exp. 2 BetrVG, why after education of a work council and an economic committee by the respective employer the obligations to cooperate mentioned are to be considered out §§ 111, 106, 80 BetrVG from the enterprises to. A common enterprise in the sense of the labor management relations right is assumed in accordance with § 1 exp. 2 BetrVG if for the pursuit of work-technical purposes the operational funds as well as the employees are used together by the enterprises or splitting an enterprise to the consequence have that from an enterprise one or more divisions one took part in splitting other enterprises are assigned, without thereby the organization of the enterprise concerned changes substantially.

G. Franchising

A further constantly increasing kind of the marketing and implementation of company targets is the Franchising. The Franchisevertrag is after its right nature a continuous obligation, into which elements of different contracts are. It contains predominantly parts of the right lease. Besides parts of the purchase, to the management of affairs, are the rent as well as purchases under company law in it in addition. Contentwise the Franchisevertrag regulates that a Franchisegeber leaves it to a Franchisenehmer under permission of the use of his trade marks, registered trade marks, products or business and marketing forms to take over and use for management these and/or to drive out special goods or also services. The Franchisenehmer pays an agreed upon payment as return for this. According to the more exact contentwise arrangement the Vertriebsfranchising and the Dienstleistungsfranchising are differentiated. Besides between the Unterordnungsfranchising and the in partnership structured Franchising is differentiated, whereby the latter is characterized by homogeneous bilateral contracts. The Subordinations Franchising however is characterized by the fact that the Franchisenehmer is obligated to the safeguarding of interests of the Franchisegebers [125][125] and the Franchisenehmer at the guidelines and paragraph regulations of the Franchisegebers holds itself. Special meaning won the Franchising for enterprises from the American area. To call here for instance the company is McDonalds, who use this marketing strategy for their products and marketing forms with large success.

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[121][121] *BAG* of 29.4.1999 AP No. 21 too § 23 KSchG 1969; of 12.11.1998 AP No. 20 too § 23 KSchG 1969.
[122][122] *BAG* of 29.4.1999 AP No. 21 too § 23 KSchG 1969; of 23.3.1984 AP No. 4 too § 23 KSchG 1969.
[123][123] *BAG* of 18.1.1990 AP No. 9 too § 23 KSchG 1969; of 23.3.1984 AP No. 4 too § 23 KSchG 1969.
[124][124] *BAG* of 13.6.2002 AP No. 29 too § 23 KSchG 1969; of 29.4.1999 AP No. 21 too § 23 KSchG 1969.
[125][125] *OLG Hamm* from 13.3.2000 NZG the 2000, 1169 mwN.

For the Franchisenehmer it is crucial that he is economically independent and on the other hand to a proven know-how as well as marketing and marketing system of the Franchisegebers can fall back, which simplifies it the positioning on the market substantially. Nevertheless the independence mentioned of the Franchisenehmer is not in every case clearly pronounced. Such intensive defaults partly exist by the Franchisegeber the fact that hieran it can be doubted and so that wins the demarcation between an independent Franchisenehmer and an employee at meaning. If in this connection a demarcation is to be made, it is always necessary to examine concrete contents of the agreements and the actual lived contractual relation regarding the instruction bindingness and the degree of personal dependence.

According to general opinion the demarcation between independent entrepreneurs and employees is made due to a general survey of all circumstances of the individual case. As reference point for the demarcation of these two conditions § 84 exp. 1 P. 2 HGB is consulted. Afterwards is independent, who can essentially arrange its activity free and determine its work time. The iurisdiction of the BAG turned off going by for example to whether the Franchisenehmer can affect its acquisition chances on the market despite the instructions regarding the activity [126][126]. Being present an employer-employee relationship would be to be affirmed about if the Franchisenehmer functions not as independent entrepreneurs, but rather as bare salesmen of the Franchisegebers [127][127]. Further an employee characteristic can have to be endorsed if the Franchisenehmer is not only subject to insignificant auditing rights of the Franchisegebers or it cannot exert crucial influence on the enterprise result. Other one applies actually to be limited however, if the Franchisenehmer must consider the instructions of the Franchisegebers, approximately regarding the marketing form, these however to the Franchising and the subject of the hiring of the marketing forms or the enterprise concept is. For an independence it speaks also, if the Franchisenehmer within own responsibility decides on it, with which further persons it the business activity to exercise would like [128][128].

As far as the Franchisenehmer applies after the saying as an independent entrepreneur, he leads his own business and can as an employer persons therefore adjust. These easily as an employee coworker who can be arranged stand then in an employer-employee relationship to the Franchisenehmer. In this way however in principle no employer-employee relationship or an other comparable legal relationship of the coworkers is justified to the Franchisegeber. Relevant a pertaining to labor law relationship of this person's group with the Franchisegeber could be accepted only if the Franchisenehmer justified a indirect employer-employee relationship to the Franchisenehmer. This again presupposes that the Franchisenehmer, according to the principles mentioned, when employee of the Franchisegebers must be regarded. In this constellation the Franchisenehmer could employ an employee, which is then certainly considered as an employee of the Franchisegebers with knowledge and the wanting of the Franchisegebers as an intermediary. In such a constellation finally a protection against dismissal complaint would have against the intermediary, who Franchisenehmer, and not against the indirect employer, which Franchisegeber are arranged. In all other respects the indirect employer would also only cling subsidiär, so if for instance the intermediary becomes insolvent or the reason of a indirect employer-employee relationship presents itself as right abusive [129][129].

H. tariff-legal possibilities of the influencing control on the Dezentralierung

The German trade unions generally do not face a misalignment of production processes abroad rejecting. For example the trade union welcomes ver.di the import by Vorprodukten,

[126][126] *BAG* of 16.7.1997 AP No. 37 too § 5 ArbGG 1979.
[127][127] *BGH* of 4.11.1998 EzA § 5 ArbGG 1979 No. 29 = NZA 1999, 53.
[128][128] *BAG* from 24.4.1980 AP No. the 1 to § 84 HGB.
[129][129] *BAG* of 21. 2. 1990 AP No. 57 too § 611 BGB dependence.

because thereby the productivity increases, the costs was lowered and in this way the competitive ability of the German industry steige [130][130]. Besides this proceeding leads in opinion of ver.di to the fact that in the export sector, which Wachstumschancen large in the result experiences numerous jobs were created secured and new. Besides also the countries, in which the pre-production takes place, of concrete Wachstumschancen within these ranges profited. In the long run use Germany in the result his chances, as other industrialized countries would also do it, what in the final result mean that by appropriate specialization in Germany out favorably imported Vorprodukten competitive final products could be manufactured [131][131]. Differently however the attitude of the trade unions to the reduction of enterprises might look inland by separating of parts of the enterprise and/or of work areas on other enterprises inland. Thus it threatens on the one hand that employees fall out of the area of application of a collective agreement, which in particular the case is if the acquiring enterprise is not tariff-bound. On the other hand the transition of the employer-employee relationships to the Erwerber leads possibly to the fact that the number to trade union-associated of the employees in the individual enterprises sinks and so that the influence possibility in times by labor disputes is reduced. Therefore the question, in which way it is possible for trade unions on as fixed in the tariff level, arises on which enterprise restructuring influence take and/or to which extent it new collective agreements if necessary force can.

Employee combinations are interested with each change of the operational structures naturally to notice and use for the penetration of these goals also the necessary pressure the interests of their members as comprehensively as possible. The German right of association has its basis in kind 9 exp. 3 GG. The freedom of coalation written here justifies a comprehensive action and inventory protection of the acting collective partners. This concerns however coalitions only pertaining to labor law, whereby these from the conceptualness a tariffable coalition, thus a trade union, are to be separated. The latter develops on first, however only trade unions are legal able to exercise that for agreement with the employer or an employers' association necessary necessary pressure by the employment of weapons.

A coalition pertaining to labor law must as combination on a freiwilligen to union under private law of several be based and besides in its existence of the in or withdrawal of their members be independent. The moreover one it is necessary that the internal will formation in substantial points is based on democratic principles. Beyond that the opponent liberty and an independence are in several respects indispensable [132][132], which are related to the social opponent as well as the state in particular. As special purpose a coalition pertaining to labor law must pursue the keeping and promotion of the work and restaurant conditions.

A further characteristic of coalitions pertaining to labor law is their outsideness. Therefore the effective range of such a coalition may not extend to only an individual enterprise. Rather it is necessary that the member structure of the coalition goes beyond only an enterprise. Behind this requirement the thought that thereby the education is to be prevented by work associations, stands on which the employer as social opponents influence exercise can. With it it is to be able to implement their interests, if necessary as trade union, in the result impossible that from the coworkers of only one enterprise a coalition pertaining to labor law can form, in order with tariff-legal means. Besides the requirement of the outsideness is to guarantee that the employee coalition the regulation goal of the promotion of the work and restaurant conditions can become fair.

If a combination fulfills the requirements of the coalition term, then it attains the Tariffähigkeit and thus the status as trade union in the sense § 2 exp. 2 TVG then only if it fulfills additionally some completely substantial conditions. To it first the obligatory acknowledgment of the valid tariff right as well as the objective embodied in the statute belong to want to affect

[130][130] Verdi. Politico-economic information 6/2005 P. 6.

[131][131] Verdi. Politico-economic information 6/2005 P. 9.

[132][132] *BVerfG* of 20.10.1981 AP No. 31 too § 2 TVG; *BAG* of 17.2.1998 AP No. 87 to kind 9 GG.

the organization of the work and restaurant conditions by the conclusion of collective agreements. The coalition continues to require „to social power in such a way specified ": It must be able to have pressure for the respective opponent in order to be able to force collective agreements in this way. Relevant it is to that extent, whether the coalition has a sufficient number of members, in order to be able to have approximately by strike corresponding pressure for the employer. It does not have to concern compellingly a purely quantitatively substantial number, is sufficient, if the members are active in relevant key positions in the respective enterprises and are able due to its by strike substantial pressure to exercise. For being present social power for example already actually reached tariff results can speak [133][133]. In each case a view of individual case is to be employed to that extent.

It continues to be necessary for the Tariffähigkeit that the employee combination exhibits a durable organization. This orders the demand for a continuous tariff system.

The requirement of power is to be separated strictly from whether the coalition is ready to implement if necessary by labor disputes their goals. For the affirmation of the Tariffähigkeit such a readiness is not necessary [134][134]. Sufficiently that the combination would be theoretical able to be able to exercise in such way pressure in order thereby the readiness to negotiate of the opponent is to be maintained. Pretty often due to this certainty on freiwilliger are locked basis collective agreements.

The German trade unions separate their competence not according to enterprises, but are statutory responsible for different industries. Their activity does not align itself thus straight at individual occupations, but at certain industries. Large trade unions are responsible for several industries, then there is with ver.di their 14. The concentration process in the German trade union landscape contributes however for this its part. This industry-specific adjustment leads apart from the requirement of the outsideness to the fact that the trade unions do not represent regularly the employees of individual concrete enterprises or a company. To such a constellation can it come only if in an industry due to economic developments only one enterprise remains.

On the other hand it is possible for the trade unions to force on certain private firms referred collective agreements. The conclusion of such house collective agreements offers itself always if in individual enterprises from the agreements of a surface collective agreement and/or not be advanced tariff-bound enterprises are to deviate to the as fixed in the tariff minimum regulations of the industry. Examples of such house collective agreements are in particular well-known from the automotive manufacture with VOLKSWAGEN or also from the information technology at IBM. They can win special meaning also if enterprises separate individual production parts in such a manner that they create for this their own society again. This is then as a newly created employer in accordance with § 2 exp. 1 TVG tariffable and can of the statutory responsible trade union of the respective industry with the goal of the conclusion of a house collective agreement be closed by strike, if this employer does not belong to an employers' association, which is tariff-bound.

Differently it behaves, if the employer is organized in an employers' association. In this case the collective agreement locked on the part of this federation finds also on the again created enterprise application, if it remains associated for the same industry. The peace obligation valid due to such a collective agreement, excludes then labor disputes for the achievement of conditions of work already regulated.

Collective bargaining is to be always led with the wage partner. This has to the consequence that a company cannot be closed by strike as such in principle, if it concerns the conclusion of a collective agreement for a subsidiary company. In the same way usually also forbid themselves the sympathy strikes the in such a way specified to exercise with which the employees of an enterprise for the employees completely of a different one strike, in order thereby pressure on the employer. Wage partner of the trade union can be in accordance

[133][133] *BAG* of 10. 9. 1985 AP No. 34 too § 2 TVG.

[134][134] *BVerfG* of 6. 5. 1964 AP No. 15 too § 2 TVG.

with § 2 exp. 1 TVG only one employer or an employers' association, in which the employer concerned is organized. In the most frequent case of the decentralization of production, which is called outsourcing transferred, this that the trade unions must adhere no more for the keeping of the interests of the changed over employees by the seller, but to the Erwerber operating or of the division. As far as the new owner is for his part tariff-bound, its as fixed in the tariff regulations apply also for the congruently organized employees, which are active in this division. If it is not tariff-bound, no characteristics apply. The collective agreement valid for the employees is transformed in the described way on the work-contractual level and experiences a one year's inventory protection. On operation of the responsible trade union with the Erwerber if a new collective agreement is closed, it applies to the changed over employees only if these members of the tariff-closing trade union are or join these.

To mark it remains in this connection that labor disputes may be used in each case for the penetration of a according to tariff adjustable goal. For this reason such combat measures are illegal, because of the save area kind 9 exp. 3 GG not covered, with which the trade unions want to intersperse by strikes that an entrepreneur moves away from his plans to the conversion of a business decision, approximately in shape of the paging of certain production sections.

I. Result

The present trend of many enterprises to use the competition advantages which result from the concentration on the core authority and corresponding separating of certain tasks and production sections, requires the view of the basic conditions pertaining to labor law both on individual-contractual and on collective-contractual level. Particularly to the regulation § 613 A BGB attention must be dedicated to that extent. The employer side must examine for each of its projects whether the considered enterprise strategies lead to the decentralization of production and the operational sequences to an operating transition. If this is the case, they are held for reasons of their own right security of making as comprehensive and detailed an instruction of the employees as possible concerned by the operating transition. These have then the choice: On the one hand they can accept the transition of their employer-employee relationship to the Betriebserwerber by nothing doing. They can contradict on the other hand in addition, the business owner change within one period from one month to entrance of the instruction by the Erwerber and/or the seller and continue with it the employer-employee relationship with the old employer. However they must realize themselves then that due to operatingconditioned reasons their employer-employee relationship can be terminated at the past employer if necessary. § 613 A BGB grants the employee beyond that an extensive catalog at protective mechanisms, which continued over adhesion-legal questions of the past business owner over the temporary at the time of the operating transition the existing conditions of work up to an absolute notice prohibition due to the transition is enough.

In addition, outside of the range of application § 613 A BGB can be achieved by Rechtsinstitut of the common enterprise of several enterprises positive effects regarding the employee protection. The protection thought is supplemented in the context of the restructuring by compelling participation rights of the representativeses for the employees, which when being present the conditions §§ of the 111 FF. BetrVG to favor of the employees of social plans to force or toward the conclusion of a reconciliation of interests work can. Not least also within their tariff competence a far operating field remains for the trade unions, in order to accompany and/or by the conclusion of collective agreements on employer side a right security to ensure be able enterprise restructuring for the employees positive.