

SUMMARY

2020/23 |he Supreme Court reiterates the importance of retention of an organizational and functional link between the business factors transferred, a prerequisite in the existence of a transfer of undertaking (GR)

The Greek Supreme Court, in a case about the transfer of a business and the obligation on the transferee to continue employing the transferred employees, underlined the importance of a thorough and genuine control on all factors to be taken into consideration in order to conclude on the existence of a transfer of undertaking or not: the business transferred must retain an autonomous economic identity, in the sense that the functional link between the different factors transferred is retained, thus allowing the new entity to use them in order to exercise an economic activity identical or similar to the previous one.

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Facts

In this rather interesting case, some background information is needed for the readers to be able to comprehend the context of the Court's legal reasoning.

The defendants (Company A and Company B) belong to a Group of approximately 100 companies in Greece, with a total of around 2,000 employees, specializing in beauty treatments through beauty centres (each beauty centre is a separate legal entity).

The plaintiff had been hired in 2004 as a sales person/beautician by Company A. She worked until 2011 when she went on maternity leave. In 2012, Company B had taken over Company A, continuing to provide the same services, at the same address and with the same personnel. Company B's management, refusing to admit that a transfer had indeed taken place, threatened part of the personnel into either accepting to resign from Company A and to be then rehired by Company B – thus losing their past service rights or – in case they did not accept resignation – to have their contracts terminated.

When the plaintiff had returned to work from her maternity leave in January 2013, at the same address where she had been working, she found out at the premises that Company B was in full operation. She was offered by the management of Company B the same options described above that had been offered to the rest of the employees. She considered such options unacceptable – as constituting a unilateral detrimental amendment of her employment terms and conditions – and refused to resign. Her contract was subsequently terminated.

Company B, realizing later that the company's assets could be at risk due to the ex-employees' claims on abusive terminations, proceeded to a close-down of its operation in September 2013. In January 2014 a new company had been established (Company C) by almost the same shareholders as the ones of Company A and B and started operating by hiring 40 employees, out of which 25 were employees of Company B, with the same clientele, using certain of Company B's assets and purchasing the rest of the equipment from other subsidiaries of the Group.

Proceedings

In 2013, the plaintiff filed a lawsuit for abusive termination against Company B – in its capacity as successor of Company A and a second lawsuit against Company C, in its capacity as successor of Company B. The First Instance Court heard jointly the lawsuits and issued one decision, ruling on the invalidity of her termination – primarily on the fact that her termination was prohibited since she was under the protection period against termination due to maternity – and accepted that a transfer had indeed taken place between Companies B and C. The defendant appealed and such decision was confirmed by the Court of Appeal. It then reached the Supreme Court on various grounds of appeal, in particular that the Court of Appeal had provided insufficient reasoning and a wrongful evaluation of the evidence.

Judgment

The Supreme Court stated that the aim of the national law implementing Directive 2001/23/EC is to safeguard the employees' rights in the event of transfers of undertakings, therefore the Directive's purpose is the protection of the employees. It underlined that in order to have a transfer of undertaking the transferred elements must have a certain organic unity (economic entity) retained under the new legal entity, so that these are capable of realizing the purposes of the previous entity. The assessment on the retention or not of the identity of an economic unit depends on the total evaluation of the circumstances of the specific case. Substantial factors are the transfer of tangible or non-tangible assets, the employment of the personnel of the transferred business, the transfer of the clientele, the identity of the activities exercised, and the eventual interruption of such operations. Based on the ECJ case law (*C-466/07, Klarenberg*) the Court stated that the above elements cannot exclude the taking into consideration of other elements, such as the retention of the same organizational structure, the vicinity of the new premises to the old premises, and the exercise of the same or identical activity. Such elements do not constitute critical elements, but they do constitute additional indications of the retention of the identity of the transferred business.

The Supreme Court confirmed the Court of Appeal's decision on the use of such facts as 'additional simple indications' of the retention or not of the identity in the context of an overall evaluation of the occurrence or not of a transfer of undertaking case. However it held as acceptable grounds of appeal the defendant's allegations that the Court of Appeal did not provide sufficient reasoning on the transfer namely: on an examination of the exact qualifications and positions of the 25 employees hired by the defendant (in order to be able to confirm that these were indeed the 'core' of the personnel); on the reasons why the totality of the assets/equipment were not transferred from Company B to Company C but only a part; on the exact time period that elapsed between the closing-down of Company B and the

starting of Company C; and finally on the way the transfer of clientele took place (the way of notification to clients, electronic transfer of clients files or not, etc).

So while accepting in substance that there was a transfer of undertaking, it quashed the Court of Appeal decision since it considered that certain issues required clarification and sent the case back for rehearing before the Court of Appeal under a different composition.

Commentary

The interest of this case lies in the fact that the Supreme Court underlines extensively the importance of effecting a substantial control when ruling on the existence or not of a transfer of undertaking. It is not sufficient to simply proceed to an identification of the several factors and/or indications, to draw in other words a catalogue of those factors, but the Court must seek to establish that indeed the functional link of interdependence between the business factors transferred exists so that the business transferred forms an independent autonomous economic entity. It is essential that the transferred assets must constitute an organized grouping of resources retaining its functional and organizational link in order to pursue an identical or analogous activity. The Supreme Court for instance does not consider that the number of the employees hired by the new business entity is sufficient, but their positions, experience, duties and knowledge are required in order to assess if they were indeed the 'core' of the transferred personnel. It further defined that additional indications should be taken into consideration in the overall assessment of the existence of a transfer or not, but these indications should be absolutely linked to evaluating whether the transferred business retains its identity or not.

Comments from other jurisdictions

Austria (Andreas Tinhofer, zeiler.partners): The outcome of this case must have been quite frustrating for the plaintiff (and her lawyer). It is true that the ECJ requires the national courts to consider all the relevant facts characterising the transaction concerned and that all those circumstances are said to be merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation. However, the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed in the undertaking, business or part of a business (see ECJ 27 February 2020, C|298/18 (*Grafe and Pohle*) para. 24 et seq. and the case law cited). According to the facts at hand Company B took over Company A in 2012, continuing to provide the same services, at the same address and with the same personnel. There is no indication that the entity concerned had not retained its identity and

therefore it was correctly qualified by the lower courts as a business transfer. Apparently, the situation was less clear when Company C reopened the beauty centre four months after it had been closed by Company B. However, as the new employer took over the majority of the employees and continued to provide the same services to the same clientele, using certain of Company B's assets, in Austria the plaintiff would have satisfied the test for the transfer of an 'entity retaining its identity'. I guess that the Austrian Supreme Court would have also taken into account the fact that the employers (Company B and C) tried to avoid by any means that the legislation implementing Directive 2001/23/EC would apply.

In such a situation the employers can only be successful before the court if they submit and prove other essential facts pointing against a business transfer. In Austria, the establishment of the “*exact qualifications and positions of the 25 employees hired*” would not lead to a different outcome. According to the predominant view here the skills and positions of the transferred employees ('key employees') are only relevant if only a minority of the whole workforce employed in the relevant entity is transferred.

Even if in certain situations the reasons for the (non-)transfer of assets/equipment can be a relevant factor in the overall assessment (see ECJ 27 February 2020, C|298/18 (*Grafe and Pohle*) para. 32 *et seq.*) it seems unlikely that this applies to the case at hand. According to the facts Company B was closed down in order to avoid any ex-employees' claims and almost the same shareholders founded Company C who continued to operate the beauty centre four months later. Such a circumvention of the law should not be facilitated by placing too much importance on single factors such as the lack of transfer of certain assets.

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the employees' rights in the event of a transfer of undertaking according to Directive 2001/23/EC are regulated in Sec. 613a Civil Code (Bürgerliches Gesetzbuch, “BGB”). As in Greece, the ECJ's decisions have greatly influenced the labour courts' case law on the question whether a transfer has taken place.

The Federal Labour Court (Bundesarbeitsgericht, “BAG”) follows the ECJ's “7-point catalogue” (1. nature of the Business, 2. transfer of tangible assets, 3. value of intangible assets, 4. takeover of employees, 5. takeover of clientele, 6. similarity of business activity before and after the takeover, 7. duration of business interruption). The BAG also states, that these circumstances are only partial aspects of the over-all assessment to be made. None of them may be considered in isolation. As in the Greek case, a closer clarification of facts by the court – based on the parties' procedural pleadings – is needed. That is why it is very likely that a German Court would have required clarification too.

With regard to the “takeover of employees” several decisions by the BAG exist. The decision if the takeover of employees results in an identity-retaining transfer crucially depends on the employees’ level of qualification. In case of low-level-qualification, a very high percentage of the employees have to be transferred. Accordingly, the takeover of 61% in case of cleaning activities is not enough (BAG, 24 May 2005, 8 AZR 333/04). The same applies for 75% in case of pickup and delivery services (BAG, 10 December 1998, 8 AZR 676/97). However, in case of high-level qualification, skills or contacts – in this case IT services for specialized software – as much as 57% may be regarded as identity-retaining transfer (BAG, 21 June 2012, 8 AZR 181/11).

Subject: Transfers of Undertakings, Transfer

Parties: Unknown [company operating the brand VIVIFY – v – ex employee E.M.]

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