Finally, the ECJ does not provide any indication as to how proportionality should be examined. Proportionality requires that measures adopted to achieve the legitimate objectives pursued must be appropriate and not go beyond what is necessary in order to achieve those objectives. In the strict sense, proportionality also requires that such measures must not, even if they are appropriate and necessary for achieving legitimate objectives, give rise to any disadvantages which are disproportionate to the objectives pursued.

The ECJ does not assess this aspect of proportionality while it ranks foremost in the opinions of the Advocate Generals both in the *Achbita*[5] and the *Bougnaoui*[6] case. Likewise, in the *Eweida* judgment, a detailed assessment of strict proportionality is made and the ECtHR comes to the conclusion that there is a manifest disproportion between the aim pursued by the company and the disadvantages caused to the employee.

By refraining from this assessment, the ECJ confirms a trend in Belgian case law, which usually considers that a general prohibition against wearing religious signs at work is necessary, without any need to verify whether, on the facts, this creates a disproportion between the conflicting interests at stake.[7]

ECJ 27 April 2017, case C-680/15 (Asklepios Kliniken), Transfer of undertakings

Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH – v – Ivan Felja and Vittoria Graf, German case

Summary

'Dynamic' referral clauses have effect after the transfer of an undertaking, if national law provides for the possibility for the transferee to make changes both consensually and unilaterally.

Facts

Ivan Felja and Vittoria Graf were employed at the hospital in Dreieich-Langen, Ivan Felja as caretaker and gardener from 1978 and Vittoria Graf as care assistant from 1986. The hospital was owned by a local authority. In 1995, the local authority transferred the hospital to a limited liability company and in 1997, the part of the hospital in which they were employed was transferred to KLS Facility Management GmbH ('KLS FM'). KLS FM did not belong to an employers' association and was therefore not bound to a particular collective bargaining agreement, but their employment contracts contained a 'dynamic' referral clause providing that their employment relationship would be governed – as it was before the transfer – by collective agreement 'BMT-G II', and that in future they would be governed by any collective agreements supplementing, amending or replacing it.

Subsequently, KLS FM became affiliated to a group of businesses in the hospital sector. On 1 July 2008, the part of the business where the workers were employed was transferred from KLS FM to another company in the group, namely Asklepios. Like KLS FM, Asklepios was not bound, as a member of an employers' association, either to BMT-G II or the TVöD, which had replaced it from 1 October 2005, or to the collective agreements on the transition of staff employed by municipal employers covered by the TVöD or to the rules relating to the transitional law.

National proceedings

The workers brought legal proceedings seeking a declaration, in accordance with the 'dynamic' referral clause in their contracts, that the provisions of the TVöD, the collective agreements supplementing it, the provisions of the collective agreement on the transition of staff employed by municipal employers to the TVöD and the rules relating to the transitional law applied all to their employment relationship in the versions in force at the date of their application.

Asklepios contended that Directive 2001/23 and Article 16 of the Charter preclude the legal consequence provided for in national law, whereby the rules of the public service collective agreements to which the contract of employment refers apply dynamically. Asklepios argued that, after the transfer of the workers to another employer, those agreements needed to be applied as they originally stood (statically), meaning that only the terms of employment agreed in the contract of employment concluded with the transferor employer, based on the collective agreements referred to by that contract could be relied on against the transferee employer.

The lower courts upheld the actions brought by the workers and Asklepios appealed to the referring court

5. Paras 112-127.
6. Paras 120-134.
7. C. trav. Bruxelles, 15 January 2008, *J.T.T.*, 2008, p. 140; Cour trav. Anvers, 23 December 2011, *Ors*. 2012/3, p. 24, note I. Plets; Trib. trav. Bruxelles, 2 November 2010, RG n° 05/22188/A, available on www.juridat.be; Trib. trav. Bruxelles, 8 June 2015, RG n° 12/7482/A, unpublished; Trib. trav. Bruxelles, 18 May 2015, RG n° 14/5803/A, unpublished; Trib. trav. Bruxelles (ref.), 9 June 2016, RG n° 15/7170/A, unpublished. See, however, Trib. trav. Bruxelles (ref.), 16 November 2015, RG n° 13/7830/A, unpublished.

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on a point of law. The Bundesarbeitsgericht (Federal Labour Court, the 'BAG') decided to stay the proceedings and to refer questions to the ECJ for a preliminary ruling.

Questions referred to the ECJ

The referring court asked whether Article 3 of Directive 2001/23, read together with Article 16 of the Charter, must be interpreted as meaning that, in the transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment extends to the clause which the transferor and the worker have agreed, by which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by any supplements, modifications or replacements of it, if national law provides for the possibility for the transferee to make adjustments, both consensually and unilaterally.

ECJ's findings

While it follows from *Werhof* (ECJ 9 March 2006, C-499/04, paragraph 23) that Article 3 of Directive 2001/23 must be interpreted as meaning that it does not require a 'static' clause to be treated as 'dynamic', the Court in this case also observed that a contract is characterised by the principle of freedom of contract. Therefore, if the transferor and the employees have freely consented to a 'dynamic' contractual clause and it is in force on the date of transfer, Directive 2001/23, in particular Article 3, must be interpreted as providing, in principle, that that obligation transfers to the transferee.

However, the Court in *Alemo-Herron and Others* (ECJ 18 July 2013, C-426/11, paragraph 25) and *Österreichischer Gewerkschaftsbund* (11 September 2014, C-328/13, paragraph 29) stated that, in the case of a 'dynamic' contractual clause, Directive 2001/23 does not aim solely to safeguard the interests of employees in the event of a transfer, but also to hold a fair balance with those of the transferee. It made clear that the transferee must be in a position to carry on its operations. Article 3 of Directive 2001/23, read in the light of freedom to conduct a business, requires that the transferee must be able to assert its interests effectively and negotiate changes in the working conditions of its employees bearing in mind its future economic activity (see *Alemo-Herron and Others*, paragraph 33).

The Court also noted that, in the case at hand, national law provided for the possibility, after transfer, for the transferee to adjust the working conditions existing at the date of the transfer, either consensually or unilaterally. The Court therefore held that the national law applicable in the main proceedings satisfied the requirements of the ECJ case law described above – and given that that case law took Article 16 of the Charter into account, the Court decided there was no need for it to examine the compatibility of the national law with that provision.

The Court also found that it was not for it to decide whether Asklepios was correct in the arguments it made, on the basis that it was for the referring court alone to assess the facts and interpret its national law.

Ruling

Article 3 of Council Directive 2001/23/EC and Article 16 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment extends to a clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, by which their employment relationship is governed, not only by the collective agreement in force on the date of the transfer, but also by agreements subsequent to the transfer and which supplement it, amend it or replace it, provided national law provides for the possibility for the transferee to make adjustments both consensually and unilaterally.

Commentary on the case

Othmar K. Traber (partner with Ahlers & Vogel PartGmbB, Germany)

The court's decision has caused disappointment among many lawyers in Germany who are often engaged in transactions where companies owned by state authorities are sold to private investors. Following the *Alemo-Herron* case and, more particularly, the opinion of Advocate General Yves Bot, it was expected that the ECJ would elaborate on his case-law on 'dynamic' referral clauses and their impact on transfers of undertakings and limit the effectiveness of such provisions to one year after the transaction (see opinion of Advocate General from January 19, 2017, recital 77 et. seqq.).

However, the very concisely and, in my view, convincing analysis of the Advocate General has, unfortunately, not been reflected in this judgment. The ECJ leaned towards the intended position of the referring court and held that German law meets both the critical legal prerequisites of Article 3 of Council Directive 2001/23/EC and Article 16 of the Charter. It will therefore be up to the transferee during negotiations with the transferor to work out whether it is possible to make an adjustment unilaterally by giving notice of dismissal with the option of reemployment on altered conditions – not including the 'dynamic' referral clause.

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But frankly, the latter is not really an option, as the German courts have created extremely high hurdles to jump if an employer wants to unilaterally change the conditions of an employment contract. Generally speaking, to get rid of these clauses (and lower the wages), is only possible if the company is in severe financial difficulties and wants to avoid filing for insolvency based on a detailed rescue plan drawn up by chartered accountants. That may work for transfers of undertakings done in the teeth of pending insolvency proceedings – but not for normal transfers. It is actually pretty unlikely that a transferee would, on the one hand, be able to purchase the assets of a company and on the other, be facing severe financial problems threatening insolvency on the other.

The referring court was very clever in influencing the ECJ's decision with the wording of its question. It opened the door for the ECJ to not force the German courts to change their settled case law. But it is a pity that Asklepios' attempt during the preliminary ruling proceedings to challenge the effectiveness of making adjustments was greeting with a simple statement by the Court that this needed to be decided by the national courts.

With this ruling the ECJ has crystalised a situation in which there is no realistic way in Germany to make adjustments even if the transferee has no opportunity to take part in future negotiations on collective agreements to which a 'dynamic' contractual clause refers. This puts businesses investing in Germany in a much more uncomfortable position than, for instance, competitors running their business in the UK, where *Alemo-Herron* will still apply.

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