EUROPEAN COURT OF JUSTICE RULING OF SEPTEMBER 9, 2015

THE NOTION OF «TRANSFER OF UNDERTAKING» AND THE DUTY TO MAKE PRELIMINARY REFERENCES TO THE ECJ

João Filipe Ferreira da Silva e Brito and Others v Estado português[1]

In this ruling, the European Court of Justice («ECJ») responded to three questions raised by the Portuguese courts:

Question 1: Was there a «transfer of undertaking»?[2]

The ECJ answered affirmatively, by concluding that a «transfer of a business» encompasses a situation in which an undertaking active on the charter flights market *(«Air Atlantis SA»)* is wound up by its majority shareholder, which is itself an air transport undertaking *(«TAP – Trasportes Aéreos Portugueses SA»)*, and the latter undertaking then takes the place of the undertaking that has been wound up by:

(i) Taking over aircraft leasing contracts and ongoing charter flight contracts;

(ii) Carrying on activities previously carried out by the undertaking that has been wound up («Air Atlantis SA»);

[1] Case No. C-160/14, available at http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-160%252F14&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=359318.

[2] Portuguese courts held conflicting decisions concerning the interpretation of the concept of «transfer of a business»: the first instance Court decided that a transfer of undertaking took place, while the STJ held that there was no transfer to consider.

(iii) Reinstating some employees that had been employed by «Air Atlantis SA» *and assigning them tasks identical to those previously performed;* and

(iv) Taking over small items of equipment from the undertaking that has been wound up.

It is our understanding that the situation was clearly one of a «transfer of undertaking» in accordance with the ECJ case-law – see *Christel Schmidt contra Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* (C-392/92) e *Dietmar Klarenberg v Ferrotron Technologies GmbH* (C-466/07). But that would also be the case under the Portuguese judicial case-law – in order to illustrate this understanding please refer to the decisions of the Portuguese Supreme Court of Justice (STJ) of September 26, 2012 (Case No. 1555/03.3TTLSB.L1.S1[3]) and of the Oporto Court of Appeal of November 18, 2013 (Case No. 176/11.1TTVRL.P1)[4].

Question 2: Mandatory character of the referral for a preliminary ruling

In this case, the STJ refused to make a preliminary reference to the ECJ regarding the main question – the existence of a «transfer of undertaking» –, by stating that there was no controversial topic, since it was self-evident that a transfer did not take place.

However, given the ECJ's response to **Question 1**, it is clear that there was indeed a *question* of EU law on whether a transfer of undertaking occurred and that the STJ should have submitted the case to the ECJ. Therefore, in reference to **Question 2**, the ECJ concluded that, in circumstances such as those of the case in the main proceedings, the STJ was obliged to refer to the ECJ for a preliminary ruling concerning the concept of a «transfer of undertaking», since the the criteria used by the ECJ case law in determining the existence of said «transfer» would most likely be conducive to a different STJ decision and, in any case, the latter could not be said to be in accordance with a settled ECJ case law.

[3] Available at http://www.gde.mj.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/45fb9de5cccc962980257a930037e374 (Portuguese version).
[4] http://www.dgsi.pt/jtrp.nsf/d1d5ce625d24df5380257583004ee7d7/70b2f3d011e9194380257c31004b3ecd?OpenDocument (Portuguese version).

In fact, the obligation of the STJ to request a preliminary ruling under Article 267, § 3 of the Treaty on the Functioning of the European Union (TFEU) occurs whenever a *question* of EU law «*is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court»* (emphasis added). However, a tendency of national Courts to, at least, a loose interpretation of the ECJ case law, allowing for a decision not to refer is recurrent, based on a superficial understanding of said case-law, mainly of the *"clear act"* theory admitted in the ECJ ruling on *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* Case No. 283/81)[5].

This ECJ ruling is particularly relevant in the context of Portuguese case-law, in order to encourage national courts to comply with such an obligation, especially on a matter such as the one under analysis – the notion of «transfer of undertaking» –, whose precise scope is highly controversial. An increase in the number of preliminary rulings to be subject to the ECJ in similar circumstances is, therefore, foreseeable.

Question 3: State liability for loss or damage caused to individuals

Given the facts described above, the applicants in the main proceedings brought an action for non-contractual civil liability against the Portuguese State, claiming that the latter should be ordered to pay damages for certain material losses that they had sustained.

In support of their action, they submitted that the STJ judgment was manifestly unlawful, since it incorrectly interpreted the concept of a «transfer of a business» within the meaning of Directive 2001/23, having the STJ failed to comply with its obligations under article 267 of TFEU.

As it is known, the principle of State liability for infringement of EU law is clearly stated in the ECJ case law since *Francovich*, and regarding judicial non-compliance since *Kobler* (case C-224/01), *Traghetti* (C-173/03) or *Commission v Italy* (C-379/10). In this regard, the ECJ concluded that the said principle precludes the application of a provision of national law which requires, as a precondition, the setting

[5] In this sense, see Miguel GORJÃO-HENRIQUES, *Direito da União*, 7th edition, 2014, Almedina, pp. 476 et seq.

aside of the decision given by that court which caused the loss or damage, when such setting aside is, in practice, very difficult to occur.

The ECJ answer to **Question 3** may have implications on the conformity of Law Nr. 67/2007, of December 31, with the EU legal order. Although it recognizes the principle of State liability for judicial misconduct, under article 13 (1) (*«[...]the State shall be liable under civil law for the loss or damage arising from judicial decisions which are manifestly unconstitutional or unlawful or unjustified as a result of a manifest error in the assessment of the facts»*), nr. 2 of said article 13 must be reinterpreted in order to respect the ECJ uniform interpretation of the EU legal order, also as per article 8 (4) of the Portuguese Constitution (in as much it declares that *«the claim for damages must be based on the prior setting aside of the decision that caused the loss or damage by the court having jurisdiction»*).

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