Workers' influence on outsourcing, tender processes and transfer of employment contracts: **watch the gap!**

ANNEXES

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Content:

Private security and cleaning industry sectors

Experiencing rapid expansion over the past two decades, the private security and industrial cleaning sectors are made up of innumerable SMEs but also large multinational companies like ISS, G4S and Securitas. These 3 companies together employ close to 1.5 million workers, of whom approximately half a million are in Europe.

Featuring large workforces, companies in these sectors are subject to fierce competition. It is not uncommon that, even in the presence of collective agreements, the commercial contracts signed between the user company and the service provider do not always respect basic wage and working conditions.

Addressing large service providers, semi-public clients like airports and rail operators invite tenders for large contracts and often try to push prices downwards. Railways invite tenders for large cleaning contracts and some security, while airports do both in large volumes.

For private clients, SME providers tend to bid under extremely competitive conditions. In a number of cases, abnormally low offers often not complying with the collective bargaining agreements in place have been documented.

During the project activities, a number of trade union representatives were surveyed in 2019 to assess the state of play in their respective countries: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Spain, Sweden and the UK.

17 unions responded, providing answers in line with their internal organizational characteristics for both sectors covered by the study (see Table)

TRADE UNION	NUGW
VIDA	FESMC UGT
ACV Voeding en Diensten - CSC Alimentation et Services	CCOO de Construcción y Servicios
Centrale Générale FGTB	Fastighets
3F	SIPTU
PAM	GMB
Prolitto	UNITE
IG Bau	CFDT
verdi	OGB L

The main outcomes of the survey are as follows:

In the case of transfer of undertaking, workers do not automatically keep or lose their jobs

There are three possibilities in the EU:

- Automatic transfer of all workers 'labour contracts on the basis of a collective agreement (BE, NL, SP and LU) and by law in the UK.
- No systematic transfer of jobs (FI, NO, SW). In Sweden, the law offers external job relocation support instead. In the case of just part of the workforce being taken over, the "last in, first out" rule applies, meaning that seniority is the main criterion used in this country/ sector.
- There may be preconditions for job transfer, taking into consideration a) seniority (minimum 3 or 9 months (BE), 4 months (SP), 6 months (L)), b) working time (50% on the commercial contract concerned, BE). In France, the transfer of staff is based on seniority OR the percentage of working time on the commercial contract concerned (e.g.: 4 years or 85% of working time in the security sector)

Interestingly, some additional rights have been identified in some countries:

- In addition to the one-year job protection linked to the transfer of employment contracts to a new employer, the Belgian collective agreements provide for 6 months job protection against dismissal on economic grounds.
- In certain countries, union delegates benefit from additional protection as they can chose whether or not to be transferred to the new employer.
- Workers can refuse the transfer and stay with the previous employer if jobs are available (DE)
- Workers cannot refuse the transfer (L). The new company must take over 100% of the workforce unless their current employer wishes to retain them.

The protection afforded by the Transfer of Undertakings Protection of Employment (TUPE) or by collective agreement differs between countries

According to the answers of survey participants, the situation is **broadly satisfactory in several countries** including BE, DE, SP and FR.

In other countries, although the legislation / collective agreement is satisfactory in general, unions have to play the **watchdog** against rogue employers making the most of legal loopholes, … (UK, IR).

Finally, the situation is deemed **not satisfactory** particularly where the law has been eroded by case-law (DK), or offers poor protection to workers to retain theirs job (FI, SW and NO). Here, a collective agreement could be a solution to improve the situation for workers.

Reviewing the answers provided, it would seem that collective agreements clarifying and improving national legislation make a difference.

Additionally, social partnership helps address difficulties regarding the interpretation of the rules thanks to dialogue and in **conciliation procedures**; these practices are usually based on a joint labour Committee (IR, SP, BE).

In many countries, the national collective agreement does not offer more detailed information than the legislation. Many participants noted that sectoral agreements make more sense as court decisions are linked to the type of services provided.

Collective bargaining agreements may ensure that workers' contracts and entitlements are continued in the case of a change of contract or transfer of undertaking

Restrictions:

In the Netherlands, although the TUPE law guarantees entitlements (except for pensions) for a year, the collective agreement does not exclude any type of contracts for the transfer. However, it has a clause reducing individual entitlements exceeding its provisions. Similarly, in Belgium, there is no maintenance of entitlements based on individual agreements or company collective agreements.

Some elements (voluntary pension and private health insurance schemes) are not transferred because they are linked to an individual company policy, as foreseen by the 2001 European Directive.

Continuity:

In terms of wages, in Belgium the agreement operates with **seniority** by occupation, e.g. workers will have a higher **wage** if they can document relevant practice as a cleaner, regardless of the employer. This also applies to documented formal **training** (Norway)

In Luxembourg, the workplace can change, but the employment contract is maintained.

Focus on Belgium (cleaning sector)

- The transfer applies to a maximum of 37 hours per week to the new employer.
- Supervisors may lose their supervisory role.
- When Company 1 (transferor) or 2 (transferee) does not properly exchange or request information on staff at the time of the transfer, this is no excuse for not complying with their obligations; they will respectively remain or become the employer.
- Losing a school contract before the summer holidays: the transfer takes place as from the beginning of the school year / contract in September.
- Company 1 (transferor) should compensate hours lost to the remaining workers (not transferred) to reach the agreed contractual hours.

Insourcing:

When a client terminates a cleaning contract with the intention of performing the cleaning with newly hired own personnel, it is obliged to take on the affected workers of the previous cleaning company (SP, cleaning).

Client relocation

In the event of a change of cleaning provider linked to a **client's relocation**, transfer rules do not apply in Belgium. Exceptions may apply when the following 3 criteria are met: a) the new workplace is 3 km or less away from the previous one, b) similar means of transport are available, and c) the tasks are similar in terms of volume and number of hours.

Workers/shop stewards/works councils are usually informed and consulted on a change of contract or transfer of undertaking individually and/or collectively.

All respondents explained that their legislation / agreement foresees collective information and consultation (dependent on the country via either a works council or a trade union).

In many countries, workers are also informed individually by post (IR, FR, SP, …). Information citing the date of transfer should be provided at least one week before the end of the contract (BE), or within a reasonable period before the transfer (DK).

Good to know!

The works council can call in an external advisor for support in enterprises with more than 300 employees (DE).

Success stories

- BE: The Cleaning Industry Social Fund receives copies of the communication exchanged between the two companies and is able to mediate between them in the case of disputes. This makes application of the collective agreement much easier.
- DE: At Frankfurt Airport and other areas, the union negotiated the takeover of staff with all rights and obligations, as otherwise they would have been employed on a temporary basis. They were also able to call a strike, with success.
- DK: workers transferred from the public to the private sector can continue benefiting from the public sector working conditions until the end of the collective agreement (30% better than in the private sector).
- DK: in 2017, the union 3F obtained that employees retain their seniority allowances.
- NO: success in lawsuits, good media visibility, campaigns, strong shop stewards
- UK: in the London Region case of Whent - Cartledge -pay rises were agreed by the local government NJC then automatically applied to contractors - what the unions call the "dynamic approach". But some more recent court decisions have undermined this success.
- UK: after several strikes, the union was able impose negotiations on both the transferor, Johnson Controls, and the transferee, Facilicom, ending up not only with the transfer of acquired rights but also with 3 days additional annual holidays.

Points for discussion:

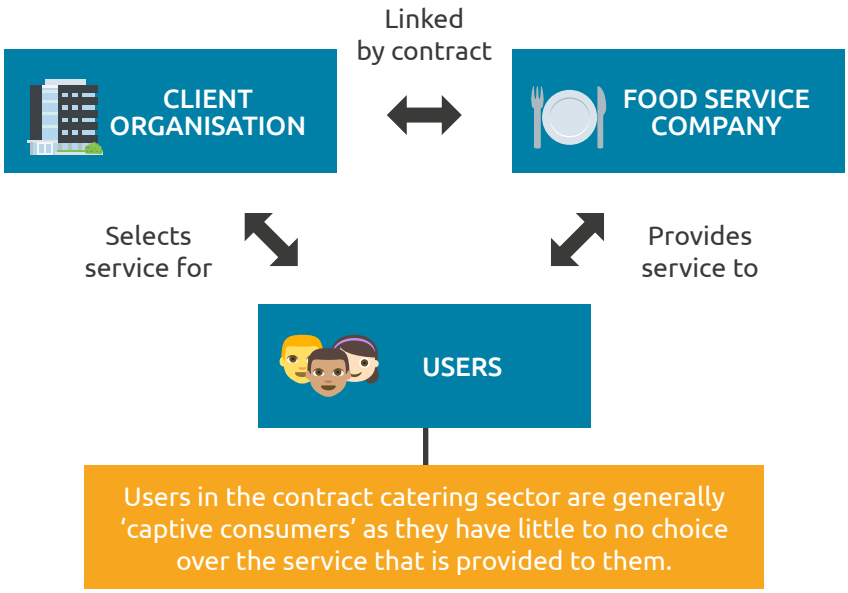
- What happens when information / consultation rights are not respected?
- The directive (Art. 7) foresees that: when "measures" are planned as regards workers, consultation shall take place **"in view of reaching an agreement"**.
- Would **EWC** information/ consultation make sense in some cases?

Contract catering services

Contract catering services are outsourced by client organisations to a specialised company on a contractual base. Normally provided on the premises of the client organisation, contract caterers provide meals and other services to workers, civil servants, school and university students, patients, prisoners, etc. with access to a canteen or internal restaurant, often at a subsidised "social" price.

👉 **According to FoodServiceEurope, the sector employs 600,000 people throughout Europe and supplies approximately 6 billion meals each year.**

DIAGRAM: THE TRIANGULAR RELATIONSHIP IN CONTRACT CATERING SERVICES[1].



In the contract catering services sector, the issue of staff transfer has been on the agenda for a long time. Discussed by the European social partners since 1999, more specific activities were undertaken from 2014 onwards. EFFAT has given precedence to social dialogue as a key tool for progress and as a way of covering the sector as broadly as possible. Following a survey on the state of play of the implementation of Directive 2001/23/EC in 2015, the social partners adopted recommendations to promote the transfer of information between transferor and transferee in the event of a transfer of undertaking with a view to protecting jobs and working conditions in 2017. They have also ensured that they work upstream of transfers, focusing on the procurement process of catering services. On this point, the European social partners have produced a guide for private and public organisations.

1 (source: "Choosing best value in contracting food services - A guide for private and public client organisations", EFFAT-FoodServiceEurope)

"The transfer of contracts is a special feature of the contract catering sector. The contract catering enterprises pursue the safeguarding of employees' rights in the event of transfers of catering contracts in respect of the relevant European legislation."

EFFAT - FoodServiceEurope 2014 Agreement on Corporate Social Responsibility (CSR) in the Contract Catering Sector

Focus on the transfer of information between employers

The European social partners have paid particular attention to the need to share workforce employment information between employers providing catering services to clients about the workforce employment features. In 2015, EFFAT and FoodServiceEurope conducted a survey among their affiliated organizations to investigate differences between countries regarding legislation and practices. The analysis report revealed that an explicit obligation to share such information existed in several but not all Member States. It also showed that templates for sharing information on workers between the two companies existed in several Member States and could be used as best practice examples. However, according to trade unionists, there is still a long way to go before these practices become standard in the sector, as certain employers do not necessarily play by the rules.

Article 3.2 of the 2001/23/EC Directive

Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article (3), so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

Content of the information: Information on the workers that should be provided to the new employer usually covers the identity including age and gender, length of service, pay and function of every worker affected, the number of hours worked on the site, mandatory or optional training, workplaces and information on a worker's possible status as a staff representative or protected worker.

In the UK, details of any outstating claims employees have against the outgoing employer are to be communicated to the new employer.

In Spain, the outgoing employer has an obligation to provide the incoming employer with the following documents:

- Certificate of clearance of social security liabilities
- Certificate of clearance of tax liabilities
- Copies of the last four payslips of the transferred employees

In certain countries, templates have been drafted by the social partners for use by companies.

In others, there are no tools regarding how information should be provided, with companies often using simple Excel files.

In the majority of answers, the transfer of the whole workforce to the new employer was automatic. Respondents also reported on the rules set by law or collective agreement that foresaw the information-consultation of workers of both employers.

In Sweden, the employer must notify employees about the transfer to enable them to voice their support or their opposition to it. The employer is required to negotiate with the unions in matters related to transfers of undertakings and business.

Some countries without a mandatory inter-company information obligation (e.g.: Austria, Germany and Sweden) have well-established information-consultation procedures ensuring that workers' representatives are able to verify that the transfer process complies with the national rules in force.

In countries with a mandatory inter-company information obligation like France, Belgium, Italy and the UK, this obligation is set by collective agreement. Information on staff profiles is to be communicated within a time limit (BE: 2 days after signing the contract, FR: 15 days before the transfer, IT: "as soon as possible and always prior to the transfer", UK: 28 days before the transfer).

However, in those countries with no strong information-consultation procedures and/or no collective agreement in place, the need for an inter-company information obligation may not be sufficient to protect workers from rogue behaviour.

EFFAT plays the social dialogue card to move on

On 21 November 2017, FoodServiceEurope and EFFAT adopted the "Recommendation on the transfer of information between employers in the context of a transfer of undertaking".

As the 2001 Directive creates no obligation for EU Member States on this point (see Article 3.2 of the 2001/23/EC Directive), the social partners consider it extremely important to ensure that the new contractor has all the relevant information on the transferred workers for several reasons, including that:

- workers will not be penalized, and their rights will be better preserved
- it will enable the new operator to perform the contract in good conditions

Additionally, the social partners highlight the need for an efficient and timely transfer of information between the transferor and the transferee. The information should be transferred in "good time" and as soon as possible after the transfer decision has been formally adopted, i.e. before the transfer actually takes place.

The social partners also strongly recommend that this process of inter-company information should extend to informing the workers concerned "in order to preserve their ability to intervene in full knowledge".

Finally, the recommendations list the information to be transferred, in a non-exhaustive manner: information on the worker, the employment relationship characteristics (labour contract features, length of service, functions, working time, …), wages and fringe benefits, medical examinations where legally permitted, collective agreements in force, social security payments.

The social partners acknowledge that their recommendations are to be applied within the framework of national legal provisions, including data privacy/protection ones.

Action beyond the transfer of staff issue

Aware of the fierce competition in their sector, the social partners wish to promote fair competition based on quality services. To promote professionalism in the interest of the client, the undertakings and the workers, in 2019 they issued a guide entitled *"Choosing best value in contracting food services: A guide for public and private client organisations"*[2]. Addressing service purchasers like schools, hospitals and companies, the guide states that calls for tenders should dictate compliance with national legislation and collective agreements implementing Directive 2001/23/EC.

Delving into history

More than 20 years ago, in the Agreement on vocational training in the European Contract Catering sector concluded in 1999 between ECF-IUF and FERCO, the social partners undertook to work together to meet "the growing demands as regards mobility". Taking into consideration the special features of the catering sector arising from the transfer of contracts, they considered it important for the whole contract catering sector to "strive for the transferability and recognition outside the enterprise of the skills acquired through the training".

2 (source: "Choosing best value in contracting food services - A guide for private and public client organisations", EFFAT-FoodServiceEurope)

Transport sector

The transport sector covers very different activities and operating mechanisms. Some are transnational, such as rail and aviation, others not at all, such as urban public transport and ground-handling. The liberalisation of several transport subsectors has had a major impact on subcontracting, increasing its volume of operations and the number of operators in the majority of EU countries. Some formerly domestic public operators have become European or even global players. With the liberalisation of transport subsectors, sector-specific regulations or directives have been adopted by the EU legislator, with the potential to influence the transposition or implementation of Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of undertakings.

Public passenger transport (urban public transport and rail)

An extended scope of workers' protection is possible

Although the 2001 directive imposes several restrictions on the possibility to transfer labour contracts to the new operator (for instance, conditional on the transfer of assets in some cases, autonomy of the operator, …), Regulation 1370/2007 (the Public Service Offering or PSO regulation) offers the possibility to push these limits aside.

The PSO regulation contains the possibility (not the obligation) for competent authorities to enlarge the scope of directive 2001/23/EC to cover cases where it would not otherwise apply. Its recital 16 states that "*Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC*". This is confirmed by Article 4.5: "*Without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC".*

In 2016, this was reinforced by a new recital 14 stating that "*where Member States require staff taken on by the previous operator to be transferred to the newly selected public service operator, such staff should be granted the rights to which they would have been entitled if there had been a transfer within the meaning of Council Directive 2001/23/EC. Member States should be free to adopt such provisions.*" There is a difference, however, in the authority in charge as we move from the "competent authority" as the decision-making body (defined as "any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority") to the decision of an EU Member State.

👉 **In conclusion, while the 2007 PSO regulation strengthens workers' rights in comparison to other sectors, its 2016 revision blurs its impact by suggesting a transfer of responsibility from authorities competent for transport to Member States.**

The statement of the European Parliament (annexed to its Resolution adopted on 14 December 2016) provides a wider interpretation of the PSO Regulation, stating that Member States are entitled to extend the scope of the 2001 Directive by adding staff protection measures such as requiring a mandatory transfer of staff even when this directive would not apply.

If this interpretation were to be followed by Member States, it would greatly extend directive 2001/23/EC, allowing alternative solutions to better cover all transfers of activities between operators and tackling a number of legal uncertainties and unfair practices.

Workers' information

Workers' information and consultation are regulated by directive 2001/23/EC in its Article 7 making it compulsory for both the outgoing and incoming operator to provide information on the impending transfer and to consult workers' representatives.

In addition, Recital 15 of the PSO regulation states that "*Competent authorities should make available **to all interested parties relevant information for the preparation of offers under competitive tendering procedures**, while ensuring the legitimate protection of confidential business information.*"

This is confirmed by Article 4.5, according to which "*Where competent authorities, in accordance with national law, require public service operators to comply with certain quality and social standards, or establish social and qualitative criteria, those standards and criteria shall be included in the tender documents and in the public service contracts.*

While respecting Directive 2001/23/EC, such tender documents and public service contracts shall, where applicable, also contain information on the rights and obligations relating to the transfer of staff taken on by the previous operator."

On this last point, directive 2001/23/EC simply states that "*Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee*" (Art. 3.2). The PSO regulation may therefore be more stringent that the 2001 directive in cases where social and quality criteria apply.

This new sentence should help secure access to information not only by the incoming (operator) but also by workers' representatives, allowing them to defend the continuity of workers' rights acquired with the previous employer.

The table below shows in bold the additional wording of the new PSO regulation, the main thrust of which is to ensure that tender documents include not only standards, but now also social and qualitative selection criteria.

Importantly, the PSO regulation also stipulates that public service contracts include such standards and criteria. It seems to be real progress not to limit expectations to tender processes without ensuring that service contracts also contain these quality and social standards and criteria, because, at the end of the day, these contracts are the operational dimension of transport services, including work organisation and pricing.

Comparing the 2007 and 2016 versions of PSO regulation Art. 4.6

2007	2016
Where competent authorities, in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts."	Where competent authorities, in accordance with national law, require public service operators to comply with certain quality and social standards, or establish social and qualitative criteria, those standards and criteria shall be included in the tender documents and in the public service contracts. While respecting Directive 2001/23/EC, such tender documents and public service contracts shall, where applicable, also contain information on the rights and obligations relating to the transfer of staff taken on by the previous operator.

Typology of transfers:

According to a report adopted by both ETF and UITP[1], "there are five basic situations in which a transfer of staff currently takes place within the context of a change of operator in urban public transport. Three situations can be legally qualified as 'transfer of staff' while two situations are de facto situations of transfer of staff:

- Transfer of staff is required by national legislation (e.g. transport laws) – this is the case in the Netherlands.
- By national-law-specific implementation of Directive 2001/23/EC, the situation of change of operator after competitive tendering is always considered as a transfer of undertaking. This is the case for example in the UK and in France;
- Tender documents require a transfer of rolling stock and assets. As a result, a change of operator is considered to qualify as a transfer of undertakings as foreseen by national rules implementing the EU Directive 2001/23/EC regarding staff transfer in the case of transfer of undertakings. As a consequence, staff is transferred to the new operator.

1 Social Conditions in Urban Public Transport Companies in Europe, 2016

Two de-facto situations of transfer of staff:

- Competent authorities can make use of Article 4(5) of the PSO Regulation – either explicitly or implicitly – to require a transfer of staff in the case of a change of operator (no transfer of assets). This situation was found in cases in Germany and in Stockholm
- Transfer of staff is not mandated by the competent authority but can be in practice negotiated between transferor, transferee and relevant trade unions on a case by case basis or can be 'regulated' within a sector collective agreement. Situations of case by case basis negotiations were found in Sweden (outside Stockholm). In Finland, there is a sector collective agreement in place that foresees that in case of change of operator a specific 'transfer unit' is created under the auspices of the public employment service and from which the new operator is limited to recruit staff. At this stage, most of the workers were in practice thus transferred to the new operator or chose to leave the sector and find work elsewhere."

Although further research would be needed to assess the impact of the PSO regulation, the social partners concluded in 2016 that there was still a huge heterogeneity of situations between countries.

"In four out of sixteen countries where information was gathered (France, Finland, the Netherlands and the UK), transfer of staff occurs on the basis of national law or sector collective agreement (Finland) in case of change of operator after tendering.

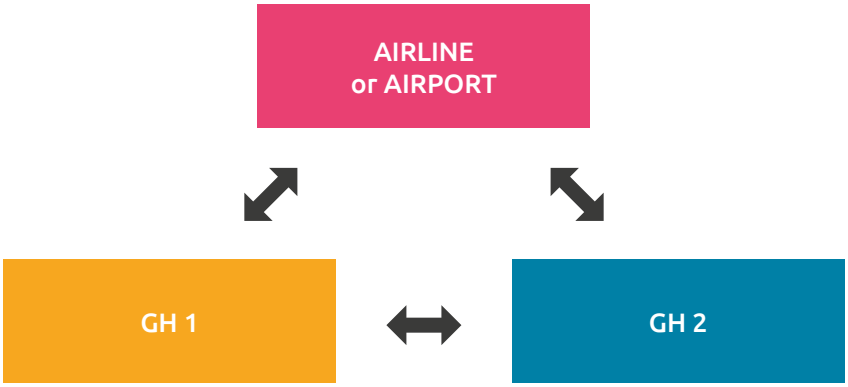
In seven countries (Austria, Denmark, Czech Republic, Hungary, Slovenia, Sweden and Bulgaria) typically no transfer of staff occurs due to the fact that in most cases the change of operator cannot be seen as a transfer of business under national legislation implementing the EU Directive 2001/23/EC on transfer of undertakings".

Ground-handling

Background

In a previous study conducted in 2018 for the European social partners of the ground-handling sector, Syndex[2] identified the following trends:

"Overall, market liberalization pushed by the adoption of a directive of 1996[3] has increased competition and, together with other factors (economic crisis, development of low-cost airlines) has led to a high pressure on prices and narrowing margins. This, in turn, has led to a worsening of working conditions as well as to the development of social dumping practices. This competition between suppliers gives great importance to the 2001/23/EC directive on transfer of undertakings, as many new businesses are competing and undermining well-established traditional players, often in the public sector."



2 Market Access, Social Conditions, Training, Qualifications and Quality Standards in the ground handling industry, February 2018
3 COUNCIL DIRECTIVE 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports

The most frequent social problems pointed out in the survey of this study and in the case studies show that conditions of transfer do matter:

- collective redundancies;
- low level of wages, lack of social benefits;
- fixed-term / civil-law contracts;
- increased number of part-time jobs, split shifts, overtime (work-life balance problems);
- increased work-load;
- outsourcing / subcontracting / interim agency workers (often paid the minimum wage);
- lack of training.

The research concluded that the worsening working conditions had a negative impact on safety and the quality of service:

- operational & safety problems:
  - recruitment problems due to low wage levels and working conditions;
  - high level of staff turnover (lower levels of skills and experience, up-skilling becomes a challenge)
  - higher absenteeism.
- health and safety issues:
  - psychological risks
  - accidents
  - injuries due to increased work-load (for example back problems).
  - Lower investment levels in GH equipment reinforce the risks.

Potential impact over the whole value chain:

- A problem encountered by a ground-handler may become, very quickly, the problem of all (carriers, airport, other handlers)

Countries and airports providers are not necessarily covered by collective agreements:

According to respondents to the first survey, in the majority of countries / airports, ground-handling workers benefit from additional protection in the form of collective agreements (national, sectoral or local).

- Exceptions are Ireland, Lithuania and Poland. There is also no additional protection for workers at Budapest airport.
- In Turkey, ground-handling is defined as a "high-risk" sector, and therefore workers' protection is higher than in the case of ordinary labour law.

Countries where a sectoral collective agreement is in force

- Belgium, Denmark, France, Spain, Finland, Sweden, Luxemburg and Italy.

In some cases, workers are protected via local or site-specific agreements

- These agreements often provide workers with more precise rights than national or sectoral collective agreements.
- Examples in Austria, Bulgaria, Switzerland, Greece, Finland, Italy and France.

Protection via collective agreements differs very much between countries:

The protection offered by collective agreements can vary greatly from one country to the next or even within one country, and CAs do not always provide workers with the expected guarantees.

- First of all, collective agreements are not necessarily binding and applied by all sector companies. This is for example the case in Italy, where the application of the CA is not compulsory and is left to the good will of the social partners, thus creating differing situations among market players.
- Moreover, different sectoral agreements may be applied to workers, according to the subsector to which their company belongs, thus implying less favourable conditions for some of them.
  - As ground-handling activities are very diverse, it is common for workers to be covered by collective agreements relating to different sectors (for example collective agreements applicable to the retail, cleaning or logistics sectors).
- Finally, in some cases, rules set by collective agreements are too general and therefore subject to subjective interpretation.

The new survey (2019-2020): 7 countries and 8 unions answered the questionnaire.

The aim of the new survey was to focus on the following countries to delve into their collective agreement practices: Austria, Belgium, Denmark, Finland, France, Italy, Luxembourg, Spain and Sweden.

The following unions were surveyed:

3F	FILT CGIL	HK
FSC-CCOO	FIT CISL	ACV - Transcom
	Unionen	SPASAF CFDT-FGTE

Preconditions for the transfer of employment contracts to another employer

National situations show different practices on qualifying transfers and starting transfer process:

In France and Sweden, for instance, there are no thresholds or ceilings for staff transfers, while Spain has set up, by collective agreement, a process for calculating the share of business : calculation of the percentage of the business transferred is based on the number of aircraft transferred vis-à-vis the total number of aircraft serviced. The percentage of business lost is then evaluated taking the last twelve months into account. The headcount covering that percentage is transferred, reflecting different contract terms, categories of workers and length of service. Assets do not necessarily have to be transferred. For mail and loading services, the same rule applies but on the basis of kilograms of mail and goods.

Collective agreements provide guidance for transfers in Belgium, where the collective agreement on staff transfers only covers blue-collar workers and in France (two collective agreements exist, one for "air transportation", the other for "handling and cleaning"). In both Belgium and Spain, conditions apply to both a loss of licence and a loss of commercial contract.

In Norway, case law is favourable to staff transfers: The courts have clarified the concept of identity maintenance over the transfer process, leading to a satisfactory implementation of the law on transfers of undertakings.

What kinds of contracts do collective agreements cover in the case of staff transfers from one employer to another?

In line with the legislation, all ongoing contracts including fixed-term, short-term / temporary ones are covered, although some restrictions may exist like a requirement of 6-month length of service in the case of France and Spain. Workers on leave are also usually transferred (like Spain) with some exceptions.

Transfers of employment contracts are an obligation foreseen by collective agreements. What happens if a worker refuses the transfer?

In several countries (France, Belgium, Spain), collective agreements allow workers to refuse to be transferred, instead remaining with their initial employer, though in Belgium, France, Italy, Norway and Sweden they may be made redundant for economic reasons. However, in Spain there are often too many workers to be transferred compared to the jobs available with the transferee.

In countries without collective agreements, practices may differ, as in Denmark where a worker refusing the transfer is considered to have broken the labour contract (individual negotiations may however take place) and Norway (automatic transfer).

Working conditions / entitlements excluded in the case of staff transfers:

The 2001/23/EC directive usually applies as foreseen: workers are entitled to keep their terms of employment and employment relationship until the collective agreement expires or at least for one year. If the new employer is not subject to a collective agreement, then the one that applied to the former employer will also apply to the new one. If the new employer is subject to a collective agreement, the working conditions set by it apply from the day of transfer.

In Belgium, both hospital insurance and pension plans attached to the transferor cease, but the 'new' employer has to continue providing these two benefits with providers of its choice. In Norway, this applies only to pension plans.

In Denmark, all conditions are transferred but as individual rights. If a negotiation takes place, solutions vary from case to case because there is no collective agreement to regulate the transfer.

In France and Spain, the collective agreement to which the new employer is subject applies only if it is more favourable to workers than the previous one; in France, however, all benefits defined in individual labour contracts cease.

In Italy, supervisory positions are not transferred.

Assessment of the protection of workers under current legislation and collective agreements in the countries covered by the study, in the case of a transfer of activity from one employer to another:

Positive points	Negative points	Points for improvement
› Bipartite commission to mediate disputes: Spain › Collective agreement more favourable than the law: Italy › Continuity of employment is secured (majority of countries with collective agreements) › Annual remuneration guaranteed: France › Involvement of trade unions in the process: Belgium › Sectoral social fund for those losing their jobs: Belgium	› No collective agreement on transfers: Denmark › The collective agreement is not binding for all companies. Risk of social dumping: Italy › Need to go through long court trials in the case of a breach by the employer: Norway › Loss of individual benefits: France	› Keeping seniority rights: France › Extending the collective agreement to all sectors by law: Italy › Incorporating case law in legislation or collective agreements: Norway › Need for a collective agreement: Denmark › Involve national aviation authorities in the processes: Italy

Workers' remedies in the event of non-compliance with collective agreement provisions:

Respondents identified 3 types of action used:

- Judicial action: this action is used by unions in many countries, in France via an interim procedure to speed up the process. However, national case law does not always seem consistent with EU jurisprudence.
- Industrial/ collective action: Non-compliance opens the door for legal strikes in many countries
- Mediation is foreseen only in few countries: by collective agreement in Spain at sector level (SMAC) and interprofessional level (SIMA); in Belgium, at sector level.

Information and consultation on the change of employer (union, works council, European works council, ...) and the impact of workers' representatives on the protection of workers' interests

Again, the responses revealed to what extent country realities differ:

Information-consultation takes place as expected: works councils are involved as foreseen by national legislation (Belgium, Denmark, France). In other countries, no consultation is foreseen (Italy, Norway, Spain), with the union and/or company informing staff in accordance with company practices. In several countries, negotiations take place immediately (Denmark, Italy, Sweden). Trade union delegates may lose or retain their mandates, in most cases dependent on the thresholds foreseen in national legislations.

CONDITIONS FOR SUCCESS IN DEFENDING WORKERS' INTERESTS: SURVEY RESPONSES:

The ground-handling unions involved in the two-year European project participated in a seminar in Sesimbra, Portugal, in 2019 and in a follow-up meeting in Brussels in 2020. According to them, the priorities and actions to be adopted are as follows:

Priorities for trade unions	Actions to be developed
› Better protection of working conditions and jobs in the case of a transfer (ver.di, Sitava, filt-cgil) › Change the European or national legislation, and understand the relationship between EU 2001/23/EC and the 1996 Ground-Handling Directive › Create a special "status" for ground-handling workers, with rights linked to the specific features of each transfer (ACLVB) › Organising campaigns for membership recruitment (Sitava, filt-cgil, Verdi) › Take unlawful practices to court (Ugt) › Ensure that all subsectors (cleaning, catering, security, etc.) are covered (Ugt) › More sustainable competition model (fsc-CCOO) › Licence to operate should be stricter on working conditions (VIDA and Sitav)	› Media campaign, petition (Verdi) › Organise meetings with workers to check implementation of the collective agreement, with all cases of non-compliance taken to court. › Organise meetings with workers for awareness-raising campaign and to recruit new members › Re-negotiate collective agreements on working conditions (Sweden, Portugal) › Set up a joint ETF/ITF analysis of the impact of the ICAO Ground-Handling Manual on social matters › Learn from the Spanish collective agreement to improve agreements in other sectors eg: training rights linked to individuals, not to employers. › Negotiate a national collective agreement on working conditions and/or staff transfers where it does not exist, covering all subsectors › Set up mediation systems as in Spain and Belgium

EXAMPLE OF A TRADE UNION STRATEGY TO GUARANTEE WORKERS' RIGHTS IN EVENT OF A TRANSFER. THE SITAVA EXAMPLE (PORTUGAL):

SITAVA PRIORITY:
IMPROVE GROUND-HANDLING WORKERS' RIGHTS, including in the case of a transfer

Objective 1: By collective agreement	Objective 2: By legislation

SITAVA ACTION 1: START NEGOTIATIONS NOW

Meet with workers and increase union membership / power	End of negotiation: agreement

SITAVA ACTION 2

Meet with government for legislation to cover the whole country and all subsectors	REPORT TO ETF and SYNDEX on achievements and challenges for the final conference

Insourcing in public local authorities

Private sector companies providing services to municipalities and the public administration in general may be insourced, often for economic reasons, but also for other reasons such as a low service quality leading to dissatisfaction among users. In such circumstances, workers may have many questions about their future at work. Working in the public sector can seem like "another world". This is particularly the case when special exams or qualifications are required to access the new job.

Does Directive 2001/23/EC apply to the public sector?

Are jobs and working conditions continued when an outsourced activity is insourced by a public administration?

- YES. The Directive applies to any type of "undertaking", whether public or private (Art. 1.1)
- BUT: **the entity shall have an economic activity, provide goods and services, on a market. However, this does not mean that the entity should be operating for gain.**
- Exclusions foreseen by the directive: administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities

A global network of organisations led by the Transnational Institute and including EPSU, PSI and individual affiliates has been monitoring insourcing developments. Published in May 2020, their most recent research[1] found 1400 examples of remunicipalisation in 1400 cities in 58 countries.

(Re)municipalisation refers to the reclaiming of public ownership of services as well as the creation of new public services.

The survey also found that in 158 cases workers benefitted from improved pay and conditions on becoming directly employed by a public authority or publicly owned company. However, in most cases information on the impact on employment conditions was not known and requires further research.

While the assumption is that workers generally benefit from municipalisation, the process is not always straightforward.

The impact on employment rights is also explored in some detail in a new guide compiled by PSI "Taking our public services back in-house"[2] that explains how trade unions can be involved through campaigning and lobbying, promoting the public sector option and dealing with any resistance from private companies. At the same time, experience shows that re-municipalisation requires appropriate support from trade unions to the workers concerned to ensure that their rights are protected and to possibly negotiate better conditions.

Featuring 50 case studies, the new guide also contains a detailed municipalization checklist for trade unions. Here are some cases of particular interest as regards the transfer of staff:

1 https://www.epsu.org/article/new-book-released-remunicipalisation

2 https://publicservices.international/resources/publications/taking-our-public-services-back-in-house---a-remunicipalisation-guide-for-workers-and-trade-unions?id=11108&lang=en

Quick solutions needed in the case of bankruptcy

Case study 1: Oslo, Norway

In Norway, in the case of a service provider going bankrupt, local authorities must sign a new ad hoc contract directly with a new operator for 18 months without following usual tender procedures. After this period, the municipality can decide whether it wants to tender out or re-municipalise, according to Fagforbundet.

In February 2017, Oslo took back control of waste collection services after 20 years of outsourcing provided by a company called Vereino. One month earlier, the company had filed for bankruptcy. The Vereino workforce had been subject to extreme workloads, with some workers working up to 70 hours a week and with shifts lasting from 6am to 10pm according to the union. Although the city of Oslo had to pay unpaid wages, it nevertheless decided to improve working conditions for the 170 employees; the workers also gained pension rights and higher wages.

Collective agreements make a real difference but are not a panacea

Case study 2: Berlin, Germany

When Berlin launched the process of privatizing water services in the mid 1990s, waterworks workers fought hard to defend their rights. They managed to conclude **a collective agreement confirming the continuity of employment and working conditions, including pay. The agreement foresaw that no jobs would be cut until 2014.**

When water services were re-municipalised in 2013, the strong collective agreement remained in effect. But while nobody had been made redundant under privatisation, no replacements had been hired when people left. This had led to a decrease in the employment level of nearly 35 per cent, with the workforce dropping from 6,012 workers in 1999 to 4,475 in 2010 (in full-time equivalents).

The legal status of the new employer does matter

Case study 3: Turin, Italy

In 2017, the city of Turin decided to modify the legal status of its local water provider - the "Turin Metropolitan Water Company (SMAT)" - from a publicly owned joint stock company governed by private law to an inter-municipal enterprise governed by public law.

According to the PSI report, this change of status had no negative impact on the workforce: ***"SMAT's workers will remain under private law and collective agreements, ensuring that they can keep their jobs and employment conditions under the new legal regime, and will not have to be dismissed and then re-hired pending a public competition, a requirement for permanent public sector employment in Italy."***

Case study 4: Grenoble, France

The Grenoble waterworks were operated by a public-private joint venture between 1989 and 2001, a period characterised by excessive pricing and corruption. When the municipality decided to re-municipalise water supplies, the decision was taken to create a legal entity belonging to the municipality but enjoying financial autonomy and a distinct legal personality. According to PSI, this status facilitated the transfer of the staff working for the former public-private joint venture into the new public body while preserving the same treatment and pay conditions that all staff enjoyed under the previous employer. Other organisational forms presented the risk that workers might lose their status or suffer pay cuts.

A transfer of working conditions does not always bridge the gap

Case study 5: Leicester, UK

When a company called Interserve took over services from the National Health System, (NHS) in 2013, it put the around 2,000 workers on zero-hours contracts (i.e.: the employer is not obliged to provide any minimum working hours for the employee). The company made significant changes to the work organization by combining cleaning and catering roles, leading to low quality services and the loss of 100 jobs.

Transferred back to the NHS after three years, ex-Interserve workers found themselves earning half of what NHS staff were being paid. According to GMB, ***"This was because the workers, who worked for Interserve previously, were transferred on their existing contracts to the same conditions, while newly employed workers were given better conditions and paid a higher wage, sometimes double the rate of what the new workers on NHS contracts were getting."***

The impact of national and European Courts on the implementation of Directive 2001/23/2C

The objective of this chapter is to assess the impact of case law in the sectors covered by this study and to draw conclusions regarding differences and commonalities (see booklet).

Cleaning and security sectors

National case law

Information based on the survey of UNI Europa affiliates:

Finland: *In 2018, the Supreme court of Finland (KKO) gave three positive rulings on transfers of undertakings and transfers of contracts, awarding compensation to employees whose employment contracts had been terminated without justification. The rulings related to the following cases:*

a) The transfer of a contract on children's afterschool programme;

b) A municipality that insourced a long-term intensive home care unit from a private service provider;

c) A municipality's rights and duties with regard to care.

Norway and **Ireland**: Though many cases have been decided, the rulings are inconsistent.

Spain: Court decisions are in line with European case law. Recent rulings state that joint and several liability is not automatically incurred for the payment of the transferor's pre-transfer social security debts.

Netherlands: With the Dutch courts following European case law, this has greatly helped improve the collective labour agreement in the sector.

France: In French law, unlike European law, an employee's consent is required to carry out the transfer, as upheld in the Sonevie (1994) and Securitas (2006) rulings. In 2007 and 2009 the Court of Cassation also handed down rulings protecting workers in the event of conflicts between incoming and outgoing service providers: if the incoming service provider does not make itself known or fails to fulfil its obligations to allow the transfer of contracts, the employees concerned remain employed by the outgoing company. On the other hand, the incoming service provider cannot argue that the outgoing company has failed to fulfil all its information obligations to refuse the transfer (Social Chamber of the Court of Cassation, 28 November 2007).

European case law

Pre-2001 case law remains applicable, as Directive 2001/23/EC has taken account of CJEU decisions. Nevertheless, some more recent decisions are good to know.

Cleaning

süzen C-13/95 of 11 March 1997

Cleaning company A lost a contract in a school to Company B. 8 workers were made redundant by company A but Ms Süzen claimed that her employment contract continued with company B.

The Court rejected the request and ruled that the mere fact that the service provided by the old and the new awardees of a contract is similar does not support the conclusion that an economic entity has been transferred. **An entity cannot be reduced to the activity entrusted to it.**

Temco case C/51/00 of 24 January 2002

This case was based on the previous legislation of 1977. Supplying car producer VW with cleaning services, Company A outsourced the cleaning work to its subsidiary, Company B. After losing the contract, Company C was hired to do the job. The Court decided that the Directive applies when the incoming contractor has taken on a major proportion, **in terms of their number and their skills**, of the staff assigned by the previous subcontractor to the performance of the subcontract.

Securitas v. ICTS C/200/16 of 19 October 2017

This case is based on the 2001 European directive. After the company ICTS lost a contract with the port of Porto Delgada in Portugal to Securitas, the latter refused to take over the 17 staff, instead only taking over the technical equipment provided by the port (the client).

The Court decided **that "when the equipment essential to the performance of the service has been taken over by the second undertaking"**, this is sufficient proof for the contract to fall under the scope of the directive.

Transport

Commission vs Italian Republic (Case C-460/02) of 9 December 2004

In the following case, the CJEU limited the implementation of national legislation as regards transfer of employment contracts.

In Italy, Legislative decree 18/99 implementing Directive 96/67/EC1 included provisions aimed at maintaining the level of employment after the opening of the market. Article 14 of the Decree provided that: "any transfer of activity in one or more categories of groundhandling (…) shall include the transfer of staff (…) from the previous supplier to the subsequent supplier, in proportion to the volume of traffic or to the scale of the activities being taken over by the subsequent supplier".

These provisions were rejected by the CJEU that sated: "The power to ensure an adequate level of social protection for the staff of undertakings providing groundhandling services (…) does not confer an unlimited jurisdiction and must be exercised in a manner that does not prejudice the effectiveness of that directive and the objectives it pursues. The aim of the directive is to ensure the opening up of the groundhandling market which must help, in particular, to reduce the operating costs of airlines.

A national provision which guarantees that existing employment levels are to be maintained and that labour relations with staff under the previous management arrangements are to be continued which applies, irrespective of the nature of the transaction concerned, to any 'transfer of activity' in the sector in question plainly goes beyond the concept of transfer laid down by Directive 2001/23. **It is only by having regard to the specific characteristics of each transfer of activity that it is possible to determine whether the transaction concerned constitutes a transfer for the purposes of the directive."**

Commission vs German Republic, Case C-386/03 of 26 May 2005

More recently (in 2005), the CJEU ruled against a German regulation stipulating that "part of the fee that a managing body of an airport may require from suppliers (…) for access to and use of its installations may be intended to offset the costs of not taking over workers." In this case also, the measure was judged as potentially jeopardizing the opening of the market.

European Commission v Portuguese Republic, Case C277/13 of 11 September 2014

"Where an undertaking has obtained a licence to supply groundhandling services upon acquiring the shares of the company acquired, that does not allow the conclusion to be drawn that the future conduct of such an undertaking will remain unchanged after it has obtained the licence and, in particular, that that undertaking will preserve all existing employment posts in the company acquired."

1 COUNCIL DIRECTIVE 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports

Telecommunications

telecom Italia (Case C-458/12) of 6 March 2014

"The transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract."

According to the Court, **the economic entity must have a sufficient degree of functional autonomy**, that can be identified as: "*powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, their work, to give instructions, allocate tasks without intervention from other organisational structures of the employer.*"

"However, the lack of functional autonomy cannot prevent, in itself, a Member State from ensuring in its national law for the safeguarding of employees rights after the change of employer. **More favourable regulations for workers are possible.**"

That directive does not aim *"to establish a uniform level of protection throughout the European Union (….)* but to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned."

Public authorities

Mayeur case (C-175/99) of 26 September 2000

The city of Metz decided to municipalise the communication and publication of its magazine "Vivre à Metz", work previously entrusted to a private-law association, APIM. The one APIM employee not taken over by the city was dismissed. The European Court ruled that, subject to compliance with the transfer criteria, the dismissal was not justified. The city of Metz had argued that the dismissal was based on the transition from labour law to administrative law, an explanation not considered admissible by the Court.

Criteria selected:

a) two different legal entities and

b) economic activity (the magazine was financed by local shops' advertisements)

Note: the "market" criterion is missing. However, producing a similar magazine featuring the city seems credible.

Collino v. Telecom Italia case (C-343/98) of 14 September 2000

"The Directive applies when an entity operating services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of an administrative **concession, to a private-law company established by another public body which holds its entire capital.**"

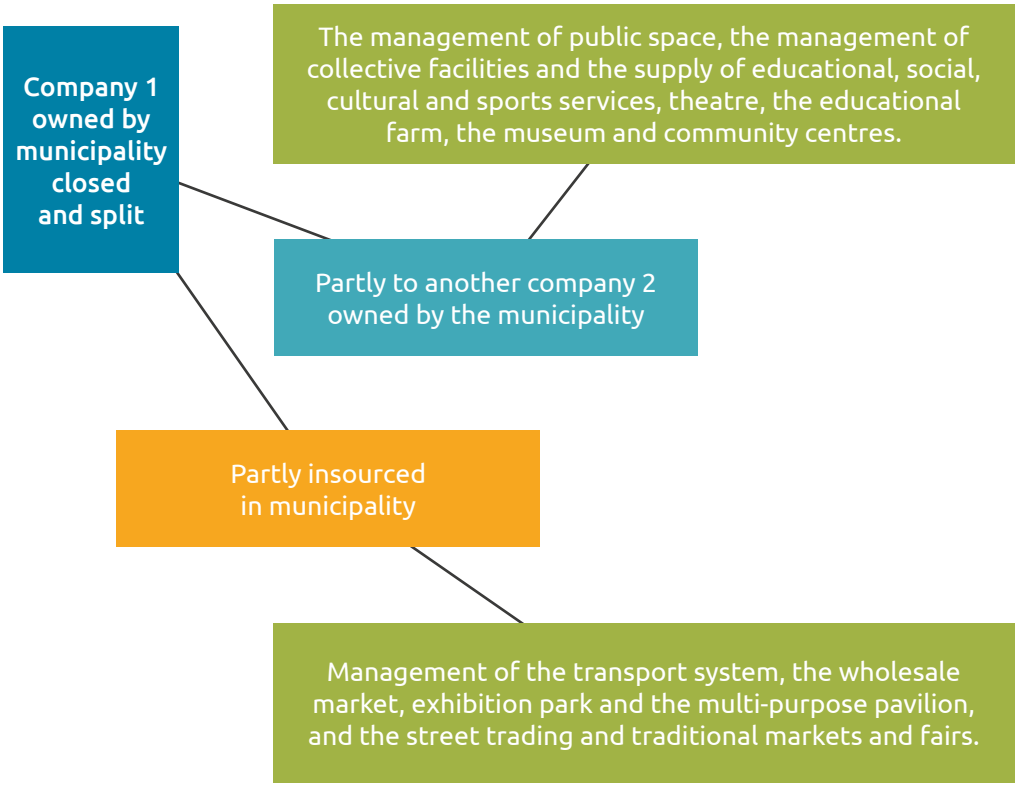
"**The persons concerned by such a transfer must, however, originally have been protected as employees under national labour law.**"

Piscarreta Ricardo (C-416/16) of 20 July 2017

A worker on long-term leave is covered by the directive.

"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."

Therefore, this was not solely an administrative reorganization, as workers' jobs and conditions were also transferred.



Moreira v. Município de Portimão (C-317/18) of 13 June 2019

While Directive 2001/23/EC is intended to protect employees in case of transfer of undertaking, it is for the Member States to provide a definition of an employee and his or her contract or employment relationship in their respective legislation." However, Portuguese law cannot exclude workers from the transfer simply because they have not passed an examination required by the public administration. Lower wages cannot apply either to the workers transferred, even though workers at the transferee (a municipality) would be paid less for a similar level of responsibility.

While Portuguese law cannot restrict the transfer of staff under **Article 4(2) TEU**, it should be observed that that provision stipulates that "*the Union must respect, inter alia, the national identities inherent in the fundamental structures, political and constitutional, of the Member States.*"

"In an area where Member States have transferred competence to the Union, such as the matter of safeguarding employees' rights in the event of transfers of undertakings, **Art. 4(2) cannot be interpreted so as to deprive a worker of the protection granted to him or her by the Union law in force in that area**."

Notes

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