



## Reports of Cases

### Case C-160/14

**João Filipe Ferreira da Silva e Brito and Others**  
v  
**Estado português**

(Request for a preliminary ruling from the Varas Cíveis de Lisboa)

(Reference for a preliminary ruling — Approximation of laws — Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses — Meaning of 'transfer of a business' — Obligation to make a request for a preliminary ruling under the third paragraph of Article 267 TFEU — Alleged infringement of EU law attributable to a court of a Member State against whose decisions there is no judicial remedy under national law — Rule of national law which makes the right to reparation for the loss or damage sustained as a result of such an infringement conditional on the prior setting aside of the decision that caused that loss or damage)

Summary — Judgment of the Court (Second Chamber), 9 September 2015

- Social policy — Approximation of laws — Transfers of undertakings — Safeguarding of employees' rights — Directive 2001/23 — Scope — Transfer — Meaning — Criteria*  
*(Council Directive 2001/23, Art. 1(1))*
- Social policy — Approximation of laws — Transfers of undertakings — Safeguarding of employees' rights — Directive 2001/23 — Scope — Transfer of a business — Meaning — Winding up of an undertaking by its majority shareholder which then takes the place of the undertaking that has been wound up — Included — Conditions — No retention of the autonomous organisational structure of the undertaking that has been wound up — No effect*  
*(Council Directive 2001/23, Art. 1(1))*
- Questions referred for a preliminary ruling — Reference to the Court — Questions concerning interpretation — Obligation to make a reference — Scope — Difficulties with the interpretation of the concept of 'transfer of a business' within the meaning of Directive 2001/23, entailing conflicting decisions of lower courts or tribunals and a risk of divergences in judicial decisions at EU level — Included*  
*(Art. 267, third para., TFEU; Council Directive 2001/23, Art. 1(1))*
- EU law — Rights conferred on individuals — Infringement by a Member State — Obligation to make good damage caused to individuals — Conditions — National law making the right to compensation subject to the prior setting aside of the judicial decision which caused the loss or damage, such setting aside being, in practice, impossible — Unlawful*

1. See the text of the decision.

(see paras 24-27)

2. Article 1(1) of Directive 2001/23 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 concept of a 'transfer of a business' encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.

For the purposes of applying Article 1(1) of Directive 2001/23, the fact that the entity whose assets and a part of whose staff have been taken over has been integrated into the transferee company, without the first entity retaining an autonomous organisational structure, is irrelevant, where a link has been preserved between, on the one hand, the assets and staff transferred to the latter company and, on the other, the pursuit of activities previously carried on by the company that has been wound up. What is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the employer on the various elements of production which are transferred, but rather the retention of the functional link of interdependence and complementarity between those elements. Thus, the retention of a functional link of that kind between the various elements transferred allows the transferee to use them — even if they are integrated, after the transfer, in a new and different organisational structure — to pursue an identical or analogous economic activity.

(see paras 32-35, operative part 1)

3. In circumstances which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23 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, and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court of Justice of the European Union for a preliminary ruling concerning the interpretation of that concept.

Although it is true that the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them, the fact remains that when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of EU law is raised before it, unless that court or tribunal has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union.

(see paras 37-39, 45, operative part 2)

4. EU law and, in particular, the principles established by the Court of Justice of the European Union with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

In view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance. Where the conditions for a State to incur liability are satisfied, a matter which it is for the national courts to determine, it is on the basis of national law that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions laid down by national law in respect of reparation of loss or damage are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness). A provision of national law which requires, as a precondition, the setting aside of the decision which caused the loss or damage, when such setting aside is, in practice, impossible, may make it excessively difficult to obtain reparation for the loss or damage caused by the infringement of EU law in question.

Moreover, a significant obstacle, as it results from that provision of national law, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU law, which is inherent in the system of the Treaties on which the European Union is based, cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.

(cf. points 47, 50, 51, 58-60, operative part 3)