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Abstract

In this paper, I am analysing the concept of “transfer of economic entity” under 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. This concept determines whether or not the above Directive applies to a given transaction and thus whether or not employees of the economic entity subject to transfer enjoy protection stemming from it. I make the above analysis from the perspective of the selected case-law of the European Court of Justice. My analysis shows that in its judgement the Court of Justice adopted consistent approach with respect to interpretation of this concept. I name this approach as “economical”. “Economical” due to the fact that in the Court of Justice’s view for classification of a given transaction as “transfer of economic entity” within the meaning of the above Directive, it is not essential on what legal event and in what legal given transaction was carried out. It is crucial whether as a result of given transaction employees are faced with new employer and whether the entity subject to transfer retains its identity. If a given transaction meets these conditions, the European Court of Justice considers it as “transfer of economic entity” within the meaning of the Directive. In my view, in the present times where there are a lot of corporate restructuring, mergers and takeovers of companies, this broad understanding of the concept of “transfer of economic entity” under the Directive should be perceive as positive. This allows stating that the Directive applies to various backgrounds (transactions). In consequence, it allows ensuring protection of the employees’ rights regardless of the type of the transaction on the basis of which transfer of economic entity is made.

Key words: European labour law, transfer of economic entity, change of employer, protection of employees’ rights

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1. Introduction

According to Professor R. Blanpain labour law is aimed at: “monitoring economic developments. Its objective is to establish appropriate balance in the relationship, interests, rights and obligations between the employer on the one hand and the employee on the other hand”1. On the basis of this definition one may say that labour law may be viewed as instrument of reconciling and balancing interests of the employees and employers. Obviously, another question arises in this respect. Namely, which interest of both parties should be taken into account and in case of conflict how to reconcile them or if it is impossible which should be treated as deserving for protection by public authorities.

In the context of labour law, several important factors should be taken into account. Namely, the fact that one of the main assumptions of existence of enterprises in the market economies build by Western Europe countries after 2nd World War, was maximization of value for their shareholders. It was obvious that in most cases this objective understood literally could not be reconciled with goals pursued by employees. The second factor, which influenced development of labour law, was globalisation of the world economy. As a result of this process, international exchange of goods and services become more important. Additionally, companies extended their operations on other countries and thus created multinational groups. The third factors was rapid development of new technologies as well as the Internet which resulted in growth of services rendered via distance communication media as well as importance of knowledge and information.

Obviously, all the above developments in the Western Europe countries’ economies would have to be reflected in relevant legal provisions. This also pertained to labour law. In the context of these developments, in Professor R. Blanpain’s opinion, the following questions arose: “(...) what kind of social protection is needed and feasible? (...) at what level social measures regarding wages, working time, dismissals, restructuring and other matters need to be taken (...)”2. As noted by Professor R. Blanpain: “(...) There are various levels at which decisions can be taken which affect the labour relations of employees. Here one can distinguish between the level of the undertaking, of the state, regional <European> as well as international levels (...)”3.

The above questions were also addressed at the European Union level. As EU grew in size and power, there was a need for approximation of laws of the Member States in various areas of labour law. One of these areas was protection of employees in case of transfer of economic entity in which they are employed. Considering that adoption of rules on EU level was required, on 14 February 1977 Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event

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2 R. Blanpain, European..., op. cit., pp. 27.
3 Ibidem, pp. 27.
of transfers of undertakings, businesses or parts of businesses\(^4\) was adopted. Currently, the above issues are covered by 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\(^5\) is the regulation related to these issues.

In this paper, I would like to focus on the above Directive. In view of the large number of corporate restructuring, takeovers and mergers of companies, which take place also within the territory of EU Member States, this Directive should be perceived as playing important role in EU labour law. Although analysis of the protection measures included in the Directive is very important, in this paper I would like to focus on the scope of situations to which the Directive applies. In other words, in this paper, I would like to analyze in what cases the Directive is applicable. In order to do so, I would have to analyze the concept of “transfer of economic entity”. This concept determines whether or not given transaction falls within the scope of the Directive. In case when particular transaction is classified as “transfer of economic entity”, the employees receive relevant protection provided for in the Directive. Thus, it plays central role in interpretation of the Directive and its applicability. Therefore, I think it would be useful to analyze this concept. As a result of this analysis I would like to establish what conditions should be met in order to treat given transaction as “transfer of economic entity”. In my view, establishment and description of such conditions could be helpful for the courts and public administrative authorities of EU Member States during interpretation of the Directive and relevant local laws implementing this Directive.

Nevertheless, the above analysis I would like to carry out only on the basis of the selected judgments of the European Court of Justice. This selectiveness is caused by the position of the case-law of the European Court of Justice in the EU legal system and its role in interpretation of the Directive and local laws of EU Member States which implements this Directive by relevant courts and public administrative authorities of this Member States. On the other hand, from the scope of my analysis I will exclude opinions presented by legal doctrine. This results from the fact that the objective of this paper is not to present every possible interpretation of the concept “transfer of economic entity” but to present this concept only from the perspective of European Court of Justice’s case-law as this case-law plays significant role in interpretation of the Directive and local laws of EU Member States. In my view, legal doctrine’s opinions would have rather secondary and not primary role in the above interpretation process.

In addition, I would like to emphasise that due to the objective of this paper, I will not conduct analysis of the whole case-law of the European Court of Justice developed under the Directive. Only selected judgments of the European Court of Justice may be treated as “adding something new” to the attempt of

defining the above concept. The remaining judgments only repeat previously
developed ideas. Thus, in my paper i refer only to selected judgments. Furthermore, i would like to stress, that due to the objective of this paper, i do not see necessity to describe backgrounds on the basis of which the abovementioned selected judgments were issued. For the purpose of this paper only parts of these judgments are important. The cases itself as well as legitimacy of classification of particular transactions by the European Court of Justice as falling within the scope of the concept of “transfer of economic entity” are beyond the scope of this paper.

Before i will move to the above analysis, i will briefly describe key provisions of the Directive.


2.1. Introductory remarks


In the proposal for adoption of the above directive it was stated that: “Industrial development, both within Member States and at the Community level, has resulted in a rapid increase in concentrations of undertakings (...) In view of this development the need has arisen for the provision, at the Community level, of an adequate legal framework (...) Experience has shown that changes brought about in the structure of industrial undertakings as a result of concentration have often had far-reaching consequences on the social situation of workers employed by the undertakings concerned and that the legislation of the Member States applicable to such operations did not always take sufficient account of the interest of workers (...) Primarily the aim of this proposal for a Council directive is to ensure, by introducing provisions covering such matters as protection and safeguards, that employees do not forfeit essential ri-

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gths and advantages acquired prior to a change of employer (…)". Thus, in the Commission’s view, there was a necessity of ensuring the employees’ rights in case of transfer of enterprises. In consequence, Council Directive 77/187/EEC was adopted on 14 February 1977. It was one of the measures, which was adopted as a result of the Social Action Programme dated 21 January 1974. Subsequently, Council Directive 77/187/EEC was amended by virtue of Council Directive 98/50/EC. As it was stated in the Recital 3 of the Preamble, the purpose of this directive was to amend Council Directive 77/187/EEC: “in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties, the case-law of the Court of Justice of the European Communities, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies and the legislation already in force in most Member States”. In other words, in EU institutions’ view there was a lot of changes as well as new developments, which require amending the original directive. As a result of these modifications, *inter alia*, the concepts of “transfer” and “employees” were clarified on the basis of the case-law of the European Court of Justice in this respect. The above state was changed in 2001. Namely, it was decided that due to the fact that Council Directive 77/187/EEC “has been substantially amended. In the interests of clarity and rationality (…)” there was a need to codify it. As a result, Council Directive 2001/23/EC of 12 March 2001 was adopted. While adopting this Directive EU has assumed that: “Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced”.

Therefore, realization of two objectives was expected by adoption of this directive i.e.: (i) ensuring comparable protection of rights of employees within Member States, and (ii) approximating obligations imposed on European enterprises as a result of this protection.

### 2.2. Scope of Directive 2001/23/EC

Pursuant to Article 1(1)(a) of the Directive, it applies to any transfer of an undertaking, business, or part of an undertaking or business (situated within the territorial scope of the Treaty) to another employer as a result of a legal transfer or merger. The Directive applies to public and private undertakings engaged in economic activities whether or not they are operating for gain. On the other hand, an administrative reorganisation of public administrative authori-

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ties, or the transfer of administrative functions between public administrative authorities, is not considered as transfer within the meaning of this Directive (Article 1(1)(c) of the Directive). In addition, on the basis of Article 1(3) transfers involving seagoing vessels are excluded from the scope of the Directive.

For the purpose of the Directive transfer exists when there is a transfer of an economic entity 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 (Article 1(1)(b) of the Directive).

The terms “transferor” and “transferee” has been defined accordingly as any natural or legal person who by reason of the transfer ceases to be (transferor) or becomes (transferee) the employer in relation to the transferred entity (Article 2(1)(a)-(b) of the Directive). In addition, the Directive provides a definition of the employee. Namely, according to Article 2(1)(d) of the Directive, the employee means any person who, in the Member State concerned, is protected as an employee under national employment law. Thus, it is clear that the Directive should cover all employees. In addition, in Article 2(2) the Directive provides that the Member States may not exclude from its scope contracts of employment or employment relationships solely because: (i) of the number of working hours performed or to be performed, (ii) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991, or (iii) they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.

Summarizing the above, in case when:
- there is a transfer of economic entity between transferor and transferee via legal transfer or merger. In other words, there is a change of the employer;
- the transfer relates to the economic entity;
- as a result of transfer the economic entity retains its identity;
- the Directive applies and thus also all the consequences resulting from its provisions. Nevertheless, according to Article 8 of the Directive, Member States are entitled to apply or introduce such laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees. Thus, Member States may adopt different measures than those stemming from the Directive, however under conditions that would meet the conditions provided for in the above Article 8.

2.3. Consequences of the transfer of economic entity

- Under Directive 2001/23/EC numerous consequences arise in the event of transaction constituting transfer of economic entity within the meaning of Article 1. In summary these consequences are as follows:
General remarks on the concept of „transfer of economic entity” within the meaning...

- the rights and obligations arising for the transferor from contract of employment and from employment relationship existing on the date of the transfer, by reason of such transfer, are transferred to the transferee (Article 3(1) of the Directive);
- the transferee is obliged to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of such agreement or the entry into force or application of another collective agreement (Article 4(3) of the Directive);
- employees’ rights to old-age, invalidity or survivors’ benefits under supplementary company or inter-company pension schemes which are outside the statutory social security schemes in Member States, are not transferred, unless the Member States provides otherwise (Article 4(4)(a) of the Directive);
- the transfer in itself does not constitute grounds for dismissal of the employees by the transferor or the transferee. However, this rule does not affect possibility of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce (Article 4(1) of the Directive);
- in case when the contract of employment or the employment relationship is terminated because the transfer made substantial change in working conditions to the detriment of the employee, this termination is treated as being made on responsibility of the employer (Article 4(2) of the Directive);
- in case when the transferor is subject to bankruptcy proceedings, under certain conditions special rules can be adopted by the Member States;
- if the transferred economic entity remains its autonomy, the status and function of the representatives or representation of the employees affected by the transfer, set out in the national legislation, must be preserved. However, in some circumstance this rule does not apply (Article 6(1) of the Directive) and its applicability is extended (Article 6(2) of the Directive);
- the transferor and the transferee are obliged to provide the representatives of employee with certain information (Article 7(1) of the Directive). Moreover, in case when the transferor or the transferee envisages any measures in relation to the employees they are obliged to consult the representatives of these employees on such measures with a view to reaching an agreement (Article 7(2) of the Directive). Under certain conditions these obligations may be limited by the Member States (Article 6(5) of the Directive);
- in case when there are no representatives of employees in a given economic entity, the Member States must ensure that the employees to be affected by transfer are provided in advance with certain information (Article 7(6) of the Directive).
- It is worth to stress that the above consequences occurs only in case when a given transaction may be classified as “transfer of economic entity” wi-
thin the meaning of Article 1 of Council Directive 2001/23/EC. Thus, as
i mentioned of paragraph 1 of this paper, it is of big importance to define
the meaning of this term. Therefore, in the next paragraph of this paper,
i will analyse this term in view of the selected judgements of the European
Court of Justice.

3. The concept of “transfer of economic entity” under Council
Directive 2001/23/EC in the light of selected case-law of the
European Court of Justice

3.1. Introductory remarks

As i indicated in paragraph 2.1 of this paper, from the analysis of Article 1 it
results that the Directive applies to the transactions, which have the following
characteristics:

there is a transfer of economic entity between transferor and transferee via
legal transfer or merger. In other words there is a change of employer;
the transfer relates to the economic entity; and
as a result of the transfer the economic entity retains its identity.

Analysis of the judgements of the European Court of Justice issued under
the Directive shows that the Court's attention was mainly focused on de/f_ining
the concept of change of the employer and retention of identity. Thus, my fur-
ther analysis will be divided into two sub-paragraphs each of them relating to
these concepts.

3.2. Change of employer

Before i will move to the analysis of judgments relating to change of em-
ployer, i would like to draw attention to the judgment issued in the case H.B.M.
Abels v. The Administrative Board of the Bedrijfsvereniging voor de Metaalind-
dustrie en de Electrotechnische Industrie. In this case the Court has stated
that: “A comparison of the various language versions of the provision in qu-
estion [i.e. Article 1(1) of the Directive - author’s note] shows that there are
terminological divergences between them as regards the transfer of underta-
kings. Whilst the German ('vertragliche übertragung'), French ('cession co-

12 Judgement of the Court of Justice, 7 February 1985, case no. 135/83 H.B.M. Abels v. The Administra-
tive Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie, ECR
1985/2/00469.
transfers resulting from a contract, from which it may be concluded that other types of transfers such as those resulting from an administrative measure or judicial decision are excluded, the English (‘legal transfer’) and Danish (‘overdragelse’) versions appear to indicate that the scope is wider (…) In view of those divergences, the scope of the provision at issue cannot be appraised solely on the basis of a textual interpretation. Its meaning must therefore be clarified in the light of the scheme of the directive, its place in the system of community law in relation to the rules on insolvency, and its purpose”. In my view, the idea resulting from the above judgement was present in subsequent considerations of the Court of Justice under the Directive. Thus, i think that in order to understand the case-law under Article 1 of the Directive, one should be remembered the idea expressed in the above judgement.

With respect to the defining the meaning of change of employer, in the first place i would like to refer to the to the case Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro13. In this case the Court stated that: “The directive is therefore applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred”. This approach was subsequently confirmed in the numerous judgements, inter alia, in the case Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall A/S14 and G. C. Allen and others v. Amalgamated Construction Co. Ltd15.

In summary, following the above judgement, for a given transaction to fall within the scope of the Directive there must be a change in the person who is responsible for carrying out the economic entity and who incurs the obligations of an employer towards employees of this entity. As a consequence of the transfer, the employees should be confronted with a new legal employer. However, it is considered that transfer of ownership to the entity is not necessary for classifying given transaction as “transfer” within the meaning of Directive. The change of employer for example may occur as a result of lease or other type of transaction where the owner is not changed. On the other hand, from the fact that there must be a change on the side of employer results that the transfer of shares in a company or change in the shareholder’s structure should not be considered as “transfer” for the purpose of the Directive. In this context, it is worth to note that in the reply to the questionnaire 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, which was prepared by the Commission for the purpose of preparing report on

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13 Judgement of the Court of Justice, 17 December 1987, case no. 287/86 Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, ECR 1987/11/05465.
14 Judgement of the Court of Justice, 10 February 1988, case no. 324/86 Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall A/S, ECR 1988/2/00739
implementation of the Directive, European Trade Union Confederation proposed that: “Some of the measures safeguarding employees’ rights provided for in the Directive (Articles 3(1), 3(2), 6 and 7) should be extended to cases of change of ownership through share purchases.”\(^\text{16}\) In response to this proposal, in the implementation report the Commission stated that: “The Commission considers that a revision of the Directive, extending the definition of “transfer” to include a change of control, as proposed by the European Confederation of Trade Unions (cf. Annex I, question 4), is not justified at this stage. Although a change of control can lead to changes in the undertaking, the employees’ legal position vis-à-vis the employer is unchanged.”\(^\text{17}\) In my view, although such statement is completely true, the Commission should not forget how European Court of Justice interprets the term “transfer”. In my opinion, from the analysis of the Court’s judgments it results that the Court takes economical approach while interpreting this term. In fact, in my view one may say that “transfer of control” in the economic entity from one party to the other is essential for classifying given transaction as “transfer” within the meaning of the Directive. Although, as a consequence of the transfer of shares in the company running economic entity there is no direct change in the control of the entity itself, shareholders often determines the way in which the entity is run. Thus, due to the fact that in certain cases transfer of shares may significantly alter the position of the employees, from economical point of view such situation may be perceived as similar to the situation in which there was transfer of the entity itself. Taking this into account, in my view, it would be advisable to conduct wide analysis of the change in employment conditions as a result of transfer of shares in order to determine in what number of cases the mere fact of change in the shareholders structure in the company running economic entity significantly worsened the position of the employees. If this analysis would confirm that there is a problem and its scale is large, it would be recommendable for EU institutions to undertake relevant actions.

In addition, in the European Court of Justice’s view, the fact that transfer of entity is carried out between the companies which are members of the same group does not influence the possibility of regarding such transfer as falling within the scope of the Directive. For example, in the case G. C. Allen and others v. Amalgamated Construction Co. Ltd, the Court stated that: “It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard. The answer to be given to the first part of the first question must therefore be that the Directive can apply to a transfer between two companies in the same cor-

\(^{16}\) Commission report..., op. cit., pp. 27.
\(^{17}\) Ibidem, pp. 3-4.
porate group which have the same ownership, management and premises and which are engaged in the same works”.

As a result of adoption of the above understanding of the term “transfer”, the Court of Justice classified, *inter alia*, the following situations as covered by the Directive: (i) take over of a leased entity by its the owner following a breach of the lease by the lessee\(^\text{18}\), (ii) lease of the entity by its owner to the new lessee upon the termination of a non-transferable lease\(^\text{19}\), (iii) transfer of an undertaking pursuant to a lease-purchase agreement and the retransfer of the entity upon the termination of the lease-purchase agreement by a judicial decision\(^\text{20}\), (iv) where, after termination of the lease, the owner of entity retakes possession of it and then sells it to a third party\(^\text{21}\), (v) where, public authority decides to terminate the subsidy paid to a foundation, which is its only source of income, as a result of which its activities are fully and definitively terminated, and to transfer it to another foundation with a similar aim\(^\text{22}\), (vi) where, entity entrusts by contract to another entity the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee\(^\text{23}\).

Other essential element of the concept of “transfer” is determination on what basis given transaction should be conducted in order to be regarded as “transfer” within the meaning of the Directive. Should it be carried out only on the basis of civil agreement or other forms may constitute such basis. The European Court of Justice ruled out that different basis should be taken into account. In the case Temco Service Industries SA v Samir Imzilyen, Mimoune Belfarh, Abdesselam Afia-Aroussi, Khalil Lakhdar\(^\text{24}\), the Court stated that: “It is clear from the wording of Article 1(1) of the Directive that its applicability is subject to three conditions: the transfer must result in a change of employer; it must concern an undertaking, a business or part of a business; and it must be the result of a contract (…) as the Court has held, the absence of a contractual link between the transferor and transferee cannot preclude a transfer within the meaning of the Directive. The transfer can be effected in two successive contracts concluded by the transferor and transferee with the same legal or natural person (…) That case-law certainly also applies in a situation where, as in the case in the main proceedings, a contractor enters into two successive cleaning contracts, the second on termination of the first, with two different underta-

\(^{18}\) Judgement of the Court of Justice, Landsorganisationen…., op. cit.
\(^{19}\) Judgement of the Court of Justice, Foreningen…., op. cit.
\(^{20}\) Judgement of the Court of Justice, 5 May 1988, joined cases no. 144/87 and 145/87 Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, ECR 1988/5/02559.
\(^{22}\) Judgement of the Court of Justice, 24 January 2002, case no. C-51/00 Temco Service Industries SA v Samir Imzilyen, Mimoune Belfarh, Abdesselam Afia-Aroussi, Khalil Lakhdar, ECR 2002/1B/I-00969.
kings (…) The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect”. In my view, the above judgment with respect to the basis of the transfer should be read jointly with the verdict issued in the case H.B.M. Abels v. The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie, where the Court of Justice ruled out that: “The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a <surséance van betaling> [i.e. judicial leave to suspend payment of debts - authors’ note]”. Thus, in the Court’s view, the transfer of economic entity may in some circumstances be considered as falling within the scope of the Directive in case when it is carried out as a result of the instrument adopted by public authority. Consequently, while interpreting Article 1(1) of the Directive, civil contracts should not be perceived as exclusive basis of transfer. Other forms e.g. court verdicts, administrative authorities decisions, should be also taken into account.

4.2.2. Retention of identity

The second element determining whether given transaction can be regarded as transfer of economic entity within the meaning of the Directive is retention of identity by the entity as a result of the transfer. In the case Ayse Süzen v Zehnacker Gebäu dreineigung GmbH Krankenhausservice, the Court ruled out that: “For the directive to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (…) The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective”. This approach was further confirmed e.g. in the case G. C. Allen and others v. Amalgamated Construction Co. Ltd.

The in-depth analysis of the issue of maintenance of the identity was made in the case Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV. In its judgement, the Court stated that: “(…) It is clear from the scheme of Directive No. 77/187 and from the terms of Article 1 (1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity. Consequently, a transfer of an undertaking, business or part

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of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities”. Next, the Court ruled out that for the purpose of performing the above analysis it is necessary: “(…) to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business’s tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation”. In the Court’s view all the above criteria should be taken into account by the national courts while examining particular case. On the other hand, in the case Dr. Sophie Redmond Stichting v Hendrikus Bartol and others, the Court additionally stated that: “In order to ascertain whether or not there has been such a transfer in a case such as that which is the subject of the main proceedings, it is necessary to determine, having regard to all the factual circumstances characterizing the operation in question, whether the functions performed are in fact carried out or resumed by the new legal person with the same or similar activities, it being understood that activities of a special nature which constitute independent functions may, where appropriate, be equated with a business or part of a business within the meaning of the directive”.

Following the above approach, the Court of Justice concluded in the case Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S that: “(…) where one businessman entrusts, by means of an agreement, responsibility for running a facility of his undertaking, such as a canteen, to another businessman who thereby assumes the obligations of employer vis-à-vis the employees assigned to that facility, the resulting transaction may fall within the scope of the Directive, as defined in Article 1(1). The fact that in such a case the activity transferred is merely an ancillary activity for the transferor without a necessary connection with its company objects cannot have the effect of excluding that transaction from the scope of the Directive. Nor does the fact that the agreement between the transferor and the transferee relates to provision of services exclusively for the benefit of the transferor in return for a fee, details of which are laid down by the agreement, preclude the applicability of the Directive”.

Summarizing the above case-law, when the national courts consider whether given transaction should be treated as falling within the scope of the Directive, they should: (i) firstly, determine whether the entity in question retains its iden-
tity, *inter alia*, by the fact that its operation is actually continued or resumed, and (ii) secondly, conduct wide analysis of the circumstance characterizing the transaction in question.

Following the adopted approach towards maintenance of identity, in the case Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice the Court stated that: “(...) the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it (…) Article 1(1) of the Directive is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract”.

Another question arose in the European Court of Justice’s practice with respect to the Directive. Namely, the Court was confronted with the question does the Directive applies if the entity is temporarily closed and thus has no employees. In the case Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, the Court ruled out that: “The fact that the undertaking in question was temporarily closed at the time of the transfer and therefore had no employees certainly constitutes one factor to be taken into account in determining whether a business was transferred as a going concern. However, the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of article 1 (1) of the directive (…) As a general rule such closure does not mean that the undertaking has ceased to be a going concern”. From this judgement it results that the fact that the entity is closed does not mean that automatically the Directive cannot apply. This situation constitutes another factor, which should be borne in mind by the national courts considering given case.

Very interesting issue was raised in the case G. C. Allen and others v. Amalgamated Construction Co. Ltd. Numerous questions where referred by the national court to the Court of Justice on the basis of situation where a company belonging to a group decided to subcontract to another company in the same group contracts for driveage work in mines. In response, the Court stated that: “It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment
relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard (…). Nothing justifies a parent company’s and its subsidiaries’ uniform conduct on the market having greater importance in the application of the Directive than the formal separation between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the Directive, would be precisely contrary to the Directive’s aim, which is, according to the Court, to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor (…). The answer to be given to the first part of the first question must therefore be that the Directive can apply to a transfer between two companies in the same corporate group which have the same ownership, management and premises and which are engaged in the same works”.

In addition, in the case Didier Mayeur v. Association Promotion de l’Information Messine, the Court ruled out that: “(…) directive applies where a municipality, a legal person governed by public law operating within the framework of specific rules of administrative law, takes over activities relating to publicity and information concerning the services which it offers to the public, where such activities were previously carried out, in the interests of that municipality, by a non-profit-making association which was a legal person governed by private law, provided always that the transferred entity retains its identity”. On the other hand, the Court stated that the fact that there are public tender proceedings involved does not preclude application of the Directive. In the case Oy Liikenne Ab v. Pekka Liskojaervi and Pentti Juntunen, the Court ruled out that: “(…) taking over by an undertaking of non-maritime public transport activities such as the operation of scheduled local bus routes - previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50, may fall within the material scope of Directive 77/187, as set out in Article 1(1) of that directive”.

From the analysis of the above case-law it follows that in order to affirm retention of identity of the transferred entity there should be continuation: (i) by the new employer of activities carried out by the this entity before the transfer, and (ii) of its workforce, its management staff, the way in which its work is organized, its operating methods or the operational resources available to it. While considering the cases brought in front of them national courts should take into account the large number of circumstances and in particular: (i) the type of entity, (ii) transfer or otherwise of tangible assets, such as buildings or movable property, (iii) the value of intangible assets at the time of the transfer,

(iv) employment of the majority of employees by the new employer, (v) transfer or otherwise of customers, (vi) degree of similarity between the activities carried out prior to and after the transfer, (vii) where appropriate, the period during which activities were suspended.

4. Conclusions

In my view, the case-law of the European Court of Justice should be perceived as constituting consistent approach towards defining the meaning of the concept of “transfer of economic entity” under Council Directive 2001/23/EC. I consider that the Court of Justice took mainly economical approach and thus did not limit the scope of applicability of the Directive to classical cases of corporate restructuring. It adopted much broader view. Consequently, the judgements issued in the cases brought under the Directive cover variety of situations. I consider this as desirable. Particularly, in my view, in the present times where numerous ways of transfer of enterprises, assets etc. are available, such broader look on the scope of the Directive should be treated positively. As a result, it is ensured that the employees are protected in numerous cases. The method for transfer of entity adopted by the transferor and the transferee in a given case does not influence the position of the employees. In consequence, their rights may be safeguarded in various situations.

Streszczenie

W niniejszym artykule dokonuję analizy pojęcia „przejęcie jednostki gospodarczej” na gruncie Dyrektywy Rady 2001/23/EC z dnia 12 marca 2001 r. w sprawie zbliżania ustawodawstw Państw Członkowskich odnoszących się do ochrony praw pracowniczych w przypadku przejęcia przedsiębiorstw, zakładów lub części przedsiębiorstw lub zakładów. Pojęcie to determinuje kwestię, czy powyższa Dyrektywa ma zastosowanie lub nie w odniesieniu do danej transakcji, a tym samym, czy pracownicy jednostki gospodarczej będącej przedmiotem przejęcia korzystają z ochrony w niej przewidzianej. Powyższą analizę przeprowadzam z perspektywy orzecznictwa Europejskiego Trybunału Sprawiedliwości. Moja analiza wskazuje, że w swoim orzecznictwie Trybunał Sprawiedliwości przyjął spójne podejście w odniesieniu do interpretacji tego pojęcia. Nazywam to podejście podejściem „ekonomicznym”. Ekonomicznym dlatego, że zdaniem Trybunału Sprawiedliwości dla zaklasyfikowania danej transakcji jako „przejęcie jednostki gospodarczej” w rozumieniu w/w Dyrektywy nie jest istotne w efekcie, jakiego zdarzenia prawnego oraz w jakie formie prawnej dana transakcja została dokonana. Ważne natomiast jest to, czy w efekcie danej transakcji pracownicy mają do czynienia z nowym pracodawcą oraz czy jednostka gospodarcza, będąc przedmiotem przejęcia, zachowuje swoją tożsamość. Jeżeli dana transakcja spełnia te dwa warunki, Europejski Trybunał Sprawiedliwości traktuje „przejęcie jednostki gospodarczej” na gruncie Dyrektywy. W mojej ocenie, w obecnych czasach, gdy mamy do czynienia z dużą ilością restrukturyza-
General remarks on the concept of „transfer of economic entity” within the meaning...

cji przedsiębiorstw, fuzji oraz przejęć spółek, szerokie rozumienie pojęcia „przejęcie jednostki gospodarczej” na gruncie Dyrektywy, powinno być postrzegane jako pozytywne. Pozwala to bowiem na stwierdzenie, iż Dyrektywa ma zastosowanie do szerokiej gamy stanów faktycznych (transakcji). W konsekwencji pozwala to na zapewnienie ochrony praw pracowniczych bez względu na rodzaj transakcji, na podstawie której następuje przejęcie jednostki gospodarczej.

Słowa kluczowe:

europejskie prawo pracy, przejęcie przedsiębiorstwa, zmiana pracodawcy, ochrona praw pracowniczych

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