EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/42 Cross-border transfers of undertakings, focussing on Germany, UK and the Netherlands (Article)

<p>Undertakings are increasingly being transferred to foreign companies. Neither the Transfer of Undertaking Directive 2001/23/EC (the ‘Directive’) nor, to my knowledge, Member States’ regulations stipulate how to apply labour law provisions to a transfer between Member States. A crucial question is which national law applies. Transposition of a directive by a Member State does not in itself lead to uniform legislation within the EU. As long as the aim of a directive is achieved, the Member States may implement the directive in the way that best suits their legal system. In addition, Directive 2001/23/EC is a minimum harmonisation directive. Article 8 allows Member States to grant employees rights that are more favourable than the directive requires. As a result of choices made by Member States, domestic laws on transfers of undertakings vary across the EU. This article focuses on the issue of the conflict of law when dealing with a cross-border transfer. It also examines, where appropriate, the jurisdiction of the courts.</p>

1. Introduction

Undertakings are increasingly being transferred to foreign companies. Neither the Transfer of Undertaking Directive 2001/23/EC (the 'Directive') nor, to my knowledge, Member States' regulations stipulate how to apply labour law provisions to a transfer between Member States. A crucial question is which national law applies. Transposition of a directive by a Member State does not in itself lead to uniform legislation within the EU. As long as the aim of a directive is achieved, the Member States may implement the directive in the way that best suits their legal system. In addition, Directive 2001/23/EC is a minimum harmonisation directive. Article 8 allows Member States to grant employees rights that are more favourable than the directive requires. As a result of choices made by Member States, domestic laws on transfers of undertakings vary across the EU. This article focuses on the issue of the conflict of law when dealing with a cross-border transfer. It also examines, where appropriate, the jurisdiction of the courts.

Cross-border transfers can take different forms. This article considers situations where not only the ownership of a business is transferred to another Member State, but its activities also move to that other Member State. It analyses the issues that can arise under the law in force in Germany, the UK and the Netherlands. It does not address problems concerning employee participation within the meaning of Article 6 of the Directive.

2. The territorial scope of Directive 2001/23/EC

Although the Directive is silent on transfers of undertakings between Member States, neither the Directive nor its underlying principles stand in the way of applying it to cross-border transfers, but the territorial scope of the Directive is not limited to intra-state transfers. Article 1(2) provides: 'This Directive shall apply where and in so far as the undertaking, business or part of the undertaking of business to be transferred is situated within the territorial scope of the Treaty'. Thus, the relevant criterion for determining the Directive's territorial scope is the situation of the economic entity on the date of the transfer. As long as the undertaking to be transferred is situated in the European Union, the transfer falls within the scope of the Directive, irrespective whether the transferor and transferee are governed by the law of the same Member State.

Most Member States do not have a specific provision on cross-border transfers and generally, this is not a problem. In the case of the Dutch and German Civil Code, the wording of the text is not specifically restricted to the territory of the Netherlands or Germany. Hence, the implementation law can be said to be in line with the Directive. This view is endorsed by Dutch and German case law.[1]

The situation in the UK is somewhat different. The legislation on transfers of undertaking,

known as TUPE, specifically requires the undertaking to be established in the UK immediately prior to the transfer. An example where this was the case in a cross-border context, was adjudicated by the Employment Appeal Tribunal.[2] In this 2011 case, the undertaking was moved from the UK to a company whose premises were based in Israel. The employees were told that, if they refused to move to Israel, they would be made redundant. None of the employees moved to Israel and, accordingly, they were dismissed. When the trade union lodged a claim against both the transferor and the transferee, the defendants argued that TUPE did not apply where a business was transferred overseas. The Employment Appeal Tribunal dismissed this argument, holding that a purposeive approach to TUPE required that the employees should be protected even if the transfer were across borders.

The wording of TUPE appears to conform to the Directive, in that Article 1(2) of the Directive refers to the place of the undertaking prior to the transfer. There is, however, a difference in perspective. In its current wording TUPE does not deal with the situation where an economic entity that was previously situated elsewhere in the EU transfers into the UK. This may be a problem in relation to the applicable law (see section 5.2).

3. Can there be a transfer of an undertaking when the business is relocated abroad?

The Directive only applies when dealing with transfers of undertakings. The transfer of an undertaking requires a legal transfer or merger of an economic entity that retains its identity. The Court of Justice of the European Union ('CJEU') gave 'transfer of undertaking' a uniform meaning and in this respect, the laws of the Member States are uniformly applied. However, the Directive does not specify whether it applies to situations where the business is physically transferred across borders. Some argue that a great distance between the old and new locations automatically leads to a significant change in the organisational structure of the undertaking, with the result that the identity is not retained. The relocation is then considered as a closure of the business rather than a transfer of the undertaking. I do not support this view.[3] In my view, the geographical relocation of the place of business does not, of itself, preclude the operation from being regarded as a transfer of undertaking.

This does not mean that the relocation of the economic entity is of no relevance. Relocation is one of the factors in determining whether the entity retains its identity under the *Spijkers* -criteria as formulated by the CJEU in 1997.[4] The importance of this factor depends on the nature of the sector in which the transfer takes place. The majority of the personnel will not be prepared to move when the distance between the transferor's and transferee's business is too great. As a result, in a labour-intensive sector there will generally be no transfer of the undertaking and the situation will be considered as a closure of the business. In a capital-intensive business, however, the transfer of (the majority of) the personnel is less relevant

when assessing whether the entity retains its identity. This is illustrated by the decision of the German *Bundesarbeitsgericht* of 26 May 2011.[5] The *Bundesarbeitsgericht* treated the relocation of the business from Germany to Switzerland as a transfer based on the reasoning that the Swiss buyer bought the department's equipment, machinery and inventory and also took over the customer lists and continued producing existing orders.

One more comment of practical concern: it is not uncommon for the transfer of a business to be phased. Let me give an example. A German company purchases a factory in the UK, not by way of a share transaction, but through an asset purchase agreement. The German transferee has now become the owner of the factory and the employer of its staff. A few months later, the factory's activities and equipment are physically relocated to Germany. The question arises as to whether the decision to relocate is linked to the transfer of the undertaking. If not, the Directive does not apply to the decision to relocate and the personnel of the transferred business can easily be dismissed. It depends of course on the circumstances of the specific case whether the relocation will be regarded as a separate decision. A decisive factor is the time period between the asset purchase agreement and the relocation. For the rest of this article, it is assumed that the decision to purchase and the decision to relocate are linked and that these decisions are treated as a transfer of undertaking within the meaning of the Directive.

4. Conflict of law

Article 1(2) of the Directive does not contain special rules for determining the applicable law in the case of a cross-border transfer and so provides no guidance as which law should be applied in relation to a cross-border transfer. This means that the transfer will be governed by the general rules on choice of law. The Rome I Regulation ('Rome I') determines which country's law applies to an individual employment relationship.[6] Rome I is binding and directly applicable in each Member State in all respects without any transposition being required or, indeed, allowed (Article 249 TFEU).

The basic principle underlying Rome I is that of free choice, but it does contain specific rules relating to individual employment contracts. The CJEU has repeatedly held that the rules deriving from the Directive are 'mandatory rules'.[7] There is, however, debate about whether the rules are mandatory provisions from which no derogation can be made by contract (Article 8(2) Rome I) or overriding mandatory provisions having their own scope rule (Article 9 Rome I). This is more than a mere academic debate. Take the following example. The business concerned is situated in the Netherlands. Some of the personnel live across the borders in Germany and also perform a big part of their job in a German establishment. Which implementation law is applicable when the Dutch business is transferred? According to Article

8(2) of Rome I, the law of the Member State where the employee habitually carries out his work or, if he does not habitually carry out his work in one country, the place of business through which he was engaged is situated, applies. In addition, if it appears that, as a whole, a contract is more closely connected with the law of another country, then the law of that other country will apply. For the personnel that work in the German establishment in this example, the result of applying Article 8 (2) of Rome I will be German that implementation law applies. In contrast, Article 9 Rome I provides that the law of the Member State where the undertaking is situated applies. The applicability of the transfer of undertaking rules in this case is not determined by the law governing the employment contract but by its own scope, i.e. the place of the undertaking. In the example Article 9 of Rome I leads to the conclusion that Dutch implementation law applies.

In 2008, the Dutch lower court established the applicable law in the context of a cross-border transfer using the mandatory rules provided in Article 8(2) Rome I.[8] The German *Bundesarbeitsgericht* ruled in the same vein in 2011.[9] An argument in favour of this approach is that the labour law rights deriving from the Directive are claimed on the basis of the individual employment contract, creating a direct link between the Directive and the individual employment contract. A disadvantage of this view is that the applicable law can differ from employee to employee, depending on the law governing the individual employment contract. That may be an undesirable outcome. Besides that, Article 1 of the Directive names the undertaking as the subject of the transfer, not the individual employee. This indicates that the Directive is of an extra-contractual nature and serves a higher interest than that of each individual employment contract as such. The latter aspect leads me to the conclusion that the provisions of the Directive qualify as overriding mandatory rules in the meaning of Article 9 Rome I. As a result, the law of the Member State where the undertaking is situated is applicable to claims based on the Directive. Dutch implementation law applies in the example of the transfer of a business situated in the Netherlands.

5. Applying the rules concerning conflict of law

A distinction should be made between two situations, one where the employee does not wish to relocate with the business and the other where the employee follows the business to another Member State. Both situations are discussed below. A dispute about whether the legal transfer or merger qualifies as a transfer of undertaking within the meaning of the Directive must always be answered according to the law where the undertaking is situated before the transfer. Normally this causes no problems, as the CJEU gave a clear definition of 'transfer of undertaking'.

5.1. Where the employee does not wish to be relocated

In most cross-border transfers, the majority of the personnel will not be prepared to move, if only because the distance between the transferor's and transferee's business is too great. This will regularly be the case when the business is relocated to a country outside the European Union or to a non-neighbouring Member State. Article 3 of the Directive states that the employees remain entitled to all their terms of employment even if they are transferred. The terms of employment include the location of the workplace. This does not, however, mean that the employees are entitled to continue their work in the 'old' Member State. The Directive does not merely protect the rights of employees in the event of a transfer, but it is also takes account of the employer's freedom to conduct its business.[10] The transferee has the right to demand that employees accept a change of workplace. When the distance to the new location is too far, however, this constitutes a substantial chance to the working conditions in the meaning of Article 4 of the Directive. In this way, the Directive strikes a balance between its two underlying principles: the protection of employees and freedom to conduct business.[11]

In the example of a Dutch business transferring to (eastern) Germany or the UK, there will usually be a substantial change to working conditions. In such a case, the question of applicable law is crucial, because the legal consequences of objecting to moving abroad differ across the Member States. Under Dutch law, employees transfer automatically. If they object to the transfer, their employment contract terminates on the day of the transfer. If there is a substantial change to the working conditions, they can ask a judge to grant them compensation, but ultimately they lose their jobs. In the UK, employees can object to the transfer in two different ways. Employees are treated as having been dismissed if the transfer involves a substantial change to working conditions and are treated as having resigned if there are no changes to working conditions. In the first situation, the employees have the right to bring claims for statutory redundancy pay or unfair dismissal. Hence, in the Netherlands as well as in the UK employees are deemed to resign when they refuse to work abroad. In Germany, by contrast, employees have a so-called *Widerspruchsrecht*. According to this, employees can oppose the transfer and continue to work under an employment contract with the transferor (assuming the transferor does not cease to exist, as will frequently be the case).

Usually, any objections will be directed against the transferor before the transfer is concluded. There is no doubt that the court of the Member State where the employee performs his activities is competent and, in addition, the provisions of that Member State's law apply. The situation before the transfer has no international aspect. However, it is rather different if the employee lodges a claim against the transferee after the transfer. This might be necessary, especially if the transferor ceases to exist as a result of the transfer and/or lacks financial resources. If the defendant is domiciled in the European Union (except Denmark), the Brussels I Regulation ('Brussels I') determines jurisdiction.[12] Article 19 of Brussels I

determines jurisdiction on the basis of the place where the employee habitually carries out his work or the last place where he did so. Thus, the relocation of the business is of no relevance for the jurisdiction of the court and the employee can lodge a plea against the foreign transferee in a court in the Member State in which he performed his work before the transfer.

Then comes the difficult question of which law the competent court should apply. If, as argued before, Article 9 Rome I governs the rights and obligations of the parties with respect to the transfer of the undertaking, it can be argued that the law of the new Member State will apply after relocation to claims lodged against the transferee. On the other hand, one could argue that the claim relating to an objection to relocation is more closely connected to the situation prior to the transfer. In my opinion, if the employee has not worked in the relocated business, the latter argument should prevail. In the example of the transfer of a business from the Netherlands to a foreign country, Dutch implementation law applies when employees object to relocation irrespective whether the action is brought against the transferor prior to the transfer or the transferee after the transfer.

5.2. Where the employee follows the business abroad

Where a cross-border transfer takes place between two neighbouring countries, the employee can agree to accompany the business abroad. Article 3 of the Directive ensures that the transferor's rights and obligations automatically transfer to the transferee by operation of law. As a result, the employee can claim continued employment abroad with the transferee on the same terms and conditions as he had prior to the transfer.

If the transferee offers the employee continued employment on inferior terms, the employee can make a claim against the transferee in a court within the Member State where he works after the transfer (Article 19 Brussels I). The law of the Member State in which the undertaking is relocated applies (Article 9 Rome I). This might be disadvantageous to transferred employees, especially in relation to collective labour rights deriving from the employment contract.

The systems for collective agreements differ across the Member States. There is a risk that a court (especially a foreign court) might not recognise certain claims deriving from a collective agreement that applied to the employment contracts before the transfer. The risk exists especially for Dutch employees, as the Dutch collective labour system is very complex. Further, Member States can choose to limit - to a year at most - the period for observing those collective rights. German law provides for such a limit, but Dutch law does not. Transfers of undertakings can also give rise to claims based on prohibition against dismissal. Article 4 of the Directive determines that a transfer 'shall not in itself constitute grounds for dismissal by

the transferor or the transferee'. After a transfer a claim based on this prohibition must be lodged in a court in the new Member State (Article 19 Brussels I) and the law of the new Member State must be applied. This is because the undertaking has relocated to the new Member State and the employee has agreed to work abroad. Therefore, the claim is related to the situation after the transfer (Article 9 Rome I). In the example, Dutch workers who relocate to Germany would have to lodge a claim against their dismissal in a German court and German implementation law would govern the dispute.

What about UK law? In section 2 of this article I noted that TUPE did not cover the transfer of an economic entity previously situated elsewhere. Does that mean that employees who decide to relocate to the UK lack any protection at all? The answer is in the negative. Rome I has direct and immediate effect and overrides the territorial limitation of TUPE. Accordingly, the transferred employees can claim protection under TUPE after the transfer. Dutch workers who relocate from the Netherlands to the UK can lodge a claim against the British transferee claiming continued employment on the same conditions that they had prior to the transfer from the Netherlands.

Another issue concerns statutory labour law rights. So far, dismissal law has not been harmonized in the European Union. As a result, existing national dismissal systems vary fundamentally. The German *Bundesarbeitsgericht* in 2007 had to rule about the possible transfer of statutory labour law rights in an inter-state context.[13] The case concerned the transfer of dismissal law rights in the context of companies that met certain thresholds. The employee enjoyed these rights before the transfer and claimed that the rights had transferred, despite the fact that the transferee did not meet the thresholds. The *Bundesarbeitsgericht* ruled that statutory rights were not protected under the Directive, meaning they do not have to be maintained in the event of a transfer. This view can be extended to a cross-border situation. Hence, the employee after the transfer is subject to foreign labour law. The argument that the Directive should not apply because the employees will be subject to foreign labour law and this will have a negative impact, has no chance of success. This argument was pleaded before the Dutch lower court in 2008.[14] The case was about the relocation of a business from the Netherlands to Belgium. The plaintiffs claimed that Belgian employment law, Belgian social insurance and Belgian taxes had a detrimental impact compared to the situation prior to the transfer. The judge stated that the employees had the right not to be transferred and were, in accordance with Dutch law, free to resign (see section 5.1). The Directive, therefore, covered the issue and there was no reason to reject the cross-border transfer based on the change of governing law.

6. Concluding remarks

Cross-border transfers remain a complex area. The case law of the Netherlands, Germany and the UK give some guidance as to how to handle a cross-border transfer upon relocation of a business. The national judgments in these countries make clear that the Directive applies in cross-border situations. Whether the physical relocation of the business might prevent the transfer has to be determined on a case-by-case basis and especially depends on the type of business to be transferred. It is clear, however, that geographical relocation itself does not preclude the operation from being regarded as the transfer of an undertaking.

Overall, it seems that the general conflict of law rules provide more or less clear guidance on which Member State's law applies to a cross-border transfer. In most situations, employees do not follow the business abroad and the matter is unproblematic. However, long distance will lead to a substantial change to the working conditions and the legal consequences will flow from the law of the Member State where the business was located before the transfer, irrespective whether any claim is directed against the transferor or transferee. Only when the employee decides to accompany the business abroad will the labour law provisions deriving from the Directive apply as transposed by the foreign country concerned. This can be a disadvantage for employees, especially if the 'new' Member State has implemented the collective labour law provisions more strictly. This is not because of the conflict of law provisions, but because the Directive is a minimal harmonisation directive.

Footnotes

[1] See for the Netherlands: Ktr. Eindhoven 9 September 2008, *EELC* 2009/2 and *JAR* 2008/271; Ktr. Tilburg 27 July 2007, *JAR* 2007/259; Ktr. Zaandam 26 September 2007, *JAR* 2008/67; Ktr. Amsterdam 8 August 1995, *KG* 1995/339 and, for Germany: BAG 13 December 2013, *ArbRAktuell*2013, 209; BAG 26 May 2011, *EELC* 2012/1 and *NZA* 2011, 1143.

[2] Employment Appeal Tribunal 12 December 2007, *EELC* 2011/3, No. UKEAT/0171/07/CEA.

[3] See also B.W. Feudner, Grenzüberschreitende Anwendung des 613a BGB, *NZA* 1999, p. 1184.

[4] CJEU 18 March 1986, C-24/85 (*Spijkers*).

[5] BAG 26 May 2011, *EELC* 2012/1 and *NZA* 2011, 1143.

[6] Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

[7] See CJEU 10 February 1988, C-324/86 (*Daddy's Dance Hall*) and ECJ [6 November 2003, C-4/01 (*Serene Martin*).

[8] Ktr. Eindhoven 9 September 2008, *EELC* 2009/2, and *JAR* 2008/271.

[9] Bundesarbeitsgericht 26 May 2011, *EELC* 2012/1 and *NZA* 2011, 1143.

[10] CJEU 18 July 2013, C-426/11 (*Parkwood Leisure Ltd.*).

[11] This is also the case when the business is relocated within the same Member State.

[12] Council Regulation (EC) No. 44/2001 of 22 November 2000 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

[13] Bundesarbeitsgericht 15 February 2007, *AZR* 397/06.

[14] Ktr. Eindhoven 9 September 2008, *EELC* 2009/2, *JAR* 2008/271.

Creator:
Verdict at:
Case number: