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ECLI:EU:C:2017:574

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

20 July 2017 (*)

(Reference for a preliminary ruling — Directive 2001/23 — Article 1(1)(b) — Article 2(1)(d) — Transfer of undertakings — Safeguarding of employees' rights — Scope — Concepts of 'employees' and 'transfer of a business')

In Case C-416/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal), made by decision of 20 July 2016, received at the Court on 27 July 2016, in the proceedings

Luís Manuel Piscarreta Ricardo

v

Portimão Urbis, E.M., SA, in liquidation,

Município de Portimão,

Emarp – Empresa Municipal de Águas e Resíduos de Portimão, EM, SA,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber, J. Malenovský (Rapporteur) and M. Safjan, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Piscarreta Ricardo, by M. Ramirez Fernandes, advogado,
- Emarp – Empresa Municipal de Águas e Resíduos de Portimão, EM, SA, by R. Rosa, advogado,
- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and S. Feio, acting as Agents,
- the European Commission, by M. França and M. Kellerbauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(b) and Article 2(1)(d) 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 (OJ 2001 L 82, p. 16).

2 The request has been made in proceedings between (i) Mr Luís Manuel Piscarreta Ricardo and (ii) the municipal undertaking Portimão Urbis, E.M., SA, in liquidation ('Portimão Urbis'), the Município de Portimão (Municipality of Portimão, Portugal) and the municipal undertaking Emarp – Empresa Municipal de Águas e Resíduos de Portimão, EM, SA ('Emarp'), concerning the legality of Mr Piscarreta Ricardo's dismissal.

Legal context

EU law

3 Directive 2001/23 codified 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88), ('Directive 77/187').

4 Recitals 3 and 8 of Directive 2001/23 state:

‘(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

...

(8) Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive [77/187] as interpreted by the Court of Justice.’

5 Article 1(1) of Directive 2001/23 provides as follows:

‘(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.

(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.’

6 Article 2(1)(d) of the directive defines ‘employee’ as ‘any person who, in the Member State concerned, is protected as an employee under national employment law’.

7 Article 2(2) of Directive 2001/23 provides:

‘This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

...

(b) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [(OJ 1991, L 206, p. 19)],

...’

8 The first subparagraph of Article 3(1) of Directive 2001/23 provides:

‘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.’

9 According to Article 4 of that 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.’

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.’

10 The wording of Article 1(1) of Directive 2001/23 is substantially the same as that of Article 1(1) of Directive 77/187.

Portuguese Law

11 Article 285 of the Código do Trabalho (Labour Code) provides:

‘1. In the event of transfer, by whatever means, of the ownership of an undertaking or business or a part of an undertaking or business that constitutes an economic unit, the rights and obligations of the employer under the employment contracts of the employees concerned shall be transferred to the purchaser, together with the liability to pay any fines imposed in respect of employment law infringements.’

2. The transferor shall be jointly and severally liable, in respect of obligations falling due up to the date of the transfer, for the period of one year following that transfer.

3. The provisions of the preceding paragraphs shall also apply to the transfer, assignment or resumption of control of the operation of an undertaking, business or economic unit and, in the event of assignment or resumption, the party carrying out that operation immediately before the assignment or resumption shall be jointly and severally liable.

4. The preceding paragraphs shall not apply to an employee who, before the transfer, has been transferred by the transferor to another business or economic unit, within the

meaning of Article 194, while being retained in the transferor's service, with the exception of matters concerning the liability of the transferor regarding payment of any fines imposed in respect of employment law infringements.

5. An organised grouping of resources which has the objective of pursuing an economic activity shall be considered to be an economic unit, whether that activity is central or ancillary.

6. A breach of the rules laid down in paragraph 1 of this Article, and of the first part of paragraph 3 thereof, shall constitute a very serious infringement.'

12 Article 295 of the Labour Code, which concerns the effects of reduction or suspension of the employment contract, provides:

'1. During the period when [the employment contract] is reduced or suspended, the rights, obligations and safeguards of parties who are not required to be in active service shall be preserved.

2. The period of reduction or suspension shall be taken into account for the purposes of length of service.

3. The reduction or suspension shall have no effect upon the duration of the contract, and nor does it preclude any of the parties from bringing the contract to an end in accordance with the general rules.

4. Once the period of reduction or suspension has ended, the rights, obligations and safeguards of the parties arising from actual performance of the work shall be restored.

5. Any attempt by the employer to prevent the employee resuming his normal activities after the period of reduction or suspension shall constitute a serious infringement.'

13 Article 317(4) of the Labour Code provides:

'Leave shall entail suspension of the employment contract and shall have the effects described in Article 295.'

14 Article 62 of Lei n.º 50/2012 aprova o regime jurídico da actividade empresarial local e das participações locais e revoga as Leis n.ºs 53-F/2006, de 29 de dezembro, e 55/2011, de 15 de novembro (Law No 50/2012 approving the legal regime for local businesses and shareholdings held by local authorities, and repealing Laws Nos 53-F/2006 of 29 December 2006 and 55/2011 of 15 November 2011), of 31 August 2012 (*Diário da República*, Portuguese Official Gazette, first series, No 169, 31 August 2012), in the version applicable to the dispute in the main proceedings ('the RJAEL'), which concerns the winding up of local undertakings, provides:

‘1. Without prejudice to Article 35 of the Companies Code, a winding-up decision must be taken, within a period of six months, in respect of a local undertaking where one of the following situations exists:

...

5. Staff performing duties in local undertakings which fall within one of the situations provided for in paragraph 1, who are not covered by the instruments of mobility provided for in Law No 12-A/2008 of 27 February 2008, shall be subject to the rules governing contracts of employment, without prejudice to the provision made in paragraph 6 below.

6. Local undertakings in the course of being liquidated may transfer to public entities having shareholdings in them their employees who are engaged under the rules governing contracts of employment, in accordance with Article 58 of Law No 12-A/2008 of 27 February 2008, to the extent to which those employees have been assigned to the activities being incorporated or brought in-house and are necessary to carry them out.

...

11. The provisions of paragraphs 6 to 10 shall apply only to employees having an employment contract of indefinite duration concluded at least one year before the date of the decision to wind up the local undertaking, to whom, where a legal relationship of public employment for an indefinite period is established, no compensation is payable for the abolition of the previous post.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 In October 1999 the Municipality of Portimão engaged Mr Piscarreta Ricardo for an indefinite period as a ‘tourism officer’.

16 In October 2008, Mr Piscarreta Ricardo left the service of the municipality and entered into a contract of indefinite duration with the municipal undertaking Portimão Turis E.M., SA (‘Portimão Turis’), for which he worked from that point onwards.

17 After deciding, in March 2010, to merge a number of municipal undertakings, the Municipality of Portimão incorporated Portimão Turis in Portimão Urbis. From then onwards, Mr Piscarreta Ricardo performed duties as an administrator, and later as director, of Portimão Urbis.

18 In September 2011, Mr Piscarreta Ricardo requested — and was granted — unpaid leave for a period of two years. In July 2013, that leave was renewed, at his request, for a further two-year period.

19 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: management of the transport system, management of economic development facilities such as the wholesale market, the fair and exhibition park and the multi-purpose pavilion, and the management of street trading and traditional markets and fairs.

20 Portimão Urbis' remaining activities were outsourced to Emarp, of which the Municipality of Portimão was also the sole shareholder: those activities were (i) the management of public space, which encompassed related advertising business, use of the public highway and public street and underground parking in the town, and (ii) the management of collective facilities and the supply of educational, social, cultural and sports services, namely the operation of the Portimão theatre, the educational farm, the Manuel Teixeira Gomes museum and community centres.

21 In accordance with those decisions, part of the workforce of Portimão Urbis was the subject of a 'public-interest transfer agreement' and was thus taken on directly by the Municipality of Portimão. The other part of the workforce was the subject of a 'transfer of contractual position' and was taken on by Emarp.

22 As Mr Piscarreta Ricardo was not covered by either of the plans mentioned in the previous paragraph, namely either bringing activities in-house or outsourcing them, he was informed that his employment contract had come to an end following the definitive closure of Portimão Urbis.

23 Mr Piscarreta Ricardo therefore brought an action before the referring court for a declaration that his dismissal was unlawful, arguing that there had been a transfer of a business from Portimão Urbis to the Municipality of Portimão and Emarp.

24 Portimão Urbis, Emarp and the Municipality of Portimão reject that argument. They maintain that, as Mr Piscarreta Ricardo was on unpaid leave, in other words was not actually carrying out any duties, his employment contract could not be transferred to either of the transferees. They also submit that there was no transfer of a business, since Portimão Urbis had been wound up as required by law and had ceased to carry on business.

25 The referring court considers, first, that there are, in the case before it, questions of interpretation concerning whether an employee who is not actually performing his duties — for example, because his employment contract has been suspended — may be considered to fall within the concept of 'employee' within the meaning of Article 2(1)(d) of Directive 2001/23. In that regard, the referring court is uncertain whether or not the rights and obligations of Portimão Urbis, arising under the employment contract entered into with the applicant, must be considered to have been transferred to the Municipality of Portimão and Emarp, in accordance with Article 3(1) of the directive.

26 Second, the referring court takes the view that there is some doubt as to whether Article 62(5), (6) and (11) of the RJAEL may, in view of the conditions laid down therein, be regarded as compatible with Article 2(2)(b) of Directive 2001/23.

27 Consequently, the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal) decided to stay the proceedings and to refer the following questions to the Court of Justice:

‘(1) Does Article 1(1)(b) of Directive 2001/23 apply to a situation such as that of the present case, 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 were 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 a 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 included in the concept of “employee” within the meaning of Article 2(1)(d) of Directive 2001/23 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 Directive 2001/23?

(3) Is it permissible, in the light of EU law, to introduce restrictions on the transfer of employees, especially on the basis of the type of employment relationship or its duration, in the context of a transfer of a business, in particular of the type referred to in Article 62(5), (6) and (11) of the RJAEL?’

Consideration of the questions referred

The first question

28 By its first question, the referring court asks, in essence, whether Article 1(1) of Directive 2001/23 must be interpreted to the effect that the directive is applicable to a situation in which a municipal undertaking, whose sole shareholder is a municipality, is wound up by a decision of the municipality’s executive body and the activities it carries on are transferred in part to the municipality to be carried on directly by it and in part to another municipal undertaking reconstituted for that purpose, whose sole shareholder is also that same municipality.

29 It is important to note at the outset that, under Article 1(1)(c) thereof, Directive 2001/23 applies to public and private undertakings engaged in economic activities whether or not they are operating for gain. On the other hand, according to the same provision, 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 the directive.

30 In the present case, the operation at issue in the main proceedings entailed the transfer of the activities of a municipal undertaking, in part, to a municipality and, in part, to another municipal undertaking.

31 In that regard, it must first be stated that the fact that, in that operation, the transferor was a municipal undertaking and the transferees were a municipality and another municipal undertaking does not, in itself, prevent Directive 2001/23 from applying to the operation.

32 Indeed, the Court has already held that the fact that the transferee is a public-law body cannot be a ground for excluding the existence of a transfer within the scope of Directive 2001/23, whether that body is a public undertaking responsible for a public service (see, to that effect, judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraphs 25 and 26) or a municipal authority (see, to that effect, judgment of 20 January 2011, *CLECE*, C-463/09, EU:C:2011:24, paragraph 26 and the case-law cited).

33 Next, it is apparent from the wording of Article 1(1)(c) of Directive 2001/23 that, in order for the directive to apply, the transfer must concern an entity engaged in economic activities whether or not for gain.

34 The Court has made clear in that regard that the notion of economic activity encompasses any activity consisting in offering goods or services on a given market. Activities which fall within the exercise of public powers are excluded as a matter of principle from classification as economic activity. However, services which are carried out in the public interest and without a profit motive and are in competition with those offered by operators who seek to make a profit may be classified as economic activities for the purposes of Article 1(1)(c) of Directive 2001/23 (see, to that effect, judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraphs 43 and 44 and the case-law cited).

35 In the present case, the various activities engaged in by Portimão Urbis and taken over by the Municipality of Portimão and Emapr, as described in paragraphs 19 and 20 of the present judgment, do not appear to fall within the exercise of public powers; they are therefore capable of being classified as economic activities for the purposes of Article 1(1)(c) of Directive 2001/23.

36 Moreover, in accordance with Article 1(1)(a) thereof, Directive 2001/23 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.

37 In that regard it is clear from settled case-law of the Court that the scope of that provision cannot be determined solely on the basis of a textual interpretation. On account of the differences between the language versions of Directive 2001/23 and the divergences between the laws of the Member States with regard to the concept of legal transfer, the Court has given that concept a sufficiently flexible interpretation in keeping with the objective of that directive, which is, as stated in recital 3 thereof, to provide for the protection of employees in the event of a change of employer (judgment of 20 January 2011, *CLECE*, C-463/09, EU:C:2011:24, paragraph 29 and the case-law cited).

38 The Court has thus held that the fact that the transfer results from unilateral decisions of public authorities rather than from an agreement does not render Directive 2001/23 inapplicable (judgment of 29 July 2010, *UGT-FSP*, C-151/09, EU:C:2010:452, paragraph 25 and the case-law cited).

39 Accordingly, the fact that a transfer such as that at issue in the main proceedings comes about as the result of a municipal undertaking being wound up pursuant to a decision of the executive body of the municipality concerned does not appear, in itself, to prevent there being a transfer within the meaning of Directive 2001/23, given that such an operation entails a change of employer.

40 Finally, under Article 1(1)(b) of Directive 2001/23, for the directive to apply, the transfer must concern an economic entity which retains its identity after being taken over by the new employer (see, judgment of 6 March 2014, *Amatori and Others*, C-458/12, EU:C:2014:124, paragraph 30).

41 It is necessary in this regard to consider all the facts characterising the transaction at issue in the main proceedings, including in particular the type of undertaking or business 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, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 32).

42 It follows that the degree of importance to be attached to any one of those criteria will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (see, to that effect, judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraphs 33 and 34 and the case-law cited).

43 The Court has also pointed out that the mere fact that one economic entity takes over the economic activity of another entity is not a ground for concluding that the latter has retained its identity. The identity of such an entity cannot be reduced to the activity entrusted to it. Its identity emerges from several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (see, to that effect, judgment of 20 January 2011, *CLECE*, C-463/09, EU:C:2011:24, paragraph 41).

44 The Court has also held 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 (judgments of 12 February 2009, Klarenberg, C-466/07, EU:C:2009:85, paragraphs 46 to 48, and of 9 September 2015, Ferreira da Silva e Brito and Others, C-160/14, EU:C:2015:565, paragraphs 33 and 34). It follows that the fact that an economic entity is wound up and its activities transferred to two other entities does not, in itself, preclude the applicability of Directive 2001/23.

45 It is for the referring court to determine, in the light of the matters set out in paragraphs 41 to 44 of the present judgment, whether, in the circumstances of the case in the main proceedings, the identity of the transferred entity has been retained.

46 It follows from all the foregoing that Article 1(1) of Directive 2001/23 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.

The second question

47 By its second question, the referring court asks, in essence, whether 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 Directive 2001/23 and whether, in circumstances such as those at issue in the main proceedings, the rights and obligations arising from that contract must be considered to have been transferred to the transferee, in accordance with Article 3(1) of the directive.

48 It should first be noted that, under Article 2(1)(d) of Directive 2001/23, any person who, in the Member State concerned, is protected as an employee under national employment law is considered to be an 'employee'.

49 Next, as is clear from the very wording of the first subparagraph of Article 3(1) of Directive 2001/23, the protection that the directive is intended to provide concerns only workers who have an employment contract or employment relationship existing at the date of the transfer (order of 15 September 2010, *Briot*, C-386/09, EU:C:2010:526, paragraph 27).

50 Moreover, in relation to Directive 77/187, which has in the meantime being codified by Directive 2001/23, the Court held that, unless otherwise expressly provided,

that directive may be relied upon solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer and the question whether or not such a contract or relationship exists at that time must be assessed on the basis of national law, subject, however, to compliance with the mandatory provisions of Directive 77/187 concerning protection of employees from dismissal as a result of the transfer (order of 15 September 2010, *Briot*, C-386/09, EU:C:2010:526, paragraph 28).

51 In the present case, the order for reference indicates that, although at the date of dissolution of **Portimão Urbis** the applicant in the main proceedings was linked to that undertaking by an employment contract of indefinite duration, he was not, at that date, actually performing his duties because he was taking a period of unpaid leave, and such leave entails, under the national legislation at issue in the main proceedings, the suspension of his employment contract.

52 The referring court has explained that that legislation provides that, while the employment contract is suspended, the rights, obligations and safeguards of parties who are not required to be in active service are maintained. Thus, it would appear that the legislation protects, in his capacity as an employee, a person such as the applicant in the main proceedings who is not actually performing his duties because his employment contract is suspended, which is, however, a matter for the referring court to verify.

53 Accordingly, subject to that verification, the rights and obligations of such a person, which arise from his employment contract, are, in accordance with the first subparagraph of Article 3(1) of Directive 2001/23, transferred to the transferee by reason of the transfer of a business.

54 In view of the foregoing considerations, the answer to the second question is that 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 Directive 2001/23 in so far 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.

The third question

55 By its third question, the referring court asks, in essence, whether Directive 2001/23 must be interpreted as meaning that it precludes national legislative provisions, such as those at issue in the main proceedings, which, in the context of the transfer of a local undertaking, make the preservation of employees’ rights subject to certain restrictions, in particular as regards the type of employment contract or the duration thereof.

56 In that regard, it should be borne in mind that, according to settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 16 July 2015, *Sommer Antriebs- und Funktechnik*, C-369/14, EU:C:2015:491, paragraph 32 and the case-law cited).

57 In the present case, the order for reference indicates that the national legislative provisions at issue in the main proceedings make the transfer of the employees of a local undertaking conditional upon the prior existence of an employment contract of indefinite duration, which was concluded at least one year before the date of the decision to wind up that undertaking.

58 However, as has been noted at paragraph 16 of the present judgment, Mr Piscarreta Ricardo had, at the date on which **Portimão Urbis ceased to carry on business**, an employment contract of indefinite duration which had been entered into several years before that date.

59 It is clear from the second paragraph of Article 267 TFEU that a national court may, at any time, request the Court to rule on the interpretation of acts of the institutions, bodies, offices or agencies of the Union if it considers that a decision by the Court on the question is necessary to enable it to give judgment.

60 However, the referring court has not provided any explanation of the reasons why, in this context, it considers that an answer to the question it raises is necessary to enable it to resolve the dispute before it. In particular, it has not explained how the restrictions laid down by the national legislative provisions at issue in the main proceedings, described in paragraph 57 of the present judgment, are applicable to Mr Piscarreta Ricardo's situation.

61 Accordingly, the third question referred for a preliminary ruling must be held to be inadmissible.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 1(1) 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 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.**

2. **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 Directive 2001/23 in so far 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.**

3. **The third question raised by the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal) is inadmissible.**

[Signatures]

* Language of the case: Portuguese.