62014CJ0160
JUDGMENT OF THE COURT (Second Chamber)

9 September 2015 (*1)

?Reference for a preliminary ruling — Approximation of laws — Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses — Meaning of 'transfer of a business' — Obligation to make a request for a preliminary ruling under the third paragraph of Article 267 TFEU — Alleged infringement of EU law attributable to a court of a Member State against whose decisions there is no judicial remedy under national law — Rule of national law which makes the right to reparation for the loss or damage sustained as a result of such an infringement conditional on the prior setting aside of the decision that caused that loss or damage'

In Case C?160/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varas Cíveis de Lisboa (Portugal), made by decision of 31 December 2013, received at the Court on 4 April 2014, in the proceedings

João Filipe Ferreira da Silva e Brito and Others

v

Estado português,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev and C. Lycourgos, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 February 2015,

after considering the observations submitted on behalf of:

—

Mr Ferreira da Silva e Brito and Others, by C. Góis Coelho, S. Estima Martins and R. Oliveira, advogados,

—

the Portuguese Government, by L. Inez Fernandes and A. Fonseca Santos, acting as Agents,

—

the Czech Government, by M. Smolek and J. Vlá?il, acting as Agents,

—

the French Government, by G. de Bergues, D. Colas and F.-X. Bréchot, acting as Agents,

—

the Italian Government, by G. Palmieri, acting as Agent, and by F. Varrone, avvocato dello Stato,

—

the European Commission, by J. Enegren, M. França, M. Konstantinidis and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of 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 (OJ 2001 L 82, p. 16), of the third paragraph of Article 267 TFEU and of certain general principles of EU law.

2

The request has been made in proceedings between (i) Mr Ferreira da Silva e Brito and 96 other individuals and (ii) the Estado português (Portuguese State) concerning an alleged infringement of EU law which is said to be attributable to the Supremo Tribunal de Justiça (Supreme Court of Justice).

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 undertakings or 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).

4

According to recital 8 in the preamble to Directive 2001/23:

'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/EEC as interpreted by the Court of Justice.’

5

Article 1(1)(a) and (b) of Directive 2001/23 provides:

‘(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.’

6

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.’

National law

7

Article 13 of Law No 67/2007 establishing the rules on the non-contractual civil liability of the State and other public bodies (Lei No 67/2007 — Aprova o Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas), of 31 December 2007 (Diário da República, Series 1, No 251, of 31 December 2007, p. 91117), as amended by Law No 31/2008, of 17 July 2008 (Diário da República, Series 1, No 137, of 17 July 2008, p. 4454, ‘the RRCEE’) provides:

‘1. Without prejudice to situations involving wrongful criminal convictions and unjustified deprivations of liberty, the State shall be liable at 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.

2. 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.’

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

8

On 19 February 1993, Air Atlantis SA (‘AIA’), a company established in 1985 and operating non-scheduled (charter) flights in the air transport sector, was wound up. In the course of the winding up, the applicants in the main proceedings were dismissed as part of a collective redundancy.

9

From 1 May 1993 TAP, the company which was the main shareholder in AIA, began to operate at least some of the flights which AIA had contracted to provide for the period from 1 May 1993 to 31 October 1993. TAP also operated a number of charter flights, a market in which it had not hitherto been active, since the routes concerned were routes previously served by AIA. For that purpose, TAP used some of the assets which AIA had used for its activities, in particular four aeroplanes. TAP also assumed responsibility for the payment of charges under the leasing contracts relating to those aircraft and took over the office equipment which belonged to AIA and which the latter had used at its premises in Lisbon and Faro (Portugal), as well as other moveable property. In addition, TAP took on a number of former AIA employees.

10

The applicants in the main proceedings subsequently brought an action against the collective redundancy before the Tribunal do Trabalho de Lisboa (Lisbon Labour Court, Portugal), by which they sought reinstatement within TAP and payment of their remuneration.

11

By judgment of the Tribunal do Trabalho de Lisboa of 6 February 2007, the action brought against the collective redundancy was upheld in part, in so far as that court ordered that the applicants in the main proceedings be reinstated in the corresponding grades and that they be paid compensation. The Tribunal do Trabalho de Lisboa found that, in the case before it, there was a transfer of a business, at least in part, inasmuch as the identity of the business had been retained and its activities had been continued, TAP having replaced the former employer in the contracts of employment.

12

An appeal was lodged against that judgment before the Tribunal da Relação de Lisboa (Lisbon Court of Appeal), which, by a judgment of 16 January 2008, set aside the judgment given at first instance in so far as it had ordered TAP to reinstate the applicants in the main proceedings and to pay compensation, taking the view that the action against the collective redundancy in question was time-barred.

13

The applicants in the main proceedings then brought an appeal in cassation before the Supremo Tribunal de Justiça (Supreme Court of Justice), which, by judgment of 25 February 2009, held that the collective redundancy was not unlawful. The court held that the fact that a commercial activity is ‘merely continued’ is not a sufficient ground for concluding that there has been a transfer of a business, since the business must also retain its identity. In the present case, when TAP operated the flights in question over the course of the summer of 1993, it did not use an ‘entity’ with the same identity as the ‘entity’ previously belonging to AIA. In the view of the Supremo Tribunal de Justiça, a transfer of a business could not be said to have occurred since the two ‘entities’ were not identical.

14

The Supremo Tribunal de Justiça also considered that there had not been a transfer of customers from AIA to TAP. Moreover, in that court's view, the business owned by AIA was one linked to a specific asset, namely a licence, which was not transferable, so that the transfer of the business was impossible, since only individual assets could be disposed of, not the business itself.

15

As regards the application of EU law, the Supremo Tribunal de Justiça stated that the Court of Justice has held, when faced with situations in which an undertaking was carrying on activities hitherto carried on by another undertaking, that that 'mere fact' does not justify the conclusion that there has been a transfer of an economic entity, since '[a]n entity cannot be reduced to the activity entrusted to it'.

16

In response to a request from some of the applicants in the main proceedings that the Supremo Tribunal de Justiça make a reference to the Court of Justice for a preliminary ruling, the Supremo Tribunal de Justiça held that '[t]he obligation to make a reference for a preliminary ruling, which is incumbent upon national courts and tribunals against whose decisions there is no judicial remedy under national law, exists only where those courts and tribunals find that recourse to [EU] law is necessary in order to resolve the dispute before them and, in addition, a question concerning the interpretation of that law has arisen'. Furthermore, taking into account the Court of Justice's case-law concerning the interpretation of the EU rules on the transfer of a business, the Supremo Tribunal de Justiça considered that there was 'no material doubt' as to the interpretation of the rules 'which would make a reference for a preliminary ruling necessary'.

17

According to the Supremo Tribunal de Justiça, '[t]he Court of Justice itself has expressly recognised that the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved, thus removing the obligation to make a reference for a preliminary ruling in that situation too. [The referring court considered that], in the light of the content of the provisions of [EU law] cited by the [applicants in the main proceedings] and the interpretation of those provisions by the Court of Justice … and in view of the features of the case … which have been taken into consideration …, there can be no material doubt as to interpretation which would make a reference for a preliminary ruling necessary'.

18

According to the Supremo Tribunal de Justiça, the 'the Court of Justice has developed settled case-law on the issue of the interpretation of the rules [of EU law] relating to the "transfer of a business", and Directive [2001/23] already gives effect to the consolidation of the concepts set out in the directive which that case-law has brought about, and those concepts are now so clear in terms of their interpretation in case-law (both Community and national) that there is no need, in the present case, for prior consultation of the Court of Justice …'.

19

The applicants in the main proceedings then brought an action for a declaration of non-contractual civil liability against the Portuguese State, claiming that the latter should be ordered to pay damages for certain material loss they had sustained. In support of their action, they submitted

that the judgment of the Supremo Tribunal de Justiça is manifestly unlawful since it interprets the concept of a ‘transfer of a business’ within the meaning of Directive 2001/23 incorrectly and since the Supremo Tribunal de Justiça failed to comply with its obligation to refer the appropriate questions concerning the interpretation of EU law to the Court of Justice.

20

The Portuguese State argued that, under Article 13(2) of the RRCEE, a claim for damages must be based on the prior setting aside, by the court having jurisdiction, of the decision that caused the loss or damage; it submitted that, since the decision of the Supremo Tribunal de Justiça had not been set aside, the damages sought were not payable.

21

The referring court explains that it is necessary to ascertain whether the judgment given by the Supremo Tribunal de Justiça is manifestly unlawful and whether it interpreted the concept of a ‘transfer of a business’ incorrectly, in the light of Directive 2001/23 and in view of the facts before it. In addition, it must be determined whether the Supremo Tribunal de Justiça was under a duty to make the reference for a preliminary ruling requested.

22

In those circumstances the Varas Cíveis de Lisboa (Court of First Instance, Lisbon) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

Must Directive 2001/23, in particular Article 1(1) thereof, be interpreted as meaning that the concept of a “transfer of a business” encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, itself an undertaking active in the aviation sector, and, in the context of the winding up, the parent company:

—

takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

—

carries out activities previously pursued by the company being wound up;

—

reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks;

—

receives small equipment from the company being wound up?

(2)

Must Article 267 TFEU be interpreted as meaning that, in the light of the facts set out in the first question and the fact that the lower national courts adjudicating on the case adopted contradictory

decisions, the Supremo Tribunal de Justiça was under an obligation to refer to the Court for a preliminary ruling the question of the correct interpretation of the concept of a “transfer of a business” within the meaning of Article 1(1) of Directive 2001/23?

(3)

Do EU law and, in particular, the principles laid down by the Court in the judgment in Köbler (C?224/01, EU:C:2003:513) concerning State liability for loss or damage caused to individuals as a result of an infringement of EU law by a national court adjudicating at last instance preclude the application of a national provision which makes a claim for damages against the State conditional upon the decision that caused the loss or damage having first been set aside?’

Consideration of the questions referred

The first question

23

By its first question, the referring court asks the Court of Justice whether Article 1(1) of Directive 2001/23 must be interpreted as meaning that the concept of a ‘transfer of a business’ encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.

24

In answering that question, it must be borne in mind that the Court has held that Directive 77/187, which has been codified by Directive 2001/23, is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business who incurs the obligations of an employer towards employees of the undertaking (see judgments in Merckx and Neuhuys, C?171/94 and C?172/94, EU:C:1996:87, paragraph 28; Hernández Vidal and Others, C?127/96, C?229/96 and C?74/97, EU:C:1998:594, paragraph 23; and Amatori and Others, C?458/12, EU:C:2014:124, paragraph 29 and the case-law cited).

25

According to settled case-law, the aim of Directive 2001/23 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of that directive is, therefore, the fact that the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (see judgments in Spijkers, 24/85, EU:C:1986:127, paragraphs 11 and 12; Güney-Görres and Demir, C?232/04 and C?233/04, EU:C:2005:778, paragraph 31 and the case-law cited; and Amatori and Others, C?458/12, EU:C:2014:124, paragraph 30 and the case-law cited).

26

In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including in particular the type of undertaking or business concerned, 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 (see judgments in Spijkers, 24/85, EU:C:1986:127, paragraph 13; Redmond Stichting, C?29/91, EU:C:1992:220, paragraph 24; Süzen, C?13/95, EU:C:1997:141, paragraph 14; and Abler and Others, C?340/01, EU:C:2003:629, paragraph 33).

27

In particular, the Court has pointed out that the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed in the undertaking, business or part of a business (see judgments in Süzen, C?13/95, EU:C:1997:141, paragraph 18; Hernández Vidal and Others, C?127/96, C?229/96 and C?74/97, EU:C:1998:594, paragraph 31; Hidalgo and Others, C?173/96 and C?247/96, EU:C:1998:595, paragraph 31; and, to that effect, UGT-FSP, C?151/09, EU:C:2010:452, paragraph 28).

28

The first question referred to the Court should be examined in the light of that case-law, while account should be taken of the principal matters of fact set out by the national court in the order for reference and, in particular, in the first question.

29

The first point to make is that in a situation such as that at issue in the main proceedings, which concerns the air transport sector, the fact that tangible assets are transferred must be regarded as a key factor for the purpose of determining whether there is a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23 (see, to that effect, judgment in Liikenne, C?172/99, EU:C:2001:59, paragraph 39).

30

In that regard the order for reference indicates that TAP replaced AIA in the aircraft leasing contracts and actually used the aircraft concerned, which shows that it took over assets that were essential for pursuing the activity previously carried on by AIA. In addition, a certain amount of other equipment was taken over.

31

As the Advocate General has noted in points 48, 51, 53, 56 and 58 of his Opinion, other factors give a strong indication, in view of the criteria set out in paragraph 26 of this judgment, that the case in the main proceedings involved a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23. Thus, TAP replaced AIA in the ongoing charter flight contracts with tour operators, which indicates that AIA’s customers were taken over by TAP, TAP developed charter flight business on routes previously served by AIA, which reflects the fact that TAP was pursuing activities previously carried on by AIA, employees who had been seconded to AIA were brought back into TAP for the purpose of carrying out identical tasks to those performed within AIA, which indicates that TAP took over some of the staff who worked for AIA, and TAP, from 1 May 1993, began operating some of the charter flight business that had been carried on by AIA until its winding up in February 1993, which attests to the fact that there was virtually no suspension of the

activities transferred.

32

In those circumstances, the fact that the entity whose assets and a part of whose staff were taken over was integrated into TAP’s structure, without that entity retaining an autonomous organisational structure, is irrelevant for the purposes of applying Article 1(1) of Directive 2001/23, since a link was preserved between, on the one hand, the assets and staff transferred to TAP and, on the other, the pursuit of activities previously carried on by the company that had been wound up. Against that background, it is immaterial that the assets concerned were used for operating scheduled flights as well as charter flights, given that the flights in issue are, in any event, air transport operations and that TAP, it should be recalled, honoured AIA’s contractual obligations with regard to those charter flights.

33

It follows from paragraphs 46 and 47 of the judgment in Klarenberg (C?466/07, EU:C:2009:85) 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.

34

Thus, 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 (see judgment in Klarenberg, C?466/07, EU:C:2009:85, paragraph 48).

35

In view of the foregoing considerations, the answer to the first question is that Article 1(1) of Directive 2001/23 must be interpreted as meaning that the concept of a ‘transfer of a business’ encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.

The second question

36

By its second question, the referring court seeks to ascertain whether, in circumstances such as those at issue in the main proceedings and, in particular, because of the fact that lower courts have given conflicting decisions concerning the interpretation of the concept of a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is in principle obliged to refer the matter to the Court of Justice in order to obtain an interpretation of that concept.

37

In that regard, although it is true that the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them, the fact remains that when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of EU law is raised before it (see judgment in Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato, C?136/12, EU:C:2013:489, paragraph 25 and the case-law cited).

38

As regards the extent of that obligation, it follows from settled case-law, beginning with the judgment in Cilfit and Others (283/81, EU:C:1982:335), that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

39

The Court has also made clear that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union (judgment in Intermodal Transports, C?495/03, EU:C:2005:552, paragraph 33).

40

It is true that the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it (see judgment in Intermodal Transports, C?495/03, EU:C:2005:552, paragraph 37 and the case-law cited).

41

In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU.

42

A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt.

43

However, so far as the area under consideration in the present case is concerned and as is clear

from paragraphs 24 to 27 of this judgment, the question as to how the concept of a ‘transfer of a business’ should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union.

44

It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of a ‘transfer of a business’ within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law.

45

Accordingly, the answer to the second question is that, in circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.

The third question

46

By its third question, the referring court seeks to ascertain, in essence, whether EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

47

The Court observes in that regard that, in view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance (see judgment in Köbler, C?224/01, EU:C:2003:513, paragraph 33).

48

The referring court is uncertain about the compatibility with those principles of the rule in Article

13(2) of the RRCEE, which provides that a claim for damages in respect of that liability ‘must be based’ on the prior setting aside, by the court or tribunal having jurisdiction, of the decision that caused the loss or damage.

49

The result of that rule is that any action for damages against the State for infringement of the obligation stemming from the failure to comply with the duty imposed by the third paragraph of Article 267 TFEU will be inadmissible if the decision that caused the loss or damage has not been set aside.

50

It must be recalled that where the conditions for a State to incur liability are satisfied, a matter which it is for the national courts to determine, it is on the basis of national law that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions laid down by national law in respect of reparation of loss or damage are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness) (see judgment in Fuß, C?429/09, EU:C:2010:717, paragraph 62 and the case-law cited).

51

A rule of national law, such as the rule in Article 13(2) of the RRCEE, may make it excessively difficult to obtain reparation for the loss or damage caused by the infringement of EU law in question.

52

Indeed, it is clear from the documents before the Court and from the argument presented at the hearing that the situations in which decisions of the Supremo Tribunal de Justiça may be subject to review are extremely limited.

53

The Portuguese Government maintains in this regard that the provision of national law in question is dictated by concerns connected with the principle of res judicata and the principle of legal certainty. It argues, in particular, that in the situation at issue in the main proceedings a review of the assessment made by a judicial body adjudicating at last instance is incompatible with that body’s function, given that its decisions are intended to determine a case once and for all, lest the rule of law and respect for judicial decisions be called in question, undermining the hierarchical structure of the judicial system.

54

It is true that the Court has stressed the importance, both for the EU legal order and for the national legal systems, of the principle of res judicata, stating that in the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States (see, to that effect, judgment in Fallimento Olimpiclub, C?2/08, EU:C:2009:506, paragraphs 22 and 24).

55

As to the impact of the principle of res judicata on the situation at issue in the main proceedings, it need only be observed that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. In an action brought to establish the liability of the State the applicant will, if successful, secure an order against it for reparation of the damage incurred but will not necessarily obtain a declaration invalidating the status of res judicata of the judicial decision which was responsible for that damage. In any event, the principle of State liability inherent in the EU legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage (see judgment in Köbler, C?224/01, EU:C:2003:513, paragraph 39).

56

As regards the argument concerning infringement of the principle of legal certainty, it must be stated that, even if this principle may be taken into account in a legal situation such as that at issue in the main proceedings, it cannot frustrate the principle that the State should be liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it.

57

To take account of the principle of legal certainty would mean that, where a decision given by a court adjudicating at last instance is based on an interpretation of EU law that is manifestly incorrect, an individual would be prevented from asserting the rights that he may derive from the EU legal order and, in particular, those that stem from the principle of State liability.

58

The last-mentioned principle is inherent in the system of the Treaties on which the European Union is based (see, to that effect, judgment in Specht and Others, C?501/12 to C?506/12, C?540/12 and C?541/12, EU:C:2014:2005, paragraph 98 and the case-law cited).

59

Accordingly, a significant obstacle, such as that resulting from the rule of national law at issue in the main proceedings, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of res judicata or by the principle of legal certainty.

60

It follows from the foregoing that the answer to the third question is that EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

Costs

61

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 (Second 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 as meaning that the concept of a 'transfer of a business' encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.

2.

In circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.

3.

EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

[Signatures]

(*1) Language of the case: Portuguese.