SUMMARY

2020/24 Transfer of actual control decisive for a transfer of undertaking, despite limited transfer of assets (NL)

Within the context of a transfer of undertaking in an asset reliant group of companies, the court should not just focus on whether the assets have been transferred between the two separate group companies, but also on whether one group company had actual control over the operation of the other group company.

Facts

As of the end of 2008 the airline KLM became sole shareholder of another airline, Martinair. The two companies were at that time involved in both passenger and freight transport. Slowly but gradually the activities of Martinair were integrated within KLM's own operation.

In 2009 this integration started with freight activities. Martinair's ground staff was transferred to KLM. Commercial integration took place, joining the commercial networks of both companies. Meanwhile the companies introduced the strategy that cargo was primarily shipped in the cargo hold of passenger planes. Only when that could not happen were cargo planes used.

Martinair's passenger division ceased its operation on 1 November 2011. The passenger planes were disposed of. The cabin crew of Martinair's passenger division entered into the service of KLM in a starter's position, without their seniority being respected. Martinair did, however, supplement their wages to their old levels.

Martinair, KLM and the trade unions entered into a collective agreement in September 2011 allowing Martinair's pilots to enter into the service of KLM. They would lose most of their seniority. The contracting parties declared that the transfer of the pilots would not constitute a

transfer of undertaking. If, however, these pilots should claim a transfer of undertaking, the collective agreement could be terminated by notice. A large number of Martinair pilots were subsequently placed in starter positions at KLM. In 2013 a group representing the interests of these pilots did claim a transfer of undertaking. In response, the collective agreement was terminated by notice.

As of 1 January 2013, Martinair's board was composed solely of KLM executives. After the companies' commercial integration, their operational integration followed, by transferring operational departments, including 65 employees, of Martinair to KLM. After completion of this integration, Martinair became a so-called 'Operating Carrier'. This meant that Martinair no longer carried its own cargo but could be engaged by other airlines in order to carry their cargo instead. Martinair used its own planes and crew for these purposes. At this time Martinair only provided flight-related activities. All other activities had been placed with KLM. As of January 2014, Martinair only employed approximately 220 full-time equivalent cargo pilots. It had four cargo aircraft for full freight services. At that time KLM had disposed of all its original cargo planes. KLM instead annually bought a guaranteed number of flying hours from Martinair, at predetermined rates. Contracts of Martinair with other parties to carry freight were terminated in 2014. At the time of the legal proceedings, Martinair employed around 100 pilots and had four cargo aircraft. A reorganization of Martinair was announced resulting in the dismissal of a number of pilots.

The Martinair pilots countered that they in fact were already employed by KLM due to a transfer of undertaking. This claim was rejected in litigation in the first two instances. According to the Court of Appeal, in a situation such as this, which concerns the aviation sector, the transfer of assets must be regarded as essential in order to trigger a transfer of undertaking. In this case, no important assets, such as planes, had been transferred from Martinair to KLM. Martinair furthermore had remained an independent entity in the aviation market. KLM was Martinair's most important client.

The pilots brought an appeal to the Dutch Supreme Court against this ruling. They argued that it is not decisive that KLM did not purchase Martinair's aircraft, as KLM had even without buying these assets decisive influence in the operation of Martinair. Over time, KLM basically took over the operation of Martinair and made it an operation of its own, which, according to the pilots, resulted in a transfer of undertaking. Although Martinair formally was an independent entity, KLM in fact ran its business. According to the employees, the Court of Appeal should have taken this (group) context in which the transactions took place into account.

Judgment

The Supreme Court held that, indeed, the Court of Appeal did not sufficiently respond to the pilots' argument that KLM had already taken control over Martinair's aircraft and that it actually operated those aircraft as part of KLM's business. According to the Supreme Court, that argument may be relevant to answer the question whether the operation of the company is in fact continued or resumed by KLM with the same or similar operating assets and thereby whether there has been a transfer of the company. It is also relevant that, although Martinair continued to exist as an independent entity and customers directly contracted with it, it in fact was completely dependent on KLM. This too can be a relevant circumstance when answering the question whether a transfer of undertaking had taken place. The Supreme Court annulled the decision of the Amsterdam Court of Appeal and referred the case back to The Hague Court of Appeal.

Commentary

In its decision of 2 December 1999, the Court of Justice had already ruled that a transfer of undertaking can take place within one and the same group of companies: the rules governing the transfer of undertaking apply in full to intra-group transfers (C-234/98, *Allen and Others – v – Amalgamated Construction*). As we could see in 2015, this rule also applies to the aviation sector, in which asset reliant sector, according to the Court, "*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'*" (ECJ 9 September 2015, C-160/14, *Brito and Others – v – Estado Português*).

The dynamics of a transfer of undertaking can be quite different within a group of companies when compared to transactions between independent companies. A controlling group company can easily decide where production will take place, for how long, who will be the contracting entity etc. This may result in (ab)use of the EU principle of transfer of undertaking, triggering a transfer of undertaking or preventing it from occurring within the group as part of a grand reorganization plan. A good example of the fine line between use and abuse of transfer of undertaking can be witnessed in the fairly recent case of the Court of Justice of 13 June 2019, C-664/17, *Ellinika Nafpigeia AE – v – Panagiotis Anagnostopoulos and Others*). In that case the Court drew attention to the general principle of EU law that the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law.

In the underlying case KLM argued that no transfer of undertaking had occurred because – briefly put – it did not take over any of the airplanes from the asset reliant airline Martinair. In the meantime, KLM increasingly called the shots within Martinair. The Supreme Court found that such an important element that the mere fact that no planes were transferred was

insufficient to conclude that no transfer of undertaking could have occurred. Although the Court of Justice considered the transfer of tangible assets key in the *Brito* case, *not* transferring these assets was not decisive in this case according to the Dutch Supreme Court. This approach of the Supreme Court seems in line with the recent decision C-298/18 of the Court of Justice of 27 February 2020, *Grafe and Pohle – v – Südbrandenburger Nahverkehrs GmbH*. In that matter the Court of Justice also held that *not* taking over buses in an asset reliant sector such as public bus transportation did not, in a situation in which it would not have been sensible from an economic point of view for a new operator to take over an existing bus fleet, exclude the possibility that a transfer of undertaking had occurred. The facts and context of each case remain crucial. This is according to the Dutch Supreme Court in any event the case within intra-group transactions.

Comments from other jurisdictions

Germany (Lucas Dahlmeier, Luther Rechtsanwaltsgesellschaft mbH): The judgment is basically in line with the German jurisdiction. A transfer of an undertaking could also be held to have occurred according to German legislation. According to German case law, whether a transfer of business exists does not only depend on the transfer of the target assets. Rather, it is also important whether immaterial assets are transferred and the organization of work is taken over. Furthermore, it is also important whether the activity is continued immediately or is interrupted for a certain period of time and whether a substantial part of the workforce is taken over. All these factors are relevant for the assessment of whether a transfer of an undertaking has taken place or not.

Given this background, it is not surprising that the Higher Labour Court of Düsseldorf (*Landesarbeitsgericht*, "LAG") decided on 15 March 2019 (6 Sa 587/18) in a similar context that a transfer of an undertaking by an airline could even occur if no airplanes are taken over by the new owner. It would be true that flight operations require a considerable use of tangible assets in the form of airplanes and that it is not a sector where human labour is the most important factor. However, a great number of specially trained pilots would have to be employed as well, which is why their takeover is of increased importance. Finally, the question whether there is a transfer of an undertaking would also depend on the acquisition of licenses and authorizations for take-off and landing rights, because airplanes alone are not sufficient for the business operations of an airline.

Subject: Transfer of Undertaking, Transfer

Parties: [116 employees] – v – KLM and VNV

Court:*Hoge Raad der Nederlanden* (Supreme Court of the Netherlands)

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