Social Security clearance certificates in the event of a change of employer. Non-existence of claims does not mean non-existence of debts

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1. Taking on debts to the Social Security owed by a transferred undertaking

1.1. Social Security rules provide that the employer is liable for compliance with the obligation to make payment in full of all contributions, including those of the undertaking and its employees. It is possible to extend such liability in the alternative, jointly and severally or *mortis causa*, to other persons or entities without legal personality under the aegis of art. 104 of the Social Security (General) Act (abbrev. LGSS).

As a general rule, when there is a plurality of employers, Social Security-related liability is joint and several. Thus, in accordance with art. 127(1) LGSS and without prejudice to art. 42 of the Employee (Rights and Responsibilities) Act (abbrev. LET), for contractor and subcontractor agreements related to the contracting employer's business, when an employer has been held liable, in whole or in part, for payment of a benefit under the provisions of employment law, if the relevant work or service has been contracted, the awardee of the same is liable for the employer's obligations in the event of such employer being held insolvent.

1.2. In connection with a transfer of undertaking (deemed to exist 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, *ex* art. 44(2) LET), art. 127(1) LGSS provides that, in the event of a change in the ownership of the undertaking or business, the transferee shall be jointly and severally liable with the previous owner or its successors for the payment of benefits accruing before said transfer. The same liability is established between the transferor and transferee employer in temporary assignments of workers, even where reciprocal or not-for-profit. Said provision adds that the issue of certificates by the Social Security Administration that involve an assurance of non-liability for transferees must be regulated by regulations.

Moreover, if we take into account the provisions of art. 104(1) LGSS, joint and several liability by the aforementioned change of ownership of undertaking or business extends to all debts incurred prior to the transfer.

2. Certificates release from liability for benefits but not for contributions

2.1. The Supreme Court (Judicial Review Division), in its judgment of 21 July 2015, Ar. 3511, has made a pronouncement in this matter on the scope of certificates issued by the Social Security Administration. In the event giving rise to the dispute, the decision of the Social Security Agency determines the joint and several liability of the company Al Andalus Management Hotels, S.L. for the monies owed to the Social Security by the company Hotetur Club, S.L.,

amounting to EUR 1,554,108.83. It is undisputed that the former succeeded the latter. However, the latter provided three Social Security certificates showing that it had no outstanding debts.

These certificates contained, as often happens, two statements. The first, that "*no claim for overdue debts to the Social Security is pending payment*" by the transferred company; the second, that this certificate does not give rise to "*rights or future entitlements in favour of the applicant or third parties, nor may it be relied on for the purpose of interrupting or staying limitation or revocation periods, nor may it serve as a means of giving notice of proceedings to which it might refer, nor may it affect what could result from further verification or investigation related thereto*."

2.2. The Balearic Islands *Tribunal Superior de Justicia* concluded in its judgment of 3 September 2013, Ar 298 752, that the transferee company should pay the debts of the transferred company since art. 127(2) LGSS, which provides for the possibility of an "*issue of certificates by the Social Security Administration that involve an assurance of non-liability for transferees*", refers exclusively to the liability for benefits and not liability for any other kind of outstanding debts of the transferred company; this is the case here, where debts are outstanding in respect of unpaid contributions, not of unpaid benefits. Thus, it is concluded that the certificates provided, although valid, are ineffective to release the transferee from joint and several liability. In an unclear point, the ruling also states that for the certificates in question to take effect as an 'assurance of non-liability', the certificates should have been issued at the request of the transferred company, not at the request of the transferee company.

The challenge brought by the latter company against this ruling is mainly based on two grounds. First, that it does not follow from a joint reading of arts. 104(1) and 127(2) LGSS, contrary to the assertion in the contested judgment, that the certificates issued by the Social Security Administration can only operate as an 'assurance of non-liability' for benefits; this is so because, while it is true that art. 127 LGSS bears the heading "*special cases of liability for benefits*", it should not be forgotten that art. 104(1) LGSS – which seeks to determine the 'person liable for the contribution' - expressly refers to art. 127 LGSS in the following terms: "*The persons mentioned in sub-articles 1 and 2 of art. 127 shall be similarly liable, where appropriate, for the fulfilment of this obligation*." On the other hand, the transferee insists that the certificates issued by the Social Security Administration reflect a situation that allows persons to feel confident as it would make no sense, given the principle of legal certainty enshrined in art. 9 of the Spanish Constitution, that what is stated in a certificate issued by the Administration has no probative value. Finally, the appeal contends that there has been procedural inconsistency since, whilst the administrative track denied value to the certificates on account of not being issued at the request of the transferee company, in the judicial review track the Administration – as well later the contested judgment – held that said lack of value was a result of art. 127(2) LGSS only referring to a liability for benefits.

3. Construction of certificates issued by the Social Security Administration

3.1. The Supreme Court notes, first, that the certificates expressly state that they cannot be used to release from any responsibility. In this regard, the court believes that it is striking that, "*under the name of 'certificate', the Administration issues documents explicitly warning that they do not certify the particulars contained in them; but, whatever the assessment such deserves from the point of view of suitability and good management, clearly it cannot be said to breach the principles of legal certainty and legitimate expectations: if they are construed, as must be the case, as a requirement of certainty, certificates such as those here considered do not fool anyone, as it is unequivocally indicated that they should not be relied on to avoid any pre-existing obligation*" (Third Point of Law).

Moreover, the Supreme Court notices that neither the contested judgment nor any

of the parties have highlighted the fact that, although art. 127(2) LGSS makes the issue of certificates conditional on their regulation by regulations, the provision in question lacks the prescribed regulatory implementation.

3.2. Second, the Court understands that not even said certificates claim, at the time of issue, that the transferred company had no outstanding debts to the Social Security. Note, in this regard, that the expression used by the Social Security Administration is not such but "*no claim for overdue debts to the Social Security is pending payment*". But the fact that there is no claim against the company for debts does not necessarily mean that there are no debts, not even that these are not due and payable. It can simply mean that the creditor, for whatever reason, has not yet decided to claim them. In fact, in the case under review, the expression is consistent with the subsequent assertion of the Social Security Administration on the existence of a deferral of outstanding debts of the transferred company at the time of issue of the certificates.

The court is of the opinion, therefore, that the principles of legal certainty and legitimate expectations, as well as arts. 104 and 127 LGSS, respectively, have not been breached. Hence an explicit pronouncement on the meaning and scope of the reference that the former makes to the latter is deemed unnecessary to confirm that, "*since the certificates here examined do not properly claim the absence of outstanding debts, the lack of effectiveness to release from liability cannot violate any legal provision. In other words, from the moment that the certificates do not say, at least not necessarily, that there were no outstanding debts, not considering them relevant for the purposes of liability cannot constitute a breach of the legal provision regulating the effectiveness of such type of certificates*" (Third Point of Law).

Finally, in relation to the indication of who should apply for the certificate, whether the transferee or the transferred company, it is held that "*in the case of change of employer for non-payment of contributions, which is the case analysed here, there is no possibility of limitation of liability as set forth in art. 127(2) of the Social Security (General) Act*" (Fourth Point of Law).

4. Some details of the debt relief by certificates Social Security Administration

4.1. At this point, we should note the possible confusion between the sphere of employment and that of Social Security, legally non-existent. On the one hand, because art. 42 LET, when regulating employment-related liability in cases of contractors and subcontractors, extends the legal regime to Social Security debts. And thus it is provided that employers contracting or subcontracting with third parties the performance of work or activity related to their own business, must ensure that such contractors are current in the payment of Social Security contributions. To this end, they must obtain in writing, identifying the concerned undertaking, a clearance certificate from the Social Security Agency, which must inexcusably issue such certificate within a period of thirty non-extendable days and in the terms established by regulations. After this period, the applicant shall be released from liability.

Similarly, art. 44 LET provides that, in the event of a transfer of undertaking, the change of ownership of a company, worksite or production unit does not in itself terminate the employment relationship; the new employer shall subrogate to the former employer's employment and Social Security-related rights and obligations, including pension commitments. Without prejudice to the provisions of Social Security legislation, the assignor and the assignee, in *inter vivos* transfers, shall be jointly and severally liable for three years for employment obligations arising prior to the transfer that have not been met.

4.2. As can be seen, the clearance certificates under art. 42 LET do not extend to the release from liability under art. 44 LET. A contractor must transact with solvent subcontractors and, if not, must assume the consequences. But transfers of undertakings are governed by a different parameter: subrogation to employment and Social Security-related rights and obligations of the former, *ex* art. 44 LET.

It is true that art. 127(2) LGSS imposes joint and several liability for "benefits accrued prior to said transfer", but it is equally true that it admits how "regulations shall regulate the issue of certificates by the Social Security Administration that involve an assurance of non-liability for transferees". It can be inferred from this that, in principle, the issue of such certificates may release from liability for benefits accrued prior to said transfer. But extending this conclusion to other employer obligations with the Social Security is not entirely justified. The wording of art. 104(1) LGSS does not allow such an interpretation since, in that provision, joint and several liability for transfers of undertakings under art. 127 "extends to all debts incurred prior to the event of transfer". Therefore, the lack of regulatory implementation of the Administration's certificates would affect, if anything, benefits accruing prior to the transfer and not other types of obligations.

4.3. The analysed judgment introduces even more confusion than clarification in a matter of particular practical application (and importance). The distinction between benefits and other obligations drawn by the same could be accepted, even that the legal treatment of liability in the field of Social Security is different in one case (contracts and subcontracts) and another (transfer of undertaking) but it cannot be accepted, at least not without dispute, that certificates issued by the Social Security Administration serve and not serve, indistinctly, to prove a reality.

If art. 127(2) LGSS recognizes that, in the event of a transfer of undertaking, "the issue of certificates by the Social Security Administration" involves an assurance of non-liability for transferees, the effectiveness of the same is undeniable. Another thing is that, if the legal provision makes the application of said certificates conditional on subsequent regulatory implementation, until such occurs those should not be issued.

However, it should be noted that, just as art. 127(2) LGSS provides for joint and several liability in transfers of undertakings exclusively in terms of "benefits accrued prior to said transfer" and the regulatory referral is found in this provision, the condition of such regulatory implementation should be limited only to this case, that is, liability for benefits already accrued. Thus, the extension of joint and several liability "to all debts incurred prior to the event of transfer" by art. 104(1), in the case of a transfer of undertaking, would not be subject to regulatory implementation inasmuch as not envisaged by the aforementioned article. Therefore, the issuance of a certificate by the Social Security Administration – not required in the latter case, but required in the former case, although subject to regulatory development, non-existent today, would be ineffective inasmuch as it does not serve to release from liability for the "debts incurred prior to the event of transfer".

In conclusion, clearance certificates in contracts and subcontracts only make sense because it is so provided in the legal provision without any conditioning, certificates in respect of benefits already accrued when a transfer of undertaking takes place become an "assurance of non-liability of transferees", but are conditioned to subsequent regulatory implementation and, finally, joint and several liability for debts incurred prior to the transfer of undertaking extend by subrogation to the transferee.

Still, the judgment allows us to observe the convenience of adapting the regulation of related situations that nowadays are subject to a truly disparate legal treatment. And so it would be more appropriate, also on the subject of transfers of undertakings, that the transferee (as the contractor) could have knowledge of what is the debt's extent (amount, origin, nature, etc.), status (overdue, postponed, offset, etc.) and, where applicable, exact demarcation of liability, for the sake of constitutionally-guaranteed legal certainty.