



**Z A A R**

Zentrum für Arbeitsbeziehungen  
und Arbeitsrecht

## **VORTRAGSREIHE**

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### **Transfer of Undertakings and Restructuring – A View from both Sides of the Channel**

Referenten:

**Neil Black**

Pinsent Masons LLP

**Manfred Schmid**

Pinsent Masons Germany LLP

# ZAAR LECTURE

- What we will cover
  - TUPE – A UK Overview
  - Case Study with a View from both Sides of the Channel
    - Implications in Germany
    - Comparable approach if in the UK

## TUPE – A UK Overview

### EU Acquired Rights Directive



Transfer of Undertakings (Protection of Employment)  
Regulations 1981



Transfer of Undertakings (Protection of Employment)  
Regulations 2006



**Collective Redundancies & Transfer of Undertakings  
(Protection of Employment) (Amendment) Regulations 2014**

# TUPE – A UK Overview

UK TUPE provides for 2 types of transfer

- **Type A** – business transfer
- **Type B** – service provision change (“SPC”) transfer

**X** *share sales*

**X** *“Henke” scenarios: administrative reorganisation of public administrative authorities or transfer of administrative functions between public administrative authorities*

## When will TUPE apply? Business Sale (Type A)

“The transfer of an **undertaking**, business or **part** situated immediately before the transfer in the UK where there is a transfer of an **economic entity** which **retains its identity**”

**Size is irrelevant**

**Multi-factoral test**

**An organised grouping of resources that has the objective of pursuing an economic activity**

**Self contained and severable**

# When will TUPE apply? Service Provision Change (Type B)

“An **organised grouping** of employees...which has as its **principal purpose** the carrying out of the **activities** concerned on behalf of **the client**”

Can be a group of one

100% dedication not required

Fundamentally or essentially the same post transfer

A single, specific client, rather than 'clients' in general

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## Five star protection

### Automatic transfer of employees

If transfer is sole or principal reason for dismissal → automatically unfair unless....

Liabilities transfer

Duty to inform & consult

Employees T&C's preserved and variations are void unless .....

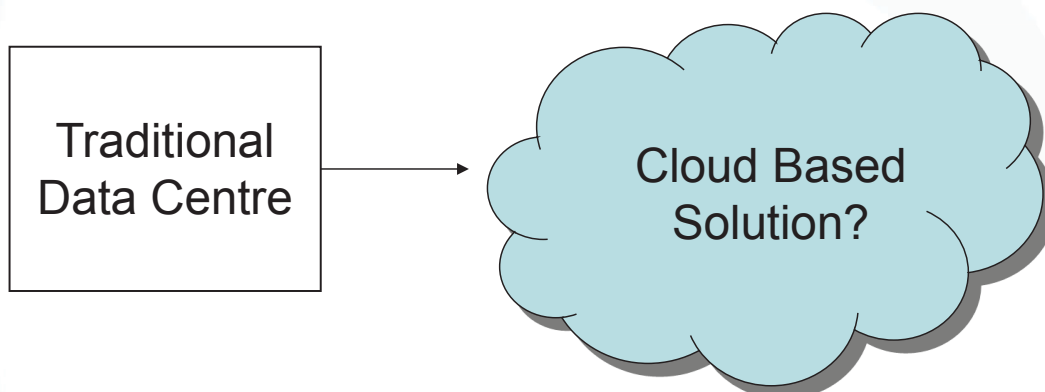
**\*\* parties can't contract out**

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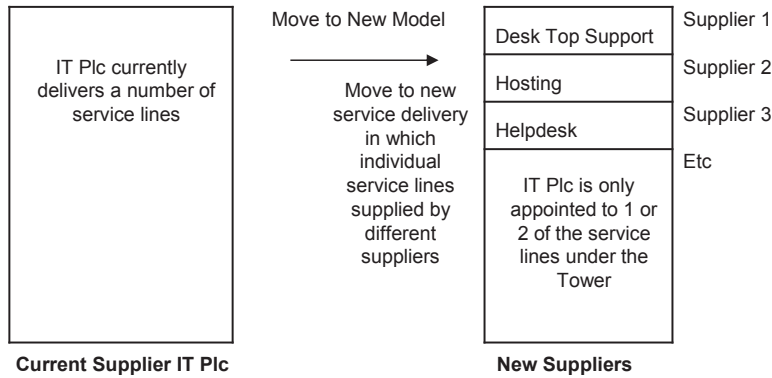
# UK hot topics

- Service Provision Changes:
  - Change of activities post transfer
  - Fragmentation post transfer
  - Organised grouping: deliberate not “happenstance”

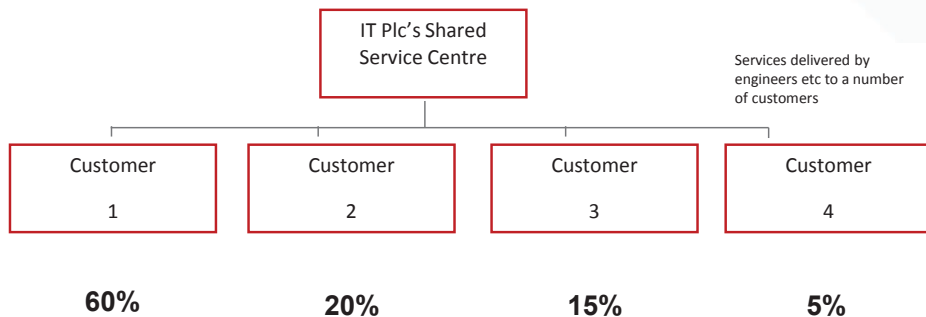
## SPC Points to Watch: Change of Activity



# SPC Points to Watch: Fragmentation Post Transfer



# SPC Points to Watch: Organised Grouping



# Changing Terms and Conditions – Collective Agreements

- Applies (only) to variation of terms **incorporated into contracts from a collective agreement.**
- Employer can seek to **agree** variations to these terms provided:
  - The variation takes effect more than **one year post transfer**
  - The rights and obligations in the employees contract after the variation, are **no less favourable overall** to the employee

## Scenario

- The UK based Titan Field Manufacturers Ltd. (“**TFM**”) employs 250 employees in branch offices in Cologne and Munich.
- TFM has two divisions in Munich: (i) Research and Development and (ii) Manufacturing; and a Customer Support Division in Cologne.
- James & Jessica are part of the Research and Development division in Munich.
- TFM intends to sell its Research and Development Division to Excalibur Group AG (“**Excalibur**”) to avoid insolvency.

# Case 1

- TFM does not want James and Jessica to be transferred to Excalibur and simply switches their positions from the Research and Development division to the Manufacturing division by the employer`s right to give instructions (*Direktionsrecht*) before the transfer.

## Implications in Germany

- Cherry picking - lemon dropping
- Limitation through purpose of section 613a BGB
- Limitation through section 613a para 4 BGB analog
- Applicability of section 613a para 4 BGB



# Comparable Approach if in the UK

- Cherry picking - lemon dropping
- No legislative restrictions
- Contractual protection common esp. re outsourcing
  - Early / on-going provision of information
  - Standstill provisions
  - Restrictions on re-employing

## Case 2

- The deal with Excalibur falls through. Jessica and James as well as all other employees of TFM shall be made redundant.

# Implications in Germany

- Mass dismissal notification
- No legal entity in Germany
- Question of competent Labour Office

# Comparable Approach if in the UK

- Collective redundancy consultation 30 / 45 days
- Notify Secretary of State via HR1 form
- If TFM becomes insolvent – claims against National Insurance Fund for limited payments
- Other employment claims as unsecured creditor

## Case 3

- The deal with Excalibur falls through. Jessica and James as well as all other employees of TFM shall be placed in a transfer company.

## Implications in Germany

- Tripartite agreement
  - BAG, decision dated 18 August 2011 – 8 AZR 312/10
  - BAG, decision dated 23 November 2006 – 8 AZR 349/06
  - BAG, decision dated 18 August 2005 – 8 AZR 523/04
  - BAG, decision dated 10 December 1998 – 8 AZR 324/97
- Works council's transitional mandate

# Comparable Approach if in the UK

- No real comparable situation in the UK
- Insolvency would be likely with any potentially profitable parts sold as a going concern
- TUPE could potentially apply to the parts sold depending on nature of insolvency proceedings:
  - terminal versus non-terminal

## Case 4

- In the course of negotiations TFM and Excalibur decide to establish a joint business (*Gemeinschaftlicher Betrieb*) after the transfer of the Research and Development Division in Munich.

# Implications in Germany

- Avoidance of change in operations (*Betriebsänderung*)
- Competent works council and works council elections

# Comparable Approach if in the UK

- Joint ventures (“JV”) common in the UK particularly in the infrastructure sector
- Movement of employees depend on JV structure chosen and nature of activities:
  - TUPE e.g. move existing activities to New JV Co
  - Employee consent e.g. new business JV
  - Secondment e.g. loan employees to JV

Thank You for Your Attention.

## Contact



**Neil Black**  
Solicitor  
Partner  
T: +44 121 626 5754  
E: [neil.black@pinsentmasons.com](mailto:neil.black@pinsentmasons.com)

Neil Black is an employment partner at Pinsent Masons LLP based in Manchester. He has extensive experience of advising clients in respect of the application of TUPE with regard to business and asset sales, outsourcing and in restructuring / insolvency context. He acts predominantly for clients across two sectors, namely manufacturing and infrastructure in which he advises a number of large corporates including Fortune 100 business and those listed on FTSE 100 and FTSE 250. Prior to entering the legal profession Neil worked for PWC and Johnson Controls Inc.



**Manfred Schmid**  
Rechtsanwalt, Fachanwalt für Arbeitsrecht  
Partner, Head of German HR & Employment  
T: +49 89 203043 536  
M: +49 172 368 01 87  
E: [manfred.schmid@pinsentmasons.com](mailto:manfred.schmid@pinsentmasons.com)

Manfred Schmid is head of the HR & Employment practice of Pinsent Masons in Germany. He specializes in advising national and international technology companies on all aspects of individual and collective labour law. He also supports clients regarding social security, privacy and immigration matters. In addition to the planning and execution of complex restructuring projects, a further particular focus of his practice is advising technology companies on labour law aspects of M & A, outsourcing and technology transactions. Manfred provides in-house training for clients' employees and executives, on all relevant aspects of employment law.



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