

Opinion of Advocate General Bot delivered on 22 March 2007

Mohamed Jouini and Others v Princess Personal Service GmbH (PPS)

Reference for a preliminary ruling: Oberster Gerichtshof - Austria

Social policy - Directive 2001/23/EC - Safeguarding of employees' rights - Transfer of undertakings - Concept of 'transfer' - Temporary employment business

Case C-458/05.

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1. In this reference for a preliminary ruling, the Court is once more invited to interpret the concept of economic entity within the meaning 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. (2)

2. The Oberster Gerichtshof (Supreme Court, Austria) asks the Court essentially whether a grouping constituted by part of the administrative staff and part of the temporary workers of a temporary employment business can be regarded as an economic entity for the purposes of application of Directive 2001/23 in the case of its transfer to another temporary employment business.

I – Legal Framework

A – Community Law

3. As set out in the third recital of its preamble, Directive 2001/23 aims to protect employees in the event of a change of employer, in particular to ensure that their rights are safeguarded.

4. This directive replaces Council Directive 77/187/EEC, (3) which has been amended in order to achieve greater clarity and coherence.

5. Pursuant to Article 1(1)(a) of Directive 2001/23, which reproduces the substance of Article 1(1) of Directive 77/187, Directive 2001/23 applies 'to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.' According to Article 1(1)(b), there is a transfer 'where 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. (4)

6. Article 2(2)(c) of the Directive provides that Member States may not exclude temporary employment relationships from its scope of application in the case of transfer of a temporary employment business.

7. In order to ensure continuity of employment contracts or relationships with the transferee, (5) the first subparagraph of Article 3(1) lays down the principle that, on the occurrence of transfer of an undertaking, business, or part of an undertaking or business, the rights and obligations of the transferor, (6) arising from a contract of employment or from an employment relationship existing on the date of this transfer, shall be transferred to the transferee.

B – National Law

8. Austria transposed Directive 2001/23 by means of the Arbeitsvertragsrechts-Anpassungsgesetz (Austrian Law amending the Law relating to employment contracts, hereafter 'AVRAG'). (7)

9. Article 3(1) of the AVRAG provides that, when part of a business is transferred to a new owner, that person assumes the status of employer, and acquires all the rights and obligations arising from the employment relationships which existed at the time of the transfer. Thus the person acquiring the business becomes responsible for all liabilities deriving from the employment relationships which are unmet at the time of the transfer.

10. Settled case-law of the Oberster Gerichtshof requires that this provision be interpreted in conformity with Directive 2001/23, taking into account Court of Justice case-law on the matter.

II – Facts and Procedure concerning the main proceedings

A – Facts of the case

11. Mayer & Co GmbH (hereafter 'Mayer') is a temporary employment undertaking. Before the transfer in issue in the main proceedings, it was constituted, in particular, by M.S., its managing director, an assistant manager Mrs S., his spouse, plus a branch manager and certain customer advisers.

12. Mayer also employed 180 temporary workers. Of these 180 employees, approximately 60 were seconded to work for Fa. Industrie Logistik Linz GmbH & Co. KG (hereafter 'ILL'), Mayer's principal client.

13. In 2001, after Mayer had run into certain financial difficulties, ILL suggested to Mrs S. that a new temporary employment business be formed. Princess Personal Service GmbH (hereafter 'PPS') was therefore set up, in order to meet ILL's requirements. M.S. and S. then took up the respective functions of business director

and commercial director of PPS. ILL terminated its employment relationships with Mayer and became PPS' principal client.

14. PPS took on 40 of the 60 staff seconded by Mayer to ILL and assigned them to work for the same client. In addition, Mayer's branch manager, certain customer advisers, some of its clients and the employees assigned to work for them, were transferred to the new undertaking. In total, approximately one-third of Mayer's personnel were taken on by PPS.

15. The employment relationships between Mayer and its former employees terminated on 30 November 2002; new employment relationships between these employees and PPS commenced on 1 December 2002.

16. Insolvency proceedings were commenced in respect of Mayer pursuant to a court order of 19 December 2002.

B – Procedure

17. Mayer had failed to pay the final salaries of 25 employees who were taken on by PPS. They decided to bring an action against PPS, claiming payment of the salaries due, before the Landesgericht (Regional Court) Wels.

18. The employees' claims were founded on the fact that there had been a transfer of part of Mayer's business to PPS, given that PPS had taken on Mayer's administrative staff, some of its clients and the staff allocated to work for them. In the employees' view, PPS had thereby assumed all the rights and obligations deriving from Mayer's previous employment relationships, and was obliged to honour Mayer's outstanding salary commitments.

19. In its judgment of 4 May 2004, the Landesgericht Wels upheld the applicants' claim. The court at first instance found there had been a transfer of part of an undertaking, within the meaning of Article 3(1) AVRAG. PPS was therefore obliged to guarantee payment of the salaries not paid by Mayer.

20. PPS appealed this judgment to the Oberlandesgericht (Higher Regional Court) Linz which, by decision of 12 October 2004, upheld the judgment at first instance.

21. PPS then brought an action before the Oberster Gerichtshof for review on a point of law (*Revision*). PPS claims that there has been no transfer of a part of a business: the transfer of rights and obligations concerning employment relationships can only be effected in respect of an economic entity organised on a stable basis; in the instant case, PPS considers that no such economic entity exists.

III – The question for a preliminary ruling

22. The Oberlandesgericht decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is there a transfer of a business or part of a business, within the meaning of Article 1 of [Council Directive 2001/23/EC] where, in the course of collaboration between two temporary employment businesses, without there being an identifiable organisational structure of the first temporary employment business, an office worker, branch manager, some customer advisers and the managing director transfer from the first temporary employment business to the second temporary employment business in order to carry out comparable work there and, also in collaboration between both businesses, approximately one-third of the assigned employees and the respective clients to whom they are assigned (varying from 3 to 50 employees per temporary assignment) transfer with them, in part or entirely?'

IV – Analysis

23. The referring court is essentially asking the Court whether Directive 2001/23 is applicable to a situation in which a grouping consisting of part of the administrative personnel and part of the temporary workers of a temporary employment business is transferred to another temporary employment business in order to carry out comparable tasks for the same clients.

24. The Oberster Gerichtshof therefore wishes to establish whether the taking on of this grouping by another temporary employment business amounts to a transfer of an economic entity in the sense intended by the Directive.

25. The court entertains some doubts as to the application of the economic entity criterion to a temporary employment business, given that, by definition, this type of business operates with few employees permanently engaged as part of its organisational structure and that its economic activity consists mainly in putting its labour force at the disposal of other undertakings.

26. The transfer of an undertaking, business or part of an undertaking or business within the meaning of Article 1(1)(a) and (b) of Directive 2001/23 requires three conditions to be satisfied. First of all, the transfer must concern an economic entity; next, this entity must have retained its identity following the transfer; finally, the resulting transfer must have been based on a legal transfer.

27. The questions raised are therefore whether part of the administrative personnel of a temporary employment business together with part of its temporary workers may be regarded as an economic entity, whether this entity is capable of retaining its identity after a transfer such as that in the main proceedings, and finally, whether such transfer results from a legal transfer.

A – Indications from previous case-law

1. Existence of an economic entity

28. As already indicated, Article 1(1)(a) of Directive 2001/23 applies 'to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.'

29. In order to clarify the concepts of enterprise, business and part of an enterprise or business the Court has subsumed them under a single concept, namely 'economic entity'. (8) It should be noted that this concept also applies to part of an undertaking or business.

30. The Court has further elaborated that 'economic entity' means a stable economic entity whose activity is not limited to performing one specific works contract. The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. (9)

31. The Court has also ruled that whilst such an entity must be sufficiently structured and autonomous, it need not necessarily have significant assets, tangible or intangible. (10)

32. The Court's case-law also makes clear that the national court, when assessing whether the conditions for the existence of a transfer have been satisfied, should take into account the type of undertaking or business in question. It can be inferred from this that the importance to be given to these conditions in accordance with Directive 2001/03 will vary, depending on the nature of the activity in question and on the production or operating methods employed. (11)

33. In this respect, the Court has accepted that, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, in the absence of other factors of production. (12)

34. Furthermore, the Court has held that the fact that the activity is performed by a single employee does not suffice to preclude application of Directive 77/187. (13) An economic entity may in other words consist of a sole employee.

35. In the case of a transfer of an undertaking or part of an undertaking whose activity is based essentially upon its labour force, I am therefore of the opinion that the decisive issue is not the organisational structure of the undertaking but the question whether it is carrying out an autonomous economic activity.

2. Retention of identity as an economic entity

36. In establishing whether there has been a transfer within the meaning of Directive 2001/23, the decisive consideration is whether the identity of the body in question is retained after the transfer: this will in particular be the case where the transferee continues or resumes the activities previously carried out. (14)

37. In order to judge whether the conditions for a transfer have been satisfied and whether its identity as an economic entity has been retained, the specific features of the undertaking or business concerned should be taken into account; one should also verify whether sufficient means to pursue the economic activity concerned were transferred. (15)

38. Where there is a transfer of an economic entity whose operating assets are essentially its labour force, it must be verified whether the employer has taken on an essential part, in terms of numbers and skills, of the personnel specially assigned by its predecessor to the carrying out of the economic activity in question. (16)

39. Another factor to be considered is the degree of similarity between the activities exercised before and after the transfer. (17)

3. Legal transfer

40. The Court has held that the concept 'legal transfer' must be considered in the light of the scheme and purpose of Directive 77/187. (18) It has interpreted this concept in a very broad fashion, in order to ensure the effectiveness of the directive.

41. The Court held the latter directive to be applicable in many different circumstances. (19) For example, it held that Directive 77/187 may apply in cases where there is no contractual link between the transferor and the transferee or in which ownership has not passed. (20)

42. Thus, it holds that this directive applies wherever, in the context of contractual relations, there is a change 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 undertaking. (21)

43. In establishing whether a legal transfer has occurred, the decisive criterion is therefore not the existence of contractual relations between transferor and transferee, but rather the occurrence of a change in the person responsible for carrying on the business.

44. Having specified these elements, the next step is to ask whether the transfer in issue in the main proceedings satisfies the conditions necessary for Directive 2001/23 to apply.

B – Application of the case-law to the present case

1. Existence of an economic entity

45. Article 1(2) of Council Directive 91/383/EEC (22) defines temporary employment relationships as the relations between a temporary employment business, which is the employer, and the worker, the latter being assigned to work for and under the control of an undertaking using his services, i.e. the client. Peculiar to such undertakings is therefore the triangular relationship they establish between the employer, employee and client.

46. The other peculiarity of a temporary employment business relates to the fact that its business as a service provider, namely the supply of labour, requires only few persons for its own operation and a very limited number of fixed assets.

47. Notwithstanding these peculiarities, there can be no doubt, in my opinion, that a temporary employment business can be regarded as an economic entity.

48. It should be recalled first of all that Article 2(2)(c) of Directive 2001/23 provides that Member States may not exclude employment contracts or relationships from the scope of application of the directive solely on the ground that they relate to temporary employment and that the undertaking transferred is a temporary employment business.

49. Next, as already stated, the existence of an economic entity presupposes the exercise of an economic activity. It is evident that such an activity is present here, as the grouping formed by the part of the administrative personnel and the part of the temporary workers of the temporary employment business supplies labour to the client undertakings, in consideration for remuneration, and thereby produces part of Mayer's turnover. (23)

50. Finally, it is apparent that the entity comprised by administrative and temporary personnel continued to function in a completely autonomous manner within PPS. Once detached from Mayer, it pursued its economic activity within PPS. It was therefore able to function equally well within Mayer and PPS. It is self-sufficient and exists independently of Mayer.

51. It therefore follows, in my opinion, that a grouping composed by a part of the administrative personnel and a part of the temporary workers of a temporary employment business, which pursues an autonomous economic activity, constitutes an economic entity in the sense of part of a business.

2. Retention of identity as an economic entity

52. As we have seen, the Court has held that in deciding whether an economic entity whose activity is based essentially upon its labour force has retained its identity as an economic entity after being transferred, it is necessary to verify whether the new employer has taken on an essential part, in terms of number and skills, of the personnel who were assigned before the transfer to perform the economic activity in question.

53. In the main proceedings, the office employees, customer advisers and the employees who had been detached to perform specific tasks for clients were allocated to perform the same tasks for the same clients. The case file also indicates that all the staff transferred from Mayer to PPS were assigned to tasks requiring particular skills, such as those of crane driver or fork-lift truck driver. It follows that the staff concerned were transferred on the basis of their skills.

54. The labour force as a body therefore survived the transfer which occurred in this case, as the administrative and temporary workers retained their functions and the clients to whom the temporary workers were seconded were also kept.

55. I am therefore of the opinion that the identity as an economic entity was retained after the transfer.

3. Was there a legal transfer?

56. As already indicated, for there to be a legal transfer in the sense of Directive 2001/23, the person responsible for carrying on the business must have changed, the concept of legal transfer having been given a broad interpretation by the Court, in order to ensure the effectiveness of this directive.

57. The elements present in the main proceedings correspond squarely with the Court's interpretation. It is clear from the reference for a preliminary ruling that PPS, by taking on and then pursuing, in the same form, the activities of an economic entity of Mayer, assumed responsibility for this economic entity and entered into new employment relationships with those employees and workers initially employed by Mayer.

58. In fact, even a narrow interpretation of the concept of legal transfer would produce the same result in the present case. It should be noted that the question referred to the Court for preliminary ruling itself indicates that the transfer in this case occurred 'in the course of collaboration between two temporary employment businesses'.

59. Were one, moreover, to entertain any doubts as to the existence of a legal transfer of such a kind, other factors should be considered which point to a similar outcome.

60. It is quite obvious that the date of commencement of insolvency proceedings in respect of Mayer coincides with the date of the transfer of its business.

61. The possibility of an operation mounted in order to salvage a business operation and make it profitable again, once divested of accumulated unmet liabilities, cannot therefore be ruled out.

62. Were the national court to find this to be the situation, the principle *fraus omnia corrumpit* would apply, and, no matter what form of legal construction were organised in order to evade the relevant rules, notably the rules contained in Directive 2001/23, the rights of the workers could not be affected.

63. In view of the foregoing, I am of the opinion that Directive 2001/23 is applicable to a situation in which a grouping formed by part of the administrative personnel and part of the temporary workers of a temporary employment business is transferred to another temporary employment business in order to carry out comparable activities for the same clients.

V – Conclusion

64. In the light of the foregoing I propose that the Court answer the question posed by the Oberster Gerichtshof as follows:

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 is applicable to a case in which a grouping consisting of part of the administrative personnel and part of the temporary workers of a temporary employment business is transferred to another temporary employment business in order to carry out comparable activities for the same clients.

¹ Original language: French.

² – OJ 2001 L 82, p. 16.

³ – Council Directive of 14 February 1977 on the approximation of the legislation 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 (OJ 1977 L 61, p. 26).

⁴ – According to the eighth recital of the preamble of Directive 2001/23, Article 1(1)(b) represents a clarification of the concept of transfer made in the light of the Court's case law. This clarification did not alter the scope of Directive 77/187.

- 5 – Article 2(1)(b) of Directive 2001/23 defines ‘transferee’ as ‘any natural or legal person who, by reason of [the] transfer ... becomes the employer in respect of the undertaking, business or part of the undertaking or business’.
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- 6 – Article 2(1)(a) of Directive 2001/23 defines ‘transferor’ as ‘any natural or legal person who, by reason of [the] transfer ... ceases to be the employer in respect of the undertaking, business or part of the undertaking or business’.
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- 7 – BGBl. 456/1993.
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- 8 – As we have seen, this concept was then adopted by Article 1(1)(b) of Directive 2001/03.
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- 9 – See in particular Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20; Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 13; and Joined Cases C-232/04 and C-233/04 *Güney-Görres and Demir* [2005] ECR I-11237, paragraph 32.
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- 10 – See in particular Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 27.
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- 11 – See in particular Joined Cases C-173/96 and C-247/96 *Hidalgo and Others*. [1998] ECR I-8237, paragraph 31.
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- 12 – *Süzen*, paragraph 21.
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- 13 – See Case C-392/92 *Schmidt* [1994] ECR I-1311, paragraph 15.
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- 14 – See in particular Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and also *Rygaard*, paragraph 15, and *Süzen*, paragraph 10, cited above.
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- 15 – See in particular *Hidalgo and Others*, paragraph 31 and case-law referred to.
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- 16 – See in particular *Hidalgo and Others*, paragraph 32 and case-law referred to.
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- 17 – See in particular Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 33.
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- 18 – See in particular Case 135/83 *Abels* [1985] ECR 469, paragraphs 12 and 13.
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- 19 – See in particular point 30 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-234/98 *Allen and Others* [1999] ECR I-8643.
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- 20 – See *Hidalgo and Others*, paragraphs 22 and 23 and references to case-law, concerning the absence of a contractual link, and Case 287/86 *Mølle Kro* [1987] ECR 5465, paragraph 12, concerning the lack of transfer of ownership.
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- 21 – See in particular Case 101/87 *Bork International* [1988] ECR 3057, paragraph 13 and Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28 and case-law referred to.
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- 22 – Directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L 206, p. 19.
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- 23 – On this point the Court also found in Case C-55/96 *Job Centre* [1997] ECR I-7119 that, in the context of competition law, the concept of undertaking encompasses every entity exercising an economic activity and that the placement of labour is an economic activity (see paragraphs 21 and 25).