Recent Trends in the European Case-Law on the Transfer of Undertakings

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The scope of the Acquired Rights Directive

- To safeguard employee rights in the event of transfer of undertakings, businesses or part of businesses.

However,

- The Directive does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other (Alemon-Herron).

- It cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business (Alemon-Herron).
There is a transfer within the meaning of the Directive when there is:

• a **transfer**

• of an **economic entity**

• which retains its **identity**
A transfer

• A change in the natural or legal person responsible for carrying on the business who incurs the obligations of an employer towards employees of the undertaking (CLECE)

• The notion of legal transfer is intended to cover any legal change in the person of the employer.
• A merger
• A transfer between two subsidiary companies in the same group which are distinct legal persons and have each specific employment relationships with their employees
• A legal contract is not required
• This can occur even in the event of a tacit agreement
• Even if there is neither a written or oral agreement between the transferor and the transferee (Merckx: transfer without legal connection – franchise)
• By a court decision, a unilateral decision of public authorities, a legislative act
However,

• The takeover of the company by way of acquisition of the shares of the company is excluded
Are included:

• A situation in which a contractor which has entrusted the contract for cleaning its premises to a first undertaking, which has that contract performed by a subcontractor, terminates that contract and enters into a new contract for the performance of the same work with a second undertaking and the second undertaking has taken on, under a collective labour agreement, part of the staff of the subcontractor (Temco)

• Where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee (Landsorganisationen)

• Where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff (Foreningen af Arbejdsledere)

• Where a municipal authority unilaterally decides to terminate a contract with a private undertaking and to carry out itself (CLECE)
An economic entity

• A transfer of the undertaking, business, or part of the undertaking or business

• A transfer of part of an undertaking, understood as a functionally autonomous part of an organized economic activity

• An organized group of resources which has the objective of pursuing an economic activity

• Any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will constitute such an entity (Scattolon)
• Economic activity: any activity consisting in offering goods or services on a given market
• This activity can be central or ancillary
• The term ‘undertaking’ covers any economic entity organised on a stable basis, whatever its legal status and method of financing.
• Whether or not the undertaking is operating for gain
However:

Activities involving the exercise of public power are excluded from classification as economic activity. Services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activities (Höfner and Elser, Aéroports de Paris, Cassa di Risparmio di Firenze)
• The transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract.

However:
Even a single employee may comprise an organized grouping of resources (Schmidt)
An entity retaining its identity

• The Directive is applied only to a transfer where the entity retains its identity following the transfer.

• to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. (Spijkers)
The degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. (Süzen)

Labour intensive business transfer v. Asset reliant business transfer
• Factors of identity: activities, workforce, its management staff, the way in which the work is organized, its operating methods, the operational resources available to it

However:

• A business can lose its organizational autonomy and retain its identity
• A temporary interruption in activities may be ignored (Landsorganisation)
Shall be taken into account

- The type of undertaking in question
- The transfer of assets
- The staff
- The similarities of activities
The transfer of assets

To be examined:

• whether a certain amount of tangible and intangible assets have been transferred to the new employer

• The transfer of customers

• The value of intangible assets

However:

• Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets. (Süzen)
The staff

To be examined:

• whether staff are taken on, especially in labour-intensive sectors

• Where the activity is essentially based on manpower, a structured group of workers may, despite the absence of significant material or immaterial assets, correspond to an economic entity (cleaning services: Hernández Vidal, Hidalgo, CLECE).

However:

• The element of transfer of staff is problematic as the transfer depends whether the staff is taken over

• The employer can defeat the operation of the Directive by refusing to take off staff
The similarities of activities

• The similarities of activities before and after the transfer

An undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up (Ferreira).

However:
The mere fact that the service provided is similar does not support the conclusion that an economic activity has been transferred (Süzen)
An overall assessment of all elements is required
Categories of workers protected

• Any person who in the Member State concerned is protected as an employee
• The protection concerns workers who have an employment relationship existing at the date of transfer.
• where the fixed-term employment contract of a temporary worker has ended, due to expiry of the agreed term, on a date prior to that of the transfer of the activity ... that temporary worker must not be regarded as still being available to the user company on the date of the transfer (Briot)
The transfer of rights and obligations

• The transferor’s rights and obligations arising from the employment contract existing on the date of transfer are automatically transferred to the transferee.

• The transferee must take into account the entire length of service of the employee transferred in order to determine its rights.

Article 3 of that directive precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the latter (Ivana).
The application of collective agreements

• The transferee shall continue to observe the terms and conditions agreed in any collective agreement
• In the same conditions applicable to the transferor
• Until the date of termination or expiry of the collective agreement.

However:
• The new employer is not bound by the future collective agreement where is not part to the bargaining machinery (Alemo – Herron).
• Only the collective agreement in force at the time of transfer is concerned
The application of collective agreements

• The terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute ‘terms and conditions agreed in any collective agreement’ so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned (Österreichischer Gewerkschaftsbund).

• The right of the employer to freedom of association must be respected.

• An employer must also have the right to conduct its business and to assert its rights effectively in a contractual process to which is party

• Supplementary pension schemes are excluded
The dismissal

• Purpose: to safeguard jobs during restructuring procedures.

• The transfer of the undertaking itself may not constitute the ground for dismissal by the transferor or the transferee
The dismissal

• The protection applies only to employees protected under national law from unlawful dismissal
• Economic technical or organizational reasons entailing changes in the workforce does not prevent redundancies
• The dismissal must be linked to the transfer
• The dismissal shall either coincide or be close to the transfer
• General economic goals are not included and do not justify the dismissal
The modification of working conditions

- The employment relationship may not be altered with regard to the transferee as it would have been with regard to the transferor.
- The transfer of the undertaking itself may not constitute the reason for that amendment.

**However:**

- The Directive does not deprive the Member States of the possibility of allowing employers to modify working relations in an unfavourable direction, notably as regards protection against dismissal and the conditions of remuneration. The directive only prohibits such modifications from taking place on the occasion of and because of the transfer (*Foreningen af Arbejdsledere*).
- The transferee must be in a position to make the adjustments and changes necessary to carry on its operations (*Alemo-Herron*).
Rights to information and consultation

• The transferor and transferee are required to inform representatives of their respective employees
• The information may be done in good time
• Consultation must be done if any measures are envisaged in relation to affected employees
Thank you for your attention!