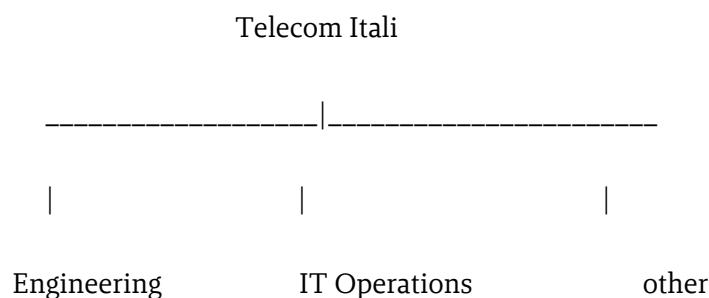


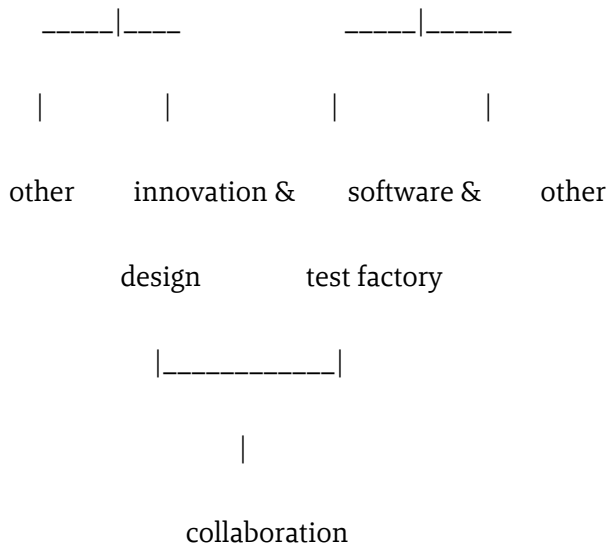
SUMMARY

# **ECJ 6 March 2014, case C-458/12 (Lorenzo Amatori and others - v - Telecom Italia SpA and Telecom Italia Information Technology Srl), Transfer of undertaking, Transfer**

## **Facts**

In February 2012, Telecom Italia carried out an internal reorganisation. Before the reorganisation the company had a section called 'Information Technology', which covered the following activities: innovation, design, implementation, operations, applications and operation of infrastructure. During the reorganisation, this section was subdivided into a dozen sections, including 'IT Operations' and 'Engineering'. The IT Operations Section included a unit called 'Software and test factory'. The Engineering Section included the innovation and design activities. The Engineering Section and the Software and test factory continued to collaborate with one another. Further, the Software and test factory received specific instructions from Telecom Italia. The foregoing can be summarized in the following diagram:





In April 2010, Telecom Italia transferred the IT Operations, where Mr Amatori and the other plaintiffs worked, to its subsidiary Telecom Italia Information Technology (TIIT). Telecom Italia and TIIT considered this to constitute the transfer of an undertaking and acted accordingly. The plaintiffs took a different view. They brought proceedings before the *Tribunale di Trento*, seeking a declaration that their employment relationship with Telecom Italia had continued.

**National proceedings**

The plaintiffs argued that, before April 2010, IT Operations had not constituted a functionally autonomous subdivision within the structure of Telecom Italia. It had not even existed as a section. They also argued that the overriding power exercised by the transferor (Telecom Italia) over the transferee (its subsidiary TIIT) prevented the legal transfer from being classified as a transfer of undertaking. Moreover, TIIT continued to carry out the greater part of its activity for Telecom Italia.

The court decided to stay the proceedings and to refer two questions to the ECJ. The first question was, essentially, whether Directive 2001/23 precludes national legislation, such as that at issue in the main proceedings, that, on the transfer of part of an undertaking, allows the transferee to take over the employment relationships from the transferor, if that part does not constitute a functionally autonomous economic activity which already existed at the time of its transfer. The second question was, essentially, whether the Directive precludes national

legislation which allows the transferee to take over the employment relationships from the transferor if, after the transfer of part of the undertaking concerned, the transferor exercises extensive, overriding powers over the transferee.

### **ECJ's findings**

The decisive criterion for determining whether there is a transfer of undertaking within the meaning of Directive 2001/23 is whether the entity in question retains its identity. An 'entity' is any organised grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous. It follows that the economic entity concerned must have a sufficient degree of functional autonomy, the concept of autonomy referring to the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of the employer (see Scattolon, case C-108/10, at § 51) (§ 29-32).

This finding is supported by Article 6(1) of the Directive, which distinguishes between a part of an undertaking that does and a part that does not preserve its autonomy. The use of the word 'preserve' means that the independence of the entity transferred must exist before the transfer (§ 33-34).

Thus, in the main proceedings, if it should prove that the entity transferred did not, before the transfer, have sufficient functional autonomy, (which it is for the national court to ascertain), that transfer would not be covered by Directive 2001/23 (§ 35).

None the less, the Directive does not prohibit a Member State from providing for the safeguard of employees' rights in the situation described in the previous paragraph. Therefore, the mere lack of functional autonomy of the entity transferred cannot, in itself, prevent a Member State from providing in its national law for the safeguarding of employees' rights after a change of employer (§ 36-41).

Directive 2001/23 is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met. The Directive can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same

premises and that they are engaged in the same work makes no difference in this regard (§ 47-51).

## **Ruling**

Article 1(1)(a) and (b) of Council Directive 2001/23/EC must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which, on the transfer of part of the undertaking, permits the transferee to take over the employment relationship from the transferor, if that part of the undertaking does not constitute a functionally autonomous economic entity existing before the transfer.

Article 1(1)(a) and (b) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables the transferee to take over employment relationships from the transferor if, after the transfer of part of an undertaking, it exercises extensive, overriding powers over the transferee.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2014-03-06

**Case number:** C-458/12