

## JUDGMENT OF THE COURT (Sixth Chamber)

26 November 2015 (\*)

(Reference for a preliminary ruling — Directive 2001/23/EC — Article 1(1) — Transfers of undertakings — Safeguarding of employees' rights — Obligation on the transferee to take on workers — Public undertaking responsible for a public service — Provision of the service by another undertaking pursuant to a public service operating agreement — Decision not to extend that agreement following its expiry — Retention of identity of the economic entity — Activity based essentially on equipment — Employees not taken on)

In Case C-509/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 9 September 2014, received at the Court on 13 November 2014, in the proceedings

**Administrador de Infraestructuras Ferroviarias (ADIF)**

v

**Luis Aira Pascual,**

**Algeposa Terminales Ferroviarios SL,**

**Fondo de Garantía Salarial,**

THE COURT (Sixth Chamber)

composed of F. Biltgen (Rapporteur), President of the Tenth Chamber, acting as President of the Sixth Chamber, A. Borg Barthet and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,
- the European Commission, by J. Rius and M. Kellerbauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 1(1) 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 request has been made in proceedings between the Administrador de Infraestructuras Ferroviarias (ADIF), on the one hand, and Mr Aira Pascual, the Fondo de Garantía Salarial (Wages Guarantee Fund) and Algeposa Terminales Ferroviarios SL ('Algeposa'), concerning the collective dismissal for economic reasons of Mr Aira Pascual.

## The legal framework

### *EU law*

3 Directive 2001/23 codifies 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).

4 Article 1(1) of Directive 2001/23 states:

'(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 subparagraph (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.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

5 Article 2(1) of Directive 2001/23 states as follows:

'For the purposes of this Directive:

(a) "transferor" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) "transferee" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

...'

6 The first subparagraph of Article 3(1) of the directive is worded as follows:

'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 Under the first subparagraph of Article 4(1) of Directive 2001/23:

'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.'

*Spanish law*

8 The rules governing employees' rights in the event of transfers of undertakings are laid down in Royal Legislative Decree No 1/1995 of 24 March 1995 approving the amended text of the Workers' Statute (Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores) (BOE No 75 of 29 March 1995, p. 9654), as amended by Law 12/2001 of 9 July 2001 (BOE No 164, of 10 July 2001, p. 24890), ('the Workers' Statute').

9 Article 44(1) and (2) of the Workers' Statute provides:

'1. The transfer of an undertaking, business or independent production unit of a business shall not in itself terminate the employment relationship; the new employer shall take over the former employer's rights and obligations with respect to the employment contract and social security, including all commitments in respect of pensions, in the circumstances provided for by the relevant specific legislation and, generally, all obligations in relation to additional social protection which the transferor has undertaken.

2. For the purposes of this article, there shall be a transfer of undertaking 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.'

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

10 ADIF is a public undertaking responsible for the service of handling intermodal transport units at the Bilbao terminal (Spain). That service is provided to Renfe Operadora.

11 Pursuant to a public service operating agreement which came into force on 1 March 2008, ADIF outsourced the management of that service to Algeposa. Algeposa provided that service in ADIF's facilities, using cranes belonging to the latter.

12 The agreement was concluded for a period of 48 months. Upon the expiry of that period, the agreement was extended until 30 June 2013.

13 In May 2013, ADIF seconded some of its employees to Algeposa in order for them to complete an immersion training programme among the staff of that company.

14 In June 2013, ADIF informed Algeposa that it did not wish to extend the agreement beyond 30 June 2013 on the ground that, as from that date, it would itself provide the service at issue in the main proceedings with its own staff. ADIF also indicated to Algeposa that it refused to take over the latter's rights and obligations as regards its employees.

15 Consequently, Algeposa carried out a collective dismissal for economic reasons of several workers, including Mr Aira Pascual, who had hitherto been assigned to the performance of the public service operating agreement concluded with ADIF.

16 On 30 July 2013, Mr Aira Pascual brought proceedings before the Juzgado de lo Social No 10 de Bilbao (Labour Tribunal No 10, Bilbao) against ADIF, the Wages Guarantee Fund and Algeposa, alleging that, upon the expiry of the agreement concluded with Algeposa, ADIF was required to take over Algeposa's rights and obligations relating to its employment relationships with its employees. According to Mr Aira Pascual, the resumption of ADIF's direct management of the provision of the service at issue in the main proceedings constituted a transfer of undertaking for the purposes of Article 44 of the Workers' Statute. Accordingly, Mr Aira Pascual claimed that his dismissal should be annulled or, in the alternative, declared unlawful, and that ADIF should be ordered to reinstate him within its staff.

17 The court granted Mr Aira Pascual's action, declaring his dismissal unlawful and ordering ADIF to pay him compensation amounting to EUR 28 793.29. Mr Aira Pascual was ordered to reimburse to Algeposa the sum of EUR 9 557.87 paid to him by way of compensation for the termination of his contract of employment.

18 The court held that, by refusing to take over Algeposa's rights and obligations relating to its employment relationship with Mr Aira Pascual, ADIF had failed to fulfil its obligation under Article 44 of the Workers' Statute, as interpreted in conformity with Directive 2001/23. According to the court, a transfer of undertaking had taken place, since the service at issue in the main proceedings had continued to be provided, using the same material resources essential to its provision, for the same customer and in the same facilities.

19 ADIF lodged an appeal against that judgment before the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country).

20 That court considers that the Court of Justice has not yet ruled on whether the concept of a transfer of undertaking within the meaning of Directive 2001/23 encompasses cases in which an undertaking responsible for providing a public service resumes the direct management of that service, where (i) that undertaking decides to perform that service using its own staff, without taking on the staff employed by the subcontractor to which it had previously entrusted the management of that service and (ii) the material resources used, essential to the provision of that service, belonged at all times to that undertaking, which stipulated their use by the subcontractor.

21 In those circumstances, the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 1[(1)](b) of Council Directive 2001/23, in conjunction with Article 4(1) thereof, preclude an interpretation of the Spanish legislation intended to give effect to the Directive, to the effect that a public-sector undertaking, responsible for a service central to its own activities and requiring material resources essential to the provision of that service, that has been providing that service by means of a contract, requiring the contractor to use those resources which it owns, is not subject to the obligation to take over the rights and obligations relating to employment relationships when it decides not to extend the contract but to provide the service itself, using its own staff and without taking over the staff employed by the contractor, so that the service continues to be provided without any change other than that arising as a result of the replacement of the workers performing the activities and the fact that they are employed by a different employer?'

### **The question referred**

22 It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. In that light, the Court may have to reformulate the questions referred to it (judgments in *Krüger*, C-334/95, EU:C:1997:378, paragraphs 22 and 23, and *Byankov*, C-249/11, EU:C:2012:608, paragraph 57).

23 In the present case, by its question, the referring court asks, in essence, whether Article 1(1) of Directive 2001/23 must be interpreted as meaning that the scope of that directive covers a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, providing to the latter undertaking the necessary facilities and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the employees of the latter undertaking, on the ground that it will henceforth perform that activity itself with its own staff.

24 In order to answer the question thus reformulated, it must be noted in the first place that, pursuant to Article 1(1)(c) of Directive 2001/23, that directive applies to public undertakings engaged in economic activities whether or not they are operating for gain.

25 The Court has therefore held that the mere fact that the transferee is a public-law body cannot be a ground for excluding the existence of a transfer within the scope of Directive 2001/23 (see, to that effect, judgment in *CLECE*, C-463/09, EU:C:2011:24, paragraph 26 and the case-law cited).

26 Accordingly, the fact that the legal person at issue in the main proceedings is a public undertaking responsible for a public service does not exclude it from the scope of Directive 2001/23.

27 In the second place, it must be pointed out that, pursuant to Article 1(1)(a) of Directive 2001/23, that directive applies 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.

28 In that respect, it is settled case-law of the Court that Directive 2001/23 is applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred (see judgments in *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 41, and *CLECE*, C-463/09, EU:C:2011:24, paragraph 30).

29 Thus the Court has held that Directive 2001/23 is capable of applying to a situation in which an undertaking, which entrusted to another undertaking the effective performance of work, decides to terminate its contract with that other undertaking and to carry out that work itself (see, to that effect, judgment in *CLECE*, C-463/09, EU:C:2011:24, paragraph 31).

30 It is therefore possible that Directive 2001/23 may be applicable to a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, and subsequently decides to terminate that agreement and to perform that activity itself with its own staff.

31 In the third place, it must be noted that, in accordance with Article 1(1)(b) of Directive 2001/23, in order for that directive to be applicable, the transfer must concern an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether that activity is central or ancillary.

32 In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction in question, 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 (see judgments in *Abler and Others*, C-340/01, EU:C:2003:629, paragraphs 33 and 34, and *CLECE*, C-463/09, EU:C:2011:24, paragraph 34 and the case-law cited).

33 In particular, the Court has held that a national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned.

34 It follows that the degree of importance to be attached to each criterion for determining whether

or not there has been a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (see, to that effect, judgment in *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 35 and the case-law cited).

35 It is true that the Court has held in that respect that, in a sector where the activity is based essentially on manpower, the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the alleged transferee (see, to that effect, judgment in *CLECE*, C-463/09, EU:C:2011:24, point 41).

36 However, in a situation such as that at issue in the main proceedings, it is necessary, first of all, to note that the economic activity in question, namely the service of handling intermodal transport units, cannot be regarded as an activity based essentially on manpower, since it requires significant amounts of equipment.

37 As indicated in the order for reference, in the context of the public service operating agreement concluded with Algeposa, ADIF put cranes and facilities — which appear to be essential to the activity at issue in the main proceedings — at Algeposa's disposal. That activity is therefore based essentially on equipment.

38 As regards, next, the fact that the tangible assets essential to the performance of the activity at issue in the main proceedings belonged at all times to ADIF, it must be recalled that, in accordance with the case-law cited in paragraph 28 above, whether or not ownership of tangible assets is transferred is not relevant for the purposes of the application of Directive 2001/23.

39 In that regard, the Court has held that the fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were merely provided by the contracting authority cannot preclude the existence of a transfer of an undertaking within the meaning of Directive 2001/23 (see, to that effect, judgment in *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 42).

40 It follows that, as the European Commission submitted in its written observations, an interpretation of Article 1(1)(b) of Directive 2001/23 which excluded from the scope of that directive a situation in which the tangible assets essential to the performance of the activity in question were owned at all times by the transferee would deprive that directive of part of its effectiveness.

41 As regards, lastly, ADIF's failure to take over Algeposa's employees, it must be recalled that the Court has already held that the failure of the new contractor to take over, in terms of numbers and skills, an essential part of the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the meaning of Directive 2001/23 in a sector, such as that at issue in the main proceedings, where the activity is based essentially on equipment. Any other conclusion would run counter to the principal objective of Directive 2001/23, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor (see, to that effect, judgment in *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 37)

42 Consequently, ADIF's failure to take over Algeposa's employees cannot preclude the possibility that the economic entity at issue in the main proceedings retained its identity and that there was therefore a transfer of undertaking within the meaning of that directive.

43 Ultimately, it is for the referring court to establish, in the light of the foregoing considerations and taking into account all of the factual circumstances of the operation at issue, whether or not there was a transfer of undertaking in the main proceedings.

44 In those circumstances, the answer to the question referred is that Article 1(1) of Directive

2001/23 must be interpreted as meaning that the scope of that directive covers a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, providing to the latter undertaking the necessary facilities and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the employees of the latter undertaking, on the ground that it will henceforth perform that activity itself with its own staff.

### Costs

45 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 (Sixth Chamber) hereby rules:

**Article 1(1) 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 the scope of that directive covers a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, providing to the latter undertaking the necessary facilities and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the employees of the latter undertaking, on the ground that it will henceforth perform that activity itself with its own staff.**

[Signatures]

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\* Language of the case: Spanish.