



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

8 May 2019*

(Reference for a preliminary ruling — Social policy — Transfers of undertakings — Directive 2001/23/EC — Article 1(1) — Scope — Criteria for assessment of the transfer — Transfer of clients — Transfer of all the financial services of a bank, excluding staff, to a stock brokering company)

In Case C-194/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 20 February 2018, received at the Court on 19 March 2018, in the proceedings

Jadran Dodič

v

Banka Koper,

Alta Invest

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, D. Šváby and N. Piçarra (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Dodič, by M. Blatnik and M. Dodič, juristes,
- the European Commission, by M. Kellerbauer and B. Rous Demiri, acting as Agents,

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

gives the following

* Language of the case: Slovenian.

Judgment

- 1 This request 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, on the one hand, Mr Jadran Dodič and, on the other hand, Banka Koper and Alta Invest, concerning the lawfulness of the termination of the former's employment contract.

Legal context

EU law

- 3 Recital 3 of 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'.
- 4 Article 1(1) 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.'

Slovenian law

- 5 Article 73(1) of the *Zakon o delovnih razmerih* (Slovenian law on employment relationships) (Uradni list RS, No 21/13; 'the ZDR'), provides:

'If, due to the legal transfer of an undertaking or part of an undertaking carried out on the basis of an Act, another legislative provision, a legal instrument and/or a final court decision, or as a result of a merger or demerger, the employer is changed, the contractual and other rights and obligations of workers arising from the employment relationships with the transferor employer that existed on the day of transfer shall be transferred to the transferee employer.'
- 6 The first indent of Article 88(1) of the ZDR provides:

'Grounds for ordinary termination of an employment contract by the employer shall be as follows:
– cessation of the need for the performance of certain tasks under the conditions laid down in the employment contract for economic, organisational, technological, structural or similar reasons connected to the employer'.
- 7 According to the seventh indent of Article 89(1) of the ZDR:

'(...) a change of employer pursuant to Article 73(1) of this law shall be deemed to be an unfounded reason for ordinary termination of an employment contract.'

- 8 Article 159(1) of the *Zakon o trgu finančnih instrumentov* (Slovenian law on the financial instruments market) (Uradni list RS, No 108/10; ‘the ZTFI’) sets out the applicable rules in the event that ‘the General Meeting of Shareholders of a brokerage company adopts a decision to cease its activity as a brokerage company and to initiate a liquidation procedure, or a decision to change the activity of the brokerage company so that it no longer provides investment services’.
- 9 Article 159(3) of the ZTFI provides:
- ‘In the case referred to in paragraph 1, a brokerage company must:
1. carry out all the activities necessary for the transfer of:
 - financial instruments and other assets managed for the clients,
 - accounts relating to the intangible debt securities of the clients, and
 - other services provided to the clients,to another person who, in accordance with Article 32 of this law, is authorised to provide investment services and perform investment activities in Slovenia;
 2. ensure that the person referred to in point 1 of this paragraph acquires:
 - all documentation in relation to investment services and activities that the financial brokerage company was required to keep, and
 - all the liabilities and obligations of the brokerage company in respect of the management and storage of that documentation, as well as access to it.’

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

- 10 On 23 December 2011, Banka Koper took a decision to cease providing investment services and performing investment activities, as well as its stock-exchange intermediation services.
- 11 On 27 June 2012, Banka Koper entered into a transfer agreement with Alta Invest pursuant to Article 159 of the ZTFI, providing that the former would transfer to the latter the financial instruments and other assets that it managed for its clients, the accounts relating to its clients’ intangible debt securities, other investment services and ancillary services within the meaning of the ZTFI, as well as the records — that is, all the documentation relating to investment services and activities that the former was required to keep for its clients. In addition, it was agreed that Banka Koper would work for Alta Invest as a dependent stock-exchange intermediary.
- 12 In July 2012, Banka Koper informed the clients to whom it had provided services as a stock-exchange intermediary that it would be ceasing to provide such services. In that context, it specifically informed its clients of the possibility of transferring to Alta Invest, and offered them special benefits if they did, for example, having their transfer costs covered. Banka Koper also informed its clients that if they failed to respond they would be deemed to have consented to being transferred to Alta Invest. 91% of Banka Koper’s clients did, in fact, transfer to Alta Invest, most of them having expressly indicated their wish to be associated with the latter going forward.
- 13 Subsequently, Banka Koper was excluded from trading at the Ljubljana Stock Exchange (Slovenia) and the Bank of Slovenia adopted a decision authorising it to provide services as a dependent stock-exchange intermediary.

- 14 On 17 September 2012, Banka Koper adopted new rules of procedure for job planning, by which it abolished its Office for Investment Services, including its stockbroker jobs.
- 15 It is against that background that the employment contracts of all employees of Banka Koper's Office for Investment Services were terminated on operational grounds, including the permanent employment contract for the job of stockbroker entered into by Mr Dodič on 30 June 2011, which was terminated on 11 October 2012.
- 16 Banka Koper had, in the meantime, proposed to all of its employees of the Office for Investment Services the conclusion of new contracts of employment for the performance of other tasks.
- 17 Mr Dodič declined the offer made to him in that regard, claiming that the job he was offered was not suitable. Subsequently, he contested his dismissal before the Slovenian courts, seeking reinstatement to his position with Banka Koper or, alternatively, with Alta Invest. He claims that Banka Koper transferred its securities trading and management activities to Alta Invest within the meaning of Article 73 of the ZDR, which transposes Article 1(1) of Directive 2001/23 into Slovenian law. Accordingly, following the transfer provided for by the transfer agreement of 27 June 2012, the activity of providing investment services continued at Alta Invest with Banka Koper's operating units and network of clients.
- 18 Banka Koper contended before the national courts that, after deciding to cease providing stock-exchange intermediary services to its clients, it was obligated, under Article 159 of the ZTFI, to transfer the accounts relating to its clients' intangible debt securities to another legal person authorised to provide the same services in Slovenia. It stated that the transfer did not apply to the employees, the business premises or the work tools, and that the clients were able to choose their new provider of investment services.
- 19 Alta Invest similarly submitted that the transfer agreement was a direct consequence of applying Article 159 of the ZTFI.
- 20 The national court of first instance ruled that the conditions for a transfer of an undertaking were not satisfied since there was no retention of the identity of the undertaking in either economic or functional terms. It noted, first, that the transfer agreement entered into by Banka Koper and Alta Invest provided for no property, rights or workers to be transferred and, second, that the clients had freely chosen to transfer their securities to Alta Invest 'or to any other financial brokerage firm'. In those circumstances, the transfer under that agreement could not be considered to be a 'transfer of an undertaking' or of 'part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23.
- 21 The appeal court also found that there was no transfer of an undertaking within the meaning of Article 1(1) of Directive 2001/23 since the transfer agreement entered into by Banka Koper and Alta Invest did not entail a change of employer within the meaning of that provision. That court considered decisive the fact that the first undertaking did not transfer its clients to the second undertaking. It clarified, in that regard, that the fact that almost all of its clients did in fact decide to move to Alta Vista was not sufficient ground for concluding that there was a 'transfer of an undertaking' within the meaning of Directive 2001/23. Moreover, the fact that Banka Koper continued to carry out financial intermediary activities, including for Alta Invest, confirms, according to that court, that there was no transfer of an undertaking.
- 22 Mr Dodič brought before the referring court an appeal in cassation against that judgment, arguing, inter alia, that the fact that 91% of Banka Koper's clients actually transferred their securities to Alta Invest supported the conclusion that there was a transfer of an undertaking.

- 23 The referring court dismissed that appeal on the grounds that it could not be concluded from the cessation of Banka Koper's stock-exchange intermediary activities, its performance of activities as a dependent stock-exchange intermediary or the fact that material resources, workers and the organisational structure were not transferred, that there was a 'transfer of an undertaking' within the meaning of Directive 2001/23. It also highlighted the fact that Banka Koper's clients were free to choose their new financial operator and that the former had a legal obligation to ensure that their clients' rights were safeguarded by transferring all documents to another financial brokerage firm in the event that those clients failed to respond to the notification of cessation of activity.
- 24 Mr Dodič then brought an appeal on constitutional grounds before the Ustavno sodišče (Constitutional Court, Slovenia), claiming that Directive 2001/23 had been interpreted in a manner that was manifestly incorrect and arbitrary and that his request for the case to be referred to the Court of Justice for a preliminary ruling had been refused without reasons. That court set aside the judgment of the Vrhovno sodišče (Supreme Court, Slovenia) and referred the case back to the latter. It found, in essence, that the referring court had not answered the appellant's questions relating to the matter of whether there had been a 'transfer of an undertaking' within the meaning of Directive 2001/23.
- 25 It is in the context of its second examination of the case in question that the referring court asks whether, in the circumstances of the case, a 'transfer of an undertaking' can be considered to have taken place, within the meaning of Article 1(1) of Directive 2001/23.
- 26 The referring court notes, first of all, that the transfer to another authorised undertaking of financial instruments and other client assets, of the accounts relating to their intangible debt securities and other financial services as well as the records, was a legal requirement that Banka Koper had to comply with in the event of cessation of its stock-exchange intermediary activities. It states, next, that Banka Koper's clients were not bound by that transfer since they had the opportunity to choose their new financial brokerage firm. It notes, lastly, that Banka Koper did not transfer its employees, material resources, or its organisational structure to Alta Invest. In that regard the referring court states that, in the event that a transfer of an undertaking is deemed to have taken place, it is clear that the clause in the transfer agreement excluding the transfer of employees would have no effect. As such, its doubts do not relate to whether the parties to the transfer agreement were entitled to exclude the transfer of workers.
- 27 In those circumstances, the Vrhovno sodišče (Supreme Court, Slovenia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- (1) Is Article 1(1) of Council Directive 2001/23 to be interpreted as meaning that a transfer, such as that which took place in the circumstances of the present case, relating to financial instruments and other client assets (specifically, transferable securities), to the accounts relating to clients' intangible debt securities and other financial and ancillary services, as well as to the records, must be deemed to be a legal transfer of an undertaking or of part of an undertaking, bearing in mind that, after the first respondent ceased to engage in business as a stock-exchange intermediary, the decision whether provision of such services was to be entrusted to the second defendant was, ultimately, a matter for the clients?
- (2) In the circumstances described above, is the number of clients who, following the cessation of the first respondent's activities as a stock-exchange intermediary, now use the second respondent for the provision of those services, relevant?
- (3) Is the fact that the first respondent continues to provide services to the clients as a dependent stock-exchange intermediary and, in performing that role, cooperates with the second respondent, relevant in any way for the purpose of determining whether there was a transfer of an undertaking or business?

Consideration of the questions referred

- 28 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(1) of Directive 2001/23 must be interpreted as meaning that the transfer, to a second undertaking, of the financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity and under an agreement the conclusion of which is required by national legislation, constitutes a transfer of an undertaking or of part of an undertaking, even though (i) the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking and, (ii) the first undertaking continues to operate as a dependent stock-exchange intermediary and, in performing that role, cooperates with the second undertaking.
- 29 It is important to note, as a preliminary matter, that according to settled case-law the scope of Article 1(1)(a) of Directive 2001/23 cannot be appraised solely on the basis of a textual interpretation. On account of the differences between the language versions of that directive and the divergences between the laws of the Member States with regard to the concept of 'legal transfer', that concept must be given a sufficiently flexible interpretation in keeping with the objective of that directive, which is, as stated in recital 3 thereof, to provide for the protection of workers in the event of a change of employer (judgments of 20 January 2011, *CLECE*, C-463/09, EU:C:2011:24, paragraph 29, and of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraph 37).
- 30 It should be noted, next, that Directive 2001/23 is applicable when the transfer of an undertaking relates to a stable economic activity. The term 'entity' referred to in Article 1(1) of that directive thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (see, to that effect, judgments of 10 December 1998, *Hidalgo and Others*, C-173/96 and C-247/96, EU:C:1998:595, paragraph 25, and of 29 July 2010, *UGT-FSP*, C-151/09, EU:C:2010:452, paragraph 26).
- 31 In the case in the main proceedings, it is not disputed that Banka Koper's Office for Investment Services was an economic entity, since it had human and logistical resources enabling the exercise of an economic activity consisting in the provision of brokerage services and the performance of investment activities for instructing parties.
- 32 In those circumstances, the fact that, having ceased, within the meaning of Article 159 of the ZTFI, to provide investment activities and services as well as ancillary services, Banka Koper continues to operate as a dependent stock-exchange intermediary and, in performing that role, cooperates with instructing parties, including Alta Invest, is, in principle, irrelevant to the classification of the transaction at issue in the main proceedings as a 'transfer of a part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23.
- 33 It should be noted, lastly, that the decisive criterion for establishing the existence of a transfer of an undertaking or of part of an undertaking within the meaning of that provision is the fact that the economic entity retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (judgments of 10 December 1998, *Hidalgo and Others*, C-173/96 and C-247/96, EU:C:1998:595, paragraph 21, and of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 25 and the case-law cited).
- 34 In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including, in particular, the type of undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, were transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees were taken over by the new employer, whether or not its customers were 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 (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 26 and the case-law cited).

- 35 However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 26 and the case-law cited). In particular, the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed in the undertaking, business or part of a business (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 27 and the case-law cited).
- 36 In the case in the main proceedings, as the Commission states in its written observations, it is not disputed that the economic activity carried on by the entity in question does not require significant tangible assets to operate. By contrast, since such economic activity is based primarily on intangible assets, the transfer of those assets is of undoubted importance for the purpose of classification as a ‘transfer of part of an undertaking’.
- 37 Indeed, the intangible assets, which consist in the financial instruments and other assets of the instructing parties, in this case the clients, the keeping of their accounts, the other financial and ancillary services, as well as the maintenance of records, namely the documentation relating to the investment services provided to clients and the investment activities carried out for them, contribute to the identity of the economic entity in question, within the meaning of the case-law referred to in paragraphs 33 to 35 above.
- 38 The transfer of those items is necessarily subject to the express or tacit agreement of the clients since, in a context such as that at issue in the main proceedings, an undertaking that ceases its activity cannot require its clients to entrust the management of their securities to the undertaking of its own choosing.
- 39 It follows, first, that the fact, as the referring court notes, that Banka Koper’s clients were not bound by the transfer agreement entered into with Alta Invest and could freely decide to transfer their securities to the latter cannot, in itself, preclude the classification of a transfer as a ‘transfer of part of an undertaking’ within the meaning of Article 1(1) of Directive 2001/23.
- 40 It follows, second, that, in order for the transaction at issue in the main proceedings to be classified as a ‘transfer of part of an undertaking’, it must be established that there was a transfer of clients.
- 41 To that end, it is necessary to carry out an overall assessment of the facts, taking into account, in particular, the incentives offered to Banka Koper’s clients to entrust the management of their securities to Alta Invest.
- 42 It is, thus, for the referring court to take into account whether the clients had an express choice or not as regards the transfer of their accounts to Alta Invest, or whether there was a default transfer of the records relating to their accounts. In that context, it is for that court to establish whether Article 159(3) of the ZTFI requires a brokerage company which decides to cease its activities to transfer the documents relating to its clients’ accounts to one single person duly authorised in Slovenia to provide investment services and carry out investment activities or whether those documents may be transferred to several people.
- 43 Another factor to be taken into consideration is the provision of financial incentives such as covering transfer fees in the case of transfer to Alta Invest.

- 44 In addition, while the fact that 91% of Banka Koper's clients agreed to entrust the management of their securities to Alta Invest appears to confirm the efficacy of such incentives, a transaction cannot be classified as a 'transfer' within the meaning of Article 1(1) of Directive 2001/23 on the basis of that observation alone, particularly since such an observation is made after the conclusion of the transfer agreement by the two undertakings.
- 45 Ultimately, it is for the national court, which has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation, to determine whether or not there was a 'transfer of part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23 (see, to that effect, judgments of 7 August 2018, *Colino Sigüenza*, C-472/16, EU:C:2018:646, paragraph 45, and of 6 December 2018, *Montag*, C-480/17, EU:C:2018:987, paragraph 34).
- 46 In the light of the foregoing, the answer to the questions referred is that Article 1(1) of Directive 2001/23 must be interpreted as meaning that the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer', and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant.

Costs

- 47 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:

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 transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer' and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant.

[Signatures]