

Note on European legislation on the protection of employees' rights in the event of transfer of undertakings

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The issue

EACA members have voiced fears about a lack of precision in the rules regarding transfers of undertakings that could lead to situations where, under certain conditions, an agency involved in a pitch could be forced to “take over” employment of the losing agency’s team.

European Law

The European Commission has issued legislation which aims primarily to protect employees' rights during takeovers, mergers and transfers of undertakings or businesses since 1977, when the Transfer of Undertakings directive 77/187/EEC was adopted.

The Transfer of Undertakings directive was modified in 1995 and finally in 2001 by directive 2001/23/EC¹. The directive establishes minimum rules on employees' rights and covers all transfers of undertakings, businesses or parts of undertakings or businesses which are situated within the European Union and the European Economic Area (Norway, Iceland, Liechtenstein). Member States are allowed to introduce national rules and regulations to increase these rights.

As the text of directive lacks precision, the European Court of Justice has often been asked to give preliminary rulings to guide national courts in cases relating to transfers of undertakings or businesses and employment obligations. This body of case law has helped in giving further precision to the definitions of the directive.

Definitions

The definition of a transfer of undertaking is given in Article 1(b) stating that it is “the transfer of an economic activity 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 directive defines an employee in Article 2(d) as “any person who, in the Member State concerned, is protected as an employee under national employment law”.

The European Court of Justice has found in the *Allen Case*² that a relevant transfer is “a change in the natural or legal person responsible for carrying out the business, who by virtue of this acquires the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership is transferred”.

¹ http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_082/l_08220010322en00160020.pdf

² CaseC-234/98, *Allen v. Amalgamated Construction* [2000] IRL 119

In its 2004 Working Document³ the Commission however lays down two conditions for a transfer to be considered as such: there must be a change of employer and the transferred entity must maintain its identity.

Change of Employer

The notion of change of employers is based on “*a change in contractual relations, in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the entity*”.⁴

The Commission in its Working Document explains that the means through which the change of employer takes place is not relevant.

Maintenance of Identity

The maintenance of identity is marked by “*the continuation of the new employer of the same activities and by the continuity of its workforce, its management staff, the way in which its work is organised, its operating methods or the operational resources available to it*”⁵.

It is left to national courts to assess whether or not there is a transfer. This assessment is based on several factors, such as:

- Type of undertaking or business,
- Whether or not tangible assets such as buildings and movable property are transferred,
- The value of intangible assets at the time of the transfer,
- Whether or not the majority of employees are taken over by the new employer,
- Whether or not customers are transferred,
- The degree of similarity between the activities carried on before and after the transfer,
- The period, if any, for which these activities were suspended.

The type of activity carried out by the undertaking is an essential factor since it might determine the degree of importance given to the others.

“In the case of service providers whose activities are based essentially on manpower, the taking over by the new employer of a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to the provision of the services in point can result in the maintenance of identity of the entity”⁶.

³ http://ec.europa.eu/employment_social/labour_law/docs/transfer_memorandum_2004_en.pdf

⁴ Case 287/86 *Ny Molle Kro*, Case C-324/86 *Daddy's Dance Hall* and Case C-234/98 *Allen*.

⁵ Case C-13/95 *Süzen*

⁶ Joint cases C-173/96 and C-247/96 *Sanchez Hidalgo*.

The nature of the transaction is at the origin of the transfer

The Commission says that a transfer can result from a unilateral act, a judicial decision or a law. Similarly, it is not necessary for a transfer to be the result of a direct contractual relationship between transferee and transferor.

The Court has found that the directive applies to transfer of undertakings which take place in specific transactions such as:

- A situation in which one entrepreneur, by a contract, assigns to another entrepreneur responsibility for running a facility for staff, which was formerly managed directly⁷,
- A situation in which a company belonging to a group decides to subcontract to another company in the same group contracts insofar as the transaction involves the transfer of an economic entity between the two companies⁸.

Conclusion

In every Member State, the provisions of this directive must be read in conjunction with the relevant national rules to define whether the transfer of an activity is or is not covered by the directive.

At European level, the Commission is currently drafting a Report on the effect of the provisions of the Transfer of Undertakings directive. The report should be ready by 17 July 2006 and will be addressed to the Council of Ministers.

EACA consulted the Commission and asked whether there was an intention to redraft the directive to make it more “user-friendly” and increase the precision of the definitions. The Commission replied that that was not its intention, but said it might suggest some rules regarding cross-border transfers.

This means that EACA members might seize the opportunity of the publication of this report to alert their national legislators to the difficulties they encounter due to lack of precision of the different rules and if these difficulties concern cross-border transfers, transmit these to EACA which will send them to the relevant service in the Commission.

⁷ Case C-209/91 *Watson Rask*.

⁸ Case C-234/98 *Allen*.