

The identity of an economic entity within a business transfer in the light of Directive 2001/23 and CJEU practice



The business transfer inevitably impacts on employment relationships, a context in which the identity of the economic entity has been the subject of exhaustive analysis in recent case-law of the Court of Justice of the European Union (CJEU).

The European court, through its case-law, provides essential guidance for the application of the rules of 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 transfers of undertakings, businesses or parts of undertakings or businesses (Directive 2001/23), which aims to ensure the continuity of existing employment relationships within an economic entity, regardless of a change of owner.

A decisive criterion for establishing the existence of a 'transfer' of a business within the meaning of this Directive, as recently emphasized by the CJEU, is whether the entity in question retains its identity, which results in particular from the actual continuation of the operation or from its takeover.

The absence of a contractual relationship between the transferor and the transferee, although it may be an indication that no transfer within the meaning of Directive 2001/23 has taken place, cannot be of decisive importance in that regard.

The scope of this Directive extends to all cases where the natural or legal person responsible for the operation of the undertaking, who assumes the obligations of employer towards the employees of the undertaking, changes within the framework of contractual relations.

Thus, for the abovementioned Directive to apply, it is not necessary to have a direct contractual relationship between the transferor and the transferee, as the transfer may be effected through a third party.

The transfer, within the meaning of Directive 2001/23, must relate to a stably organized economic entity whose activity is not limited to the execution of a specific work. Such an entity is any organized grouping of persons and elements enabling an economic activity to be carried out, which pursues its own objective and is sufficiently structured and autonomous.

In order to determine whether the requirement to maintain the identity of the undertaking is fulfilled, all the factual circumstances characterizing the transaction in question must be taken into account, including in particular the type of undertaking or business concerned, 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 new employer has taken over the key personnel, whether or not customers have been transferred, the degree of similarity between the

activities carried out before and after the transfer and the duration of any suspension of those activities.

However, these elements are only partial aspects of the overall assessment required and therefore cannot be assessed in isolation. It results that the weight to be attached to the various criteria for the existence of a ‘transfer’ within the meaning of Directive 2001/23 necessarily varies according to the activity carried out or the production or operating methods used in the economic entity, business or part of business concerned.

The CJEU has pointed out that an economic entity may operate, in certain sectors, without having significant tangible or intangible assets, so that the maintenance of the identity of such an entity after the transaction to which it is subject cannot, by definition, depend on the disposal of such assets.

In a sector in which the activity is mainly based on work force, which is particularly the case where an activity does not require the use of specific tangible assets, the identity of an economic entity cannot be maintained after the transaction in question has been carried out if the key personnel of that entity, in terms of numbers and skills, is not taken over by the deemed transferee.

This analysis therefore implies the existence of a number of factual findings, which must be assessed in concreto by the national court in the light of the criteria laid down by the CJEU and the objectives pursued by Directive 2001/23, such as the protection of workers in the event of a change of employer in order to ensure the preservation of their rights, as set out in recital (3) of the abovementioned directive.

According to the constant case-law, the scope of Article 1 paragraph (1) letter (a) of Directive 2001/23 cannot be assessed based on a purely textual interpretation. As a result of the differences between the language versions of the directive and the divergences between national laws as regards the concept of contractual assignment, that concept must be given a sufficiently flexible interpretation in order to meet the objective of that directive, which, as it results from recital (3) thereof, is to protect employees in the event of a change of employer.

Directive 2001/23 is applicable to the transfer of an undertaking which concerns a business organized on a stable economic basis. The concept of a business, referred to in Article 1 paragraph (1) of this directive, refers to an organized grouping of persons and assets which makes it possible to carry out an economic activity which pursues its own objective.

However, these assets are only partial aspects of the overall assessment that is required and therefore cannot be assessed in isolation.

There are situations in which the economic activity carried out by the employer - financial institution - does not require significant tangible elements for its functioning. Instead, as this economic activity is based mainly on intangible assets, their transfer has some significance for the purposes of qualifying as a transfer of part of an undertaking.

Thus, intangible assets such as financial instruments and other assets of the beneficiaries, namely clients, bookkeeping, other investment and ancillary services and records, i.e. documentation relating to the investment services and activities provided to clients, contribute to the identity of the economic entity concerned.

The transfer of these assets is necessarily conditional on the express or tacit acceptance of the customers, since, in a context such as that in which the employer is a financial institution, an undertaking which ceases its activity cannot require its customers to entrust the management of their securities to the undertaking of its choice.

Thus, the takeover by a second undertaking of the financial instruments and other assets of the customers of the first undertaking, following the cessation of the latter’s business activity, pursuant to a contract the conclusion of which is provided for by national law, where the customers of the first undertaking retain the freedom not to

entrust the second undertaking with the management of their securities on a stock exchange, may constitute a transfer of an undertaking or part of an undertaking, since it is established that there is a transfer of customers. In that context, the number, even if it is a very large number, of customers actually transferred is not, in itself, decisive as to whether it qualifies as a 'transfer', and the fact that the first undertaking collaborates, as a non-independent financial intermediary, with the second undertaking is, in principle, irrelevant.

As such, maintaining the identity of an economic entity in the framework of business transfer has to be analysed based on all the characteristic elements of each concrete situation.

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