

SUMMARY

ECJ 9 September 2020, Joined Cases C-674/18 and C-675/18 (TMD Friction), Transfer of Undertakings, Employment Terms, Insolvency

EM - v - TMD Friction GmbH (C-674/18) and FL - v - TMD Friction EsCo GmbH (C-675/18), German cases

Summary

Member States can decide that rules on transfer of undertaking do not apply to supplementary occupational pension scheme accruals pre-transfer, if the transfer has been carried out by an insolvency administrator after the opening of insolvency proceedings.

Questions

Must Directive 2001/23, having regard to, in particular, Article 3(1) and (4) and Article 5(2)(a) of that directive, be interpreted as precluding, in the event of a transfer of an undertaking subject to insolvency proceedings that is carried out by the insolvency administrator of that undertaking, national legislation, as interpreted by national case-law, which provides that, on the occurrence, after the institution of insolvency proceedings, of the event conferring eligibility for a retirement pension under a supplementary occupational pension scheme, the transferee is not liable for an employee's rights conferring prospective entitlement to that retirement pension where those rights have accrued with respect to periods of employment that pre-dated the opening of the insolvency proceedings?

Must Article 3(4)(b) of Directive 2001/23, read together with Article 8 of Directive 2008/94, be interpreted as precluding national legislation, as interpreted by national case-law, which provides that, on the occurrence of an event conferring eligibility for old-age benefits under a supplementary occupational pension scheme subsequent to the opening of the insolvency

proceedings in the course of which the transfer of the undertaking has been made, as regards the portion of those benefits for which the transferee is not liable: (i) the insolvency guarantee body established in accordance with national law is not required to intervene where the rights conferring prospective entitlement to old-age benefits were not already definitive at the time when those insolvency proceedings were instituted and (ii), for the purposes of determining the amount relating to the portion of those benefits for which liability falls on that body, the calculation of that amount is to be based on the gross monthly pay earned by the employee concerned at the time when those insolvency proceedings were opened?

Does Article 8 of Directive 2008/94, in that it prescribes a minimum protection of employees' rights conferring immediate or prospective entitlement to old-age benefits, have direct effect on which a party concerned may rely against a guarantee body governed by private law that is responsible for collecting from employers obligatory contributions and that may have recourse, for that purpose, to enforcement action, while subject to supervision by a public authority of the Member State concerned?

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 transfer of undertakings, businesses or parts of undertakings or businesses, having regard in particular to Article 3(1) and (4) and Article 5(2)(a) of that directive, must be interpreted as not precluding, in the event of a transfer of an undertaking subject to insolvency proceedings that is carried out by the insolvency administrator of that undertaking, national legislation, as interpreted by national case-law, which provides that, on the occurrence, after the opening of insolvency proceedings, of an event that confers eligibility for a retirement pension under a supplementary occupational pension scheme, the transferee is not liable for an employee's rights conferring prospective entitlement to that retirement pension where those rights have accrued with respect to periods of employment that preceded the opening of the insolvency proceedings, provided that, with respect to the portion of the amount for which the transferee is not liable, the measures adopted to protect the interests of the employees are at a level that is at least equivalent to the level of protection required under Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

Article 3(4)(b) of Directive 2001/23, read together with Article 8 of Directive 2008/94, must be interpreted as precluding national legislation, as interpreted by national case-law, which provides that, on the occurrence of an event that confers eligibility to old-age benefits under a supplementary occupational pension scheme after the opening of insolvency proceedings in

the course of which a transfer of an undertaking has been made, with respect to the portion of those benefits for which the transferee is not liable: (i) the insolvency guarantee body established under national law is not required to intervene where the rights conferring prospective entitlement to old|age benefits had not already become definitive at the time when those insolvency proceedings were opened and (ii), for the purposes of determining the amount relating to the portion of those benefits liability for which falls on that body, the calculation of that amount is to be based on the gross monthly pay earned by the employee concerned at the time when those insolvency proceedings were opened, if the consequence of that legislation is that the employees are deprived of the minimum protection guaranteed by Article 8, which it is for the referring court to determine.

Article 8 of Directive 2008/94, in that it prescribes a minimum protection of employees' rights conferring immediate or prospective entitlement to old|age benefits, is capable of having direct effect, and consequently that provision can be relied upon in proceedings against a body governed by private law, designated by the Member State concerned as the body that guarantees occupational pensions against the risk of insolvency of employers, provided that (i) in the light of the task of guarantor with which that body has been charged and the circumstances in which it performs that task, that body can be treated as equivalent to the State and (ii) that task does actually cover the types of old|age benefits for which the minimum protection prescribed in Article 8 is sought, which it is for the referring court to determine.

Creator: European Court of Justice (ECJ)

Verdict at: 2020-09-09

Case number: C-674/18 and C-674/18