When does the employee follow the work – and particularly when not

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by Anita A. de Jong[1]

Legislation regarding a "Transfer of an Undertaking, or a Part of an Enterprise", which was intended for classic takeovers of assets, can also be applicable on outsourcing transactions. The basic purpose of the legislation is to protect employees if the sponsor of the business in which they are employed, changes. Therefore, if a specific case of outsourcing constitutes a Transfer of Undertaking, all employees involved in the outsourced activities automatically transfer to the acquirer, whilst in principle being entitled to their existing terms and conditions.

A party that outsources activities for the first time usually no longer needs the employees involved. Therefore, the Request for Proposals often already explicitly requires the service provider to take over most of the employees involved.

However, in case of second and further generation outsourcing (e.g. where services transfer from the first service provider to a new service provider) the principle usually no longer requires that the new service provider takes over the employees from its predecessor. The reason being that, by changing the service provider, the client often intends to obtain an improvement in quality and/or a reduction of costs by a smarter use of fewer, or at least less expensive, employees. These objectives could be put at risk if the new service provider was obliged to take over all of its predecessor's employees. Therefore, the question whether or not succeeding generations of outsourcing will constitute a Transfer of Undertaking can cause difficult discussions. When does the employee follow the work - and particularly when not?

When is there a Transfer of Undertaking?

According to the European Court of Justice, the question of whether there is a Transfer of Undertaking must be answered based on the criterion of whether the undertaking has retained its *identity* after a change of entrepreneur. Retention of identity is shown by making an overall assessment whereby a number of factors play a role, such as the type of the undertaking, whether tangible and/or intangible assets are transferred, whether a (substantial) part of the employees are transferred, whether or not customers are transferred, and the degree of similarity between the activities carried out before and after the transfer.[2]

In 1992, the European Court of Justice ruled that the legislation can also be applicable to outsourcing.[3] Based on case law of the European Court of Justice, no direct contractual relationship between the old and the new service provider is required.[4] There may already be a Transfer of Undertaking when two (almost)[5] successive contracts are concluded by the transferor and the transferee with a same principal.[6]

However, gradually the differences between classic takeovers and outsourcing, which is about awarding a contract for a limited period of time, have been acknowledged. The retention of identity must also be evident from factors other than solely the loss of a contract to another party, and for this reason certainly re-outsourcing will *not always* constitute a Transfer of Undertaking.

Labour intensive activities

According to case law of the European Court of Justice, the decisive factor in the overall assessment depends greatly on the nature of the activities performed**.** If labour is the main factor in production (for example, in the cleaning sector), a transfer could usually qualify as a Transfer of Undertaking if the new service provider not only continues the activities (which alone is not enough), but also takes over the majority – in terms of their numbers and/or skills – of the employees who previously carried out the services.[7]

Capital intensive activities

On the other hand, if labour is not the main factor in production, but the presence of tangible assets is characteristic of an undertaking by its nature, that undertaking cannot maintain its identity if it is transferred without those assets. In a case of bus transport, buses were considered essential to carry out the activities. So there was no Transfer of Undertaking *without* a transfer of the buses.[8] Moreover, the aviation sector has also been qualified as a capital intensive sector: the transfer of assets (e.g. aircraft) is essential to determine whether or not there is a Transfer of Undertaking.[9] Another example of a capital intensive business is the service of handling intermodal transport units, again because it requires significant amounts of equipment (i.e. cranes and facilities).[10]

Mixed activities

The distinction between capital and labour-intensive activities is, of course, not always clear. The nature of the activities performed can also have a mixed character. An example of mixed activities may be catering activities that require a great deal of specific equipment in the kitchen on site. In a case where the new service provider had taken over the on-site kitchen equipment and continued to make use of the customer base on location, but did not take over the employees, the European Court ruled that the commercial entity had retained its identity. Consequently, all employees involved automatically transferred to the acquirer, whilst being entitled to their existing terms and conditions.

The nature of ICT Services

The European Court of Justice has not given any decisions on the outsourcing of ICT services, but in most cases ICT services will be (more) labour-intensive. This means that if, after the termination of an outsourcing contract the majority of the employees (or the key employees) of a service provider transfer to the new service provider, it would easily be deduced from this that the undertaking has retained its identity.

However, if the new service provider wishes the activities to be carried out (in large part) by its own employees, most likely the transfer of ICT services will not constitute a Transfer of Undertaking, certainly if the new service provider also has a different procedure and organisation of the work and/or the activities, will be performed out of a new location. In that case, the employees would not automatically follow the work, let alone be able to demand a continuation of their terms and conditions.

Conclusion

This article is a brief introduction to a complex piece of EU and national legislation. Specialised legal knowledge of European and local laws, as well as specific European and local case law, is required to answer the question whether or not in a particular case of (re-) outsourcing there is a Transfer of Undertaking. Certainly not all transfers can be qualified as a Transfer of Undertaking; especially in a case of mixed activities, every argument will count!

It should be pointed out here that if the employees do not transfer, which will happen more often in second and further generation outsourcing, this does not necessarily mean that this is detrimental to the employees. The employer that loses a contract (by contrast to classic takeovers) will usually continue to have remaining activities as a part of its undertaking, or will be able to acquire new work which would safeguard jobs for the employees. If not, employees will usually be able to claim reasonable compensation on termination of their employment.

Moreover, a transfer may not be advantageous for the employee if, for instance, the new service provider does not have any work for the employee or has fewer financial resources to make severance payments etc.

Especially now that second and further outsourcing contracts may not constitute a Transfer of Undertaking, suppliers are therefore advised to provide for financial exit provisions in their outsourcing contracts.

Anita de Jong (anita.dejong@hoganlovells.com) is partner and attorney at law specialising in employment law and outsourcing law with Hogan Lovells International LLP in Amsterdam. Anita is also a member of the HR Expert Committee of *Sourcing Nederland.*

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[1] Author Anita A de Jong (anita.dejong@hoganlovells.com) is partner and attorney at law specialising in employment law and outsourcing law with the law firm Hogan Lovells International LLP in Amsterdam. Anita is also member of the HR Expert Committee of *Platform Outsourcing Nederland.*

[2] ECJ 18 March 1986, Case C-24/85 (*Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik* en Zonen BV.).

[3] ECJ 12 November 1992, Case C-209/01 (*Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S*).

[4] ECJ 10 February 1988, Case C-324/86 (*Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*).

[5] In a case of 7 August 2018, the European Court of Justice ruled that second generation outsourcing and an interruption period do not preclude a Transfer of Undertaking. In this particular case the management of the Municipal Music School was continued by a third party after a tendering procedure and a five-month interruption of activities including three months of school holidays (Case C-471/16 (*Jorge Luís Colino Sigüenza v Ayuntamiento de Valladolid and Others*).

[6] ECJ 7 March 1996, Cases C-171/94 and C-172/94 (*Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA*) and ECJ 10 December 1998, Cases C-173/96 and C-247/06 (*Francisca Sánchez Hidalgo and Others v Asociación de Servicios Aser and Sociedad Cooperativa Minerva*).

[7]See for example: ECJ 26 October 2010, Case C-463/09 (*CLECE SA v María Socorro Martín Valor and Ayuntamiento de Cobisa*), ECJ 11 March 1997, Case C-13/95 (*Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*), and ECJ 24 January 2002, Case C-51/00 (*Temco Service Industries SA v Samir Imzilyen and Others*).

[8] ECJ 25 January 2001, Case C-172/99 (*Oy Liikenne Ab v Pekka Liskojarvi and Pentti Juntunen*).

[9] ECJ 9 September 2015, Case C-160/14 (*João Filipe Ferreira da Silva e Brito and Others v Estado português*).

[10] ECJ 26 November 2015, Case C-509/14 (*ADIF v Luis Aira Pascual and Others*).

Contacts

Anita de Jong

Partner

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