

SUMMARY

## **ECJ 20 July 2017, case C-416/16 (Piscarreta Ricardo), Transfer of undertaking**

***&lt;p&gt;The Acquired Rights Directive applies in a situation in which a municipal body was wound up and its activities transferred in part to another municipality and in part to a different body, and an employee on long term leave, whose employment contract was suspended and was therefore not working at the time, was still covered by the concept of ‘employee’ within the meaning of the Directive.&lt;/p&gt;***

### **Summary**

The Acquired Rights Directive applies in a situation in which a municipal body was wound up and its activities transferred in part to another municipality and in part to a different body, and an employee on long term leave, whose employment contract was suspended and was therefore not working at the time, was still covered by the concept of ‘employee’ within the meaning of the Directive.

### **Facts**

In October 1999, the Municipality of Portimão hired Mr Piscarreta Ricardo for an indefinite period as a tourism officer. In October 2008, he left the service of the municipality and started working under a permanent contract form Portimão Turis E.M., SA (‘Portimão Turis’), which was also a municipality. In March 2010, the Municipality of Portimão decided to merge a number of municipal undertakings and it therefore incorporated Portimão Turis into another municipality – Portimão Urbis. From then on, Mr Piscarreta Ricardo worked as an administrator, and later director, of Portimão Urbis.

In September 2011, Mr Piscarreta Ricardo requested – and was granted – unpaid leave for two

years. In July 2013, that leave was renewed, at his request, for a further two-year period.

During his, in October 2014, the Municipality of Portimão decided to wind up Portimão Urbis, of which it was the sole shareholder. Some of the activities of that undertaking were taken over by the Municipality of Portimão, the remaining activities were outsourced to Emarp, of which the Municipality of Portimão was also the sole shareholder. Part of the workforce of Portimão Urbis was subject to a 'public-interest transfer agreement' and thus taken on directly by the Municipality of Portimão. The other part of the workforce was subject to a 'transfer of contractual position' and were taken on by Emarp.

As Mr Piscarreta Ricardo was not covered by either of these plans, he was informed that his employment contract had come to an end following the closure of Portimão Urbis. He therefore brought an action in court for a declaration that his dismissal was unlawful, arguing that there had been a transfer of business from Portimão Urbis to the Municipality of Portimão and Emarp.

### **National proceedings**

The referring court, the District Court of Faro (Tribunal Judicial da Comarca de Faro) decided to stay the proceedings and put certain questions to the ECJ.

### **Questions put to the ECJ**

(1) Does Article 1(1)(b) of the Acquired Rights Directive apply to a situation in which a municipal undertaking (whose sole shareholder is the municipality) is wound up (by decision of the municipality's executive body), and the activities carried on by it are allocated in part to the municipality and in part to another municipal undertaking (whose objects have been altered to that end – and which is also wholly owned by the municipality): that is, in those circumstances may it be considered that there has been a transfer of the business within the meaning of the abovementioned directive?

(2) Must an employee not in active service (in particular, because his employment contract is suspended) be considered to be included in the concept of 'employee' within the meaning of Article 2(1)(d) of the ARD and, accordingly, must the rights and obligations arising from the contract of employment be considered transferred to the transferee, in accordance with Article 3(1) of the ARD?

### **ECJ's findings**

#### **Question (1)**

The ECJ found that the ARD applied to public and private undertakings engaged in economic activities whether or not they are operating for gain. However, it also found that the administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, was not a transfer within the meaning of the ARD.

In the case at hand, there was a transfer of the activities of a municipal body, in part to a municipality and in part, to another municipal body. However, in the Court's view, this did not, in itself, prevent the ARD from applying. Previous ECJ case law had ruled that the fact the transferee was a public law body was not good grounds for excluding the existence of a transfer within the scope of the ARD, whether the body was a public undertaking responsible for a public service (e.g. *Aira Pascual and Algepos Terminal Ferrovios*, C-509/14) or a municipal authority (e.g. *CLECE*, C-463/09).

Next, in order for the ARD to apply, the transfer must concern an entity engaged in economic activities, whether or not for gain. Economic activity includes any activity consisting in offering goods or services on a market. Activities within the exercise of public powers are excluded from classification as economic activities. However, services carried out in the public interest without gain, which are in competition with services offered by operators who do seek to make a profit, may be classified as economic activities for the purposes of Article 1(1)(c) of the ARD (e.g. *Scattolon*, C-108/10). In the case at hand, the various activities engaged in by *Portimão Urbis* and taken over by the Municipality of *Portimão* and *Emarp*, did not appear to the Court to fall within the exercise of public powers and could therefore be classified as economic activities.

Moreover, the ARD applies 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. The Court pointed out that because of the differences between the language versions of the ARD and in the laws of the Member States with regard to when a legal transfer occurs, it has traditionally interpreted the ARD flexibly, in a way that protects employees in the event of a change of employer (*CLECE*). It has therefore ruled that the ARD will still apply, whether the transfer is carried out based on a unilateral decision of a public authority or an agreement (*UGT-FSP*, C-151/09). In the case at hand, the transfer came about because a municipal undertaking was being wound up pursuant to a decision of the executive body of the municipality. However, this should not, in itself, prevent there being a transfer within the meaning of the ARD, as the result was a change of employer.

Finally, for the ARD to apply, the transfer must involve an economic entity which retains its identity after being taken over by the new employer. This must be considered on the facts, by

looking, for example, at the type of business in question; whether or not its tangible assets, such as buildings and movable property, transfer; 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 transfer; 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. But, all those factors should be considered as a whole and not in isolation. The degree of importance to be attached to any one factor will also vary on the facts (e.g. *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14).

The Court also pointed out that the mere fact that one economic entity takes over the economic activity of another is not grounds for concluding that the latter has retained its identity. Identity cannot be reduced to the activity itself. Identity emerges from several factors taken together, such as the workforce, management, the way the work is organised, the operating methods and possibly also the resources available to it (e.g. *CLECE*, C-463/09). The Court has also held that, where identity is concerned, the most important element is retention of a functional link of interdependence and complementarity between all the various factors. This means, that, for example, the transferee could use the various elements transferred in a new and different organisational structure — but to pursue an identical or analogous economic activity (e.g. *Klarenberg*, C-466/07, and *Ferreira da Silva e Brito and Others*, C-160/14).

## **Question (2)**

In terms of whether someone whose contract is suspended because he is on long term leave transfers, the Court noted that everyone who is protected as an employee under national employment law is considered to be an ‘employee’. However, the protection that the ARD gives only extends to workers who have an employment contract or employment relationship existing at the date of the transfer (*Briot*, C-386/09). Whether or not such a contract or relationship exists at that time must be assessed on the basis of national law, subject, to compliance with the mandatory provisions of Directive 77/187 (*Briot*, C-386/09).

In the case at hand, although at the date of dissolution of *Portimão Urbis* Mr *Piscarreta Ricardo* was linked to that organisation by an employment contract of indefinite duration, he was not actually working at that point because he was on unpaid leave and, under Portuguese law, this had the effect of suspending his employment contract. However, the referring court had explained the law provided that while an employment contract is suspended, all rights, obligations and safeguards are maintained. This would seem to protect Mr *Piscarreta Ricardo*, although this was a matter for the referring court to verify. Subject to that, the Court’s view was that Mr *Piscarreta Ricardo* should have been treated as transferring to the transferee in

accordance with Article 3(1) of the ARD.

## **Ruling**

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Article 1(1) of the ARD must be interpreted to the effect that, where a municipal undertaking, whose sole shareholder is a municipality, is wound up by a decision of the municipality's executive body and its activities are transferred in part to the municipality to be carried on directly by it and in part to another municipal undertaking re-formed for that purpose, whose sole shareholder is also that same municipality, that situation falls within the scope of the directive, provided that the identity of the undertaking in question is preserved after the transfer, which is a matter for the referring court to determine.

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A person such as the applicant in the main proceedings who, because his employment contract is suspended, is not actually performing his duties, is covered by the concept of 'employee' within the meaning of Article 2(1)(d) of the ARD insofar as that person is protected as an employee under the national law concerned, which is, however, a matter for the referring court to verify. Subject to that verification, in circumstances such as those at issue in the main proceedings, the rights and obligations arising from that person's employment contract must be considered to have been transferred to the transferee, in accordance with Article 3(1) of the directive.

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

**Verdict at:** 2017-07-20

**Case number:** C-416/16 (Piscarreta Ricardo)