

JUDGMENT OF THE COURT (Ninth Chamber)

6 March 2014 (*)

(Request for a preliminary ruling – Social policy – Transfer of undertakings – Safeguarding of employees' rights – Directive 2001/23/EC – Transfer of employment relationships in the event of a legal transfer of part of a business that cannot be identified as a pre-existing autonomous economic entity)

In Case C-458/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Trento (Italy), made by decision of 20 September 2012, received at the Court on 11 October 2012, in the proceedings

Lorenzo Amatori and Others

v

Telecom Italia SpA,

Telecom Italia Information Technology Srl, formerly Shared Service Center Srl,

THE COURT (Ninth Chamber),

composed of M. Safjan, President of the Chamber, J. Malenovský (Rapporteur) and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Amatori and Others, by R. Bolognesi, avvocato,
- Telecom Italia SpA and Telecom Italia Information Technology Srl, formerly Shared Service Center Srl, by A. Maresca, R. Romei and F.R. Boccia, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,
- the European Commission, by C. Cattabriga and J. Enegren, acting as Agents,

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

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(a) and (b) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).
- 2 The request has been made in proceedings between Mr Amatori and 74 other applicants and Telecom Italia SpA ('Telecom Italia') and Telecom Italia Information Technology Srl, formerly Shared Service Center Srl ('TIIT'), concerning the classification as a 'transfer of part of an undertaking' of the contribution by Telecom Italia of assets in the form of an information technology section called 'IT Operations' to TIIT.

Legal context

European Union law

- 3 Council Directive 2001/23 repeals 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 businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 28 June 1998 (OJ 1998 L 201, p. 88).
- 4 Recital 3 in the preamble to Directive 2001/23 provides as follows:
- 'It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.'
- 5 Article 1(1)(a) and (b) of that directive provides:
- '(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.
- (b) Subject to 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.'
- 6 The first subparagraph of Article 3(1) of the directive provides:
- 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.
- ...'
- 7 The first and fourth subparagraphs of Article 6(1) of Directive 2001/23 state as follows:
- 'If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.
- ...

If the undertaking, business or part of an undertaking or business does not preserve its autonomy,

the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.'

8 Under Article 8 of Directive 2001/23:

'This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.'

Italian law

9 Article 2112(1) and (5) of the Civil Code, in the version deriving from Article 32 of Legislative Decree No 276/2003 on the application of the powers in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003 (decreto legislativo n. 276 – Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003 n. 30) of 10 September 2003 (Ordinary Supplement to the GURI No 235 of 9 October 2003, 'the Civil Code'), in force at the material time, provides:

'1. In the event of a transfer of an undertaking, the employment relationship shall continue with the transferee ...

...

For the purposes and the effects of the present Article, the transfer of a business includes any transaction that, as a consequence of a legal transfer or merger, entails a change in the ownership of an organised economic activity, whether profit-making or not, existing before the transfer, that maintains its identity in the transfer, irrespective of the agreement or the measure pursuant to which the transfer is carried out, including the usufruct or lease of the business. The provisions of the present Article shall apply also to the transfer of part of the business, understood as a functionally autonomous part of an organised economic activity, identified as such by the transferor and the transferee at the time of its transfer'.

10 Furthermore, it is clear from the order for reference that the last sentence of Article 2112(5), in the version before that legislative decree, provided:

'The provisions of this Article shall also apply to the transfer of part of an undertaking, understood as a functionally autonomous part of an organised economic activity within the meaning of this paragraph, existing as such before the transfer and retaining its own identity during the transfer.'

11 Furthermore, the order for reference states that, if there is no 'transfer of an undertaking or part of an undertaking' within the meaning of Article 2112(5) of the Civil Code, the transfer of employment contracts by the employer is covered by Article 1406 of the Civil Code. That article provides that that transfer requires the employee's consent.

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

12 In February 2010, Telecom Italia carried out an internal reorganisation.

13 Before that reorganisation, the structure of Telecom Italia included a division called the 'Technology and Operations Division', made up of a number of sections including, in particular, the 'Information Technology' Section. The latter was a single structure which covered IT operational

activities: innovation, design, implementation, operations, applications and operation of infrastructure. During that internal reorganisation, Telecom Italia subdivided that section into a dozen sections including ‘IT Operations’, ‘IT Governance’ and ‘Engineering’. The ‘Engineering’ Section included the innovation and design activities.

- 14 Three subdivisions, including the ‘Software and test factory’ Unit which were attached to the IT Operations Section.
- 15 After the creation of the IT Operations Section, the employees assigned to the ‘Engineering’ Section and the ‘Software and test factory’ Unit continued to collaborate with one another.
- 16 Furthermore, after the creation and transfer of the IT Operations Section, the ‘Software and test factory’ Unit received specific instructions from Telecom Italia.
- 17 On 28 April 2010, Telecom Italia transferred that section to its subsidiary TIIT in the form of a contribution in kind to TIIT’s capital. The applicants in the main proceedings, assigned to that section, continued, without having consented to it, their employment relationship with the transferee in accordance with Article 2112(1) of the Civil Code.
- 18 Taking the view that that legal transfer could not be classified as a transfer of part of an undertaking within the meaning of Article 2112(5) of the Civil Code, the applicants in the main proceedings brought an action before the Tribunale di Trento (District Court, Trento), sitting as an employment tribunal, seeking a declaration that that transfer could not be relied on against them and that, consequently, their employment relationship with Telecom Italia had continued.
- 19 In support of their application, the applicants in the main proceedings argued that, before the contribution of the IT Operations Section to the capital of TIIT, that section had not constituted a functionally autonomous subdivision within the structure of Telecom Italia. Moreover, that section had not existed before the transfer. Furthermore, the overriding power exercised by the transferor over the transferee also prevents that legal transfer from being classified as a transfer of an undertaking.
- 20 Furthermore, as a result of the contribution of assets in the form of the IT Operations Section, TIIT continued to carry out the greater part of its activities for Telecom Italia.
- 21 In those circumstances, the Tribunale di Trento decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘1. As regards the “transfer of a part of a business”, does European Union legislation (in particular, Article 1(1)(a) and (b) of [Directive 2001/23], read in conjunction with Article 3(1) thereof) preclude a rule of national law, such as that laid down in the fifth paragraph of Article 2112 of the Civil Code, which permits the transferee to take over the employment relationships of the transferor, without the consent of the employees transferred being necessary, even where the part of the business transferred is not a functionally autonomous economic entity already existing before the transfer and identifiable as such by the transferor and the transferee at the time when it is transferred?
 2. As regards the “transfer of a part of a business”, does European Union legislation (in particular, Article 1(1)(a) and (b) of [Directive 2001/23], read in conjunction with Article 3(1) thereof) preclude a rule of national law, such as that laid down in the fifth paragraph of Article 2112 of the Civil Code, which permits the transferee to take over the employment relationships of the transferor, without the consent of the employees transferred being necessary, even where, after the transfer, the transferor undertaking exercises extensive and overriding powers over the transferee, a relationship which manifests itself through a tight

commercial bond and the commingling of business risk?’

Consideration of the questions referred for a preliminary ruling

The first question

- 22 By its first question, the referring court asks essentially whether Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as precluding national legislation, such as that at issue in the main proceedings that, on the transfer of part of an undertaking, allows the transferee to take over the employment relationships from the transferor if that part of the undertaking does not constitute a functionally autonomous economic entity which already existed at the time of its transfer.

Admissibility

- 23 Telecom Italia and TIIT consider the first question to be inadmissible, in so far as it proceeds on an unfounded premise that the section that was the subject of the transfer had to be an entity which existed before the transfer. The concept of ‘preexistence’ is unknown in the wording of Article 2112 of the Civil Code, Directive 2001/23 and the case-law of the Court alike.

- 24 In that connection, it must be observed that that plea of inadmissibility, in that it refers to Article 2112 of the Civil Code, raises the issue, not of the admissibility of the first question, but of the jurisdiction of the Court.

- 25 While, under the first paragraph of Article 267 TFEU, the Court has jurisdiction to give a preliminary ruling on the interpretation of treaties and on the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union, the interpretation of national law does not fall within its jurisdiction.

- 26 However, contrary to Telecom Italia and TIIT’s submissions, the referring court does not seek an interpretation of its national law which it has undertaken itself.

- 27 Furthermore, whether the concept of ‘pre-existence’ is unknown to Directive 2001/23 does not exceed the jurisdiction of the Court, because it does not relate to the admissibility of that question, but concerns its substance (see, by analogy, Joined Cases C-457/11 to C-460/11 *VG Wort and Others* [2011] ECR I-0000, paragraph 46).

- 28 Thus, it is clear from all the foregoing considerations that the first question referred by the Tribunale di Trento is admissible.

Substance

- 29 As a preliminary point, it must be recalled that Directive 2001/23 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business who incurs the obligations of an employer towards employees of the undertaking (see, Case C-463/09 *CLECE* [2011] ECR I-95, paragraph 30 and the case-law cited).

- 30 According to settled case-law, in order to determine whether there is a ‘transfer’ of the undertaking within the meaning of Article 1(1) of Directive 2001/23, the decisive criterion is whether the entity in question keeps its identity after being taken over by the new employer (Case C-108/10 *Scattolon* [2011] ECR I-7491, paragraph 60 and the case-law cited).

- 31 That transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. Any organised grouping of persons and of assets enabling the exercise of an

economic activity pursuing a specific objective, and which is sufficiently structured and autonomous, constitutes such an entity (see Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraphs 26 and 27; Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 31; and *Scattolon*, paragraph 42).

- 32 It follows, for the purpose of the application of that directive, that the economic entity concerned must have a sufficient degree of functional autonomy, the concept of autonomy referring to the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of the employer (*Scattolon*, paragraph 51 and the caselaw cited).
- 33 That finding is supported by the first and fourth subparagraphs of Article 6(1) of Directive 2001/23, relating to the representation of workers, according to which that directive is intended to apply to any transfer satisfying the conditions laid down in Article 1(1) thereof, whether or not the economic entity transferred retains its autonomy in the transferee's organisational structure (C-466/07 *Klarenberg* [2009] ECR I-803, paragraph 50).
- 34 The use of the word 'preserved' in the first and fourth subparagraphs of Article 6(1) means that the independence of the entity transferred must, in any event, exist before the transfer.
- 35 Thus, in the main proceedings, if it should prove that the entity transferred did not, before the transfer, have sufficient functional autonomy, which it is for the national court to ascertain, that transfer would not be covered by Directive 2001/23. In such circumstances, there would be no obligation arising under that directive to safeguard the rights of the workers transferred.
- 36 None the less, that directive is not to be read as prohibiting a Member State from providing for the safeguard of employees' rights in the situation described in the preceding paragraph of this judgment.
- 37 Recital 3 in the preamble to Directive 2001/23 states that 'it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.
- 38 Thus, that recital sets out the risk to employees' rights represented by the change of employer and the need to protect workers from that risk by the adoption of appropriate measures.
- 39 Therefore, the mere lack of functional autonomy of the entity transferred cannot, in itself, prevent a Member State from ensuring in its national law for the safeguarding of employees' rights after the change of employer.
- 40 That finding is supported by Article 8 of Directive 2001/23, which provides that the directive does not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.
- 41 That directive is intended to achieve only partial harmonisation of the area in question. It is not intended to establish a uniform level of protection throughout the European Union on the basis of common criteria, but to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned (Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 27, and Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 41).
- 42 Having regard to all the foregoing considerations, the answer to the first question is that

Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, on the transfer of part of the undertaking, permits the transferee to take over the employment relationship from the transferor if that part of the undertaking does not constitute a functionally autonomous economic entity existing before the transfer.

The second question

- 43 By its second question, the national court asks essentially if Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows the transferee to take over the employment relationships from the transferor if, after the transfer of part of an undertaking concerned, the transferor exercises extensive, overriding powers over the transferee.

Admissibility

- 44 Telecom Italia and TIIT take the view that the second question is inadmissible since it requires an assessment of the facts.

- 45 In that connection, it must be observed that the question referred by the national court asking whether Directive 2001/23 is also applicable if, after the transfer of part of an undertaking, the transferor exercises extensive, overriding powers over the transferee concerns the interpretation of that directive and, therefore, of European Union law.

- 46 Since, pursuant to the first subparagraph of Article 267 TFEU, the Court has jurisdiction to give preliminary rulings on the interpretation of European Union law, the second question referred by the Tribunale di Trento is admissible.

Substance

- 47 First of all, it does not appear from any provision of Directive 2001/23 that the European Union legislature contemplated that application of that directive would be conditional on the autonomy of the transferee vis-à-vis the transferor.

- 48 Next, it must be recalled that the Court has previously held that Directive 77/187, as amended by Directive 98/50, which was repealed and replaced in substance by Directive 2001/23, is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard (Case C-234/98 *Allen and Others* [1999] ECR I-8643, paragraph 17).

- 49 Nothing justifies a parent company's and its subsidiaries' uniform conduct on the market having greater importance in the application of the directive than the formal separation between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the directive, would be precisely contrary to the directive's aim, which is, according to the Court, to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor (*Allen and Others*, paragraph 20).

- 50 Therefore, a situation such as that at issue in the main proceedings, in which the transferor undertaking exercises extensive, overriding powers over the transferor which manifests itself

through a tight commercial bond and the commingling of business risk, cannot, in itself, prevent the application of Directive 2001/23.

- 51 Finally, a different interpretation would enable the objective of that directive which aims, according to the settled case-law of the Court, to ensure the continuity of employment relationships existing within an economic entity irrespective of any change of ownership to be circumvented with ease (*Klarenberg*, paragraph 40 and the case-law cited).
- 52 Have regard to all the foregoing considerations, the answer to the second question is that Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as not precluding national legislation such as that at issue in the main proceedings which enables the transferee to take over the employment relationship if, after the transfer of part of an undertaking concerned, the transferor exercises extensive and overriding powers over the transferee.

Costs

- 53 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 (Ninth Chamber) hereby rules:

1. **Article 1(1)(a) and (b) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which, on the transfer of part of the undertaking, permits the transferee to take over the employment relationship from the transferor if that part of the undertaking does not constitute a functionally autonomous economic entity existing before the transfer.**
2. **Article 1(1)(a) and (b) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables the transferee to take over the employment relationships from the transferor if, after the transfer of part of an undertaking concerned exercises extensive, overriding powers over the transferee.**

[Signatures]

* Language of the case: Italian.