



ADVESTRA

Employees in M&A Transactions

M&A Academy

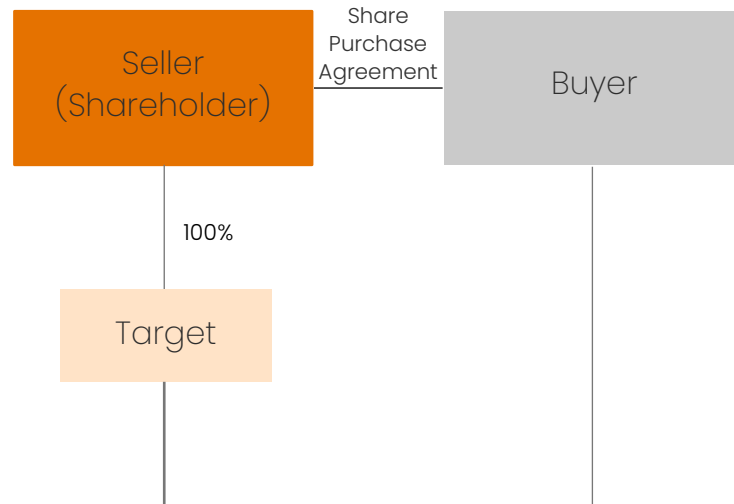
29 September 2026

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Deal Structure

Share Deal



Target remains employer

PRINCIPLE

No change of employer, ergo no impact on the employment relationship, i.e.:

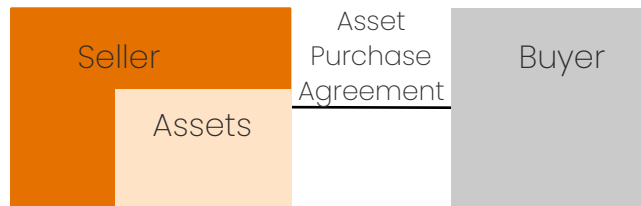
- No extraordinary termination rights, objection rights etc. of the employer or the employees
- No information or consultation obligations of the employer

Exceptions typically in participation plans (acceleration clauses / option exercises / exit payout triggers)

Need for retention of (key) employees may nevertheless require measures (see below)

Information / communication towards employees often still important

Asset deal / transfer of business



Buyer becomes new employer

Automatic transfer of employees to buyer with all rights and obligations

(i.e. no agreement between the parties is required)

Art. 333 CO

Usually: transfer of business or business unit within the meaning of Art. 333 CO

Business: a permanent, structured and self-contained organizational unit equipped with personnel, material and immaterial resources and which is financially independent

Business unit: organizational sub-unit that forms a coherent organizational entity, such as a branch or department, but lacks financial independence

- **Transfer to a third party:** continuation of similar or same business activity (preservation of identity)
- **Employee is assigned to the transferring business unit**

ADDITIONAL SCOPE RULES

MIXED FUNCTIONS

Employees who work both in the transferring business unit and in a retained business unit: assessment of **focus of the activity**; no splitting of the employment relationship

EMPLOYER IN SCOPE

Art. 333 CO does not have any effect with regard to **employees who are not employed by the seller** (but, e.g. by a holding or management company)

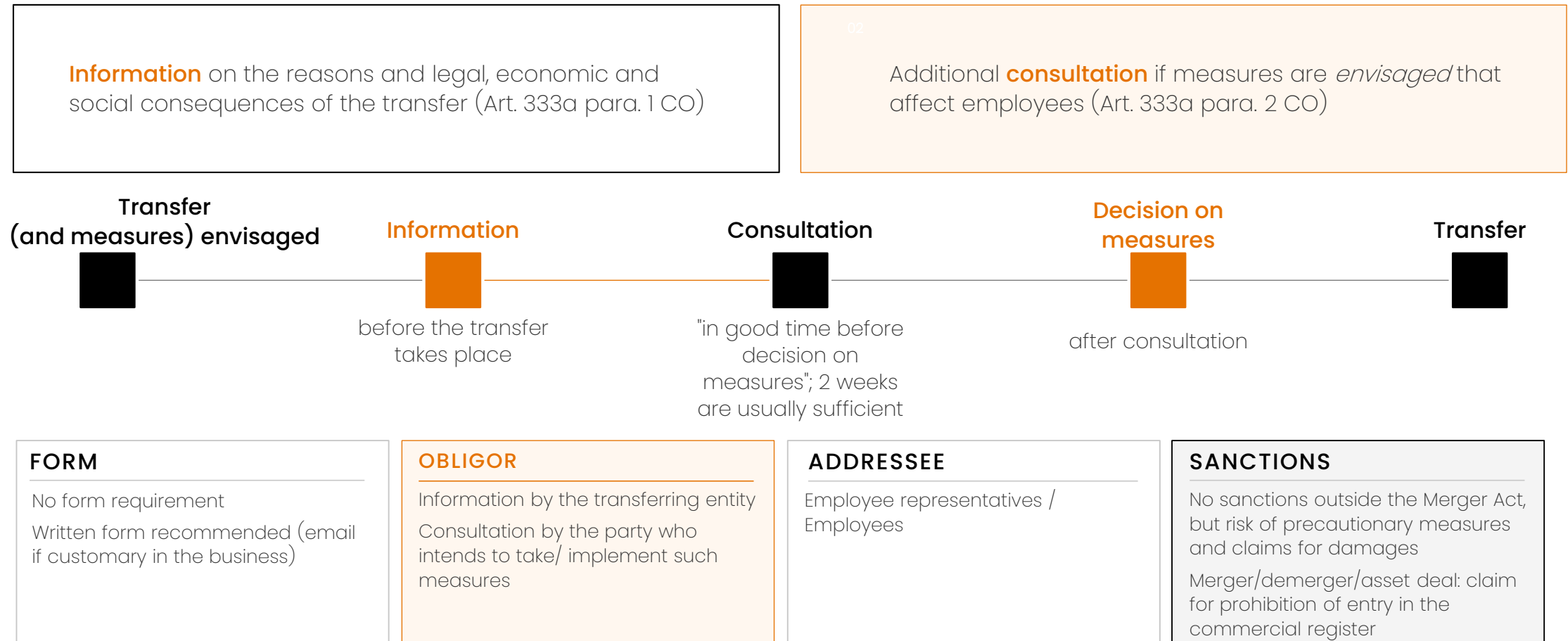
MERGER ACT

Art. 333 CO by reference applies to mergers, demerger and transfers of assets under the Merger Act – regardless of a transfer of a business.

→ Employee lists

Asset deal / transfer of business

Information and consultation*



* Extended information obligations under the Merger Act

Asset deal / transfer of business

Right to object



Each employee can object to the transfer

Objection is not a termination

- No form requirements, even if there is a formal requirement for the notice of termination
- Statutory rules on protection against dismissal are not applicable

No statutory objection period

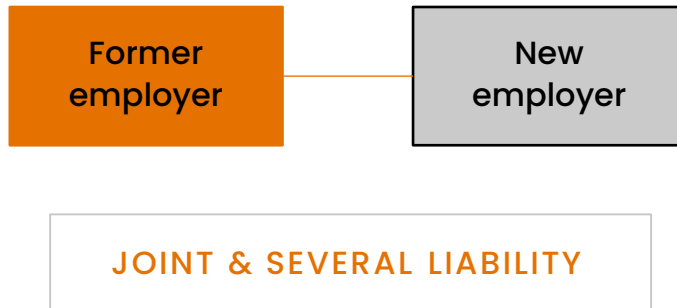
- Recommendation: at least 1 month (in analogy to the statutory probation period);
- Recommendation: set a reasonable period of time (if possible in writing)
- Objection period starts with complete information according to Art. 333a CO

CONSEQUENCES

- Employment relationship ends after expiration of the **statutory notice period** (1–3 months, depending on years of service)
- Contractual notice periods are irrelevant, but contractual termination dates are
- Employment relationship ends at the **earliest on the date of the transfer of the business**
- Employee and buyer of the business remain bound until the employment ends; in other words: notwithstanding the refusal the employment relationship transfers for the remaining period
- Lapses of non-compete obligations? (Art. 340c para. 1 CO; doctrine)

Asset deal / transfer of business

Joint and several liability



TRANSFER OF RIGHTS AND OBLIGATIONS

- The employment relationship passes to the buyer with all rights and obligations as of the date of the transfer of the business (Art. 333 para. 1 CO)
- A collective bargaining agreement continues to apply to the new employer for one year (Art. 333 para. 1bis CO)

SCOPE OF JOINT AND SEVERAL LIABILITY

(Joint and several) liability of the former and the new employer for claims due before the transfer as well as claims due until expiry of the notice period (starting on the transfer date) or (in case of refusal) until termination (for fixed-term contracts until the end of the contract) (Art. 333 para. 3 CO)

BLOCKING PERIODS

Extension of joint and several liability through blocking periods (e.g. in case of illness)

MERGER ACT

Additional protective provisions under the Merger Act

INDEMNIFICATION

Mutual contractual indemnification is customary and advisable (particularly from the buyer's perspective)

Asset deal / transfer of business

Transfer-related termination

PRINCIPLE Freedom of dismissal

subject to the prohibition of circumventing the mandatory transfer under Art. 333 CO

INDICATORS

for a circumvention

- 01 Termination seeks to avoid the mandatory effects of Art. 333 CO (seniority rights, joint liability, continued CBA)
- 02 Dismissed employee's position is replaced
- 03 Buyer offers a new employment relationship
- 04 Termination closely coincides with the transfer

EXCEPTION

Permissible dismissal

Valid if supported by genuine economic, technical or organisational reasons

SCRUTINY

Termination agreement?

Genuine settlement?
Signed freely and without pressure?

LEGAL CONSEQUENCES

Circumventing dismissal or termination agreement

null and void under prevailing doctrine (not just abusive)

Advice: Document the operational rationale and decision of the termination

Asset deal / transfer of business

Deviating arrangements (1/2)

SCENARIO

Buyer wishes to take over employee who does not belong to the transferring unit

No automatic transfer

Article 333 CO does not apply to this employee

CONSENT REQUIRED

A separate transfer of the employment agreement is required.

Transfer of employment agreement

CONTRACTUAL ROUTE

Original employment relationship



Employee consent to transfer



Employment relationship with buyer

Key legal points

No application of Art. 333 CO

The employee does not transfer automatically because the employee is outside the transferring business unit.

Employee consent

Consent is required. Consent may also be implied, although express consent is recommended.

PRACTICAL POINT

Document the employee's consent expressly

→ avoids uncertainty over an implied agreement

Asset deal / transfer of business

Deviating arrangements (2/2)

SCENARIO

An employee belonging to the transferring business unit is intended to remain with the seller.

Employee consent required

The arrangement should be selected according to when the statutory notice period ends

KEY DECISION POINT

Choose the route based on timing and the parties' preferred documentation.

Re-transfer of employment

Transfer of employee by virtue of Art. 333 para. 1 CO



Termination of employment with buyer



New employment contract with seller

CONTRACTUAL ROUTE

Employee objection + new employment agreement

Timely employee objection



Employment ends on transfer date



New employment agreement with seller starts immediately after transfer

STATUTORY NOTICE PERIOD ENDS BEFORE TRANSFER

Termination agreement + new employment agreement

Termination agreement with buyer



Employment ends by agreement



Employment agreement with seller starts immediately after transfer

STATUTORY NOTICE PERIOD ENDS AFTER TRANSFER

ALTERNATIVE

Change of function prior to transfer

→ employee does no longer belong to the transferring business unit

Due Diligence

Bonus and equity programmes

Transaction relevance: The buyer needs to understand which compensation entitlements remain binding, where discretion exists and which transaction-related consequences arise under the relevant plans.

BONUSES

Legal qualification

VARIABLE SALARY

Amount fixed or determinable based on objective criteria

GRATIFICATION

"In addition" to fixed salary; employer's discretion

Core DD question

Is there an enforceable entitlement, or does the employer retain discretion as to payment and amount?

EQUITY PLANS

Transaction and entitlement consequences

1 Plan structure

STIs generally provide for cash compensation; LTIs typically grant options or equity rights

2 Legal qualification

Treatment as variable salary or gratification affects forfeiture, clawback and leaver provisions

3 Impact of transaction

Review change of control, vesting, acceleration, bad leaver and replacement or settlement arrangements

DD OUTPUT

Quantify entitlements | Validate discretion | Identify CoC and leaver consequences | Derive settlement and retention measures

Non-compete clauses

Key issue: Post-contractual non-competes under Art. 340 et seq. CO are subject to strict formal and substantive requirements.

FORM

Written form

The covenant must be agreed in writing (or qualified electronic signature)

PROTECTED INTEREST

Customer relationships / secrets

The employee must have access to customer relationships or manufacturing / business secrets, and use of that knowledge must be capable of causing harm.

SCOPE

Place, time and activities

The restriction must be appropriately limited and must not unduly impede the employee's economic advancement.

TYPICAL M&A TOUCHPOINTS

- Review existing covenants
- Assess scope, enforceability and transaction exposure during due diligence.
- Agree new covenants
- Consider new protections for key employees or management in connection with the transaction.

DRAFTING RECOMMENDATIONS

- Precisely describe the prohibited activities
- Provide for a contractual penalty, including repeated or continuing breaches
- State that payment does not release the employee from compliance (Art. 340b para. 2 CO)
- Reserve specific performance and damages (Art. 340b para. 3 CO)

KEEP IN MIND

- Judicial limitation
- An excessive but otherwise ascertainable covenant may be reduced to a permissible scope (Art. 340a para. 2 CO)
- check the grounds for lapse under Art. 340c CO.

TAKEAWAY Precision is critical: the clause should protect the business without exceeding the statutory limits.

Retention

Retention

Key consideration

Retention of management and key employees is often decisive for transaction certainty, continuity and post-closing value creation.

BUYER CONTEXT

STRATEGIC BUYER

Focus on continuity and successful integration. Incentives may be linked to integration milestones and future operating performance.

PRIVATE EQUITY BUYER

Focus on value creation and exit alignment. Incentives may be linked to re-investment, an earn-out or a future resale.

MANAGEMENT AS SELLER

Retention is often achieved through a minority stake / re-investment and/or an earn-out.

RETENTION TOOLKIT

1

Employment conditions

Targeted improvement of employment conditions

2

Retention bonus

Retention bonus conditional on remaining employed

3

Interest alignment

Bonuses linked to successful integration or a future resale

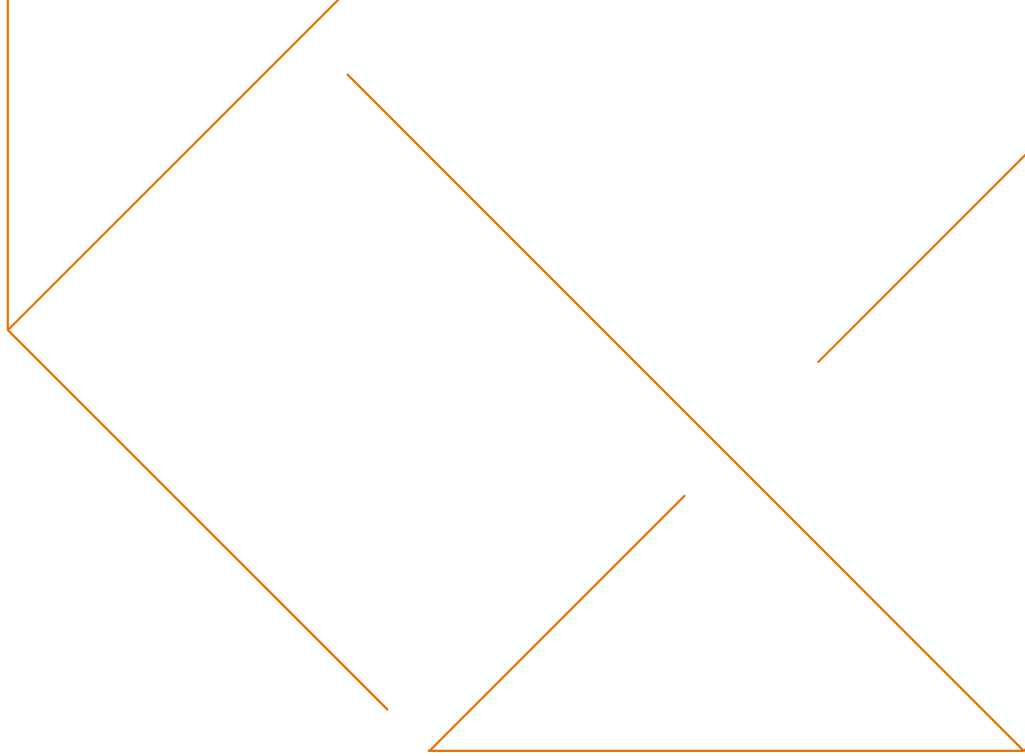
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Negative incentives

Enforceable non-compete as a supporting measure

LIMITED EFFECT Long fixed terms or notice periods are likely to provide only limited retention value.

Post-Acquisition Integration



Post-acquisition integration

Starting point

Employment contracts generally continue unchanged after a share deal and, following an automatic transfer, after an asset deal.

Instruction right

Only targeted, short-term measures within the limits of mandatory law, the employment contract, any CBA and personality rights.

Examples: reporting lines, temporary duties, holiday scheduling or overtime compensation.

Mutual agreement

Broadest route but requires genuine employee consent and compliance with mandatory law.

Accrued claims cannot be waived.

Document changes clearly in a written amendment or, where appropriate, a new agreement.

Termination with amended offer

Fallback if agreement cannot be reached.

Observe ordinary notice periods, objective operational or market-related reasons and statutory dismissal protection.

Collective redundancy rules may apply.

TRANSACTION AGREEMENT

Check whether the buyer is required to preserve existing employment terms for a minimum period. Such commitments may restrict the timing and scope of harmonisation.

INCENTIVE PLANS

Review early whether existing targets remain workable and whether harmonisation, settlement or replacement compensation is required.

Mass dismissal

Count employer-initiated terminations for non-personal reasons within a rolling 30-day period



10+ employees

Workforce: 20–100

10%^{of} employees

Workforce: 100–300

30+ employees

Workforce: more than 300

GENERALLY NOT COUNTED

- Employee resignations
- Termination for personal reasons
- Termination agreements

IF THE RULES APPLY

INFORMATION AND CONSULTATION

- Employee information and consultation
- Genuine opportunity to comment

NOTIFICATION

- Cantonal labor office
- Already at intended stage

SOCIAL PLAN

- Check statutory thresholds
- Negotiation duty, if triggered

Key Takeaways



Deal structure drives the employment consequences

Analyse the deal structure and its employee consequences early.

Observe the information and consultation requirements

Inform before the transfer and consult in good time where measures are envisaged – and consider proactive employee communication beyond the mandatory rules to safeguard trust and retention.

Terminations and deviating arrangements require careful planning

Dismissals circumventing Art. 333 CO are null and void – document genuine economic, technical or organisational reasons; deviating arrangements must be planned carefully.

Due diligence: focus on bonus schemes and non-competes

Bonus and equity plans determine enforceable entitlements, change of control and leaver consequences; non-competes decide whether key know-how and customer relationships are actually protected post-closing.

Retention and integration should be planned early

Bonus and equity plans, non-competes, retention packages, harmonisation of terms and mass dismissal thresholds determine post-closing value.

Questions / Discussion

