SUMMARY

ECJ 9 September 2015, case C-160/14 (Joao Filipe Ferreira da Silva e Brito and others - v - Estado português), Transfer of undertaking

Facts

The airline company AIA wound up on 19 February 1993. From 1 May 1993, its main shareholder TAP, also an airline company, began to operate some of the flights which AIA had contracted to provide. It took over the leases on four of AIA's airplanes and its office equipment. TAP also took on a number of AIA's former employees.

The plaintiffs were former AIA employees who were not taken on by TAP. They sought reinstatement within TAP and payment of wages. In 2007, the court of first instance found in their favour, holding that there had been a transfer of (part of) AIA's undertaking. This judgment was overturned on appeal in 2008 and in 2009 the Supreme Court upheld the Court of Appeal's judgment. Applying the ECJ's case-law, the Supreme Court reasoned that the mere fact of carrying on activities which another undertaking had hitherto undertaken does not justify the conclusion that there has been a transfer of undertaking, since an entity cannot be reduced to the activity entrusted to it. The Supreme Court turned down a request by the plaintiffs to ask the ECJ for a preliminary ruling. In the light of the EU law on transfer of undertakings, the ECJ's interpretation of those rules and the features of the case "there can be no material doubt as to the interpretation which would make a reference for a preliminary ruling necessary", so the court held. The concepts set out in the relevant directive "are now so clear in terms of their interpretation in case -law (both Community and national) that there is no need, in the present case, for prior consultation of the Court of Justice", the Supreme Court

continued.

National proceedings

The plaintiffs then brought an action against the Portuguese State, seeking an order for the latter to compensate them for the loss they had sustained. The court referred three questions to the ECJ. The first question related to the interpretation of Directive 2001/23. The second was whether the Supreme Court had an obligation to apply to the ECJ for a preliminary ruling. The third question concerned the compatibility with EU law of the provision of Portuguese law that a claim for damages against the State is conditional upon the decision that caused loss having first been set aside.

ECJ's findings

In the air transport sector, the fact that tangible assets are transferred must be regarded as a key factor for the purpose of determining whether there is a transfer of a business within the meaning of Directive 2001/23. In this case, the fact that TAP took over the lease of, and then proceeded to use AIA's aircraft, also taking over office equipment, in combination with other circumstances (replacing AIA in ongoing charter flights and thereby taking over AIA's customers, taking on some of AIA's staff, etc.), gives a strong indication that there was a transfer of undertaking. The fact that the entity whose assets and a part of whose staff were taken over was integrated into TAP's structure, without that entity retaining an autonomous organisational structure, is irrelevant, since a link was preserved between, on the one hand, the assets and staff transferred to TAP and, on the other, the pursuit of activities previously carried on by AIA. It follows from Klarenberg (C-466/07) that what is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the undertaking on the various elements of production which are transferred, but rather the retention of the functional link of interdependence and complementarity between those elements. Thus, the retention of a functional link of that kind between the various elements transferred allows the transferee to use them — even if they are integrated, after the transfer, in a new and different organisational structure — to pursue an identical or analogous economic activity (§23-35).
When there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU, where a question relating to the interpretation of EU law is raised before it. A court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it

has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. It is true that the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring the matter to the Court. However, so far as the area under consideration in the present case is concerned, the question as to how the concept of a 'transfer of a business' should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the EU. It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of 'transfer of a business' within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law (§36-45).

In view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance. The principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. In an action brought to establish the liability of the State the applicant will, if successful, secure an order against it for reparation of the damage incurred but will not necessarily obtain a declaration invalidating the status of res judicata of the judicial decision responsible for that damage. In any event, the principle of State liability inherent in the EU legal order requires such reparation, but not revision of the judicial decision responsible for the damage. As regards the argument concerning infringement of the principle of legal certainty, even if this principle may be taken into account in a legal situation such as that at issue in the main proceedings, it cannot frustrate the principle that the State should be liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it. To take account of the

principle of legal certainty would mean that, where a decision given by a court adjudicating at last instance is based on an interpretation of EU law that is manifestly incorrect, an individual would be prevented from asserting the rights that he may derive from the EU legal order and, in particular, those that stem from the principle of State liability. Accordingly, a significant obstacle, such as that resulting from the rule of national law at issue in the main proceedings, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of res judicata or by the principle of legal certainty (§46-60).

Ruling

Article 1(1) of Council Directive 2001/23/EC [.....] must be interpreted as meaning that the concept of a 'transfer of a business' encompasses a situation in which 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.
In circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.
EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

Creator: European Court of Justice (ECJ)

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