

**Analysis of the Portuguese legal framework concerning
the safeguarding of employees' rights in the event of the transfer
of an undertaking or an establishment compliance with the directive
2001/23/CE of 12 march 2001**

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Abstract

*The undertaking, business, or part of an undertaking or business can be transferred to another person or corporation as a result of a merger or a legal transfer, transitory or definitive. As a consequence of the transfer, there is subrogation *ex lege* of the transferee in the rights and obligations arising from the employment relationship existing on the date of a transfer. This issue is of the utmost importance to accomplish the freedom of the employer negotiate the undertaking and the protection of employees' rights as well. The Portuguese legal framework has been shaped by Directive 77/187/ CEE and subsequently by Directive 2001/23/CE. In this paper, in order to assess the compliance of the legal framework concerning the enshrined in Labor Code with the Directive 2001/23 /CE, it will be performed a comparative analysis between both regulations, which will be coordinated with the case law from the Court of Justice and Portuguese Courts. We will conclude that, apart from some issues, the Portuguese labour law regarding the safeguarding of employees' rights in the event of the transfer of an undertaking complies with the Directive 2001/23 /CE and the case law from the Court of Justice.*

Keywords: *Directive 2001/23/CE, Portuguese Labour Law, transfer of undertaking*

JEL Classification: K31

1. Introduction

The undertaking, business, or part of an undertaking or business can be transferred to another person or corporation as a result of a merger or a legal transfer, transitory or definitive.

As a consequence of the transfer, there is a subrogation *ex lege* of the transferee in the transferor rights and obligations arising from the employment relationship existing on the date of a transfer.

This issue is of the utmost importance to accomplish the freedom of the employer to negotiate the undertaking and the protection of employees' rights as well.

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The Portuguese legal framework has been shaped by Directive 77/187/CEE and subsequently by Directive 2001/23/CE.

In this paper, in order to assess the compliance of the legal framework provided in Labour Code with the Directive 2001/23/CE, we will perform a comparative analysis between both regulations, which will be coordinated with the case law Court of Justice of European Union and Portuguese Courts.

Contrary to what happened in the art. 319^o/3 of the Portuguese Labour Code 2003 (CT2003), the transferee no longer has the right to post a notice in the workplace to inform the workers that they have a deadline of three months claim their credits. Under that rule, the transferee was not liable for the payment of credits that were not claimed within that deadline.

We intend to discuss the removal of this rule in Portuguese Labour Code 2009 (CT), questioning its validity in light of Directive 2001/23/EC.

We will also evaluate the circumstances under which the employee may oppose the transfer of his contract employment contract to the transferee.

We will analyse the compatibility of art. 285^o/4 of the Portuguese Labour Code 2009 with Directive 2001/23/EC, considering that this provision excludes from the undertaking, business, or part of an undertaking or business transfer legal frame work workers, whose employment contract the transferor has decided to maintain, but that are transferred to another business or part of the undertaking by referring to the legal framework concerning the workplace transfer ruled by art. 194^o of the CT.

We will also examine the issues raised by the compliance of the duty to inform and to consult the representatives of employees by transferor and transferee and by the protection granted to the status and function of the representatives or of the representation of the employees of the economic unit transferred.

Throughout this *paper*, we will address, where necessary, the law of the European Union, in particular, Directive 2001/23/EC and the case law of the Court of Justice.

We will conclude that, apart from some issues, the Portuguese labour law regarding the safeguarding of employees' rights in the event of the transfer of an undertaking complies with the Directive 2001/23/CE and the case law from the EU Court of Justice.

2. The transfer of undertakings, businesses or parts of undertakings or businesses

The legal framework concerning the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses is enacted by art. 285^o/1 of the CT, which states that "*In the case of transmission, by any title, of undertakings, businesses or parts of undertakings or businesses that constitutes an economic unit, the rights and obligations arising*

from a contract of employment are transferred to the transferee, as well as the liability to pay the fine imposed by the practice of a labour offense."²

The scope of this rule is delimited by two criteria: the type of transaction that operates the transmission and the object transferred.³

With regard to the first criteria, we can draw a broad notion of transfer, which includes several legal transactions suitable to produce a change of employer, including sell and purchase, judicial sale, merger or spin-off, among others.⁴

This legal regime is also extended, in accordance with art. 281º/3 CT, to transitory transmissions, such as, the lease and the retransfer of the undertaking.⁵

² This issue was firstly regulated by art. 37º Decreto-Lei n.º 49408 de 24 de Novembro de 1969 (LCT) and was subsequently ruled, with considerable modifications by arts. 318º-321º of the CT2003. The provisions 285º-287º of the CT preserved, with slight changes, the legal framework provided by arts. 318-321 CT2003, adding the liability for payment of the fine and the removal of the possibility of posting a notice in the workplace to inform the workers that they have a deadline of three months to claim their credits. The harmonization of both legal frameworks is explained by the fact that both had the purpose to transpose 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. This Directive was preceded by Directive 77/187/EEC of 14 February 1977, which was subsequently amended by Directive 98/50/EC of 29 June 1998. As noted by Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho, Parte II - Situações Laborais Individuais*, 5.ª Edição, Almedina, Coimbra, 2014, p. 802, these directives reveal the concern of EU Law with the protection of employees affected by the transfer. Employee in the meaning of the Directive is any person who, in the Member State concerned, is protected as an employee under national employment law, workers with an employment relationship governed by a fixed-duration contract or on a temporary employment temporary employment relationships between a temporary or a worker assigned within an employment business worker to work for and under the control of an undertaking and/or establishment making use of his services, according to Article 1 (1) (2) of Directive 91/383/EEC.

³ Cfr. Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho, Parte II - Situações Laborais Individuais*, cited above, pp. 804-807, João Reis, *O regime da transmissão da empresa no Código do Trabalho*, Nos 20 anos do Código das Sociedades Comerciais: Homenagem aos Professores Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. I, Coimbra Editora, 2007, p. 307.

⁴ According to the broad notion provided by the Directive, art. 1º, b) "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". COJ in decision 7 March 1996, *Merckx and Neuhuys*, Joined Cases C-171/94 and C-172/94, European Court Reports 1996 I-01253, ECLI:EU:C:1996:87, paragraph 28, sustains that as regards the mode of such a transfer, the Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who incurs the obligations of an employer towards employees of the undertaking. Cfr. Coutinho de Abreu, *A empresa e o empregador em Direito do Trabalho*, Separata do BFD – Estudos em Homenagem ao Prof Doutor José Joaquim Teixeira Ribeiro, 1983, p. 300, defined transfer as a "subjective change of the employer" performed by any act, negotiable or non negotiable, that cause the undertaking or business circulation.

⁵ COJ in decision 15 June 1988 P. *Bork International A/S, in liquidation v Foreningen af Arbejdsledere i Danmark and others*, Case 101/87, European Court reports 1988, Page 03057, expressly refers that "Article 1 (1) of Directive 77/187/EEC is to be interpreted as meaning that the directive applies where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the

As far as it concerns to the second criteria, the transfer has as object an economic entity, which can be an undertaking, business but also parts of the undertaking or business.⁶

It must be noted that the concept of an undertaking sustained by the Court of Justice in the meaning of Directive is wider than the concept of business under commercial law, including, as provided in art. 1º, 1, c) of Directive 2001/23/EC,

*lease, with just over half of the staff that was employed in the undertaking by the former lessee, provided that the undertaking in question retains its identity”(paragraph 20). For more details, Roger Blanpain, *European Labour Law*, 11th revision, Wolters Kluwer, Alphen aan den Rijn, 2008, p. 649. Joana Vasconcelos, commentary on art. 285º, in Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho Anotado*, 9.^a ed, Almedina, 2013, p. 627, refers that this was one of the great innovations of the CT2003 in relation to art. 37º of the LCT, in addition to the transferor and the transferee jointly and severally liability in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer. As regards the aforementioned, Joana Vasconcelos, commentary on art. 285º, in Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho Anotado*, cited above, p. 627, states that this solution, besides being supported by the broad notion of transfer e already referred, enshrines the interpretation of Directive 77/187/EEC, sustained by the COJ, and that has been progressively being accepted by Portuguese literature, that the undertaking fall within the framework laid down in Directive 77/187/EEC and later 2001/23/EC, provided that subsists the economic identity of the establishment and continuation of its activity. This position was denied by Portuguese courts, that demanded an agreement between transferor and transferee pursuant to property transfer, as underlined by Joana Vasconcelos, *A transmissão da empresa ou estabelecimento no Código do Trabalho*, Prontuário de Direito do Trabalho, 71, Maio-Agosto 2005. p. 80. As sustained in COJ decision 18 March 1986. - **Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV.**, European Court Reports 1986 - 01119, ECLI:EU:C:1986:127, the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity (paragraph 11). So there is the need to consider whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities (paragraph 12). The Court also sustained that to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business 's 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 and 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. All those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (paragraph13). Even a temporary suspension of the undertaking's activity does not of itself preclude the possibility that a transfer has taken place as the COJ held in the decision 17 December 1987, *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro*, Case 287/86, European Court Reports 1987 -05465 ECLI:EU:C:1987:573, paragraph 19.*

⁶ The notion of economic entity demands that the production unit have any autonomy, according to Catarina de Oliveira Carvalho, *Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho*, A Reforma do Código do Trabalho, Coimbra Editora, Coimbra, 2004, p. 461, n. 50. Portuguese jurisprudence has adopted this broad concept of establishment, identified with an idea of autonomous production unit, in several decisions. See Supreme Court decisions from 27.05.2004, Case No. 03S2467, 29.06.2005, Case No. 05S164 and 24.02.2010, Case 78/1998.S1 available in www.dgsi.pt

public and private undertakings engaged in economic activities whether or not they are operating for gain.⁷

⁷ COJ in decision 19 September 1995 - *Ledernes Hovedorganisation, acting for Ole Rygaard v Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S*, Case C-48/94, European Court reports 1995 Page I-02745, (ECLI): ECLI:EU:C:1995:290, sustains a notion quite similar to the notion of business provided by Commercial law as it demands that under the meaning of the Directive must be transferred a stable economic entity whose activity is not limited to performing one specific works contract, explaining that transfer must include a body of assets enabling the activities, or certain activities, of the transferor undertaking to be carried on in a stable way (paragraphs 20 and 21). COJ in decision 11 March 1997, *Ayşe Sützen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*, Case C-13/95, European Court Reports 1997 I-01259, ECLI:EU:C:1997:141, also sustains that the term 'entity' refers to an organised grouping of persons and of assets enabling an economic activity which pursues a specific objective to be exercised (paragraph 13). The Court also held that it must be recognized that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task (paragraph 21). Nevertheless, COJ in decision 14 April 1994, *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen*, Case C-392/92, European Court Reports 1994 I-01311, ECLI:EU:C:1994:134, sustained that article 1(1) of the directive covered a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee (paragraphs 16, 17 and 20). The COJ also stated that the fact that the activity transferred is for the transferor merely an ancillary activity not necessarily connected with its objects cannot have the effect of excluding that operation from the scope of the directive (paragraph 14). The COJ in decision 10 December 1998. *Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97)*, Joined cases C-127/96, C-229/96 and C-74/97, European Court Reports 1998 I-08179 ECLI:EU:C:1998:594, sustained that the Directive 77/187/EEC covers the situation in which an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate its contract with that other undertaking and in future to carry out the cleaning work itself, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings. In the meaning of the Directive the term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. Therefore, the mere fact that the maintenance work carried out first by the cleaning firm and then by the undertaking owning the premises is similar does not justify the conclusion that a transfer of such an entity has occurred (paragraph 35).

The Court has held that in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, if such an entity is capable of maintaining its identity after it has been transferred. Where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking in a stable way (paragraph 32). The Court in decision 2 December 1999, *G. C. Allen and Others v Amalgamated Construction Co. Ltd.*, Case C-234/98, European Court Reports 1999 I-08643, ECLI:EU:C:1999:594, also sustained that: *Where, in particular, an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets* (paragraph 28) concluding that "Directive applies to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts for driveage work in mines in so far as the transaction

In accordance with article 3^o/1 of Directive 2001/23/EC, art. 285^o CT provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are *ex lege* transferred to the transferee, by reason of the transfer of an undertaking or an establishment, or part of an undertaking or business.⁸

The transferee will be, then, liable for the obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

In accordance with the possibility accepted by article 3^o/2 of Directive 2001/23/EC, the Portuguese legislator provides in art. 285^o/2 CT that the transferor and transferee are jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer during the year following the transfer.⁹

Contrary to what happened to the former art. 319^o/ 3 of the CT2003, the transferee no longer has the right to put a notice in the workplace to inform the workers that they have a deadline of three months claim their credits. Otherwise, the transferee was not liable for the payment of credits that were not claimed within that deadline.

involves the transfer of an economic entity between the two companies. The term 'economic entity' refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective." (paragraph 39).

⁸ Our literature identifies a subrogation *ex lege*. See Carlos Mota Pinto, *Cessão da posição contratual*, Almedina, Coimbra, 1982, p. 90, Pedro Romano Martinez, *Direito do Trabalho*, 7.^a edição, Almedina, 2015, p. 769, Catarina de Oliveira Carvalho, *Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho*, A Reforma do Código do Trabalho, cited above, p. 460, Rosário Palma Ramalho, *Tratado de Direito do Trabalho*, cited above, p. 815.

⁹ The joint liability, which is not imposed, but only allowed by article 3, 1, of the Directive, reinforces the equity guarantee workers and guardianship, although scarcely protects the transferee. See Joana Vasconcelos, commentary on art. 285^o, Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho Anotado*, cited above, p. 625. The Portuguese Labour Code does not provides a solution to the internal relations between transferor and transferee. Júlio Gomes, *Direito do Trabalho*, Vol I, Coimbra Editora, 2005, p. 832, considering that the aim of this regime is to protect the worker, sustains that within this period the transferee may demand the payment of the debts to the transferor. Joana Vasconcelos, commentary to art. 285^o, Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho Anotado*, cited above, p. 625, holds that the payment by the transferor of debts transferred to the transferee enables him to demand that payment to the transferee. Naturally, it must be considered the solution provided by the parties in the agreement through which the transfer occurred. Unlike the provision of art. 37^o of LCT, according to which the joint and several liability was limited to the transferor's obligations due in the six months prior to transmission, the art. 318^o CT2003, such as 285^o CT, does not limit temporally the retroactive effect of the transfer. Cfr. Pedro Romano Martinez, *Direito do Trabalho*, cited above, p. 775.

This rule enabled the transferee to have a more accurate idea of the labour debts, allowing a better judgment regarding the agreement underlying the undertaking transfer.¹⁰

Some literature claimed that this restriction of the transferee liability to the credit claimed within the three months deadline could be incompatible with the transfer to the transferee of transferor's obligations and rights imposed by art. 3^o of the Directive.¹¹

These reservations lack foundation, as on the one hand, the transferee just will not be liable for the payment of debts that workers for obvious lack of diligence did not claim¹². On the other hand, art. 319^o/3 CT recognized only the possibility to post the notice, eliminating the mandatory nature provided by art. 37^o of LCT.

This notice appears to fulfill the art. 3^o/2 from the Directive 2001/23/EC where is admitted that Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer.¹³

The CT has eliminated this rule, denying the transferee the possibility to know the exact amount of the debts from the transferor to the transferee,

Joana Vasconcelos sustains, in our opinion correctly, that it is still possible and also useful to post notice establishing a deadline for credits claims by workers. This warning, although devoid of any sanction, reinforces the good faith and could justify, in the case of a deliberate omission by the workers, the denial to the right to claim the credit, under the good faith.¹⁴

3. The worker's right to object to the transfer of his contract of employment or employment relationship to the transferee.

The transfer of transferor's rights and obligations arising from the employment relationship existing on the date of a transfer does not require the consent of workers.

¹⁰ Joana Vasconcelos, commentary to art. 285^o, in Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho*, cited above, p. 626 and Pedro Romano Martinez, *Direito do Trabalho*, cited above, p. 776.

¹¹ Joana Vasconcelos, *Transmissão da empresa ou estabelecimento, responsabilidade por créditos laborais e tutela do adquirente*, *Prontuário de Direito do Trabalho*, 87, Setembro-Dezembro 2010, p. 174.

¹² Pedro Romano Martinez, *Direito do Trabalho*, cited above, p. 776.

¹³ Nevertheless, under art. 3^o/2 *in fine* a failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

¹⁴ Cfr. Joana Vasconcelos, commentary to art. 285^o, in Pedro Romano Martinez, Luís Miguel Monteiro, Joana Vasconcelos, Pedro Madeira de Brito, Guilherme Dray, Luís Gonçalves da Silva, *Código do Trabalho*, cited above, p. 626.

It has however been discussed in Portugal if there is a right of the worker to oppose to the transfer of his employment contract to the purchaser.

In favor of the recognition of this right is invoked the decision of the Court of Justice in the case *Katsikas*.¹⁵

The Court of Justice, arguing that the employee obligation to retain his employment relationship with the transferee would endanger the fundamental rights of the employee, sustained that the employee must be free to choose his employer and cannot be forced to work for an employer whom he has not freely chosen.

The Court of Justice held that art. 3^o/1 of the Directive does not preclude an employee from deciding to object to the transfer of his contract of employment or employment relationship.¹⁶

However, it was also held that the Directive does not require the Member States in the event that the worker freely decide not maintain the contract or employment relationship with the transferee to provide that the contract or relationship is to be maintained with the transferor, leaving it to Member States to determine the fate of the contract or the employment relationship with the transferor.¹⁷

¹⁵ CJEU 16 December 1992 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH.*, Joined cases C-132/91, C-138/91 and C-139/91. European Court Reports 1992 I-06577, ECLI:EU:C:1992:517. The Court held that Article 3(1) of Directive 77/187/EEC is to be interpreted as not precluding an employee of the transferor on the date of the transfer of the undertaking, within the meaning of Article 1(1) of the directive, from objecting to the transfer of his contract of employment or employment relationship to the transferee. The directive does not, however, require Member States to provide that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the contract or relationship should be maintained with the transferor. Neither does the directive preclude this. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be. Grigorios Katsikas was a cook in a restaurant owned by Angelos Konstantinidis, which subsequently lease the restaurant to a third party. Katsikas, opposing the transfer of a business, intended to continue to work for primitive employer, Konstantinidis. Katsikas refused to work for Mitossis. He was therefore dismissed by Konstantinidis on 26 June 1990. The *Arbeitsgericht Bamberg* wanted to know if it was possible under Article 3(1) of the (Directive 77/187/EEC) for an employee of the transferor at the date of transfer within the meaning of Article 1(1) of Directive 77/187/EEC to object to the transfer of rights and obligations from the transferor to the transferee, with the result that the transferor's rights and obligations are not transferred to the transferee. See Júlio Gomes, *O conflito entre a jurisprudência nacional e a jurisprudência do Tribunal de Justiça das Comunidades Europeias em matéria de transmissão do estabelecimento no Direito do Trabalho: o artigo 37º da LCT e a directiva 77/187/CEE*, RDES, 1996, n.ºs 1-2-3-4, pp. 127 e ss, Joana Simão, *A transmissão do estabelecimento na jurisprudência do trabalho comunitário e nacional*, QL, 20, 2002, pp. 210-211.

¹⁶ CJEU 16 December 1992, *Grigorios Katsikas v Angelos Konstantinidis*, cited above paragraphs 21 a 33.

¹⁷ CJEU 16 December 1992, *Grigorios Katsikas v Angelos Konstantinidis*, cited above paragraph 35. This decision has been confirmed in decision in 7 March 1996., *Albert Merckx e Patrick Neuhuys/Ford Motors Company Belgium SA*, Case. C-171/94 e C-172/94, European Court Reports 1996, I-01253, ECLI:EU:C:1996:87. This decision was also upheld in 12 November 1998. *Europièces SA v Wilfried Sanders and Automotive Industries Holding Company SA*, Case C-

Some literature, as Portuguese Labour Law remains silent in this issue, sustains that, in accordance with Community Law, it must be recognized the employee the right to object to the transfer and to keep the employment contract with the transferor.¹⁸

This means that in the event of the transfer of part of an undertaking or an establishment, as happens in a spin-off or demerger, the worker has the right to object to the transfer and to keep the employment contract with the transferor.

If this is not possible, contract will be terminate, pursuant to art. 346° CT, which has to be interpreted restrictively, since paragraph 1 of this provision excludes from its scope the transfer of business or establishment as these contracts should be transferred.¹⁹

In our opinion, however, it is not possible to conclude from the Court of Justice case law that the subrogation *ex lege* of the transferee in the rights and obligations arising from the employment relationship existing on the date of a transfer depends on the consent of the employee.²⁰

In our opinion, the recognition to the employee of the right to oppose the transfer of his contract, not benefiting from the protection provided by the Directive, bearing in mind that the CJEU has held that the Directive does not impose to the Member States to determine the contract or employment relationship is maintained with the transferor nor prevent it, is compatible to those who reject to the employees the right demand the maintenance of employment contract with the

399/96. European Court Reports 1998 I-06965, ECLI:EU:C:1998:532. The COJ referred that the protection granted by Directive is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer, confirming that in that situation the Court has already held that Article 3(1) of the Directive does not apply as decided in 11 July 1985. *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation*, Case 105/84, European Court Reports 1985 - 02639, ECLI:EU:C:1985:331, and Katsikas, cited above (paragraph 38), stressing that it is for the Member States to determine what the fate of the contract of employment or employment relationship should be (paragraph 39). The CJEU, however, referred that Article 4(2) of the Directive provides that if employment contract is terminated owing to the fact that the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for the termination (paragraph 40).

¹⁸ Catarina Carvalho, *Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho*, cited above, pp. 473-474, Júlio Gomes, *O conflito entre a jurisprudência nacional e a jurisprudência do Tribunal de Justiça das Comunidades Europeias*, cited above., pp. 166 e ss, *idem*, *A jurisprudência recente do Tribunal de Justiça das Comunidades Europeias em matéria de transmissão de empresa, estabelecimento ou parte de estabelecimento – inflexão ou continuidade?*, Estudos do Instituto de Direito do Trabalho, Vol I, Almedina, Coimbra, 2001, pp. 517 e ss.

¹⁹ Catarina Carvalho, *Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho*, cited above, 474.

²⁰ Concerning the Portuguese case law, the Supreme Court in 27.05.04, Case 03S2467, and 29.06.2005, Case 05S164, available at www.dgsi.pt/jst recognized the employee the right to oppose to the transfer of his employment contract to the transferee, sustaining that the employer is to be considered responsible for the termination. The Supreme Court, in 24.02.2010, Case 78/1998.S1, available in www.dgsi.pt, held that the consent of the employee is not, in accordance with Article 37 of the LCT, or the Directive 77/187/EEC a requirement of the undertaking transfer.

transferor, requiring the transfer to a another workplace or the termination of the employment contract with a monetary compensation.

The legal framework of the transfer of an undertaking or part of undertaking also aims at protecting the transferor and transferee, namely, the freedom to conclude the businesses considerer relevant, including purchase and sell, lease, merger, demerger, and so. This right sheltered by the constitutional principle of free enterprise, includes the right of the transferor to transfer the establishment and the right of the transferee to acquire an undertaking or establishment with workers and assets required by the establishment or undertaking economic activity.²¹

This reasoning, however, does not prevent the employee to object to the transfer of his employment contract, terminating the contract with notice, pursuant to art. 400º/ 1 CT. Nonetheless, in this situation, the employee is not entitled to a compensation as the transferor is no liable for the employment contract termination.²²

Nevertheless, it can not be ruled out the right of the employee to terminate the contract with just cause, claiming that the transfer is a substantial and lasting change in working conditions, pursuant o art. 394º/3, b) CT. As the transfer is a lawful exercise of the employer's powers, the employee will also not have the right to be given compensation.²³

We may also consider the possibility of fraudulent intent governing the transfer of the undertaking, for instance, when the transferee has serious financial issues. The employee, in this circumstance, may terminate the contract, under art. 394º/2, al. b) or e) CT, claiming a violation of his rights and guaranties, being entitled to a compensation under art. 396º CT.

²¹ Rosário Palma Ramalho, *Tratado de Direito do Trabalho*, cited above, p. 803 e Pedro Romano Martinez, *Direito do Trabalho*, cited above, p. 769. Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, Memórias dos IX e X Congressos Nacionais de Direito do Trabalho, Almedina, Coimbra, 2007, p. 331, also refers the protection of the negotiability of undertakings and establishments and the market functioning, enabling the transfer of economic units set to perform an activity, which entails employment contracts.

²² Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, cited above, p. 330, Rosário Palma Ramalho, *Tratado de Direito do Trabalho*, cited above, p. 811.

²³ Pedro Romano Martinez, *Direito do Trabalho*, cited above, p. 769, refers that the transfer cannot constitute the ground for the contract termination under art. 394º/3, b) CT.

4. Some issues of the Portuguese legal framework concerning the safeguarding of employees in the event of the transfer of an undertaking or an establishment that may infringe the Directive 2001/23/CE

In violation of European Union law, art. 285°/4 CT, as art. 319°/1 CT2003 did, excludes from the transfer to the transferee the employment contracts concerning employees who have been previously transferred to another establishment or part of the establishment. The transferor, by transferring the workers to another establishment, prior to the transfer, preserves the employment contracts.²⁴

The literature has upheld that the compatibility of this provision with the Directive requires that this rule is to be interpreted as meaning that it is forbidden an agreement between the transferor and the transferee regarding the employment contracts, and, that the transfer cannot constitute the grounds for the workplace transfer, which can occur up to date of transmission.²⁵

Rosário Palma Ramalho, regarding the transfer of workplace previous to the transfer of undertaking, considers that the legal framework of the transfer of workplace may leave the workers unprotected, as it is not dependent of the agreement of workers.²⁶

This observation lacks in our opinion grounds as the transferor rights and obligations transfer to the transferee does not require the consent of the employee.

Though, as pointed out by this author, the workplace transfer referred in art. 285°/4 CT relates to a definitive transfer, which can be individual or collective.

In the individual transfer, the worker may refuse the transfer, claiming serious harm, according to art. 194/1b) of the CT. By refusing the transfer, the employee will be able to preserve the workplace in the establishment that will be later transferred. As a consequence, the employee will be entitled to the protection provided by art. 285° CT when the transfer of an undertaking occur.

In the collective transfer, the employees must obey to the order regarding the transfer of workplace, without the option to preserve the workplace, by refusing

²⁴ It has been removed the possibility, of an agreement between transferor and transferee with the purpose to exclude some employment contracts from the transfer, so that the transfer could preserve those contracts in another establishment, provided by art. 37°/1 LCT. This agreement was considered incompatible with the automatic transmission of rights and obligations for the transferor to the transfer enacted by art. 3°/1, of the Directive. For more details, see Júlio Gomes, *O conflito entre a jurisprudência nacional*, cited above, pp. 155-156, Catarina Carvalho, *A admissibilidade de um acordo entre transmitente e transmissário no sentido de excluir a transmissão de contratos de trabalho*, QL, 21, 2003, p. 99 e ss.

²⁵ Cfr. Catarina de Oliveira Carvalho, *Algumas questões sobre a empresa e o Direito do trabalho no novo Código do Trabalho*, A Reforma do Código do Trabalho, cited above, p. 467. Because it goes beyond the scope of this paper, we can not assess the legal framework concerning the workplace transfer in Portuguese labour law. The application of this regime to a work place transfer, prior to a transfer of an undertaking or establishment, raises several doubts. For a developed approach on this issue, see Rosário Palma Ramalho, *Tratado de Direito de Trabalho*, cited above, p. 807 e ss.

²⁶ *Tratado de Direito de Trabalho*, cit., p. 808.

the order. The employee may though terminate the contract, alleging serious harm, being entitled to a compensation, in accordance to art. 285º /5 CT.

As the author highlights, workers are less protected in the collective transfer, as it is excluded the possibility to preserve the workplace in the establishment that will be transferred, in accordance to art. 194/1, a) and 194/5 of CT.²⁷

As referred by Rosario Palma Ramalho, the transfer of establishment or undertaking can not constitute the grounds of the transfer of workplace. This requirement aims at preventing that the transfer of workplace is used to exclude workers from the protection assigned by the law to the rights of workers in the event of a transfer of workplace.²⁸

The duty of information and consultation provided by article 286º CT, in compliance with the process of information and consultation of representatives of employees affected by the transfer duty enacted by art. 7º of Directive 2001/23/EC, also raises some doubts regarding the compliance with the Directive.

This article imposes on the transferor and transferee a duty of information and consultation of representatives of their respective employees, including workers' council, trade union and inter-union committees and trade union delegates. In the absence of these representatives, the employees themselves must be informed.²⁹

The transferor and the transferee must provide information concerning the date and reason of the transmission, their legal, economic and social consequences for the employees, the grounds for the transfer and any measures envisaged in relation to workers.

This information must be provided in written and in good time, which corresponds to a minimum of 10 days notice before worker representatives' consultation, in accordance with art. 286º/2 CT.

The literature sustains that this information must be sufficiently complete and precise to enable a serious negotiation and the exercise of a right to oppose the transmission of employment, when this is recognized.³⁰

Nevertheless it must be allowed to draw some limitations on the disclosure of information, when these prove to be sensitive, for instance, in the context of mergers or spin-off of a undertaking.³¹

²⁷ *Tratado de Direito de Trabalho*, cit., p. 809.

²⁸ *Tratado de Direito de Trabalho*, cit., p. 809.

²⁹ Concerning the duty to inform the employees directly, in the absence of employees representatives structures, art. 7º/6 da Directive states that Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the workers are informed. Júlio Gomes, *Novas, novíssimas e não tão novas questões sobre a transmissão da unidade económica em Direito do Trabalho*, *Novos Estudos de Direito do Trabalho*, Coimbra Editora, Coimbra, 2010, p. 111, n 39, considers that this right to information is assigned to all the workers.

³⁰ Júlio Gomes, *Novas, novíssimas e não tão novas questões sobre a transmissão da unidade económica em Direito do Trabalho*, cited above, p. 112.

³¹ Júlio Gomes, *Novas, novíssimas e não tão novas questões sobre a transmissão da unidade económica em Direito do Trabalho*, cited above, p. 112.

Portuguese law still has not enacted the duty of information and consultation to obligations laid down in this article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.³²

The consultation of workers provided in art. 286°/3CT, according to art. 7°/2 of the Directive, aims at reaching an agreement with transferor and transferee regarding the measures they foreseen to apply to workers after the transfer.

As sustained by Rosário Palma Ramalho the consultative nature of participation of workers and their representative structures in this process leads us to conclude that the absence of an agreement regarding the measures can not prevent the transmission, under the constitutional right of free enterprise of the transferor.³³

This consultation duty also raises questions as to the confidentiality of data, with particular acuity in certain projects of merger or split. Art. 412° CT, thought, imposes to the members of employees representative structures a duty of confidentiality, which continues even after expiry of their terms of office, as long as it expressly stated that the information has been provided to them in confidence.³⁴ Thus duty of confidentiality is strengthened by art. 412°, 3 do CT. This provision exempts the employer from the duty to communicate or consult when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it.

The violation of the duties of this article is an offense lightweight, pursuant to art. 286°/5. Its violation does not compromise the viability of the transmission.

Some authors wisely question if this lightweight consequences regarding the violation of these duties of information and consultation is in compliance with the Directive, as this is a fundamental right according to the Directive.³⁵

The art. 287, closely following the art. 6 of the Directive, also establishes rules concerning employee's representatives, as well as the protection afforded to workers' representatives, after transmission.

The art. 287°/1, in accordance to 6/1 of the Directive also states that 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

³² Cfr. Catarina Carvalho, *Algumas questões sobre a empresa e o Direito do Trabalho*, cited above, p. 470.

³³ Rosário Palma Ramalho, *Tratado de Direito do Trabalho*, cited above, p. 813.

³⁴ In compliance with art. 6° of 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation.

³⁵ Júlio Gomes, *Novas, novíssimas e não tão novas questões sobre a transmissão da unidade económica em Direito do Trabalho*, cited above, p. 113 and Catarina Carvalho, *Algumas questões sobre a empresa e o Direito do Trabalho*, cited above, p. 470.

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.

This provision has to be interpreted according to the principle of unit that rules the workers' councils in art. 54^o of Portuguese Constitutional Law and art. 415^o CT. In fact, employees can only have one council of worker per employer.³⁶

So, in the event of a merger or spin off, where the transferee has a worker's council and the undertaking transferred preserves autonomy and also has a workers' council, it is not possible to have two workers' councils.

In this scenario, our literature, bearing in mind that Directive asserts that the status and function of the representatives shall be preserve, provided that the conditions necessary for the constitution of the employee's representation are fulfilled, has sustained that it is enforceable the solution provided by art. 287/3CT.³⁷

In fact, if both transferee and transferor have each one workers' council and the transferred undertaking preserves autonomy, the conditions necessary for the constitution of the employee's representation are not fulfilled, as the employees are entitled to one Council of workers.³⁸

According to art. 287/2, if the undertaking, business or part of an undertaking or business does not preserve its autonomy and there is no works council in the transferee, the Council work remains in office for a period of two months from the date of transfer or until the new commission enters in office or even for another two months if the election is null.

Thus, if the workers decide to continue to have a workers' council, they have two months to promote the election of a new workers' council granting all the workers the right to vote. If they choose not to be represented by a workers' council, not promoting its election, the workers council will cease functions after the two-month period established by law.³⁹

5. Conclusion

The Portuguese legal framework has been shaped by Directive 77/187/CEE and subsequently by Directive 2001/23/CE.

³⁶ Cfr Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, cit., pp. 315-316.

³⁷ Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, cit., p.323-324.

³⁸ Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, cit., p.325-326.

³⁹ Despite the silence of art. 287 CT, if there is already a worker's council in the transferee, the representatives structure from the economic unit transferred is extinguished, before the period of two months. Cfr. Pedro Furtado Martins, *Duas questões a propósito dos efeitos da transferência de estabelecimento nas relações de trabalho: artigo 321.º do Código do Trabalho e oposição do trabalhador à transmissão do contrato de trabalho*, cit., pp. 328-329.

In this paper, in order to assess the compliance of the legal framework provided in Labour Code with the Directive 2001/23/CE, we have performed a comparative analysis between both regulations, which was coordinated with the case law from the Court of Justice and Portuguese Courts.

The undertaking, business, or part of an undertaking or business can be transferred to another person or corporation as a result of a merger or a legal transfer, transitory or definitive.

As a consequence of the transfer, there is a subrogation *ex lege* of the transferee in the transferor rights and obligations arising from the employment relationship existing on the date of a transfer.

In accordance with the possibility accepted by article 3^o/2 of Directive 2001/23/EC, the Portuguese legislator provides in art. 285^o/2 CT that the transferor and transferee are jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer during the year following the transfer.

The transferee no longer has the right, granted by art. 319^o/3 of the former Portuguese Labour Code 2003, to post a notice in the workplace to inform the workers that they have a deadline of three months to claim their credits. Under that rule, the transferee was not liable for the payment of credits that were not claimed within that deadline.

The removal of this rule prevents the transferee to be the aware of the transferor obligations arising from the employment relationship existing on the date of a transfer, compromising the judgment regarding the agreement underlying the undertaking transfer.

Some literature discussed that this restriction of the transferee liability to the credits claimed within the three months deadline could be incompatible with the transfer to the transferee of transferor's obligations and rights enacted by art. 3^o of the Directive.

We have considered this rule in compliance with the Directive 2001/23/EC, as the transferee just will not be liable for the payment of debts that workers for obvious lack of diligence did not claim and art. 319^o/3 CT recognized only the possibility to post the notice, eliminating the mandatory nature provided by art. 37^o of LCT.

It strengthened our position the fact that art. 3^o/2 from the Directive 2001/23/EC provides that Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer.

We also evaluated the circumstances under which the employee may oppose the transfer of his contract employment contract to the transferee.

We concluded that the recognition to the employee of the right to oppose the transfer of his contract, not benefiting from the protection provided by the

Directive, bearing in mind that the COJ has held that the Directive does not impose to the Member States to determine the contract or employment relationship is maintained with the transferor nor prevent it, is compatible with those who deny to the employee the right demand the maintenance of employment contract with the transferor, requiring the transfer to a another workplace or the termination of the employment contract with a monetary compensation.

In favour of this judgment, we mentioned that the legal framework of the transfer of an undertaking also aims at protecting the transferor and transferee, namely, the freedom to conclude the businesses considered relevant. This right, sheltered by the constitutional principle of free enterprise, includes the right of the transferor to transfer the establishment and the right of the transferee to acquire an undertaking or establishment with workers and assets required by the establishment or undertaking economic activity.

This reasoning, however, does not prevent the employee to object to the transfer of his employment contract, terminating the contract with notice, in accordance with art. 400°/ 1 CT or terminate the contract with just cause, claiming that the transfer is a substantial and lasting change in working conditions, under art. 394°/3, b) CT. In both cases the employee is not entitled to compensation.

We considered though that in the event of a fraudulent intent governing the transfer of the undertaking, the worker may terminate the contract, under art. 394°/2, al. b) or e) CT, claiming a violation of his rights and guaranties, being entitled to compensation under art. 396° CT

Regarding the compatibility of art. 285°/4 CT with Directive 2001/23/EC, considering that this provision excludes from the undertaking, business, or part of an undertaking or business transfer legal frame work workers, whose employment contract the transferor has decided to maintain, but that are transferred to another business or part of the undertaking, we have sustained, following our literature, that this provision is to be interpreted as meaning that it is forbidden an agreement between the transferor and the transferee regarding the employment contracts, and, that the transfer cannot constitute the grounds for the workplace transfer, which can occur up to date of transmission.

We have also agreed with Rosario Palma Ramalho when the author stresses that in accordance to the legal framework concerning the workplace transfer ruled by art. 194° of the CT the employees involved in a collective workplace transfer are less protected than the employee individually transferred. In the individual transfer, the worker may refuse the transfer, claiming serious harm, according to art. 194/1b) of the CT. By refusing the transfer, the employee will be able to preserve the workplace in the establishment that will be later transferred. On the contrary the in the collective transfer, the employees must obey to the order regarding the transfer of workplace, without the option to preserve the workplace, by refusing the order. The employee may, though, terminate the contract, alleging serious harm, being entitled to a compensation, in accordance to art. 285° /5 CT.

The duty of information and consultation provided by article 286° CT, in compliance with the process of information and consultation of representatives of

employees affected by the transfer duty enacted by art. 7° of Directive 2001/23/EC, also raises some doubts regarding the compliance with the Directive.

First, Portuguese law still has not enacted the duty of information and consultation to obligations laid down in this article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer

Second, the violation of the duties of this article is an offense lightweight, according to art. 286°/5 which leads some authors wisely to question if this lightweight consequences regarding the violation of these duties of information and consultation is in compliance with the Directive, as this is a fundamental right according to the Directive.

Art. 287, closely following the art. 6 of the Directive, also establishes rules concerning employee's representatives, as well as the protection afforded to workers' representatives, after transmission.

This provision has to be interpreted according to the principle of unit that rules the workers' councils in art. 54° of Portuguese Constitutional Law and art. 415° CT. In fact, employees can only have one council of worker per employer.

So, in the event of a merger or spin off, where the transferee has a worker's council and the undertaking transferred preserves autonomy and also has a workers' council, it is not possible to have two workers' councils.

In accordance with our literature, we sustained that it is enforceable the solution provided by art. 287/3CT, considering that the art. 6°/1 of Directive asserts that the status and function of the representatives shall be preserve, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.

We may conclude that, apart from some issues, the Portuguese labour law regarding the safeguarding of employees' rights in the event of the transfer of an undertaking complies with the Directive 2001/23/CE and the case law from the Court of Justice of European.

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