EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/51 Transfer of employees on reoutsourcing? The employee follows the work... or not? (Article)

<p>The business case for outsourcing is determined in part by whether the supplier will take over employees with the work. In second and further generations of outsourcing contracts this can – at least in a number of European countries - cause difficult discussions - over the heads of the employees - between the old and the new supplier. When does the employee follow the work - and particularly when not? </p>

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When a party first out-sources some activities there is usually hardly any discussion as to whether this constitutes a Transfer of an Undertaking, or a Part of an Enterprise within the meaning of the Directive on transfer of undertaking ("TUPE"). In a first generation outsourcing the Request for Proposals often explicitly requires the service provider to take

over the employees involved and/or it is assumed by all parties that this transfer will qualify as a TUPE. In that case as per the transfer date the workers automatically transfer to the service provider and in principle can claim a continuation of their employment conditions. Some local laws may provide for exceptions, such as an opt out for pension rights in the event the new employer already has its own pension scheme.

In a succeeding generation of outsourcing the client usually no longer requires that the new service provider takes over the personnel from its predecessor. On the contrary, by taking on a new service provider the client often intends to obtain an improvement in quality and/or a reduction of costs by a smarter use of fewer or at least less expensive employees. These objectives could be put at risk if the new service provider were obliged to take over all its predecessor's personnel.

When is there a Transfer of Undertaking?

The laws on TUPE are based on the European (Acquired Rights) Directive on transfer of undertakings, which was intended for classic takeovers of assets. The European Court of Justice rules on questions of how provisions from this Directive, which are implemented in the national laws of the EU Member States, are to be interpreted. In 1992 (in the *Watson Rask* [1] case) the European Court of Justice ruled that the Directive on transfer of undertaking can also apply to outsourcing (!). But also in outsourcing situations the European Court of Justice confirmed that the question of whether there is a TUPE must be answered based on the criterion of whether the undertaking has retained its *identity*after a change of entrepreneur[2].

In making this overall assessment, all facts and circumstances of the case play a role, such as the nature of the undertaking, whether tangible and/or intangible assets are transferred, whether a (substantial) part of the personnel are transferred, whether a customer base is transferred, and whether there is a continuation or a resumption of the same or similar activities.

Labour Intensive Activities

In 1997, in the *Süzen*[3] case, the European Court of Justice ruled that a reoutsourcing certainly will not always constitute a TUPE. The mere loss of a service contract to a competitor that carries out similar business activities constitutes insufficient evidence for a TUPE. The retention of identity must also be evident from other factors. Furthermore, the European Court of Justice elaborated that the weight of the factors that play a role in the question of whether there is a retention of identity will differ depending on the *nature* of the activities performed, the manner of production, etc.

Within the services sector, where *labour* is the main factor in production, a transfer could especially be qualified as a TUPE if the new service provider not only continues the activities (which alone is not enough), but also takes over a major portion – in terms of their numbers and skills - of the workforce assigned by his predecessor to perform the contract.

In a decision of the European Court of Justice in the *CLECE*[4] case in 2011, it was once more confirmed that precisely for those activities in which labour is the main factor - in this case it was the cleaning industry - there will not be a TUPE if the acquirer merely continues the activity but does not take over the employees who previously carried out the work for the customer from the previous service provider. In this case the party that was re-insourcing had taken on new workers itself and consequently the European Court of Justice found that there was no transfer of a commercial entity that had retained its identity.

Capital Intensive Activities

On the other hand, if labour is not the main factor of production - as the European Court of Justice concluded in 2001[5] for bus transport, since this requires a significant deployment of tangible assets - then even taking over the majority of personnel involved was insufficient to conclude that there was a TUPE.

Mixed Activities

In 2003, in the Sodexho[6] case, the European Court of Justice gave further (more detailed) rules and argued that catering activities that required a great deal of equipment in the kitchen on site, in a particular case, in fact had a *mixed*character, because of their both labour and capital intensiveness. In that case the new service provider had also taken over the on-site kitchen equipment and continued to make use of the customer base on location, so on these grounds and some other less relevant circumstances the European Court ruled that the commercial entity in this case had retained its identity. Consequently, in principle all employees would automatically transfer to the acquirer of the activities, whilst being entitled to their existing terms and conditions.

ICT Services are Labour Intensive?

The European Court of Justice has not given any decisions on the outsourcing of ICT services, but in my view - at least in many cases - ICT services will be (more) labour intensive. This means that if after the termination of an outsourcing contract the majority of the employees of a service provider transfer to the new service provider it would easily be deduced from this that the undertaking has retained its identity.

If, however, the new service provider wishes the activities to be carried out (in large part) by its own employees, it would not be concluded as easily for ICT services that such transfer will constitute a TUPE, certainly if the new service provider also has a different procedure and organization of the work and/or the activities will be performed out of a new location. Consequently, in that case it would not easily be assumed that there is a TUPE. In case the transfer cannot be qualified as a TUPE, the employees would not automatically follow the work, let alone be able to demand a continuation of their terms and conditions.

Can ICT services be of a Mixed Nature?

In the legal literature and case law the decision of the European Court of Justice in the *Ferrotron*[7] case of 2009 is also mentioned . In this case the European Court ruled that activities may also retain their identity if 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. However, in such case it will still be necessary to prove other facts and circumstances, such as that the new service provider is taking over employees and/or significant tangible assets from its predecessor, and/or carries out the work from the same location, and/or on the basis of comparable working methods etc.

In a recent interlocutory judgment by a Dutch District Court in 20138 two ICT companies – as letting and acquiring supplier of ICT services - fought out a conflict who was the employer of one of the employees concerned. The new service provider had no work for the predecessor's employees, but this employer argued that, also due to a months-long transition phase, the employee had transferred to the new service supplier on the basis of a TUPE. The judge found that ICT services in general have a labour intensive character but that these can also be mixed (both labour and capital intensive) in nature. But in this case, the new service provider had not taken over any essential intangible or tangible assets, such as servers. Furthermore, after the transfer the activities would be carried out at two other locations. Since labour was deemed to be the main factor of the activities and the new supplier wished to deploy its own workers, this part of an undertaking had not maintained its identity after the date of transfer, according to the judge. In the absence of any TUPE the employees did not transfer and continued to be employees of the supplier who had lost the work.

Conclusion

In brief, specialized legal knowledge of European and local laws, as well as specific European and local case law is required to answer the question whether in a particular case there is a TUPE in case of outsourcing of services, or not, because certainly not all transfers can be qualified as a TUPE. Every argument counts!

In case the employees do not transfer, which will happen more often in case of 2nd and further generation outsourcing, this does not necessarily mean that those employees are not protected. A transfer may not be advantageous to the employee if for instance the new service provider does not have any work for the employee or has fewer financial resources to pay severance payment etc.

The employer that loses a contract (contrary to classic takeovers) will usually continue to have some remaining activities as a part of its undertaking, within which there may be other appropriate jobs available. That employer may also be able to acquire new work which would safeguard jobs for the employees. If not, employees will usually be able to claim reasonable compensation on termination of their employment.

It follows that the old supplier can certainly be faced with considerable costs from this. Especially now that 2nd and further outsourcing contracts may not constitute a TUPE, suppliers are therefore advised to provide for financial exit provisions in their outsourcing contracts.

Footnotes

1 ECJ, 12 November 1992, Case C-209/91.

2 ECJ in the Spijkers-case of 18 March 1986, Case 24/85.

3 ECJ, 11 March 1997, Case C-13/95.

4 ECJ, 20 January 2011, Case C-463/09.

5 ECJ, 25 January 2001, Case C-172/99.

6 ECJ, 20 November 2003, Case C-340/01.

7 ECJ, 12 February 2009, Case C-466/07.

8 Judgment of the Court of Justice of Utrecht in summary proceedings, JAR 2013/84.

Creator:
Verdict at:
Case number: