Transfers of undertakings and guarantees of employment

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Some collective agreements include so-called "employment guarantees" amongst their clauses. By way of such clauses, companies commit, as it were, to maintaining their workers in employment even under circumstances which would support the termination of employment contracts. Although such commitments generally involve technology companies, with continuous innovation processes that require regular technical changes, a question arises as to whether transfers of undertakings constitute a breach of such clauses inasmuch as workers find themselves dependent on a different company even whilst retaining their job.

1. The application of the collective agreement to which the company Euskaltel, S.A. is a party has recently raised this issue by reason of said agreement containing a guarantee of employment for its workers. Euskaltel, with most of its share capital privately owned, is a telecom operator in the Basque country and offers land line, mobile, Internet and digital television services. One of its departments, that of "Development and Operations", is responsible for maintenance and programming of the software and infrastructure related to the company's information systems, creating, developing and installing computer programming and offering computer maintenance.

   Euskaltel decides to sign a contract with another company, Grupo Corporativo GFi Norte, S.L., under which the latter assumes the maintenance and development of the software and infrastructure related to Euskaltel's information systems, as well as of the services of execution of specific projects that are defined as essential to the correct and proper course of Euskaltel's business. GFi undertakes to acquire by purchase or, where appropriate, permission to use, material resources of Euskaltel, whereas Euskaltel warrants to GFi ownership of the software licenses whose use it exclusively authorises within the scope of provision of the services as defined in the framework agreement, without the possibility of using them for other services, be they their own or third parties'. GFi gives all kinds of undertakings in terms of service (incident management, request management, ongoing maintenance, complaint resolutions, malfunctions, launch processes and product management, billing process, critical data loading, hosting services, etc.).

2. From a labour perspective, the process involves the outsourcing of 33 workers from a production unit of Euskaltel where a total of 63 persons work. Addressing the possibility of construing a transfer of undertaking, the judgment of the Supreme Court of 14 April 2016 (Ar. 105673) examines whether the core elements of such a transfer are present in the case at issue.

   GFi has taken on workers who formed part of Euskaltel's "Development and Operations" Department, personnel qualified in programming, systems installation and systems maintenance. The trade unions, however, contend that this is

not an area within the pre-existing Department of Systems Operations, but one that has been artificially created, shortly before, as a result of the movement of workers from other areas of the company. Moreover, in this process, people, the workers, are transferred, but the related production means are servers and computers belonging to Euskaltel, owned by Euskaltel and located on premises of Euskaltel.

Nor can a transfer of undertaking be construed on account of a "staff transfer", the trade unions contend, since only 33 of the 63 workers from the affected Department are transferred. These, moreover, lack not only the independence to operate on their own, but also an organisation and management in the new company to make decisions on the work to be performed by them. Euskaltel maintains the task of governance and control over their work, since certain core duties have not been transferred, and despite the infrastructure to carry out their functions being essential, not marginal, there has been no transfer of basic assets.

3. According to art. 44(2) of the Employee (Rights and Responsibilities) Act (*Estatuto de los Trabajadores*), there is a transfer of undertaking where the transfer affects 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. As is known, this provision results from the transposition of EU legislation, which refers to the "transfer of an undertaking, business or part of an undertaking or business" [art. 1(1)(a) of Directive 2001/23], whilst art. 44(1) of the Employee (Rights and Responsibilities) Act refers to a "change of ownership of a company, worksite or independent production unit", using in the next sub-article the term "transfer".

   The judgment of the Supreme Court of 14 April 2016 (Ar. 105673) recalls that the decisive criterion for establishing the existence of a transfer for employment purposes is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed [Judgment of the Court of Justice of the European Union (CJEU) of 20 November 2003 in case C-340/01, *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH.*, and of 15 December 2005 in joined cases C-232/04 and C-233/04, *Nurten Güney-Görres and Gul Demir v Securicor Aviation (Germany) Ltd and Kötter Aviation Security GmbH & Co. KG.*]. The transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract [Judgment of the European Court of Justice (ECJ) of 19 September 1995 in case C-48/94 *Rygaard*], inferring from this the concept of an entity as an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

   To this end, all the facts characterising the transaction in question must be taken into account, including in particular, the type of undertaking or business, whether or not its 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, 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. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation [Judgment of the ECJ of 11 March 1997 in case C-13/95, *Süzen*].

   On this point it also questioned whether the transfer of an organised grouping of resources necessary to pursue its activity only covers the transfer to the transferee of the transferor's property or, instead, it is not necessary for the transferee to acquire ownership for a transfer of undertaking to exist. According to EU case law, any 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 the employees of the undertaking suffices, regardless of whether or not ownership of the undertaking is transferred [Judgment of the ECJ of 17 December 1987 in case C-1992/84, *My Molle Kiro*, and of 12 November 1992 in case C-209/91, *Watson Rask*]. That the transfer is in the form of a lease is thus not material, because to be an employer the transferor's property need not be owned [Judgments of the Supreme Court of 11 December 2002 (Ar. 1961) and 12 December 2007 (Ar.1460)]. Moreover, the absence of a contractual relationship between the transferor and the transferee cannot be decisive in this regard, although it may point to

the absence of a transfer within the meaning of the Directive [Judgment of the ECJ of 11 March 1997 in case C-13/95, *Süzen*]. In fact, it is acknowledged that the transfer may occur over two stages or through a third party [Judgment of the ECJ of 7 March 1996 in joined cases C-171/94 and C-72/94, *Merckx and Neuhyus*].

4. In view of the foregoing, the Court concludes that there has been a transfer between Euskaltel and GFi. The latter has taken on the workers who formed part of the "Development and Operations" Department and in the activity of this Department "the human element is essential due to its mastery of computer programming and computer maintenance. All Euskaltel workers serving in said Department have been transferred to GFi, together with middle management and the material resources with which said activity is pursued (computers, permissions to use of software licences, etc.). No instructions are given by Euskaltel to GFi workers, who receive their instructions from the latter company" (Judgment of the Supreme Court of 14 April 2016 [Ar. 105673, FJ 13]).

In conclusion, the outsourcing is found to be consistent with the law because, as a result of the same, surplus labour has been avoided, outplacing all workers in the new company and thereby complying with the collectively agreed provision at issue. If, as the Court has done, one takes the employment guarantee contained in the collective agreement as involving the maintenance of employment contracts, the agreed clause has not been breached; if, however, the provision included by the bargainers is construed as meaning stability in the company, such intention must be deemed breached.