Transfers of Undertakings
Recent developments

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Outline of the talk

1. Sources and principles
2. Scope
   – When is there a transfer of an undertaking?
3. Automatic transfer of the employment relationship with all the rights and duties
New(ish) cases

• Case C-466/07 Klarenberg
• Case C-242/09 Albron
• Case C-463/09 CLECE
• Case C-108/10 Scattolon
• Case C-426/11 Alemo-Herron
• Case C-458/12 Amatori
• Case C-328/13 Österreichischer Gewerkschaftsbund
1. Sources and principles
Sources

• Directive 2001/23 (previously 77/187), the ‘Acquired Rights Directive’

• The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended in 2014 and earlier 1981) (TUPE)
Key points

• Partial harmonisation Directive
  – That directive is intended to achieve only partial harmonisation of the area in question. It is not intended to establish a uniform level of protection throughout the European Union on the basis of common criteria (Case C-209/91 Watson Rask [1992] ECR I-5755, paragraph 27)

• Minimum standards Directive: Article 8
  – ‘Article 3 of Directive 2001/23, read in conjunction with Article 8 of that Directive, 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’: Alemo-Heron, para. 36
The principle of employment protection

• The main purpose of the Directive is ‘to ensure as far as possible the continuation without change of the contract of employment or the employment relationship with the transferee in order to avoid the workers being placed in a less favourable position by reason of the transfer alone’: Case C-287/86 Ny Molle Kro
2. Scope of the Directive
‘Relevant transfer’: the ‘economic entity’ test

• Art. 1(1)(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

• Art. 1(1)(b) ‘...there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’

• Case C-446/07 Klarenberg: Art. 1(1)(b) must be narrowly construed
Gateway requirements

1. (Stable) Economic entity
2. Transferred
3. Retains its identity
Exceptions/exclusions

- Activities which fall within the exercise of public powers
  - BUT those services carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive are economic activities: Case C-108/10 Scattolon [44]

- For those activities not falling within the exercise of public powers (Case C-108/10 Scattolon [44]), the Directive does not apply to ‘administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities’ (Art. 1(a)(c))
Gateway requirements

1. (Stable) Economic entity
   (=undertaking: Case C-108/10 Scattolon)
2. Transferred
3. Retains its identity
1. ‘Stable economic entity’

- Directive: SEE means an *organised grouping* of resources which has the objective of pursuing an *economic activity*, whether or not that activity is central or ancillary (Case C-466/07 *Klarenberg*, [45], both required)

- Organised grouping of resources includes single employee (*Schmidt*);

- Absence of material or immaterial assets not prevent structured group of workers from being an economic entity in manpower sector (Case C-108/10 *Scattolon* [49])

- But NOT an entity whose activity is limited to performing one specific works contract (Case C-458/12 *Amatori* [31])
1. Stable economic activity

- ‘Any organised grouping of persons and of enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous assets constitutes such an entity’: C-458/12 *Amatori* [31]
- SEE must have ‘a sufficient degree of functional autonomy, the concept of autonomy referring to the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within that group without direct intervention from other organisational structures’ C-458/12 *Amatori* [32]; *Scattolon* [51]
Case C-458/12 Amatori

Transferor has extensive powers over transferee

Telecom Italia

Technology and operations division

Subsidiary TIIT

IT section

IT operations

Software and test factory

IT governance

Engineering incl. innovation and design

cooperation

transfer
Case C-242/09 Albron v. Roest

Heineken International

HNB (employer of all staff)

Heineken Nederland

employees

No contract but HN could still be considered transferor

contract

Albron
Gateway requirements

1. (Stable) Economic entity
2. Transferred
3. Retains its identity
2. Transfer of the entity: ‘Legal transfer or merger’

• Legal transfer
  – ‘in the context of contractual relations’ C-458/12 Amatori
    • Sale
    • Leasing: Case 287/86 Ny Molle Kro
    • Contracting out, including transfers between subcontractors: C-209/91 Rask, and contracting back in: Case C-463/09 CLECE [31]
  – transfer between two companies in the same corporate group: C-234/98 Allen; Case C-458/12 Amatori [47]
  – Unilateral decision by public authorities: C-108/10 Scattolon [63]

• But NOT a merger by share transfer
  – except perhaps where the corporate veil can be pierced: Millam v. Print Factory (London) 1991 Ltd
Gateway requirements

1. (Stable) Economic entity (=undertaking: Case C-108/10 Scattolon)
2. Transferred
3. Retains its identity
3. The Economic ‘entity retains its identity following transfer’

• ‘decisive criterion’: C-458/12 Amatori [30]

• Case 24/85 Spijkers (cited in Case C-463/09 CLECE [31])

• Entreprise-activité: C-392/92 Schmidt
  – ‘an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee’
The early case law: Case 24/85
*Spijkers* formula

It is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business’s tangible assets, such as building and moveable 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.
Case C-13/95 Süzen

• Entreprise-organisation: C-13/95 Suezen
• Change in service providers not sufficient nor is similarity of activity (Case C-463/09 CLECE [41])
• Requirements:
  – concomitant transfer from one undertaking to the other of significant tangible or intangible assets, or
  – taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract
Criticisms

- Bootstrapping
- Uncertainty
- What if functions do not fall into either category:
  - C-340/01 Abler v Sodexho
C-466/07 Klarenberg, [53]

• Directive applies to transfer of undertaking not retaining its organisational autonomy, provided 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’.
‘Service provision changes’ (SPC)

• Standard transfers covered (transfer of economic entity that retains its identity) (Reg 3(1)(a))

• AND: extended transfer definition: service provision change: addition made by TUPE 2006, now Reg 3(1)(b).

• Applies to:
  – first generation,
  – subsequent transfers, and
  – to the return of work in-house

• The activities before and after the transfer have to be fundamentally the same (Reg 3(2A))
Standard v extended definitions

- Requirement of transfer of economic entity which retains its identity does not apply to Reg 3(1)(b) SPCs; Süzen avoidance techniques will not work
- Many transfers may fall in both Reg 3(1)(a) and (b)
- C-463/09 CLECE highlights difference between EU and UK approaches
Case C-463/09 CLECE

Transferor I
Ayuntamiento

employees

Transferee
CLECE

employees

Transferee
Ayuntamiento

No CLECE employees

Ayuntamiento:
• Employed new staff
• Didn’t take over old staff
• Didn’t take over assets
Only similarity of activity.
3. Novation of the contract of employment
Transfer of statutory and contractual rights: Art. 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee. ... 

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.
Personal scope

• Cf Art. 3(1)
  – automatic transfer principle applies to those who have a "contract of employment or employment relationship" with the transferor; C-242/09 *Albron*

• Employees +
  – Contract of service, apprenticeship or ‘otherwise’ (includes workers) (Reg 2(1))
Case C-108/10 Scattolon

• Collino:

‘while the transferred employees’ length of service with their former employer does not as such constitute a right which they may assert against the new employer, the fact remains that, in certain cases, it is used to determine certain financial rights of employees, and that those rights must then, in principle, be maintained by the transferee in the same way as by the transferor
Case C-108/10 Scattolon

Rules laid down in a collective agreement (which can expire after a year)

‘where a transfer ... leads to the immediate application to the transferred workers of the collective agreement in force with the transferee, and where the conditions for remuneration are linked in particular to length of service, 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. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary’.
Transfer of bridging term from collective agreement

- collective agreements can be transferred over
- Static situation: Case C-499/04 Werhof [2006] ECR I-2397: Article 3 did not bind the transferee to any collective agreement or any amendment that was made after the transfer to which he was not a party (either directly or by virtue of its membership of an employers’ association)
- Dynamic situation: Case C-426/11 Alemo-Herron
Incorporation of collective agreements in the UK

Collective agreement, not presumed to be legally binding

CA may be incorporated by reference into contract of employment if (1) bridging clause; (2) Terms are suitable for individuation
Case C-426/11 Alemo-Herron

Transferor I
Lewisham LBC
employees

Transferee
CCL
employees

Contract of sale
(May 2004)

Transferee
Parkwood
employees

NJC collectively agreed terms
Apr 2002 - Mar 2004 incorp by reference
Case C-426/11 Alemo-Herron

• Dir. 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. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations [25].

• dynamic clause is ‘liable to limit considerably the room for manoeuvre necessary for a private transferee to make such adjustments and changes’ and so undermine the fair balance. [28]
Case C-426/11 Alemo-Herron: the Charter

• the provisions of Directive 2001/23 must be interpreted in a manner consistent with the fundamental rights as set out by the Charter [30]

• the interpretation of Article 3 of Directive 2001/23 must in any event comply with Article 16 of the Charter, laying down the freedom to conduct a business, including freedom of contract [31-32]
In the light of Article 3 of Directive 2001/23, it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.

However, the transferee in the main proceedings is unable to participate in the collective bargaining body at issue. In those circumstances, the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.

In those circumstances, the transferee’s contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.
Variations of terms and conditions post-transfer

- No waiver allowed under EU law: Case 324/86 Daddy’s Dance Hall
- Cf Regulation 4(4) of original TUPE 2006: contractual changes are only void if the sole or principal reason for the change is transfer
  - Unless the change relates to a term or conditions incorporated from a collective agreement and takes effect more than a year after transfer and overall package is no less favourable.
- So ‘modifying working conditions in an unfavourable direction’ is permissible so long as it is not connected with the transfer: Scattolon, [59]
- Reg 4(5) variation in the contract of employment is permitted if:
  The sole or principal reason for the variation is an economic, technical or organisational reason entailing changes in the workforce (including a change to the place where the employee was employed), provided the employer and employee agree on the variation, or (ii) the terms of the contract permit the employer to make such a variation