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Beltzer, R.M.

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TRANSFER OF UNDERTAKING – RECENT DEVELOPMENTS AT THE EUROPEAN LEVEL

1. PRINCIPLES OF COUNCIL DIRECTIVE 2001/23/EC

The basic principle underlying the directive on transfers of undertakings (Council Directive 2001/23/EC¹), dating from 1977 and amended in 1998 and 2001, is that the employees are protected against the possible negative consequences of transfer of the undertaking in which they are employed. The retention of rights and obligations under the employment contract² (including those resulting from collective agreements) forms the core of the protection offered by the directive.³ This protection has certain gaps, and ambiguities occasionally arise with regard to the level of this protection. These gaps and ambiguities may be of either an international or a national nature. Some are due to the fact that the scope of a provision of a directive is unclear – for example, even after 32 years and many judgments of the European Court of Justice there is still no clear definition of ‘undertaking’ – and some are due to the fact that the regulations in the national legal systems are insufficiently in keeping with the provisions of the directive. In this overview the case law of the European Court of Justice will be covered from 2007 until the present day.

2. UNDERTAKING – THE JOUINI AND THE KLARENBERG CASES

As mentioned above, some terms used in the directive give rise to questions. The largest lacuna in employee protection legislation is probably the fact that, despite a flood of case law and a definition in the current directive, the term ‘undertaking’⁴ is still unclear. In the *Spijkers* case (1986),⁵ the Court of Justice clarified under what conditions a transfer of *undertaking*, as defined by the directive, takes place. The term ‘transfer of undertaking’ can be used only if the undertaking retains its identity. In the opinion of the Court of Justice that is the case only if a going concern has been transferred. According to the Court of Justice, the national court must consider all the facts that characterise the transaction in question, including:

1. the type of undertaking or business;
2. whether or not the business's tangible assets, such as buildings and movable property, are transferred;
3. the value of its intangible assets at the time of the transfer;
4. whether or not the majority of employees are taken over by the new employer;

¹ OJ L 82 of 22 March 2001, p. 16.

² The directive protects any person who is protected as an employee under national employment law (Article 2(1)(d) of the directive).

³ Chapter 2 of the directive.

⁴ Article 1(1)(c) of the directive.

⁵ Case 24/85, Judgment of the Court (Fifth Chamber) of 18 March 1986 (*Spijkers*), ECR 1986, page 1119.

5. whether or not its customers are transferred;
6. the degree of similarity between the business carried on before and after the transfer; and
7. the duration of any interruptions in that business.

It should be noted, however, that all these circumstances are merely individual factors in the overall assessment to be made and therefore cannot be considered in isolation.

Since 1986, the Court of Justice has repeated the seven factors that jointly determine whether a going concern has been transferred in a relatively large number of judgments, without any change occurring in those factors, apart from a little finetuning. But that has not yet smoothed the ruffled term 'undertaking'. The value to be attached to these factors both individually and in conjunction remains obscure to many litigants and lawyers. That obscurity is an unavoidable result of the almost total lack of guidelines for weighing the various factors, which renders such weighing extremely subjective. It is possible, for instance, for two judges to rule differently on the same factual information in answering the question whether a transfer of undertaking has taken place.⁶ It is virtually impossible to present that subjectivity to a European court, since the weighing of the Spijkers factors is a question of fact finding rather than a legal exercise. The most important guideline seems to be the following: It can be concluded from the Schmidt (1994)⁷ and Süzen (1997)⁸ judgments on the one hand and the judgment on the Finnish bus companies (2001)⁹ on the other hand that it may be relevant whether the transferred activity in question is or is not labour-intensive. A labour-intensive undertaking can exist without any tangible assets (Schmidt and Süzen judgments). But if the presence of tangible assets is characteristic of an undertaking by its nature, that undertaking cannot maintain its identity if it is transferred without those assets (or in any event such part of those assets as may be qualified as 'significant'). In other words: in that case no going concern has been transferred. Whereas in the Schmidt and Süzen cases there could be an undertaking that consists primarily or even exclusively of personnel, the buses were essential in the case of the Finnish bus companies. This distinction is, of course, not always easy to execute. Some companies seem to defy the distinction. In the Jouini case,¹⁰ the Court had to answer the question whether, and if so, under which circumstances, a temporary employment agency could be identified as a transferable undertaking. In this case The Court decided that "temporary employment relationships (...) fall, in principle, under Directive

⁶ This has occurred in Dutch cases; see District Court of Utrecht 14 May 1997, *JAR* 1997/223 and District Court of Dordrecht 20 August 1997, *JAR* 1997/209.

⁷ Case C-292/92, Judgment of the Court (Fifth Chamber) of 14 April 1994 (*Schmidt*), ECR 1994, page I-1311.

⁸ Case C-13/95, Judgment of the Court of 11 March 1997 (*Süzen*), ECR 1997, page I-1259. See also the Temco (Case C-51/00, Judgment of the Court of 24 January 2002, ECR 2002, page I-00969).

⁹ Case C-172/99, Judgment of the Court (Sixth Chamber) of 25 January 2001 (*Oy Liikenne*), ECR 2001, page I-0745. See also Case C-340/01, Judgment of the Court (Sixth Chamber) of 6 November 2003 (*Abler*): catering is not labour-intensive.

¹⁰ Case C-458/05, Judgment of the Court (Fourth Chamber) of 13 September 2007 (*Jouini*), OJ C 269 of 10 November 2007, p. 10.

2001/23, implying that their special characteristics must be taken into account when analysing the taking over of such relationships. Such businesses are characterised, in general, as pointed out in the order for reference, by the lack of a suitable business structure from which it is possible to identify, within such a business, various economic entities which can be detached on the basis of the transferor's organisational arrangements. As a result, in the absence of an identifiable organisational structure of the temporary employment business, an analysis should take account of its special characteristics rather than aim to establish whether an economic entity exists at the level of its organisational structure. In that context, the assessment of the existence of an economic entity for the purposes of Article 1(1) of Directive 2001/23 requires an assessment whether the assets transferred by the transferor constituted for its purposes an operational grouping sufficient in itself to provide services characterising the business's economic activity, without recourse to other significant assets or to other parts of the business. (...). The pursuit of such an activity requires, inter alia, expertise, an administrative structure capable of organising that assignment of employees and a grouping of temporary workers who are capable of integrating in the user undertakings and of carrying out the tasks required of them. (...) Those workers are (...) essential assets, without which the temporary employment business would, by definition, not be capable of performing its economic activity. (...) It can be concluded from the foregoing that a single grouping consisting of management personnel, temporary workers and know-how, can pursue an objective of its own, namely the provision of services consisting in the temporary assignment of workers to user undertakings in return for remuneration, and that such a grouping can constitute an economic entity which can operate without recourse to other significant assets or to other parts of the transferor. (...) It is for the national court to establish whether that is the case." In this case, the whole undertaking had been transferred. It is therefore very likely that the national (Austrian) court will decide that the transaction fell under the scope of Directive 2001/23.

In theory, the transferor and the transferee are able to organise the transfer in such a way that, depending on their wishes, it will or will not constitute a transfer of undertaking. The transfer could be effected, for instance, in several parts over a relatively long period of time, in order to justify the conclusion that no transfer of undertaking has taken place because no going concern has been transferred. Parties may also believe that the integration of (certain parts of) the undertaking of the transferor (those parts themselves falling under the scope of "undertaking") could preclude a transfer of undertaking from having taken place, since the undertaking being transferred has not retained its identity: the undertaking as such will no longer be identifiable after the transfer. In the Klarenberg Case,¹¹ the Court seems to have extended the scope of the definition of "undertaking", thereby answering the question whether this lack of identifiability after the transfer bars a transfer. The Court decided that "the directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy,

¹¹ Case C-466/07, Judgment of the Court (Fourth Chamber) of 12 February 2009 (*Klarenberg*), OJ C 82 of 4 April 2009, p. 5.

provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity” (a matter which it is for the national court to determine). In this case, the transferor, ET, a company in the ICT-sector, had entered into an ‘asset and business sale and purchase agreement’ with Ferrotron and its parent company (which has its company seat in the USA), in respect of some products, developed by the ‘F+E/ET-Systeme/Netzwerk/IBS’ unit of ET, and called ‘ET-DecNT’, ‘Et-DecNT light’, ‘ET-DecNT Power Melt’, ‘ET-TempNet’, ‘ET-OxyNet’ and ‘FT7000’. Pursuant to that agreement, Ferrotron’s parent company acquired all the rights over the software, patents, patent applications and inventions relating to the abovementioned products, as well as all the rights over the product names and technical know-how. Ferrotron acquired the development hardware and the inventory of product materials belonging to ET, as well as a related list of suppliers and of customers. Ferrotron also re-engaged a certain number of ET employees, namely Mr Neumann and three engineers from the ‘F+E/ET-Systeme’ team, but not Mr. Klarenberg. The judgment of the court will have repercussions for law practitioners in several EU countries (and most certainly in Germany).

3. EMPLOYEES

There is also uncertainty as to the scope of the employees protected. Are workers, seconded within a group of companies, included as well, or is it necessary for employees to be actually legally employed by the employer whose undertaking is being transferred? Recently, the Dutch Court of Appeal has asked a prejudicial ruling from the European Court in regard to this matter.¹² The questions referred are:

1. Should Directive 2001/23/EC be interpreted as meaning that there is a transfer of rights and obligations to the transferee referred to in the first sentence of Article 3(1) only if the transferor of the undertaking to be transferred is also the formal employer of the employees concerned, or does the protection of employees envisaged by the Directive imply that, upon transfer of an undertaking from an operating company belonging to a group, the rights and obligations pertaining to the employees working for that undertaking are transferred to the transferee if all the personnel working in the group are in the employ of a personnel company (which also belongs to that group) which functions as the central employer?

2. What would be the answer to the second part of the first question if the employees referred to there who work for an undertaking belonging to a group are in the employ of another company which also belongs to that group, which is not a personnel company as described in the first question?

The questions touch upon an important feature in law practice regarding group structures. The legal separation of the employment contracts (and therefore: the employment relationship) from the company in which the personnel are actually

¹² Case 242/09, Reference for a preliminary ruling from the Gerechtshof te Amsterdam (Netherlands) lodged on 3 July 2009 (*Albron Catering BV v FNV Bondgenoten and John Roest*).

working – the personnel are employed by, for instance, the holding company - leads, at least according to Dutch case law, to the Directive not being applicable.

4 PROTECTION AGAINST DISMISSAL

An employee may not be dismissed purely as a result of the transfer of the undertaking (Article 4(1) of the directive), however, this provision also states that dismissal for economic, technical or organisational reasons (“ETO reasons”) resulting in a change in the number of jobs are permitted. If the employer – who may be either the transferor or the transferee¹³ – can prove that the employee was dismissed for an ETO reason, the dismissal is valid. It is impossible to indicate beforehand what situations constitute an ETO reason. The Member States have a certain freedom in this respect. Obviously, the closer the date of dismissal is to the date of transfer, the more critically the reason stated by the employer must be scrutinised. The Court of Justice has ruled on several occasions that the protection that the directive provides relates to public order: employees or their representatives cannot waive its application.¹⁴ Unfortunately, the Court of Justice has only once – in 2008 - been asked to give its opinion on the scope of these reasons and in this case, the ETO-reason was easily established: the transferee failed to renew a lease of the store premises necessary for the exploitation of the undertaking, which was in itself, according to the Court, an ETO-reason.¹⁵

The initiative to end the contract of employment does not always come from the employer. Sometimes employees foresee that the transfer of undertaking will have the effect of them losing career opportunities, having to travel more or being part of a culture that is not of their choosing. For that situation, Article 4(2) of Directive 2001/23 provides that if the contract of employment (or the employment relationship) is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment.¹⁶ The scope of this provision should not be exaggerated, as is clear from the *Juuri* case (2008).¹⁷ In this case, in which a Finnish employee claimed compensation equal to that in case of unlawful termination of the contract by the employer, the Court decided that the provision does not set out the legal consequences of the employer’s responsibility. Thus it does not impose on the Member States any obligation to guarantee employees a particular compensation scheme or, accordingly, to ensure that the detailed rules under that scheme are the same as those under the scheme

¹³ Case C-319/94, Judgment of the Court of 12 March 1998 (*Dethier Équipement*), ECR 1998, page I-1061.

¹⁴ See e.g. the *Daddy’s Dance Hall* judgment.

¹⁵ Case C-313/07, Judgment of the Court (Fourth Chamber) of 16 October 2008 (*Kirtruna*), OJ C 313 of 6 December 2009, p. 8.

¹⁶ Sometimes this cannot be established. National law will have to provide for the situation in which the employee wishes to terminate the contract without this being “because of the transfer” as envisaged by the Directive. See for an Irish case *EELC 2009/20*: the refusing employee whose terms of contract were unchanged by the transfer was not entitled to any severance payment.

¹⁷ Case C 396/07, Judgment of the Court (Fourth Chamber) of 27 November 2008 (*Juuri*), OJ C 19 of 24 January 2009, p. 7.

from which employees can benefit if the employer unlawfully terminates the contract of employment or by virtue of the notice period to be observed by the employer. Article 4(2) cannot be regarded as having impliedly fixed a uniform level of protection for employees above and beyond the rule it lays down regarding the responsibility to be attributed to employers. Thus, in particular, that provision does not specify the financial consequences flowing from the fact that responsibility for termination of the contract of employment or the employment relationship can be attributed to the employer. Accordingly, those consequences must be established in each Member State in accordance with the applicable rules of national law. However, these applicable rules may not put the employee in a worse position: the national court is required to ensure that, at the very least, the transferee in such a case bears the consequences that the applicable national law attaches to a 'normal' termination by an employer of the contract of employment.