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Critical decision for European case law on transfers of contracts of employment in compliance with the terms of a collective agreement

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Despite the Supreme Court's efforts to settle the legal doctrine on transfers of staff under the terms of collective agreements, difficulties of implementation have led to a number of questions being referred for preliminary ruling. One such ruling has recently been given, but it does not provide a firm foothold for a matter of great legal and economic importance.

1. The reference for a preliminary ruling here discussed concerns the application of the collective agreement for security firms, 'conventional' (i.e., as per the terms of a collective agreement) transfers of staff and the release from debts of a new contractor under said collective agreement. Adjudicated on by the Court of Justice on 11 July 2018, *Somoza*, Case C-60/17, the matter under consideration was very similar to that of many other cases settled by the different Spanish courts. As a result of the application of the relevant collective agreement, the contract of employment of a worker, a security guard, was transferred to a new company which notified the worker that, according to the said agreement, any differences in salary and additional social security benefits granted by his former employer and pending collection would have to be paid by said former employer. The Spanish Employment Court found both companies jointly and severally liable in application of art. 44(1) of the Workers' Statute Act and, on appeal, the Spanish High Court of Justice stayed its own proceedings to refer the matter for preliminary ruling.

   In said reference, the case law of the Supreme Court, as contained in its judgment of 7 April 2016 (Ar. 1702) - nowadays settled - and which makes a pronouncement on the

collective agreement in question, is recalled. Said pronouncement states that art. 14 of the collective agreement for security firms requires the transferee to take on the transferor's employees. Thus, according to that judgment, where one contractor succeeds another, a transfer of undertakings under art. 44 of the Workers' Statute Act does not operate if there has not been a transfer of financial assets or of staff in those sectors where the activity is essentially labour-based. Consequently, in such cases, the taking-on of the former undertaking's employees does not reflect the situation in which members of staff are transferred because the new contractor voluntarily takes on the majority of the employees who provided the services under the procurement contract. On the contrary, the transfer of staff is the result of complying with the terms of the applicable collective agreement; in fact, the new contractor could have assigned its own staff to the services in question but is, however, required by the collective agreement to take on the employees assigned to those services by the former contractor.

The Supreme Court did not take the view that its decision is contrary to the Judgment of the Court of Justice of 24 January 2002, *Temco*, Case C-51/00, since the transfer of contracts of employment (and the rights, powers, duties and liabilities under or in connection with them) imposed by the collective agreement for security firms does not arise from a situation falling within the scope of Directive 2001/23 or of art. 44 of the Workers' Statute Act. Hence, the relationship between a statutory provision and a collective agreement term "*is one of supplementation or of peaceful coexistence, in that the rules of the collective agreement, governing a different situation, improves the situation by applying one of the effects laid down in the statutory provision for its own scope of application*". A point of view the Supreme Court has continued to hold in other areas in the face of the same controversy.

2. The national court's question is precisely whether an activity that is essentially labour-based falls within the scope of Directive 2001/23 and whether the latter therefore covers transfers of contracts of employment between undertakings arising from the transfer of a contract for services in accordance with a collective agreement which provides that the transferee undertaking is required to take on the staff of the previous undertaking awarded the contract. If so, the court questions whether a collective agreement stipulating "*the exclusion of joint and several liability of the transferor and the transferee in respect of the performance of contractual obligations arising out of employment contracts concluded prior to the date of transfer of the service in question*" complies with the aforementioned Directive.

   And in response to two questions, two answers. To the first, the Court responds by recalling well-known pronouncements. In accordance with settled doctrine, the Court takes the view that Directive 2001/23 is applicable whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the undertaking and entering into the obligations of an employer towards employees of the undertaking. 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 according to the production or operating methods employed

in the relevant undertaking, business or part of a business (Judgment of the Court of Justice of 19 October 2017, *Securitas*, C-200/16). As it has previously stated that an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, and therefore the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets. In that regard, inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, 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 an organised body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (Judgment of the Court of Justice of 20 January 2011, CLECE, C-463/09).

Applying that doctrine to the case at bar, the Court is of the opinion that surveillance activity such as that at issue in the main proceedings, which does not require specific tangible assets, can be regarded as essentially a labour-intensive activity and, consequently, a group of workers engaged in a joint security activity on a permanent basis may, in the absence of other factors of production, constitute an economic entity. The identity of that entity must nonetheless be retained after the transfer in question. In this respect, taking into account the fact that the order for reference states that, in order to carry out the surveillance activities in question, the new contractor took on the workers assigned to those activities by the old contractor, it cannot but be concluded that the identity of an economic entity which is essentially labour-based can be retained if the majority of its employees are taken on by the presumed transferee. Furthermore, although the Spanish Government submits in its written observations that the new contractor did not take on the staff voluntarily but by virtue of the applicable collective agreement, "*that circumstance, in any event, has no bearing on the fact that the transfer concerns an economic entity. It must, moreover, be emphasised that the objective pursued by the collective agreement for security firms is the same as that pursued by Directive 2001/23 and that that collective agreement is expressly intended, as regards the engagement of part of the staff, to cover the case of a new tendering procedure such as that at issue in the main proceedings (see, to that effect, judgment of 24 January 2002, Temco, C-51/00)*" (paragraph 38).

Consequently, the answer to the first question is that art. 1(1) of Directive 2001/23 must be interpreted as meaning that "*that directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned*" (paragraph 39).

3. As regards the second of the questions raised, the Court recalls that art. 3(1) of the Directive 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 to be transferred to the transferee and, moreover, that Member States may provide that, after the date of transfer, the transferor and the transferee are to be 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. In this respect, it is indicated that art. 44(3) of the Workers' Statute Act provides that, in the case of inter vivos transfers, the transferor and the transferee are to be jointly and severally liable for three years for obligations arising from an employment contract before the transfer and which have not been fulfilled even though, in this case, the collective agreement does not provide for any such joint and several liability.

   The Court addresses the objection raised by the Spanish Government on this point and points out that its own jurisdiction is confined to considering provisions of EU law alone, not extending to questions of compatibility between the internal rules of each State. It is therefore for the national court to assess the scope of national provisions and the manner in which they must be applied (Order of 23 May 2011, *Rossius and Collard*, C-267/10 and C-268/10, not published) and since the second question concerns the examination of the consistency of a provision of a collective agreement with a provision of national law - which implies the assessment of hierarchy of norms in national law - the Court is not competent to carry out such an examination.

4. We should probably interpret that we are back to square one. Or maybe not. Because here the Court of Justice expressly recognises that the Directive is applicable to a situation in which staff is transferred as a result of the application of the collective agreement. It does not take into account the differentiation made between those who take on staff voluntarily and those who do so bound by the terms of a collective agreement. It relates only two factors, namely whether a group of workers engaged in a joint security activity on a permanent basis may, in the absence of other factors of production, constitute an economic entity and whether that entity retains its identity even after the transfer in question. If this is the case - and without differentiating between whether the taking-on of employees arises from a statutory requirement or in accordance with the terms of a collective agreement - the Directive's safeguards are imposed. And these safeguards do not allow for a release from joint and several liability in the fulfilment of employment or social security obligations if such liability is laid down by the domestic legislation of the Member State in question. As pointed out by the dissenting opinions in the aforementioned judgment of the Supreme Court of 7 April 2016, Ar. 1702, it will be possible to discuss whether or not there is a transfer of undertakings by reason of a transfer of staff, but if there were - as is apparent from this judgment - the provided legal safeguards would be imposed.

   But the decision is not very different from what happened in the Temco case - even if the subcontracting of the transferred activity and the refusal of the worker to join the undertaking awarded the contract were reviewed there - and the Supreme Court had already decided

to relativise the doctrine of this ruling in this matter. This is a pronouncement, according to the Supreme Court, which refers to the effects derived directly from the Directive but which obviously does not refer to the "*effects provided for in article 44, since the collective agreement, when it imposes a compulsory transfer of contracts of employment (and the rights, powers, duties and liabilities under or in connection with them), does so where such effect does not arise from circumstances that can be included in the provisions of the Directive or of article 44 of the Workers' Statute Act. For this reason, the collective agreement, by incorporating its own 'transfer of contracts of employment' clause, introduces the circumstances that it regulates within the scope of the Directive, while maintaining full freedom to set the terms of the same in respect of those provisions that the Directive does not refer to*".

The Court of Justice has clearly avoided in the judgment under review a pronouncement on the possible coexistence of a statutory provision and a collective agreement term, but the decisive defining element does not seem to be involved in the adjudged dispute. For the Supreme Court, the relationship between art. 44 of the Workers' Statute Act and the collective agreement in question is in terms of "*supplementation or of peaceful coexistence*", since the collective agreement, regulating a different reality, "*improves it*" by applying one (though not all) of the effects that the statutory provision has provided for regulation. For this reason, it is assumed that the collective agreement is sovereign as regards laying down liability rules, supporting the qualitative and quantitative release of the successful bidder from the debts of the outgoing undertaking.

An examination would be useful, however, of the evolution of the Court of Justice's legal doctrine, in which it has now admitted the existence of a succession of "*part of the staff of the subcontractor, provided that the staff thus taken on are an essential part, in terms of their number and their skills, of the staff assigned by the subcontractor to the performance of the subcontract*" (Temco case), to accept that an activity such as that at issue in the present case "*which does not require specific tangible assets, can be regarded as essentially a labour-intensive activity and, consequently, a group of workers engaged in a joint security activity on a permanent basis may, in the absence of other factors of production, constitute an economic entity. The identity of that entity must nonetheless be retained after the transfer in question*". It follows that this is the case when "*the majority of its employees are taken on by the presumed transferee*". Terms of expression in the grounds for the judgment exactly the same as those used in art. 44 of the Workers' Statute Act to define a transfer of undertakings.

In any case, and in the face of such judicial ups and downs, a solution is required – foreseeably statutory - that will provide legal operators with certainty not only in the private sphere but also - and especially - in the public sector, where transfers of staff are proliferating due to the application of collective agreements and where disputes based on these interpretative discrepancies occur.