



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 25 May 2023¹

Joined Cases C-583/21 to C-586/21

NC (C-583/21)
JD (C-584/21)
TA (C-585/21)
FZ (C-586/21)

v
BA,
DA,
DV,
CG

(Request for a preliminary ruling from the Juzgado de lo Social de Madrid (Social Court, Madrid, Spain))

(Request for a preliminary ruling – Safeguarding of employees’ rights in the event of transfers of undertakings – Transfer of a notary’s office – Applicability of the provisions of Directive 2001/23/EC to the employees)

1. Can a notary’s succession to the outgoing post-holder in a notary’s office constitute a transfer of an undertaking for the purposes of safeguarding employees’ rights?

I. Legal context

A. *European Union law*

Directive 2001/23/EC

2. Article 1(1) of Directive 2001/23² 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.

¹ Original language: Italian.

² Council Directive 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).

- (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.
- (c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

3. Article 3(1) and (3) of the directive provides:

'1. 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.

Member States may provide that, after the date of transfer, the transferor and the transferee shall 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.

...

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.'

4. Pursuant to Article 4(1) of the directive:

'1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.'

B. Spanish law

5. Article 1 of the Ley de 28 de mayo de 1862, Orgánica del Notariado (Organic Law of 28 May 1862 governing the notarial profession)³ defines a notary as 'a public official authorised to authenticate contracts and other extra-judicial documents, in accordance with the law' and adds that 'throughout the Kingdom there shall be a single class of such officials'.

³ *Gaceta de Madrid*, No 149, 29 May 1862, p. 1.

6. Article 44(1) and (2) of Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree No 2/2015, approving the recast text of the Law on the Workers' Statute of 23 October 2015, *BOE* No 255 of 24 October 2015, p. 100224; 'the Workers' Statute') provides:

'1. A change in ownership of an undertaking, business or independent production unit of such an undertaking shall not in itself give rise to termination of the employment relationship, and the new employer shall be subrogated in the employment and social security rights and obligations of the previous employer, including pensions commitments, in accordance with the terms of the specific applicable legislation and, in general, in all supplementary social protection obligations assumed by the transferor.

2. For the purposes of the present article, the transfer of an undertaking is deemed to occur where the transfer affects an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether central or ancillary.'

II. The facts, main proceedings and question referred for a preliminary ruling

7. The employees NC, JD, TA and FZ worked in a notary's office for the various notaries who were in post there. On 30 September 2019, at the time of his relocation, the notary DV delivered to each of the employees a letter in which he offered them the choice of either relocating with him to his new business address or terminating the employment relationship. The employees chose to bring their employment relationships to an end and the notary DV proceeded to dismiss them 'on grounds of economic *force majeure*' and to pay them severance pay.

8. BA was appointed as the notary for the notary's office in question on 20 January 2020 and took on the employees who had worked for the previous notary who had held that post, using the same material resources and at the same place of work where the notarial records, defined by national legislation as the set of authentic instruments and other documents added to that set every year, were kept. On 11 February 2020 the notary BA and each of the applicants entered into an employment contract with a six-month probationary period.

9. On 15 March 2020, due to the COVID-19 pandemic, the Dirección General de Seguridad Jurídica y Fe Pública (Directorate-General for Legal Certainty and Public Attestation) of the Ministerio de Justicia (Ministry of Justice, Spain) adopted a decision stating that only urgent matters could be conducted and that notaries' offices would have to implement the authorities' recommendations on social distancing and introduce shifts. The following day, NC, TA and JD went to the notary's office to ask BA to implement the above measures. BA refused and on the same day sent dismissal letters to NC, TA and JD, and on 2 April 2020 to FZ, stating that they had not successfully completed their probationary period.

10. The applicants accordingly filed an action with the referring court, requesting that their dismissal be declared void or unfair, arguing that their seniority should be calculated from the day on which they had started working in the notary's office occupying the same premises as BA.

11. BA opposed their claims and maintained that their seniority should run from 11 February 2020, the date of conclusion of the contract between the parties.

12. In that context, the referring court referred the following question to the Court for a preliminary ruling:

‘Does Article 1(1)(a) of [Directive 2001/23], and consequently the contents of [that] directive, apply to a situation in which the notary in post in a notary’s office – who is both a public official and also the private-sector employer of the office’s employees, with the employment relationship being governed by general employment legislation and by a sectoral collective agreement – succeeds the outgoing post-holder, takes [over] the previous notary’s [records], continues to provide services at the same place of work using the same material facilities, and takes on the staff who had worked for the ... notary who had [previously] held that post?’

III. Legal analysis

Preliminary remarks

13. The dispute in the main proceedings concerns a number of employees who had been employed for many years in a notary’s office and who, on the relocation of the notary who was their employer to another post, were dismissed on economic grounds. Following negotiations those employees were rehired under new contracts by the incoming notary who took over the notary’s office but were subsequently dismissed for failure to complete successfully their probationary periods.

14. There are numerous legal questions in connection with the main proceedings and, from what one is given to understand from the case file, these concern the lawfulness of the first dismissal, the lawfulness of the second dismissal, the seniority to which the employees are entitled, the lawfulness of the inclusion of a probationary period in the second contract and other questions relating to remuneration. However, these are issues that can be resolved only by the national court.

15. The subject matter of my analysis will be confined to the legal issue that underlies the entire case and which, in the referring court’s view, is a legal prerequisite for subsequently determining the main proceedings: are the provisions on the transfer of an undertaking set out in Directive 2001/23 applicable, for the purposes of safeguarding employees’ rights, to the case of the relocation of a notary, following which the successor notary takes on the records, continues to provide services at the same place of work using the same material facilities and takes on the staff who had worked for the previous notary who had held that post?

16. If, in fact, the directive were to apply to a case such as that in the main proceedings and the first dismissal had been made for no reason other than the relocation itself,⁴ subject to an assessment of the consequences on the basis of national law, we would be in a situation in which the new notary would probably have to preserve the employment relationship of those employees whom he chose to remain in the notary’s office without interruption.

⁴ This would be unlawful under Article 4 of Directive 2001/23.

17. In order to answer the question posed, it is necessary briefly to analyse the following aspects: (1) whether the activities carried on by a notary in Spain constitute those of a public administrative authority;⁵ (2) whether the activities carried on by a notary in Spain constitute an economic activity within the meaning of Directive 2001/23; and (3) whether the aforementioned situation, under which a new notary succeeds to the post in a notary's office, constitutes a transfer of an undertaking within the meaning of Directive 2001/23.⁶

18. As regards the evidence disclosed by the case file useful for the purposes of the analysis: notaries in Spain perform the functions of public officials but at the same time are the private-sector employers of their employees subject to the relevant laws on private-sector employment and collective bargaining; in their capacity as public officials they are authorised to authenticate contracts and extra-judicial documents in accordance with the law (notaries must therefore ensure that all the conditions legally required for the execution of the documents or contracts in question are satisfied); they are empowered to amend the civil status of persons and to verify the provisions of law applicable to a private-law contract between two parties; they are the public authority competent to elevate a document stemming from the will of the parties to the rank of a notarised instrument, which implies attributing to the document effects that do not depend on the will of the parties but derive from the legislative provisions on authentic instruments;⁷ users may select the notary of their choice;⁸ a portion of notaries' fees is fixed by law through tariffs but the quality of the services provided (and the ensuing remuneration) may vary from one notary to another;⁹ it would also appear from experience that in Spanish notaries' offices clients predominantly have contact with the employees in charge of preparing the documents, notifying the tax authorities and delivering the documents to the client, and more rarely directly with the notary;¹⁰ in the case at issue in the main proceedings, the employees of the notary's office worked for the various notaries who succeeded one another over a period of between 20 and 30 years and the premises remained unchanged, as did even the telephone number, which was still the same since the office was established in 1981;¹¹ when a notary leaves his or her post, on either relocation or retirement, the new notary must retain the previous notary's records for 25 years and must, at the request of clients, issue copies and certifications of authentications of instruments.¹²

19. Before proceeding to analyse the abovementioned aspects, it should be borne in mind, in relation to the legal context, that the purpose of Directive 2001/23 is to ensure the safeguarding of employees' rights in the event of a change of employer;¹³ that the transferor's rights and obligations under a contract of employment or an employment relationship existing on the date of the transfer are transferred to the transferee;¹⁴ and, furthermore, that the transfer of an

⁵ The reorganisation or transfer of functions to another authority does not constitute a transfer of an undertaking within the meaning of Article 1(1)(c) of Directive 2001/23.

⁶ Thus, whether the requirements of Article 1(1)(b) are fulfilled, that is to say, that it be an economic entity, that there be a transfer and that the business identity be retained following the transfer.

⁷ See the Kingdom of Spain's written observations, paragraph 45.

⁸ Article 126 of the law governing the notarial profession, pursuant to which 'any person wishing to avail of notarial services has the right to choose the notary who provides them', cited by the Kingdom of Spain in its written observations in paragraph 69.

⁹ Minutes of the hearing, page 3.

¹⁰ Minutes of the hearing, page 4. This is one of the reasons why the clientele tends to remain loyal to the notary's office, even if the notary changes, along with other reasons pertaining to both geography and customary relations with employees. In the present case, it can be said that the clientele has remained unchanged despite the various changes of notaries over the years.

¹¹ Minutes of the hearing, page 5.

¹² Minutes of the hearing, page 12.

¹³ As can be deduced from recital 3.

¹⁴ Pursuant to Article 3 of Directive 2001/23.

undertaking cannot be a valid reason for dismissal for the transferor or the transferee.¹⁵ It may be inferred from the abovementioned aims of protection that the interpretation of the provisions of the directive itself must be geared towards the effective safeguarding of employees.

20. Lastly, it should be noted that, by virtue of the considerable diversity and heterogeneity of the functions exercised by notaries in the various Member States and of the manner in which they are regulated (and hence the absence of a concept of notary in EU law), and in the light of the importance of the factual circumstances for the purposes of determining whether or not the activities of notaries in Spain can be categorised as economic activities within the meaning of Directive 2001/23, it will, without prejudice to the principles set out by the Court mentioned below, be for the national court to ascertain all the factors that may militate in favour of the applicability of the provisions of Directive 2001/23 to a case such as that at issue in the main proceedings.

1. The classification of notarial activities: public administrative authority or undertaking pursuing an economic activity?

21. As mentioned above, notaries in Spain perform the functions of public officials but at the same time are the private-sector employers of their employees;¹⁶ as public officials, they are authorised to authenticate contracts and extra-judicial documents in accordance with the law; they are empowered to amend the civil status of persons and to verify the provisions of law applicable to a private-law contract between two parties; they are the public authority competent to elevate a document stemming from the will of the parties to the rank of a notarised instrument.

22. The Kingdom of Spain has argued that notaries enjoy the status of civil servants and consequently that their activities fall outside the business sphere because of their close connection with the State.¹⁷ Moreover, it is claimed that notarial activities are not ascribable to those of an independent professional either¹⁸ but constitute those of a public office since notaries are charged with the activities delegated to them by the State.

23. While it is undoubtedly true that the activities carried on by notaries in Spain include public functions delegated to them by the State,¹⁹ this element alone cannot suffice to justify the conclusion that notarial activities in that country are those of a public administrative authority within the meaning of Article 1(1)(c) of Directive 2001/23.

24. It is settled case-law that activities connected with the exercise of public powers are not of an economic nature²⁰ and the fact that an entity has public powers to pursue some of its activities does not in itself prevent it from being classified as an undertaking within the meaning of

¹⁵ Pursuant to Article 4(1) of Directive 2001/23. The possibility for employers to make dismissals for economic, technical or organisational reasons is not excluded.

¹⁶ As private-sector employers, private-sector employment laws and collective bargaining unquestionably apply to them.

¹⁷ Written observations, paragraph 36.

¹⁸ Written observations, paragraph 39.

¹⁹ I agree with the analysis of Advocate General Cruz Villalón in his Opinion in *Commission v Belgium* (C-47/08, EU:C:2010:513, point 56). In his summary of Belgian, German, Greek, French, Luxembourg and Austrian law relating to the notarial profession (points 12-55), the Advocate General notes that 'apparent in all the Member States [defendants in the actions for failure to fulfil obligations] is the fact that notaries enjoy a special, hybrid status half-way between a public official and an independent professional and are as such subject to rights and obligations that make the office one the holders of which carry on an economic activity *sui generis*'.

²⁰ See judgments of 12 July 2012, *Compass-Datenbank* (C-138/11, EU:C:2012:449, paragraph 36 and the case-law cited), and of 6 May 2021, *Analisi G. Caracciolo* (C-142/20, EU:C:2021:368, paragraph 56).

competition law or, as in the case at hand, the right of employees to social protection, for those of its activities that are to be classified as economic activities, provided that those activities can be separated from the exercise of public powers.²¹

25. The Court has not, to my knowledge, so far delineated a concept of public administrative authority within the meaning of Directive 2001/23, in order to define its scope of application. Nor has it resolved the question as to whether the activities of a notary can be categorised as those of a public administrative authority, not least because of the previously mentioned diversity in the regulation of the notarial profession in the various Member States.

26. On several occasions,²² however, the Court has clarified that some of the most typical notarial activities, while pursuing general interests in the performance of functions of a public nature, do not entail the exercise of official authority.²³ This applies to the activities of drawing up authentic instruments and endorsement of the authority to enforce, the functions entrusted to notaries in connection with certain sales of immovable property and the activities of notaries in relation to inventories of deceased persons' estates and property in joint ownership or co-ownership, the affixing and removal of official seals, and the judicial division of estates.²⁴

27. The notion of 'exercise of official authority' in Article 51 TFEU seems to me to be similar to that of 'public administrative authority' in Article 1(1)(c) of Directive 2001/23. Indeed, in both cases the EU legislature excludes from the scope of application of rules – in the first case concerning freedom of establishment and in the second concerning a transfer of undertakings – entities which, as public authorities, exercise official authority on behalf of the State²⁵ and do not engage in economic activities within a market.

28. According to the information available from the case file, notaries practise their profession under competitive conditions since users are able to select the notary of their choice to provide services²⁶ and notaries charge fees for their services that are variable to a certain extent. Moreover, in carrying out their work they are directly and personally liable towards their clients

²¹ See, to that effect, judgments of 12 July 2012, *Compass-Datenbank* (C-138/11, EU:C:2012:449, paragraphs 37 and 38 and the case-law cited); of 7 November 2019, *Aanbestedingskalender and Others v Commission* (C-687/17 P, not published, EU:C:2019:932, paragraph 18); and of 24 March 2022, *GVN v Commission* (C-666/20 P, not published, EU:C:2022:225, paragraph 71).

²² In particular with reference to the freedom of establishment under Articles 49 and 51 TFEU. The cases in question related to actions for failure to fulfil obligations brought by the European Commission against Member States which had imposed a nationality condition for access to the profession of notary, as they had failed to fulfil their obligations under Article 43 EC (now Article 49 TFEU). Seven judgments were delivered on 24 May 2011 concerning the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Portuguese Republic, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic: *Commission v Belgium* (C-47/08, EU:C:2011:334), *Commission v France* (C-50/08, EU:C:2011:335), *Commission v Luxembourg* (C-51/08, EU:C:2011:336), *Commission v Portugal* (C-52/08, EU:C:2011:337), *Commission v Austria* (C-53/08, EU:C:2011:338), *Commission v Germany* (C-54/08, EU:C:2011:339) and *Commission v Greece* (C-61/08, EU:C:2011:340). Subsequent judgments of 1 December 2011, *Commission v Netherlands* (C-157/09, not published, EU:C:2011:794), of 10 September 2015, *Commission v Latvia* (C-151/14, EU:C:2015:577), of 1 February 2017, *Commission v Hungary* (C-392/15, EU:C:2017:73), and of 15 March 2018, *Commission v Czech Republic* (C-575/16, not published, EU:C:2018:186), concern the Kingdom of the Netherlands, the Republic of Latvia, Hungary and the Czech Republic.

²³ See judgments of 24 May 2011, *Commission v Belgium* (C-47/08, EU:C:2011:334, paragraph 123), and of 15 March 2018, *Commission v Czech Republic* (C-575/16, not published, EU:C:2018:186, paragraphs 107 and 108 and the case-law cited). The regulation of the profession of notary in Belgian law appears to be similar to that in Spanish law.

²⁴ See judgment of 24 May 2011, *Commission v Belgium* (C-47/08, EU:C:2011:334, paragraphs 105 to 111).

²⁵ See the Commission's written observations, paragraph 48, in which it is taken for granted that the two notions overlap, citing the Court's case-law on the exercise of official authority in the context of freedom of establishment.

²⁶ Article 126 of the law governing the notarial profession.

for damage resulting from their actions or omissions and may choose various legal forms under which to organise themselves.²⁷ These are circumstances that are not characteristic of the exercise of official authority.²⁸

29. As regards the main activity of Spanish notaries, that is to say, that of drawing up authentic instruments, which they authenticate and imbue with significant probative force, those instruments are not the result of a decision-making power.²⁹ In particular, the enforceability of an authentic instrument is based on the will of the parties to enter into an instrument or agreement, subject to the notary's verification of its conformity with the law, and to render it enforceable.³⁰ The notary's intervention thus presupposes prior consent or an accord without which the notary cannot unilaterally amend the agreement.

30. I therefore share the Commission's view that notaries in Spain perform a public service that pursues an objective of general interest, namely to guarantee the legality and legal certainty of the instruments concluded between parties, but this must be distinguished from that performed by the State in other areas since the pursuit of this objective cannot entail notarial activities constituting a direct and specific participation in the exercise of official authority.³¹

31. Consequently, it is plausible to take the view, subject to verification by the referring court, that the activities of a notary are not to be included among those connected with the exercise of official authority and are thus not classifiable as those of a public administrative authority.

32. If one excludes notaries in Spain from the concept of 'public administrative authority' in the sense outlined above, that is to say, an authority exercising official authority delegated by the State in a purely public context and outside a market in which services are offered on a competitive basis, it follows that notaries may be included within the concept of undertakings pursuing an economic activity.

33. In accordance with settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.³²

²⁷ Minutes of the hearing, page 3: 'They alone are responsible for their professional actions from a civil and criminal point of view and, unlike civil servants in the strict sense, the State is not liable for the errors that they may commit in the practice of their profession. It is the notaries who must take out a civil liability insurance policy in order to be covered in the event of liability ... They can choose any type of legal organisation just like as any entrepreneur in Spain, a co-ownership, a partnership, a limited liability company.' This is an assertion by the applicant in the main proceedings that is not specifically contested by other parties to the proceedings.

²⁸ See judgment of 24 May 2011, *Commission v Belgium* (C-47/08, EU:C:2011:334, paragraphs 117 and 118), and the Commission's written observations, paragraph 49.

²⁹ See judgments of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 26, cited in paragraph 44 of the judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542); of 24 May 2011, *Commission v Belgium* (C-47/08, EU:C:2011:334, paragraph 90); and of 15 March 2018, *Commission v Czech Republic* (C-575/16, not published, EU:C:2018:186, paragraph 102 and the case-law cited).

³⁰ See the Commission's written observations, paragraph 49 and the case-law cited.

³¹ See the Commission's written observations, paragraph 49 and the case-law cited.

³² In relation to Article 101 TFEU, see in particular the judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 46 and the case-law cited), and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraph 35).

34. An economic activity³³ entails offering goods and services on a given market. Its classification as such also depends on the fact that the operators concerned bear the financial risks associated with engaging in that activity, particularly if they are members of an independent profession. This is because, in the event of losses, the professionals must bear them personally. They are also civilly liable towards their clients for errors or omissions in their professional activity.

35. The complex and technical nature of the services provided and the fact that the practice of the profession is regulated cannot call into question the classification of an activity as an economic one.

36. It is clear from case-law that the concept of economic activity thus encompasses any activity consisting of offering goods and services on the market.

37. A notary's office, pursuant to this definition, could therefore be regarded as such in so far as it constitutes a set of human and material resources that enable an economic activity to be pursued by offering goods and services on a market such as that of the authentication of contracts and other extra-judicial documents.³⁴ These activities consist in offering services on a given market,³⁵ namely that open to notaries chosen by their clients, in exchange for (in part variable) remuneration corresponding to the services rendered, for which they are fully liable to their clients.

38. In the light of what the court record shows, I consider it reasonable to take the view that notarial activities in Spain, subject to verification by the referring court, may come within the scope of the concept of an undertaking engaging in an economic activity within the meaning and for the purposes of Directive 2001/23.

2. *The question referred for a preliminary ruling*

39. The fact that a notary in Spain, subject to verification by the referring court, is not classifiable as a public administrative authority within the meaning of Article 1(1)(c) of Directive 2001/23 but may, on the contrary, be included within the scope of the concept of an undertaking engaged in economic activities within the meaning of that provision is not sufficient to lead to the conclusion that the case at issue in the main proceedings involves a transfer of an undertaking.

40. The elements necessary for a case to be made out under Article 1(1)(b) of that directive are that there be a 'transfer' of an 'economic entity' and that the latter, in the said transfer, retain '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.

³³ Judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 47 and the case-law cited), and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraph 36).

³⁴ See the Commission's written observations, paragraph 45.

³⁵ See judgments of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542, paragraph 43 and the case-law cited), and of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 34).

41. With regard to the concept of a 'transfer', the Court has consistently held that the fact that the transfer stems from unilateral decisions of public authorities and not from a meeting of minds does not rule out the application of Directive 2001/23.³⁶

42. The notion of transfer must therefore be interpreted broadly:³⁷ there is a transfer in all cases of a change in the natural or legal person responsible for carrying on the undertaking, irrespective of the legal instrument used to bring about that change and regardless of the manner in which that change is brought about.³⁸ There is thus no need for there to be a contractual relationship between the transferor and the transferee.³⁹ As the Court has recalled in numerous judgments, the essential criterion is the change of employer.⁴⁰

43. Therefore, no relevance attaches in the present case to the circumstance that the relocation of the notary took place as a result of the act of a public authority (which apparently ordered the relocation of the previous notary) and that there was no contractual relationship between the departing notary and the successor notary.

44. Regarding the concept of 'economic entity' to which the transfer relates, as has effectively been noted in the legal literature, 'this is a concept the content of which varies, which is based on the totality of the factual circumstances of the individual case, including the type of undertaking in question, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, as well as the degree of similarity between the activities carried on before and after the transfer and the period, if any, during which those activities were suspended'.⁴¹ With the caveat that 'these elements are ... merely single factors in the overall assessment ... and cannot therefore be considered in isolation, and nor is it necessary that they all exist at the same time'.⁴²

³⁶ With regard to the interpretation of Article 1(1) of 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), reproduced without amendment in Directive 2001/23, see judgments of 10 December 1998, *Hidalgo and Others* (C-173/96 and C-247/96, EU:C:1998:595, paragraphs 21 and 22), and of 14 September 2000, *Collino and Chiappero* (C-343/98, EU:C:2000:441, paragraph 34 and the case-law cited). As regards the present Directive 2001/23, see judgments of 29 July 2010, *UGT-FSP* (C-151/09, EU:C:2010:452, paragraph 24 concerning a decision taken by decree), and of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 38).

³⁷ Likewise in the legal literature it has been pointed out that, as a result of the interpretations given by the Court of Justice, the concept of transfer of an undertaking 'has been significantly broadened, going beyond the narrow reference to mere legal transfer contained in the directive', Carinci, F. and Pizzoferrato, A., *Il diritto del lavoro dell'Unione europea*, Turin, 2021, p. 292.

³⁸ Carinci, F. and Pizzoferrato, A., *Il diritto del lavoro dell'Unione europea*, op. cit., p. 294.

³⁹ By way of example, regard should be had to the judgment of 19 October 2017, *Securitas* (C-200/16, EU:C:2017:780, paragraphs 23 and 24), in which it was stated that the lack of a contractual link between the two undertakings successively entrusted with managing the surveillance and security of port facilities had no bearing on the question as to whether or not Directive 2001/23 was applicable. See also the judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 39), in which it was stated that the fact that a transfer comes about as the result of a municipal undertaking being wound up pursuant to a decision of the executive body of the municipality does not in and of itself prevent there being a transfer.

⁴⁰ See judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 39), and before that again, for the predecessor directive, judgment of 2 December 1999, *Allen and Others* (C-234/98, EU:C:1999:594, paragraph 17).

⁴¹ Romei, R., 'La Direttiva europea sul trasferimento di imprese. Profili generali', in Cosio, R., Curcuruto, F., Di Cerbo, V. and Mammone, G., *Il diritto del lavoro dell'Unione europea*, Giuffrè, 2023, p. 775. In the same vein, see the Court's judgment of 20 November 2003, *Abler and Others* (C-340/01, EU:C:2003:629, paragraph 33). It is not necessary that the ownership of the assets be transferred since it suffices that they be made available to the transferee; see judgment of 15 December 2005, *Güney-Görres and Demir* (C-232/04 and C-233/04, EU:C:2005:778).

⁴² Romei, R., 'La Direttiva europea sul trasferimento di imprese. Profili generali', op. cit., p. 775. In the same vein, see the Court's judgment of 20 November 2003, *Abler and Others* (C-340/01, EU:C:2003:629, paragraph 34).

45. 'Economic entity' is thus a concept that, from the point of view of its constituent elements, 'varies according to the type of activity and depending on the activity engaged in'.⁴³

46. In any event, even taking into account the variability of the concept, mere succession in the pursuit of an activity does not give rise to a transfer of an economic entity: in order for there to be a transfer of an economic entity there must also be a transfer (in the broad sense described above) of assets.

47. In the case at hand, subject, as always, to the necessary findings of fact of the referring court, it is hard to question that a transfer of an economic entity has taken place: as mentioned above, the premises of the office, the notary's records, most of the employees and, it must be held, part of the clientele, have been transferred to the successor notary.

48. The third requirement that must be fulfilled is the preservation, in the transfer, of the 'identity' of the economic entity, an entity that must maintain the prerequisites of autonomy and stability.

49. The economic entity's retention of its identity stems in particular from the actual continuation of its operation.⁴⁴ However, the Court has clarified that '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. 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'.⁴⁵

50. The clarification must be added that, in order to fulfil the requirement of autonomy, which the transferred entity must possess before its transfer and keep even afterwards, it is necessary, despite the fact that the employer imposes precise obligations on the group of workers and thus has an extensive influence on its activities, that 'that group possess a certain freedom to organise and carry out its tasks'.⁴⁶

51. In other words, the requirement of autonomy serves as an indicator of the continuity of the production activity before and after the change of its owner and thus acts as an element confirming the suitability of the transferred entity to pursue a production activity.⁴⁷

52. This means that the protection of the employees is triggered not at the same time as the transfer of an asset, but upon the 'occurrence of the event represented by the continuation of a business activity that must retain its identity, proving that what has been transferred is capable of carrying on a business activity'.⁴⁸

⁴³ Romei, R., '*La Direttiva europea sul trasferimento di imprese. Profili generali*', op. cit., p. 777.

⁴⁴ See, for example, judgment of 8 May 2019, *Dodič* (C-194/18, EU:C:2019:385, paragraph 33).

⁴⁵ See judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 44).

⁴⁶ See judgment of 6 September 2011, *Scattolon* (C-108/10, EU:C:2011:542, paragraph 51).

⁴⁷ Romei, R., '*La Direttiva europea sul trasferimento di imprese. Profili generali*', op. cit., p. 779.

⁴⁸ Romei, R., '*La Direttiva europea sul trasferimento di imprese. Profili generali*', cit., p. 780.

53. However, as mentioned above with regard to the concept of an economic entity, in order to determine whether an entity retains its identity, all factual circumstances must be taken into account, and 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.⁴⁹

54. The function of an asset or element of a transfer may be more or less relevant depending on the context and, therefore, judgement must be relativised depending on the individual case.

55. Turning now to examine the actual case that is the subject of the question referred for a preliminary ruling, in order to ascertain whether there is a transfer of an undertaking, the analysis will have to cover all of the elements intended to make possible the carrying-on of the notarial activity.

56. Since it is a highly professional intellectual profession, there is no doubt that the notary's personal contribution is of considerable importance in the pursuit of the activities of the notary's office. The argument put forward by the defendant in the main proceedings, to the effect that the notary's office is identified with the notary himself, in the sense that no activity carried on in it would be possible without his personal contribution, appears more questionable. The result is that, if the latter argument were true, following the relocation of the notary to another post, the notary's office, consisting of movable property, immovable property, records and staff, would enjoy no autonomy and would therefore not satisfy all the requirements necessary for a transfer and, in particular, that of autonomy. There would thus be no real continuation of the business activity.

57. A reading of the documents in the case file together with the presentation of the arguments of the parties at the hearing leads me to the conclusion that a notary's office, following the relocation of one notary and the assumption of the post by another, continues to operate as a business activity since, reasonably – for reasons of geography, existing relationships with employees and the presence of the records – clients will continue to turn to the same office to request notarial services.

58. It is, however, for the national court to determine whether or not, on the basis of all the factual circumstances, in the light of the abovementioned principles and criteria, all of the requirements for a transfer of an undertaking are fulfilled.

IV. Conclusion

59. On the basis of all of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling as follows:

Article 1(1)(a) 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, and consequently the contents of Directive 2001/23, are applicable to a situation in which the notary in post in a notary's office – who is both a public official and also the private-sector employer of the office's employees, with the employment relationship being governed by general employment legislation and by a sectoral collective agreement – succeeds the outgoing post-holder, takes over the

⁴⁹ See, for example, judgment of 8 May 2019, *Dodič* (C-194/18, EU:C:2019:385, paragraphs 34 and 35).

previous notary's records, continues to provide services at the same place of work using the same material facilities, and takes on the staff who had worked for the notary who had previously held that post.

It is for the national court to determine, first, whether or not, on the basis of the principles expressed by the Court, the activity of notaries in Spain can be categorised as that of an undertaking engaging in an economic activity and, secondly, in the light of all the factual circumstances, whether or not in the main proceedings the requirements for the transfer of an economic entity that retains its identity within the meaning of Directive 2001/23 are met.