

SUMMARY

# ECJ 27 February 2020, Case C-298/18 (Grafe and Pohle), Transfer of undertakings

## *Reiner Grafe and Jürgen Pohle - v - Südbrandenburger Nahverkehrs GmbH and OSL Bus GmbH, German case*

### Summary

In the context of a takeover of an activity which requires substantial operating resources, not transferring the substantial operating resources cannot necessarily preclude the classification as a transfer of an undertaking, since other factual circumstances make it possible to establish that the identity of the economic entity has been retained.

### Legal background

Directive 2001/23/EC aims to safeguard employees' rights in case of a transfer of undertaking. Pursuant to Article 1(1)(b), there is a transfer within the meaning of the 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.

In this regard, in case C-172/99 (*Oy Liikenne*), the ECJ held that in the case of a transfer of a non-maritime public transport service – such as the operation of scheduled local bus routes following a procedure for the award of a public service contract – Directive 77/187 (the predecessor of Directive 2001/23/EC) does not apply where there is no transfer of significant tangible assets between those two undertakings.

### Facts

SBN had operated a public bus service since 1 August 2008. In September 2016, the district Oberspreewald-Lausitz carried out a new tendering procedure for the service. SBN did not

submit a tender and in fact closed down. Kraftverkehrs-gesellschaft Dreiländereck mbH won the contract from 1 August 2017. It set up a subsidiary, OSL, which recruited the majority of SBN's drivers and management staff. However, it did not take over buses, depots and other operating facilities or workshops.

Mr Grafe was a bus driver who had been transferred. However, his previous periods of employment were not taken into account, so that he was classified at the entry level of the collective wage agreement. He claimed that he should have been classified at his old level, as there had been a transfer of undertaking. Another bus driver, Mr Pohle, was not even recruited. He challenged his dismissal by SBN. SBN took the position that there had been a transfer of undertaking. So, in both cases, the question was whether there had been a transfer.

OLS referred to the *Oy Liikenne* judgment and argued that it had not taken over any buses, so that there could not have been a transfer. However, SBN argued that new buses were necessary anyway as new technical and environmental standards were in force. According to SBN, the drivers constituted a 'scarce resource' in rural areas. Their know-how and knowledge of the network ensured the continuity of public transport. They were therefore vital to the economic entity.

In this context, the referring court asked preliminary questions (which the ECJ rephrased into one question).

### **Question**

Must Article 1(1) of Directive 2001/23 be interpreted as meaning that, in the context of a takeover, by an economic entity, of an activity under a procedure for the award of a public contract, the fact that that entity has not taken over the operating resources owned by the economic entity which was previously engaged in that activity precludes the classification of that transaction as a transfer of an undertaking?

### **Consideration**

The term entity refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. The decisive criterion for a transfer is that the entity retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed. To that end, all facts characterising the transaction must be considered. The degree of importance to be attached to each criterion will necessarily vary with the activity and the production or operating methods employed (*Ferreira da Silva e Brito and Others*, C-160/14, paras. 25-27 and the case law cited).

The specific question of the court is whether the approach adopted in case C-172/99 (*Oy Liikenne*), which concerned a contract for the provision of a bus transport service covering seven regional routes for three years, is applicable in the present case. In that case, the Court held that bus transport cannot be regarded as an activity based essentially on manpower. As the tangible assets contributed significantly to the activity and as they were not transferred, the entity did not retain its identity.

However, it cannot be inferred that the takeover of the buses must be regarded in the abstract as the sole determining factor of whether an undertaking was transferred or not. The referring court must take account of the particular circumstances of the case. In this case, it is apparent that in order to comply with the new technical and environmental standards required it would not have made sense to take over the existing bus fleet as they could not be operated. In other words, the decision not to take over the resources was dictated by external constraints, which appears not to have been the situation in the *Oy Liikenne* case.

It is also clear that the original contractor would have had to replace its bus fleet, if it had submitted a tender for a new contract. In that context, the fact that there is no transfer of operating resources, insofar as it results from legal, environmental or technical constraints, does not therefore necessarily preclude the taking over of the activity concerned from being classified as a 'transfer of an undertaking'. The referring court must therefore determine whether other factual circumstances support the conclusion that the identity of the entity has been retained and that there has been a transfer of an undertaking.

In this respect, the order for reference suggests that the bus transport service is essentially similar to that provided by the previous undertaking. It was not interrupted and has probably been operated for many of the same routes for many of the same passengers. The presence of experienced bus drivers in a rural area is crucial for the purpose of ensuring the quality of the public transport service concerned. Since a group of workers may constitute an economic entity, this can maintain its identity if the activity is continued but also where a major part, in terms of numbers and skills, of the employees is taken over. To the extent that not taking over the operating resources does not necessarily preclude the entity from retaining its identity, the taking-over of the majority of the drivers must be regarded as a factual circumstance to be taken into account.

## **Ruling**

Article 1(1) of 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 must be

interpreted as meaning that, in the context of the takeover by an economic entity of an activity the pursuit of which requires substantial operating resources, under a procedure for the award of a public contract, the fact that that entity does not take over those resources, which are the property of the economic entity previously engaged in that activity, on account of legal, environmental and technical constraints imposed by the contracting authority, cannot necessarily preclude the classification of that takeover of activity as a transfer of an undertaking, since other factual circumstances, such as the taking|over of the majority of the employees and the pursuit, without interruption, of that activity, make it possible to establish that the identity of the economic entity concerned has been retained, this being a matter for the referring court to assess.

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

**Verdict at:** 2020-02-27

**Case number:** C-298/18