The Plessers saga has come to an end â€“ Is this a breakthrough in the reform of the reorganisation procedure?

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The reorganisation procedure aims to provide an opportunity for undertakings facing financial difficulties to continue their business and activities and is governed by the provisions in book XX of the Belgian Economic Law Code (“ELC”) (previously the procedure was provided in the Belgian Act on the Continuity of Enterprises (commonly abbreviated to “WCO”)).

In the framework of the judicial reorganisation by transfer under judicial supervision, Article XX.86, §3 ELC provides that the transferee of the debtor’s activities can choose which employees it will take over. This choice must be determined by technical, economic and organisational reasons and may not include any prohibited differentiation. This choice derogates from the general rule under the Collective Labour Agreement 32bis in the event of a transfer of a company that the transferee is obliged to take over all employees. Therefore, this right to choose forms an important exception and is often the incentive for the transferee to acquire the activities of a debtor in the framework of a judicial reorganisation by transfer under judicial supervision.

The Plessers case has questioned the legality of this so-called right to choose under Article XX.86, §3 ELC. The Court of Justice of the European Union (the “EU Court”) decided on 16 May 2019 that the European Directive 2001/23/EC regulating employees’ rights in the event of transfers of undertakings (the “Directive”) precludes Article XX.86, §3 ELC (the previous Articles 61, §3 of the WCO).

This judgment caused a serious threat for the future applicability of this type of reorganisation procedure. The Court of Appeal recently found the Belgian State liable for the incorrect implementation of the Directive.

I. Refreshment of the Plessers case

On 23 April 2012, at the request of Echo NV, the Commercial Court of Hasselt started a judicial

reorganisation procedure to reach a collective agreement with the creditors (better known as "WCO 2"). At the request of Echo NV, the legal procedure was changed into a transfer under judicial supervision ("WCO 3"). On 22 April 2013, Prefaco NV took over the activities of Echo NV together with approximately 2/3 of Echo NV's employees. Ms. Plessers, however, was not taken over and argued that this was contrary to Articles 3 to 5 of the Directive. Consequently, Ms. Plessers initiated a legal procedure before the labour court against Prefaco NV. Afterwards, the Court of Appeal of Hasselt referred to the EU Court for a preliminary ruling on the interpretation of Articles 3 to 5 of the Directive.

The general principle of the Directive is that employment contracts are automatically transferred in the event of a transfer of an undertaking and that a transfer as such is not a reason to dismiss employees. Redundancies in the context of a transfer of an undertaking must be justified by economic, technical or organisational reasons relating to employment that do not intrinsically relate to such transfer of an undertaking (Articles 3 and 4 of the Directive).

However, this protection for employees does not apply in the case of (i) a transfer of (a part of) an undertaking (ii) that is the subject of bankruptcy or similar proceedings (iii) with a view to the liquidation of its assets under the supervision of a competent public authority (Article 5 of the Directive).

On 16 May 2019, the EU Court ruled that a transfer under judicial supervision does not meet these conditions and therefore does not fall under the exception of Article 5 of the Directive. The EU Court ruled that the Directive precludes national legislation that, in the context of judicial reorganisation by transfer under judicial supervision, gives the transferee the right to choose the employees he wishes to take over.

II. Decision of the Court of Appeal of Hasselt

On 24 March 2021, almost two years after the EU Court's ruling, the Court of Appeal of Hasselt held the Belgian State liable for infringing its obligation to correctly implement the Directive into national law.

Ms. Plessers waived her claim against Prefaco NV and shifted focus to the Belgian State by initiating a claim against the latter regarding the non-contractual liability for the incorrect implementation of the Directive.

The Court of Appeal stated that the Directive can only be interpreted contra legem as the interpretation of Article XX.86, §3 ELC (the previous Article 61, §4 of the WCO) in compliance with the Directive is not possible. Such a contra legem interpretation falls outside the competence of the national courts. Therefore, the Court of Appeal qualified the incorrect implementation of the Directive into national legislation as a fault that could lead to the liability of the Belgian State.

The qualification of the fault of the Belgian State was easy to establish but providing proof of

damages suffered and causal link between the fault and these damages seemed to be more problematic for Ms. Plessers.

Unfortunately, Ms. Plessers failed to deliver sufficient evidence to prove a causal link between the fault of the Belgian State and the damage she suffered from the incorrect implementation of the Directive.

According to Ms. Plessers, the total elimination of the transferee's right to choose would have been the only alternative for the Belgian State to comply with the Directive. In that respect the transferee would automatically become her employer so that her resignation would give her the right to a termination fee.

However, the Court of Appeal did not follow Ms. Plessers on that point. Instead, the Court of Appeal stated that the EU Court did not impose a total elimination but merely stated that the national legislation had not implemented enough safeguards to guarantee a justified redundancy for employees.

The EU Court also suggested that the Belgian legislator could implement an obligation for the transferee to justify the redundancies in the context of a transfer of an undertaking by economic, technical or organisational reasons relating to employment which do not intrinsically relate to that transfer. Given this alternative, the Court of Appeal rejected the claim of Ms. Plessers regarding the indemnity.

Although her claim was denied, Ms. Plessers did not return home empty-handed as the Court of Appeal awarded her a compensation estimated at EUR 1,000.00 ex aequo et bono for the loss of a potential chance of employment with the transferee.

III. Future developments of the reorganisation procedure

On 21 October 2020, a draft bill was introduced in order to cope with the consequences of the EU Court's ruling.

The Belgian legislator aims to reform the reorganisation procedure so that the exception of Article 5 of the Directive would be applicable. This would mean that the right for the transferee to choose will remain untouched. In addition to that, the legislator suggests an obligation for the transferee to reason its choice regarding the employees that will not be transferred based on economic, technical or organisational reasons irrespective of the transfer itself.

At this moment, the draft bill is still pending in the Chamber of Representatives. It remains to be seen whether the new bill will stand the European test and whether the future bill will be compliant with the Directive.

In absence of this new legislative amendment, there is still legal uncertainty in every judicial reorganisation as to what position the competent court will take regarding the transferee's choice

of employees to take over. In practice, we see that some courts apply the current Belgian legislation while others conform to the European regulations. It is therefore important that the legislator quickly provides an appropriate answer to this uncertainty, also in line with the European Directive.