JUDGMENT OF THE COURT (Fourth Chamber)

12 February 2009 *

In Case C-466/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesarbeitsgericht Düsseldorf (Germany), made by decision of 10 August 2007, received at the Court on 22 October 2007, in the proceedings

Dietmar Klarenberg

v

Ferrotron Technologies GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, G. Arestis and J. Malenovský (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 September 2008,

after considering the observations submitted on behalf of:

— Mr Klarenberg, by J. Dieker, Rechtsanwalt,

— Ferrotron Technologies GmbH, by M. Trayer, Rechtsanwalt,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— Commission of the European Communities, by V. Kreuschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(1)(a) and (b) 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 (OJ 2001 L 82, p. 16).

2 The reference was made in the course of proceedings brought by Mr Klarenberg against Ferrotron Technologies GmbH ('Ferrotron') for a declaration that the employment contract had been transferred to that company.

Legal context

Community legislation

3 Directive 2001/23 consolidated Council Directive 77/187/EEC of 14 February 1977 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 (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88) ('Directive 77/187').

4 Recital 8 in the preamble to Directive 2001/23 states:

'Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187/EEC as interpreted by the Court of Justice.'

5 Article 1(1)(a) and (b) of Directive 2001/23 provides:

'(a) This Directive shall apply 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.

(b) Subject to [point] (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive 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.'

6 The first subparagraph of Article 3(1) of Directive 2001/23 provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.'

7 Article 4(2) of that directive provides:

'If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

8 The first and fourth subparagraphs of Article 6(1) of Directive 2001/23 state:

'If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.

…

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.'

9 The wording of the abovementioned provisions of Article 1(1) of Directive 2001/23 is, in essence, identical to that of the provisions of Article 1(1) of Directive 77/187.

National legislation

10 The first sentence of Paragraph 613a(1) of the German Civil Code (Bürgerliches Gesetzbuch; 'the BGB') states:

'In the event of a transfer of a business or part of a business to another employer as a result of a legal transaction, the latter shall assume the rights and obligations arising under employment contracts existing at the time of the transfer.'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 From 1 January 1989 Mr Klarenberg was employed by ET Electrotechnology GmbH ('ET'), a company specialising in the development and manufacture of products in the field of industrial automation, and measurement and control technology, for the steel industry.

12 From 1 May 1992, Mr Klarenberg headed the 'F+E/ET-Systeme/Netzwerk/IBS' (R&D/ET-Systems/Network/Interface technology and bus systems) unit of ET. That unit was itself subdivided into three teams, namely 'F+E/ET-Systeme' (R&D/ET Systems), headed by Mr Klarenberg, 'EDV/Netzwerk/ServerSysteme/Datensicherung' (Data Processing/Network/Server Systems/Data protection), and 'Produktion/Schaltschränke/Platinen' (Production/Control Cabinets/Circuit Boards), headed by Mr Neumann, who was also deputy head of the whole unit.

13 Ferrotron specialises in the design and manufacture of products in the field of measurement and control techniques for the steel industry.

14 On 22 November 2005, ET entered into an 'asset and business sale and purchase agreement' with Ferrotron and its parent company, which has its company seat in the USA, in respect of the following products, developed by the 'F+E/ET-Systeme/Netzwerk/IBS' unit of ET, and called 'ET-DecNT', 'Et-DecNT light', 'ET-DecNT Power Melt', 'ET-TempNet', 'ET-OxyNet' and 'FT7000'.

15 Pursuant to that agreement, Ferrotron's parent company acquired all the rights over the software, patents, patent applications and inventions relating to the abovementioned products, as well as all the rights over the product names and technical know-how. Ferrotron acquired the development hardware and the inventory of product materials belonging to ET, as well as a related list of suppliers and of customers. Ferrotron also re-engaged a certain number of ET employees, namely Mr Neumann and three engineers from the 'F+E/ET-Systeme' team.

16 It is also apparent from the order for reference that, apart from the products which were the subject-matter of that contract, Ferrotron develops, manufacturers and distributes other products in the field of the metallurgical measurement techniques, and that the former employees of ET were integrated into the structure established by Ferrotron. In addition, those employees also carry out duties in relation to products other than those acquired by Ferrotron from ET.

17 On 17 July 2006, insolvency proceedings were initiated against ET.

18 Mr Klarenberg brought an action before the Arbeitsgericht Wesel (Labour Court, Wesel) claiming that Ferrotron should re-employ him in his role as head of unit. However, by judgment of 29 November 2006, the Arbeitsgericht Wesel dismissed his action.

19 Mr Klarenberg appealed that judgment to the Landesarbeitsgericht Düsseldorf (Regional Labour Court), claiming that Ferrotron should be ordered to re-employ him in his position under the terms of the employment contract concluded on 1 January 1989 with ET. In the alternative, Mr Klarenberg sought a declaration from that court that an employer-employee relationship had existed between the parties since 9 December 2005.

20 The Landesarbeitsgericht Düsseldorf takes the view that the 'F+E/ET-Systeme/ Netzwerk/IBS' unit, headed by Mr Klarenberg, is a part of the business — within the meaning of the first sentence of Paragraph 613a(1) of the BGB — which was transferred to Ferrotron, given that Ferrotron acquired the essential tools of production of the business concerned, the related lists of suppliers and of customers, that it re-engaged a number of the employees who were fully competent as regards the technical know-how, and that its parent company acquired the rights over the principal products and technologies.

21 However, the Landesarbeitsgericht Düsseldorf is uncertain whether the case before it concerns a transfer within the meaning of Directive 2001/23. According to a certain number of recent decisions of the Bundesarbeitsgericht (Federal Labour Court), a part of a business is not recognised as having been transferred to a new employer if the transferee does not continue to operate the relevant part of the business substantially unchanged and with its identity retained. It follows from that case-law that a transfer pre-supposes that the transferee preserves the organisational autonomy of that part of the business. By contrast, a part of the business cannot be regarded as transferred where it is fully integrated into the other undertaking's organisational structure or where its functions are carried out in a significantly larger organisational structure.

22 In the case before it, according to the referring court, Ferrotron did not retain the organisational autonomy of the relevant part of the business, in so far as the re-engaged employees were integrated into different units, and the functions taken over are now carried out in the framework of a different organisational structure.

23 It is in those circumstances that the Landesarbeitsgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a part of an undertaking or business only transferred to another employer within the meaning of Article 1(1)(a) and (b) of Directive 2001/23 … if, under the new employer,

that part of the undertaking or business continues to operate as an organisationally autonomous part of an undertaking or business?'

Admissibility of the order for reference

24 In its observations, Ferrotron expressed doubts regarding the admissibility of the order for reference, disputing the relevance of the question referred for the purposes of determining the outcome of the dispute in the main proceedings.

25 In that regard, it should be borne in mind that, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, inter alia, Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20; Case C-228/05 *Stradasfalti* [2006] ECR I-8391, paragraph 44; and Case C-313/07 *Kirtruna and Vigano* [2008] ECR I-7907, paragraph 25).

26 In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (*Schneider*, paragraph 21; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 31; and *Kirtruna and Vigano*, paragraph 26).

27 It follows that questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-202/04 and C-94/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; and *Kirtruna and Vigano*, paragraph 27).

28 In that regard, it is clear from the case-law that the presumption of relevance of questions referred for a preliminary ruling cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depend (*Cipolla and Others*, paragraph 26, and *van der Weerd and Others*, paragraph 23).

29 In the first place, Ferrotron contends that the existence of a transfer within the meaning of Directive 2001/23 is, from the outset, excluded, as it has not been established that the elements acquired by Ferrotron constituted an entity capable of being the subject of such a transfer. It follows that the question referred for a preliminary ruling is not relevant to the outcome of the dispute in the main proceedings.

30 However, it must be observed that the referring court made a different assessment on that point. According to it, the 'F+E/ET-Systeme/Netzwerk/IBS' unit is a part of a business, within the meaning of the first sentence of Paragraph 613a(1) of the BGB, which was transferred to Ferrotron, since Ferrotron acquired the essential tools of production of the business, the related lists of suppliers and of customers, that it re-engaged a number of the employees who were fully competent as regards the technical know-how, and that the parent company acquired the rights over the principal products and technologies. In the light of those factors referred to by the referring

court, and the conclusion which it reached, and for which it is responsible, doubt should not be cast on the relevance of the question referred by that court.

31 In the second place, Ferrotron argues out that, even if it were to be held that a transfer of a business took place on the basis of Directive 2001/23, that would not imply the transfer of the employment contract of the applicant in the main proceedings, since the duties which the latter carried out at ET were, in large part, carried out in units other than the 'F+E/ET-Systeme/Netzwerk/IBS' unit and could not therefore be linked to that unit.

32 The order for reference, however, in its description of the factual context in which the question referred arises, explicitly indicates, on the contrary, that the applicant in the main proceedings was the head of the 'F+E/ET-Systeme/Netzwerk/IBS' unit. As is clear from paragraph 27 of this judgment, the national court alone is responsible for such a factual assessment, and it is not for the Court to determine the accuracy of that assessment.

33 In the third place, Ferrotron maintains that Mr Klarenberg has forfeited the right to invoke the transfer of his employment contract since, although he was aware of the agreement between Ferrotron and ET, he nevertheless waited until ET was insolvent before asserting claims against Ferrotron.

34 The existence, in Germany, of legislation laying down a time-limit after which the applicant in the main proceedings would no longer be in a position to rely on the transfer of his employment contract is a matter which, as is clear from paragraph 28 of this judgment, it is not for the Court to determine.

35 Having regard to the foregoing, it must be held that the reference for a preliminary ruling is admissible.

The question referred for a preliminary ruling

36 By its question, the referring court asks, in essence, whether Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as meaning that that Directive may also apply in a situation where the new employer does not preserve the organisational autonomy of the part of the undertaking or business transferred.

37 At the outset, it should be borne in mind that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-53/05 *Commission* v *Portugal* [2006] ECR I-6215, paragraph 20; and Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-7841, paragraph 15).

38 It is clear from the very wording of Article 1(1)(a) of Directive 2001/23 that any transfer, to another employer, involving an undertaking, a business, or part of an undertaking or business and brought about by a legal transfer or merger falls within the scope of that directive.

39 Subject to those conditions, the transfer must nevertheless also satisfy the conditions laid down in Article 1(1)(b) of Directive 2001/23 if that directive is to apply: that is to say, it must concern an economic entity — understood by 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' — which, following the transfer, retains its 'identity'.

40 It should at the outset be recalled that, as is clear from recital 8 in the preamble to Directive 2001/23, the above provision was adopted to clarify the concept of transfer in the light of the case-law of the Court (see, inter alia, Case 186/83 *Botzen and Others* [1985] ECR 519, paragraph 6, and Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 11). According to that case-law, Directive 2001/23 is intended to ensure the continuity of employment relationships existing within an economic entity, irrespective of any change of ownership and, thus, to protect employees in the event that such a change occurs.

41 It is clear from the provisions of Article 1(1)(a) of Directive 2001/23, read in conjunction with those of Article 1(1)(b) thereof, that, in the event that the economic entity transferred does not retain its identity, the application of point (b) of Article 1(1) forestalls the operation of point (a) of that provision. It follows that Article 1(1)(b) of Directive 2001/23 is capable of restricting the scope of Article 1(1)(a) of that directive, hence the scope of the protection afforded by that directive. Such a provision must therefore be construed narrowly.

42 Ferrotron contends that the 'economic entity', defined in Article 1(1)(b) of Directive 2001/23, retains its identity only if the organisational link which connects all of the staff and/or all of the elements is preserved. By contrast, the economic entity transferred does not retain its identity in a situation where, following the transfer, it

loses its organisational autonomy, the acquired resources having been integrated by the transferee into an entirely new structure.

43 However, regard being had, in particular, to the objective pursued by Directive 2001/23, which seeks — as is clear from paragraph 40 of this judgment — to ensure effective protection of employees' rights in the event of a transfer, such an understanding of the identity of the economic entity, according to which that identity depends entirely on the single factor relating to organisational autonomy, as contended by Ferrotron, cannot be accepted. It would imply that, on account of the sole fact that the transferee decides to break down the part of the undertaking or business which it has acquired and to integrate it into its own structure, Directive 2001/23 could not be applied to that part of the undertaking or business, thus depriving the employees concerned of the protection afforded by that directive.

44 As regards, specifically, the factor relating to organisation, although the Court has previously held that that factor contributes to defining an economic entity (see, to that effect, Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 15; Case C-234/98 *Allen and Others* [1999] ECR I-8643, paragraph 27; Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraph 53; and Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 34), it has also held that an alteration in the organisational structure of the entity transferred is not such as to prevent the application of Directive 2001/23 (see, to that effect, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraphs 20 and 21; *Mayeur*, paragraph 54; and Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 36).

45 Moreover, of itself, Article 1(1)(b) of Directive 2001/23 defines the identity of an economic entity by referring to an 'organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary', thus emphasising not only the organisational element of the entity transferred but also the element of pursuing an economic activity.

46 Having regard to the foregoing, in order to interpret the condition relating to the preservation of the identity of an economic entity, within the meaning of Directive 2001/23, account should be taken of the two elements — as laid down in Article 1(1)(b) of Directive 2001/23 — which, taken together, constitute that identity, and of the objective pursued by that directive, namely the protection of employees.

47 In accordance with those considerations and, in order not to frustrate in part the effectiveness of Directive 2001/23, that condition should be interpreted, not as requiring the retention of the specific organisation imposed by the undertaking on the various elements of production which are transferred, but — as the Advocate General stated in points 42 and 44 of his Opinion — as requiring the retention of a functional link of interdependence, and complementarity, between those elements.

48 The retention of such a functional link between the various elements transferred allows the transferee to use them, even if they are integrated, after the transfer, in a new and different organisational structure, to pursue an identical or analogous economic activity (see, to that effect, Case C-392/92 *Schmidt* [1994] ECR I-1311, paragraph 17).

49 It is for the referring court to ascertain, in the light of the foregoing elements, in the context of a global assessment of all the facts characterising the transaction in question in the main proceedings (see, to that effect, *Spijkers*, paragraph 13; Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 24; *Süzen*, paragraph 14; and *Allen and Others*, paragraph 26) whether the identity of the economic entity transferred was preserved.

50 As was pointed out both by the referring court in its order for reference, and by the German Government and the Commission of the European Communities in their observations to the Court, the wording of the first and fourth subparagraphs of

Article 6(1) of Directive 2001/23 confirm that, in the mind of the Community legislature, that directive is intended to apply to any transfer satisfying the conditions laid down in Article 1(1) of that directive, whether or not the economic entity transferred retains its autonomy in the transferee's organisational structure.

51 It is, lastly, necessary to reply to Ferrotron's argument that, in the event of the transferred economic entity losing its organisational autonomy, the continuity of the employment relations that Directive 2001/23 seeks to guarantee cannot, in any event, be assured because the employment position of head of unit, previously occupied by Mr Klarenberg, cannot be linked to any equivalent employment position in the new work structure established by the transferee.

52 In that regard, it should be recalled that the Court has already held that an obligation to terminate contracts of employment governed by private law in the case of the transfer of an economic activity to a legal person governed by public law constitutes, in accordance with Article 4(2) of Directive 2001/23, a substantial change in working conditions to the detriment of the employee and resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer (*Mayeur*, paragraph 56). Likewise, it must be held that the impossibility, which may arise in the event of a transfer, of assigning to an employee, in the organisational structure put in place by the transferee, a position of employment which is equivalent to that which that employee occupied under the previous owner could, if it leads to a substantial change in working conditions to the detriment of that employee, be assimilated with termination of the employment contract resulting from the action of the employer, for the purposes of that provision.

53 The reply to the question referred by the Landesarbeitsgericht Düsseldorf is therefore that Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as meaning that that directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity, a matter which it is for the national court to determine.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 1(1)(a) and (b) 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 must be interpreted as meaning that that directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is

preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity, a matter which it is for the national court to determine.

[Signatures]