Key Issues: **Transfer of Undertaking**

Case: **Joao Filipe Ferreira da Silva and Others v Estado Portugues**

Reference: **Case C-160/14, CJEU (Second Chamber), 9 September 2015**

Legislation: **Council Directive 2001/23/EC**

On 19 February 1993, Air Atlantis SA ('AIA'), a company established in 1985 and operating non-scheduled (charter) flights in the air transport sector, was wound up. In the course of the winding up, the applicants in the main proceedings were dismissed as part of a collective redundancy. From 1 May 1993, TAP, the company which was the main shareholder in AIA, began to operate at least some of the flights which AIA had contracted to provide for the period from 1 May 1993 to 31 October 1993. TAP also operated a number of charter flights, a market in which it had not hitherto been active, since the routes concerned were routes previously served by AIA. For that purpose, TAP used some of the assets which AIA had used for its activities, in particular four aeroplanes. TAP also assumed responsibility for the payment of charges under the leasing contracts relating to those aircraft and took over the office equipment which belonged to AIA and which the latter had used at its premises in Lisbon and Faro (Portugal), as well as other moveable property. In addition, TAP took on a number of former AIA employees.

The applicants in the main proceedings subsequently brought an action against the collective redundancy before the Tribunal do Trabalho de Lisboa, by which they sought reinstatement within TAP and payment of their remuneration. By judgment of the Tribunal, the action brought against the collective redundancy was upheld in part, in so far as that court ordered that the applicants in the main proceedings be reinstated in the corresponding grades and that they be paid compensation. The Tribunal found that, in the case before it, there was a transfer of a business, at least in part, inasmuch as the identity of the business had been retained and its activities had been continued, TAP having replaced the former employer in the contracts of employment.

An appeal was lodged against that judgment before the Tribunal da Relação de Lisboa, which set aside the judgment given at first instance in so far as it had ordered TAP to reinstate the applicants in the main proceedings and to pay compensation, taking the view that the action against the collective redundancy in question was time-barred.

The applicants in the main proceedings then brought an appeal in cassation before the Supremo Tribunal de Justiça, which held that the collective redundancy was not unlawful. The court held that the fact that a commercial activity is "merely continued" is not a sufficient ground for concluding that there has been a transfer of a business, since the business must also retain its identity. In the present case, when TAP operated the flights in question over

the course of the summer of 1993, it did not use an “entity” with the same identity as the “entity” previously belonging to AIA. In the view of the Supremo Tribunal de Justiça, a transfer of a business could not be said to have occurred since the two ‘entities’ were not identical. The Supremo Tribunal de Justiça also considered that there had not been a transfer of customers from AIA to TAP. Moreover, in that court’s view, the business owned by AIA was one linked to a specific asset, namely a licence, which was not transferable, so that the transfer of the business was impossible, since only individual assets could be disposed of, not the business itself.

As regards the application of EU law, the Supremo Tribunal de Justiça stated that the Court of Justice (CJEU) has held, when faced with situations in which an undertaking was carrying on activities hitherto carried on by another undertaking, that that “mere fact” does not justify the conclusion that there has been a transfer of an economic entity, since ”an entity cannot be reduced to the activity entrusted to it”.

The Supremo Tribunal de Justiça refused to make an application for a preliminary ruling to the CJEU in accordance with Article 267 TFEU.

The applicants in the main proceedings then brought an action for a declaration of non-contractual civil liability against the Portuguese State, claiming that the latter should be ordered to pay damages for certain material loss they had sustained. In support of their action, they submitted that the judgment of the Supremo Tribunal de Justiça is manifestly unlawful since it interprets the concept of a “transfer of a business” within the meaning of Directive 2001/23 incorrectly and since the Supremo Tribunal de Justiça failed to comply with its obligation to refer the appropriate questions concerning the interpretation of EU law to the CJEU.

The referring court, Varas Cíveis de Lisboa, explains that it is necessary to ascertain whether the judgment given by the Supremo Tribunal de Justiça is manifestly unlawful and whether it interpreted the concept of a “transfer of a business” incorrectly, in the light of Directive 2001/23 and in view of the facts before it. In addition, it must be determined whether the Supremo Tribunal de Justiça was under a duty to make the reference for a preliminary ruling requested. In those circumstances the Varas Cíveis de Lisboa (Court of First Instance, Lisbon) decided to stay the proceedings and to refer a number of questions to the CJEU for a preliminary ruling.

Consideration by CJEU

The fact that the entity whose assets and a part of whose staff were taken over was integrated into TAP’s structure, without that entity retaining an autonomous organisational structure, is irrelevant for the purposes of applying Article 1(1) of Directive 2001/23, since a link was preserved between, on the one hand, the assets and staff transferred to TAP and, on the other, the pursuit of activities previously carried on by the company that had been wound up. Against that background, it is immaterial that the assets concerned were used for operating scheduled flights as well as charter flights, given that the flights in issue are, in any event, air transport operations and that TAP, it should be recalled, honoured AIA’s contractual obligations with regard to those charter flights.

The question as to how the concept of a “transfer of a business” should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union. It follows that a national court or tribunal, against whose decisions there is no judicial remedy under national law, must comply with its obligation to make a reference to the CJEU, in order to avert the risk of an incorrect interpretation of EU law.

The CJEU held that:

1. **Article 1(1) of Council Directive 2001/23/EC must be interpreted as meaning that the concept of a “transfer of a business” encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.**

2. **In circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a “transfer of a business” and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the CJEU for a preliminary ruling concerning the interpretation of that concept.**

3. **EU law and, in particular, the principles laid down by the CJEU with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.**

Why is this decision important?

It is not unusual for a parent company to wind-up (or allow to be wound-up) a failing subsidiary and subsequently carry out activities which had previously been performed by it. There is a risk that the employees of the subsidiary may be entitled to claim that they should be employed by the parent business in accordance with the Transfer of Undertakings Directive (2001/23/EC)..

CLfE (13/2015)

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