

SUMMARY

## **ECJ 13 June 2019, case C-664/17 (Ellinika Nafpigeia), transfer of undertakings, transfer**

### ***Ellinika Nafpigeia AE – v – Panagiotis Anagnostopoulos and Others, Greek case***

#### **Summary**

It is not contrary to Directive 2001/23/EC to initiate a transfer with a view to liquidation of the company, unless this must be deemed abuse. A transferee can still have the required autonomy, even if it is largely dependent on third parties, provided that safeguards are in place.

#### **Legal background**

Directive 2001/23/EC protects employees in case of a transfer of undertaking. It applies to any transfer of an undertaking, business or part of an undertaking or business to another employer. There is a transfer when 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. The relevant Greek implementation law is more or less comparable with the Directive.

#### **Facts and initial proceedings**

Ellinika Nafpigeia was a former public sector undertaking which was privatised in 2002 and made subject to a prohibition on reducing its workforce before 30 September 2008. It had four lines of business, as well as four production divisions. Shortly after its privatisation, in 2006 it created a subsidiary named ETYE for its business in the rolling stock sector. Ellinika Nafpigeia and ETYE concluded various contracts, e.g. for intercompany transactions in terms of stock, leasing property, use of administrative services and personnel and various assignments. These

contracts enabled ETYE, as an autonomous company, to operate the rolling stock directorate.

On 28 September 2007, parties concluded a framework agreement providing for ETYE's liquidation on 30 September 2008. Ellinika Nafpigeia would bear the liquidation costs equivalent to the estimated redundancy costs of ETYE's 160 staff members. Later, the liquidation was postponed and the shares in ETYE were sold to another party. In 2010, ETYE became insolvent at last.

However, in 2009 some ETYE employees had started proceedings, claiming that they were still employees of Ellinika Nafpigeia. Their claim was upheld in first instance. It seems that Ellinika Nafpigeia had asserted that the employees had transferred to ETYE as a result of a transfer of undertaking. However, the court had found that ETYE had never been an autonomous organisational entity as – put shortly – it was fully dependent on Ellinika Nafpigeia. Consequently, there had not been an entity which had transferred, so the employees were still in service of Ellinika Nafpigeia. Ultimately, the case came before the Court of Cassation, which eventually asked preliminary questions to the ECJ.

### **Question**

Must Directive 2001/23, in particular Article 1(1)(a) and (b) thereof, be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous?

### **Consideration**

A transfer must meet the applicable conditions, including those in Article 1(1)(b) of the Directive. To provide the referring court with a useful answer, first it must be established whether the Directive applies in a situation where the transferor, transferee or them jointly envisage not only pursuit of the activity of the entity but also the future liquidation of the transferee. If that is the case, it must be established whether the entity at issue (in the present case) falls within the scope of the Directive.

While the transfer must be carried out with 'the objective of pursuing an economic activity', such pursuit does not have to be forever, nor is it out of question that the parties might intend the activities to cease. It is not intended to make the applicability of the Directive dependent on the transferee to exist beyond a particular time. The protection of Articles 3 and 4 of the

Directive applies, unless the transferor is subject to bankruptcy proceedings following Article 5 of the Directive. However, that is not the case here.

As is apparent from the order of reference, the referring court doubts whether the transfer involves abuse in order to conceal the true intention of facilitating the liquidation of the entity transferred without having to assume the financial consequences. It is a general principle of EU law that its application cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (*N Luxembourg 1 and Others*, C-115/16, paragraph 96-97). Even though the provisions for benefitting from the advantages in question are met, these benefits must be refused.

The ECJ can provide guidance for the referring court, which must assess whether there has been abuse of EU law. The fact that the activity has been continued after the transfer, is not met merely because of the fact that there has been a pursuit. It must be done in a stable way (*Allen*, C-234/98, paragraph 37), which refers to a coherent grouping of different factors of production, enabling the entity to pursue an economic activity. A grouping which, from the time of transfer, gives rise to an imbalance between production inputs and outputs, and which may thus well lead to production being stifled and, gradually but inevitably, to the activity transferred ceasing to exist, not only cannot be regarded as complying with the requirement of stability but would in particular betray an abusive intent of the economic operators at issue in order to escape the adverse financial consequences connected with the future liquidation of the entity transferred which would normally have fallen on the transferor and which the transferee is not in position to assume. That could also be the case if the activity of the entity transferred were limited to the completion of certain specific contracts or programmes, without an organised grouping of assets being put in place (*Rygaard*, C-48/94). The referring court must establish this.

Regarding the economic entity transferred, it must pursue a specific objective and be sufficiently structured and autonomous. It must also retain its identity. That identity necessarily entails, amongst others, functional autonomy. This functional autonomy does not have to be total but can also be limited, as follows already from the fact that the Directive can also apply to a transfer of part of an undertaking.

In this case, production might not be capable of operation without having recourse to the factors of production of a third party. In order for a hived-off unit to retain autonomy, it must therefore have, after the transfer, sufficient safeguards ensuring its access to the factors of production of the third party at issue so as not to be dependent upon the economic choices unilaterally made by the latter. These safeguards may be, in particular, agreements or contracts between the unit transferred and the third party concerned that lay down the

specific and mandatory conditions under which access to the third party's factors of production will be ensured.

### **Ruling**

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, in particular Article 1(1)(a) and (b) thereof, must be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous, provided that — matters which are for the referring court to establish — first, the general principle of EU law requiring the transferor and transferee not to seek to obtain fraudulently or wrongfully the advantages that they might derive from Directive 2001/23 is observed and, second, the production unit concerned has sufficient safeguards ensuring it access to the factors of production of a third party so as not to be dependent upon the economic choices unilaterally made by the latter.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2019-06-13

**Case number:** C-664/17