TRANSFER OF AN ECONOMIC UNIT AND COLLECTIVE BARGAINING AGREEMENTS

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Contents

[1] This paper is based on my master thesis discussed and approved by the University of Lisbon Law School in 2010 and published (CARVALHO MARTINS, D. (2013) *Da Transmissão da Unidade Económica no Direito Individual do Trabalho*, Almedina).

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[3] Abbreviations: I Directive on ToEU (Council Directive 77/187/EEC of 14 February 1977), II Directive on ToEU (Council Directive 98/50/EC of 29 June 1998), III Directive on ToEU (Council Directive 2001/23/EC of 12 March 2001), AJJ (Association of Young Labour Lawyers, Portugal), APODIT (Portuguese Association of Labour Law), *Brief* (*Employment Law Brief HR*), CBA (collective bargaining agreement), CCA (Coimbra Court of Appeal), CEJ (Centre for Judicial Studies), Charter (Charter of Fundamental Rights of the European Union), CJ (*Colectânea de Jurisprudência*), CJUE (Court of Justice of the European Union), CLRI (collective labour regulation instrument, such as CBA, Accession Agreement to a CBA, Arbitral Award in Voluntary Arbitration, Extension Ordinance, Ordinance for Minimum Conditions and Arbitral Award in Compulsory Arbitration), CPR (Constitution of the Portuguese Republic), ECtHR (European Court of Human Rights), EAT (Employment Appeal Tribunal, United Kingdom), ECA (Évora Court of Appeal), LCA (Lisbon Court of Appeal), MoU (Memorandum of Understanding on Specific Economic Policy Conditionality) MS (Member State), MSs (Member States), NZA (*Neue Zeitschrift für Arbeitsrecht*), OCA (Oporto Court of Appeal), PCC (Portuguese Constitutional Court), PCCode (Portuguese Civil Code), PLC (Portuguese Labour Code), *QL* (*Questões Laborais*), TEU (Treaty on European Union), ToEU (transfer of an economic unity), ToEUR (Transfer of an Economic Unity Regulation), TFEU (Treaty on the Functioning of the European Union), UDHR (Universal Declaration of Human Rights), v.g. (*verbi gratia*).

ABSTRACT

The present paper intends to present the conditions on which the application of the transfer of an undertaking regulation or – hereafter referred as Transfer of an Economic Unit Regulation (ToEUR) – depends, to summarise its individual and collective effects and to analyse recent rulings of the CJEU, especially by considering thoroughly the Portuguese system.

In the first part I will provide a general overview of the five positive cumulative conditions that have to be verified for the application of the ToEUR: a) existence of an economic unit; b) effective link of the worker with the economic unit; c) validity of the employment contract at the time of the transfer of the economic unit; d) change of owner or operator of the economic unit; and e) assumption of the operation by the transferee. The paper will proceed to analyse the three negative conditions that can each individually prevent the application of the ToEUR: a) lawful termination of the employment contract; b) change of workplace lawfully decided by the transferor up until the moment of the transfer; c) exercise of the right of the worker to oppose the transfer of the legal position of employer.

In the second part I will briefly consider the individual and collective effects of the transfer of the economic unit (namely, the automatic transfer of the legal position of employer and the maintenance of the collective labour agreement).

For the third part, recent case law of the CJEU will be discussed. Particularly, the understanding of Cases MARK ALEMO-HERRON 18.7.2013 (C-426/11) and ÖSTERREICHISCHER GEWERKSCHAFTSBUND 11.9.2014 (C-328/13) is of the utmost importance for this enquiry. In the former, the CJEU stated that the EU Directive "must be interpreted as precluding a Member State from providing (…) that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer". In the latter, the CJEU ruled that the EU Directive "must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute 'terms and

conditions agreed in any collective agreement' so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the workers concerned".

1. The application of the ToEUR

1.1. General assessment

The ToEUR intends to guarantee two main values: to protect the worker in case the control over an economic unit is changed, which is achieved through the maintenance of his/her employment contract; and to assure that the transferee will receive an operative economic unit, which necessarily includes the workforce[4]. In a structural perspective, the transmission, by any mean, of a business unit (e.g. a restaurant, an industrial plant or the human resources department) will determine, as a rule, an automatic or *ipso iure* change of the position as employer[5/6].

This topic is extremely relevant the world of today. Notably, it raises many concerns in events like assets selling and, most particularly in outsourcing services (e.g. accountancy, human resources management, cleaning and facility services, surveillance, IT services, inter alia)[7]. Moreover, the correct assessment of the business value of an economic entity being transferred is fundamental to discern the exact dimension of the human resources and to identify any labour contingency regarding eventual undisclosed workers.

In my view, the application of ToEUR depends on the cumulative occurrence of five positive conditions and on the non-verification of three negative conditions.

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[4] Recital 3 of the III Directive.
[5] CARVALHO MARTINS, D. (2013) p.29.
[6] In the European Union (EU) the origins of ToEUR can be found in the Social Action Plan 1974-1976 (Council Resolution of 21.1.1974, *Official Journal* C013, 12.2.1974, pp. 1-4) and among three fundamental Directives for the protection of workers: (i) Collective Redundancies (Council Directive 75/129/EEC of 17.2.1975, Official Journal L048, 22.2.1975, pp. 29-30, which was revoked and replaced by Directive 98/59/EC of 20.7.1998, Official Journal L225 of 12.8.1998, pp. 16-21); (ii) Transfer of undertakings, businesses or part of business (Council Directive 77/187/EEC of 14.2.1977, Official Journal L061, 5.3.1977, pp. 26-28, which was revoked and replaced by Directive 98/50/EC of 29.6.1998, Official Journal L201 of 17.7.1998, pp. 88-92, and Directive 2001/23/EC of 12.3.2001, Official Journal L82 of 22.3.2001, pp. 16-20); (iii) Employer's insolvency (Council Directive 80/987/EEC of 20.10.1980, Official Journal L283, 28.10.1980, pp. 23-27, which was revoked and replaced by Directive 2008/94/EC of 22.10.2008, Official Journal L283 of 28.10.2008, pp. 36-42).
[7] In Portugal, the services sector employs approximately 60% of the employed population (CARVALHO MARTINS, D. (2013) p.27).

The positive conditions can be listed as:

a) Existence of an economic unity;
b) Effective link of the worker with the economic unity;
c) Validity of the employment contract at the time of the ToEU;
d) Change of owner or operator of the economic unity; and
e) Assumption of the operation by the transferee.

The negative conditions can be enumerated as:

a) Lawful termination of the employment contract;
b) Change of workplace lawfully decided by the transferor up until the moment of the ToEU; and
c) Exercise of the worker's right of opposition to the transfer of the legal position of employer[8].

The cumulative verification of the positive conditions and the non-verification of the negative conditions leads to the application of the legal mechanism in de Directive, which comprises a set of three main legal effects:

a) Automatic and mandatory transfer of the legal position of employer – mandatory for both the transferor and the transferee;
b) Protection of the worker against dismissal, rooted solely on the ToEU; and
c) Emergence of information duties[9].

I will proceed to describe the EU legal framework based on the III Directive on ToEU and the recent ruling on the collective labour law[10], although I will start by explaining the mandatory conditions for the application of ToEUR.

1.2. Positive conditions

1.2.1. The economic unit

[8] CARVALHO MARTINS, D. (2013) p. 354.
[9] CARVALHO MARTINS, D. (2013) p. 355.
[10] The Directive does not expressly cover the cross-border transfers, when the transferor and the transferee are covered by different legal systems (European Commission, *First Phase Consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfer of undertakings, businesses or parts of undertakings or businesses*, available at www.ec.europa.eu).

First, one must determine what an economic unit is. In my opinion, it comprises a set of assets – contracts, clients, intellectual property rights, public law licenses or permits, facilities, tools, etc. – and people. This entity must be independent and organized with defined working methods and an hierarchical structure, and has to develop a main or ancillary economic activity, either for profit or not, being owned or managed by a natural person or a legal person and governed by public or private law[11].

In Portugal, the service provision changes are not directly covered by the law, but by CBA with general effect granted through extension ordinances issued by the Government. The PCC held that such solution was similar to the ToEUR and was not unconstitutional because it protects the employment and the financial viability of companies[12].

The economic unit must maintain its identity after the transfer, regardless of its underlying legal form, of financing sources, of whether its owner pursues profit and of whether its activity is the main one or an ancillary one in the wider business context. With this background, a global assessment of the circumstances has to be made and a minimum set of characteristics required to identify the object to be transferred have to be gathered. Only then the range of legal effects established by the law is automatically set in motion[13].

1.2.2. Effective link between the worker and the economic unit

[11] Article 1 (1) (a), (b) and (c) of the III Directive and CARVALHO MARTINS, D. (2013) pp. 183-206. Examples of economic entities: cleaning services (CJEU 14.4.1994 (SCHMIDT) case no. C-392/92, CJEU 11.3.1997 (SÜZEN) case no. C-13/95, CJEU 10.12.1998 (HÉRNANDEZ VIDAL) cases no. C-127/96, C-229/96 and C-74/97, CJEU 24.1.2002 (TEMCO SERVICE) case no. C-51/00 and CJEU 22.1.2011 (CLECE) case no. 463/09), employment agencies (CJEU 13.9.2007 (JOUINI) case no. C-458/05), driveage work in mines (CJEU 10.12.1999 (ALLEN) case no. C-234/98), home-help service for persons in need or maintaining surveillance of premises (CJEU 10.12.1998 (SÁNCHEZ HIDALGO) case no. C-173/96 and no. C-247/96), operation of scheduled local bus routes (CJEU 25.1.2001 (OY LIIKENNE AB) case no. C-172/99), catering services (CJEU 20.11.2003 (ABLER) case no. C-340/01), activities relating to publicity and information concerning the services which a public entity offers to the public (CJEU 26.9.2000 (MAYEUR) case no. C-175/99), telecommunications services (CJEU 14.9.2000 (COLLINO) case no. C-343/98), auxiliary services at public schools (CJEU 6.9.2011 (IVANA SCATTOLON) case no. C-108/10). The later case refers to group of publicly employed workers that carried out a set of activities such as cleaning, caretaking and administrative assistance. The local authorities operated this services concomitantly through contracts celebrated with private entities.
In Portugal, several examples can be found, respecting to: milk collection services (Supreme Court 12.1.1990), schools (Supreme Court 1.4.2009, 4.5.2011 and 22.9.2011), industrial facilities (Supreme Court 30.6.1999 and ECA 11.1.2005), shipping and distribution of publications (OCA 29.11.2004), liberal arts (LCA 19.1.2005 and CCA 13.10.2005), accountancy and payroll services (Supreme Court 22.9.2004 and 29.6.2005) and cleaning services and refusal to collect (Supreme Court 27.5.2004 and 5.11.2008).
[12] PCC Rulings of 12.7.1990 and of 5.3.1998.
[13] Inter alia, CJEU 18.3.1986 (SPIJKERS) case no. 24/85, CJEU 19.5.1992 (SOPHIE REDMOND) case no. C-29/91, CJEU 7.3.1996 (MERCKX AND NEUHUYS) case no. C-171/794 and no. C-172/94 and CJEU 15.12.2005 (GÖRRES AND DEMIR) case no. C-233/04 and C-233/04. See also, CARVALHO MARTINS, D. (2013) pp. 189-192.

The second condition requires the recognition of a group of workers (a team)[14], which is exclusively or predominantly (at least 50% of their working time) connected with the economic unit. That is, workers who carry out their activity solely or mainly within the scope of the economic unit.

It should be stressed that only the workers who carry out their activity, exclusively or chiefly, in the economic unit to be transferred may be covered by the automatic and mandatory transfer of the legal position of employer. In other words, there should be a strong link with the economic unit so that the provisions apply. For instance, the fact that the employer placed the worker in the economic unit to be transferred a few days before the transfer occurs is not sufficient[15], given that the worker cannot be linked in a fortuitous or occasional manner nor can such link have been created very close to the date of the transfer. The worker should contribute to the normal operation of the business[16].

It can be questioned whether there is a standard to assess the minimum seniority of the worker in the economic unit, considering that the Directive and the PLC of 2009 provide no interpretative indications.

One can look into some sectors of activity, in Portugal, that show some signs of a minimum link with the economic unit, which may be useful as object of comparison. For instance, the CBA applicable to the cleaning sector determines that the following are not considered workers performing normal activity in the workplace:

a) All those who have performed their functions in the workplace for 120 days or less;

[14] In exceptional cases, an economic unit can be comprised of a single worker, especially when other relevant resources required to carry out the activity are transferred (e.g. a taxi driver, a lorry driver). See CJEU 14.4.1994 (SCHMIDT) case no. C-392/92 and, in particular, CJEU 11.3.1997 (SÜZEN) case no. C-13/95, CJEU 10.12.1998 (HÉRNANDEZ VIDAL SA) cases no. C-127/96, no. C-229/96 and no. C-74/97 and CJEU 24.1.2002 (TEMCO SERVICE) case no. C-51/00.

[15] CARVALHO MARTINS, D. (2013) p. 188.

[16] *Inter alia*, CJEU 16.12.1992 (KATSIKAS) cases no. C-132/91, no. C-138/91 and C-139/91, CJEU 26.5.2005 (CELTEC LTD.) case no. C-478/03, CJEU 13.9.2007 (JOUINI) case no. C-458/05. See also, CARVALHO MARTINS, D. (2013) p. 207.

b) All those whose remuneration and/or professional category suffered alterations within 120 days or less, insofar as the change has not resulted directly from the application of a collective bargaining instrument (clause 15, § 4)[17].

This provision of the CBA is applicable to cases of mere succession in the activity (or loss of the client), that is, to situations that are more fluid and where it is more difficult to identify an economic unit. In other words, this provision covers an area that falls out of the scope of the Directive or the PLC of 2009. Thus, in this sector of activity, seniority in the economic unit should be equal or higher than 120 days.

In any case, the worker should be allocated to the economic unit for a reasonable period of time before the transfer. Due to the lack of elements that would allow to further define this concept of "reasonable time", I would say that, in general, an effective link will exist if on the date of the transfer the workers have been carrying out their activity, exclusively or chiefly, in the economic unit for approximately 120 days. I believe that there are also exceptional cases to be considered, namely: a) workers on a leave of absence; b) workers recently hired; and c) workers recently transferred to the economic unit, for example, based on the company's legitimate interest (e.g. a long term increase of activity in the economic unit) or on a right of the worker (v.g., there is a right to be transferred to another workplace justified by domestic violence)[18/19].

In the case of temporary workers, my opinion is that, as a rule, there is no effective or likely permanent link with the economic unit of the company using temporary work[20], except when the transferee also undertakes the legal position of user company in the contract of use of temporary work[21].

[17] CBA signed between the Portuguese Association of Facility Services (*Associação Portuguesa de* Facility Services – *APFS*) and the Federation of Trade Unions of Services Workers (*Federação dos Sindicatos dos Trabalhadores de Serviços – FETESE*), published in the Work and Employment Bulletin n.er 8, of 28/2/2010.
[18] CARVALHO MARTINS, D. (2013) pp. 210-212.
[19] In my view, workers transferred to the economic unit after the prior notice of termination of a contract for the provision of services would very likely not be deemed as having a link with the economic unit and, therefore, would most probably not be covered by the ToEUR.
[20] CARVALHO MARTINS, D. (2013) p. 210.
[21] A different question is whether a temporary agency could be deemed as an economic unit. This question was answer in the affirmative by the CJEU 13.9.2007 (JOUINI) case no. C-458/05. This ruling raised also a really important enquiry: if a temporary employment agency cannot function without its temporary workers, could the cleaning service or catering service companies do it? (MESTRE, B. (2007) "CJEU considers employees as the main assets of temporary employment agencies", in *European Law Reporter*, no. 12, pp. 448-454, available at http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/Transmissao_estabelecimento.pdf?id=9&username=guest).

1.2.3. Validity of the employment contract at the time of the ToEU

The legal mechanism of ToEU is applicable to the workers whose employment contracts are in force at the time of the transfer. In addition to that situation, the mechanism is also applicable to the workers who have been unlawfully dismissed prior to the transfer. In that case, the worker should sue the transferor and the transferee jointly[22].

1.2.4. Change of owner or operator of the economic unit

The ToEU may be direct or indirect, that is, it can be based on an agreement between the transferor and the transferee regarding the transfer of ownership, operation or management of the economic unit (**direct transfer**); or alternatively it can be based on a decision of a third party to successively transfer the temporary use of the economic unit to different companies (**indirect transmission**). Moreover, there is the possibility of bringing the **service back in-house**, that is, the case where the third party – e.g. the renter, the assigning entity or the beneficiary of the services – starts operating or managing the economic unit directly.

One should note that, for this purpose, the legal institute on which the ToEU is grounded is irrelevant. What is necessary is to determine whether the economic unit maintains its activity after the change of owner, operator, or manager; rather, in the specific case, if the new businessperson is taking the position that belonged to the former one[23].

As such, the legal framework under study is applicable to all the possible cases of change of the natural or legal person who is responsible for the operation of an economic unit and who, in this way, takes on the obligations of an employer with regard to the workers assigned to that economic unit. What is relevant, therefore, is the change of the person who owns the economic unit or simply manages it, regardless of whether or not contractual relations exist between the transferor and the transferee, as well as of whether or not there is a transfer of

[22] CARVALHO MARTINS, D. (2013) pp. 213-216.
[23] Article 1 (1) (a), (b) and (c) of the III Directive. See also, CARVALHO MARTINS, D. (2013) pp. 229-227, GALANTINO, L. (2014) *Diritto del Lavoro dell'Unione Europea*, G. Giappichelli Editore, p. 261. In fact, the ToEUR *is intended to cover any legal change in the person of the employer* (CJEU 2.12.1999 (ALLEN) case no C-234/98). See also, inter alia, CJEU 7.2.1985 (ABELS) case no. 135/83, CJEU 10.2.1988 (DADDY'S DANCE HALL) case no. 324/86, CJEU 12.11.1992 (RASK AND CHRISTENSEN) case no. C-209/91, CJEU 22.1.2011 (CLECE) case no. C- 463/09.

ownership over the economic unit or the assets that compose it, insofar as the unit maintains its identity[24].

1.2.5. Assumption of the operation by the transferee

In addition, it is required that the transferee assumes the operation of the economic unit. I can be questioned whether the assumption of the operation by the transferee must occur immediately or may occur at a later stage. The PLC of 2009 does not directly address this problem.

The activity should be maintained mostly without interruptions. However, the legal mechanism of ToEU should still be applied in case of an interruption of the activity for the time necessary, for instance, to carry out rehabilitation works or works to improve the facilities.

The LCA considered – rightfully so, in my opinion –the legal framework under analysis to be applicable to the following case: the transferor closed down the supermarket; the transferee carried out renovation works for a month, having reopened the supermarket, but without a butcher section; besides, the transferee used the facilities to continue pursuing the same line of business and kept both the clientele and the manager[25].

Additionally, it should be noted that it is possible that the change of employer does not occur at the same time as transferee carries on the activities of the economic unit. In fact, the transferee may initiate the activity and subsequently recruit the workers of the transferor[26].

According to the CJEU, it is necessary that between the activity carried out by the transferor and the activity taken on by the transferee there is a functional correlation of interdependence and complementarity linking the tangible and intangible assets and the workers. Thus, the integration of the assets and the workers after the transfer in a new and different

[24] CARVALHO MARTINS, D. (2013) pp. 238-239.
[25] LCA 24.02.1999 (FERREIRA MARQUES), *CJ*, Tome I (1999), pp. 172-176.
[26] CJEU 2.12.1999 (ALLEN) case no C-234/98. See also, CARVALHO MARTINS, D. (2013) p. 239.

organisational structure with the goal of carrying out an identical or analogous economic activity does not hinder the transfer of the employment contracts[27].

1.3. Negative conditions

1.3.1. Lawful termination of the employment contract

The termination of the employment contract in any of the ways envisaged as legitimate in the law prevents the application of the ToEUR.

As such, if the transferor terminates the employment contract by way of (i) disciplinary proceedings, (ii) dismissal due to unsuitability of the worker, (iii) collective dismissal, (iv) dismissal due to the extinction of the work position or (iv) of mutual agreement between the parties, the legal position of employer will not be transferred with the ToEU. A similar solution will be applicable to the termination of the employment contract due to expiration or by the worker's initiative.

However, the dismissal that aims to contravene the law, that is, to prevent the transfer of the employment contracts, should be deemed unlawful[28]. That does not mean that the ToEU cannot be cumulated with other grounds for dismissal (technical, organisational, structural or technological), but it cannot be the main reason for dismissal of the worker (either invoked by the employer or implied and assessed by a third party, such as the judge)[29].

1.3.2. The change of workplace lawfully determined by the transferor up to the moment of the transfer

The transferor may change the workplace of the worker prior to the ToEU, to the extent that such change is not grounded, whether expressly or implicitly, on the ToEU. Otherwise, the change cannot prevent the transfer of the employment contract[30].

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[27] CJEU 12.2.2009 (KLARENBERG), case no. C-466/07. See also, inter alia, CJEU 18.3.1986 (SPIJKERS) case no. 24/85, CJEU 19.5.1992 (SOPHIE REDMOND) case no. C-29/91, CJEU 19.9.1995 (RYGAARD) case no. C-48/94 and CJEU 20.11.2003 (ABLER) case no. 340/01.

[28] Article 4 (1) of the III Directive, article 381 (b) of the PLC of 2009 and article 294 of the PCCode.

[29] In fact, after the ToEU the transferee shall be able to harmonize the working conditions and to eliminate any redundancy. However, the transferee shall consider the entire workforce but not only the workers affected by the ToEU (CARVALHO MARTINS, D. (2013) p. 254).

[30] CARVALHO MARTINS, D. (2013) p. 257.

As previously mentioned, the worker must have had a prior effective link with the economic unit so as to allow, with greater certainty, the transfer of his or her employment contract. A change of workplace that is determined or agreed reasonably in advance and that takes the worker away from the economic unit to be transferred will allow this requirement to be fulfilled[31].

1.3.3. The exercise of the right of the worker to oppose the transfer of the legal position of employer

The existence of a right of opposition by the worker is not a peaceful matter in labour law scholarship and case law[32]. In Portuguese scholarship and cases, the following means of reaction of the worker have been put forward as alternatives:

a) Unjustified termination, with or without prior notice, but without a right to being compensated (articles 400 and 401 of the PLC of 2009)[33];
b) Justified termination, without a right to compensation (article 394 (3) (b) of the PLC of 2009);
c) Justified termination, with a right to compensation, when the ToEU occurs with fraudulent intent (for instance, a case of transmission of the economic unit to *a de facto* or judicially declared insolvent entity) (articles 394 (2) (b) or (e) and 396 (1) of the PLC of 2009);
d) Reasoned opposition to the transfer of his or her contract to the transferee and keeping of the employment contract with the transferor[34].

[31] The sale and purchase of economic units is, in the vast majority of cases, preceded by extensive and detailed due diligences within which it is highly advisable to clarify if a prior change of workplace was a way to "hide" key-personnel and therefore to promote an undercover decrease of the economic unit value and to unlawfully avoid the transfer of a worker. E.g.: the transfer of workplace further to a request by the worker, in case of domestic violence (article 195 of the PLC of 2009).

[32] For example, some authors consider that the right of the workers to oppose the transfer of the legal position of employer *might work as a double-edged sword, taking into account its impact on the market. If on the one hand it emancipates the individual, it might on the other hand have adverse effects on the commercial transactions that have the undertaking as its object because a mass refusal to be transferred could jeopardise the whole intention underlying the transfer* (HARTZÉN, A-C / HÖS, N / LECOMTE, F. / MARZO, C. / MESTRE, B / OLBRICH, H. / FULLER, S. (2008) "The right of the employee to refuse to be transferred. A comparative and theoretical analysis", in *European University Institute – Department of Law*, EUI Working Paper LAW no. 2008/20, pp. 69-71, available at http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/Transmissao_estabelecimento.pdf?id=9&username=guest).

[33] In Portugal, the unjustified termination without prior notice entitles the employer to compensation amounting to the salary that would be paid to the workers if they had given the employer the notice of termination in advance.

Generally, the CJEU tends to accept the right of the worker to oppose the transfer of the legal position of the employer to the transferee, but it is up to the MSs to decide the consequences for the employment contract of exercising that right[35].

Against the recognition a right of opposition, with its consequence of keeping the employment contract with the transferor, these main criticisms are voiced:

a) The lack of an express rule acknowledging such right;
b) The risk of jeopardizing the ToEU;
c) The risk of creating a right to bargain an extra compensation in order to assure the non-exercise of the right to oppose.

In my opinion, the right to oppose the transference of the labour contract is based on the direct application of fundamental principals and rights enshrined in the CRP, the following being the most relevant:

a) Article 1 (principle of human dignity): *Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society*[36];
b) Article 26 (1) (fundamental right to the development of personality): *Everyone is accorded the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to their image, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination*[37];
c) Article 47 (1) (fundamental right to chose a profession or type of work): *Everyone has the right to choose a profession or type of work freely, subject to the legal restrictions*

[34] CARVALHO MARTINS, D. (2013) pp. 277-311.
[35] CJEU 11.7.1985 (MIKKELSEN) case no. 105/84, CJEU 10.2.1988 (DADDY'S DANCE HALL), case no. 324/86, CJEU 16.12.1992 (KATSIKAS) case no. C-132/91, no. C-138/91 and no. C-139/91, CJEU 7.3.1996 (MERCKX AND NEUHUYS) cases no. C-171/94 and no. C-172/94, CJEU 12.11.1998 (EUROPIÈCES) case no. C-399/96 and CJEU 24.1.2002 (TEMCO SERVICE) case no. C-51/00.
[36] See also recital 2 and article 1 of the Charter, articles 1 and 22 of the UDHR and recital 2 of the International Covenant on Economic, Social and Cultural Rights.
[37] See also articles 22 and 29 of the UDHR and article 1 (1) of the International Covenant on Economic, Social and Cultural Rights.

that are imposed in the collective interest or the restrictions that are inherent in a person's own capabilities[38];

d) Article 59 (1) (b) (fundamental right to work under conditions of social dignity): *Regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker has the right* (...) *that work be organised under conditions of social dignity and in such a way as to provide personal fulfilment and to make it possible to reconcile work and family life*[39].

The worker cannot be treated as an object – among others making up the economic unit – without any legally binding will, allowing him/her to merely opt between working for the transferee (an employer who was not chosen by him/her) or a "honourable" unemployment status. I believe this solution will not fully respect the above-mentioned fundamental rights and principles.

A second criticism is based on empirical evidence: nowadays, the "human capital" is probably the main asset of a company[40]. Consequently, a widespread or unrestrictive acceptance of the right to oppose could indirectly jeopardize the ToEU: the transferee may lose their interest in the business if the key-workers remain with the transferor[41]. In this respect, one needs to as well consider the fundamental rights of the other side, i.e., the right of the transferor and the transferee to run a business[42]: [p]*rivate economic enterprise shall be undertaken freely within the overall frameworks defined by the Constitution and the law and with regard for the general interest* (article 61 (1) of the CPR). There is a need to achieve a fair balance between those fundamental rights and principles, which in the Portuguese system must be obtained taking into consideration article 18 (1) and (2) of the CPR that state:

[38] This fundamental right shall also include the right to choose the employer or the person that will benefit from the legal subordination of the worker, notably (i) defining how to render the services, (ii) assuming the risk of the activity, and (iii) benefiting from the results of the work carried out by the worker.
See also article 15 (1) of the Charter, articles 22 and 29 of the UDHR and article 6 (1) of the International Covenant on Economic, Social and Cultural Rights.
[39] See also articles 31 (1) of the Charter and article 6 (1) of the International Covenant on Economic, Social and Cultural Rights.
English and French versions of the CPR are available at: http://www.parlamento.pt.
[40] In RAY's words: "S'agissant aujourd'hui des très volatiles travailleurs du savoir, la transmission impérative des contrats est vitale pour le nouvel employeur: ce ne sont pas les bureaux et les 134 IMac qui constituent en effet son véritable capital, mais la somme des neurones de ses meilleurs collaborateurs attachés à l'entreprise" (RAY, J-E (2013) *Droit du Travail, Droit Vivant*, Editions Liaisons, 22nd ed., p. 249).
[41] The right to oppose refers only to the change on the legal position of employer, but not the transfer of assets as a going concern.
[42] See below CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11.

1. *The constitutional precepts with regard to rights, freedoms and guarantees are directly applicable and are binding on public and private entities.*
2. *The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests*[43].

In my view, the workers have the right to a reasoned opposition to the ToEU with the effect of keeping the employment contract with the transferor. For such purposes they must declare their will to the transferor and to the transferee in good time after being informed about (i) the date or proposed date of the transfer, (ii) the reasons for the transfer, (iii) the legal, economic and social implications of the transfer for the workers, and (iv) any measures envisaged in relation to the workers (as for article 286 (1) and (2) of the PLC of 2009). Naturally, the right to oppose does not guarantee a job with the transferor, v.g., when the economic unit concerned was the only business the transferor had. In such cases, it is up to the worker to decide between being dismissed with compensation paid by the transferor (e.g. collective dismissal or elimination of work position based on economic, structural or technological motives) or to find work with a new employer.

The fair balance between fundamental rights and principals imposes the opposition to the transfer to be justified also on a relevant interest of the worker in the particular case that demands an exceptional restriction to the change of legal position of employer. A third-party (e.g. a judge) will deem as good justification motives such as (i) the solvency of the transferee, (ii) the risk to violate ethic and professional deontological rules, and (iii) the violation of a specific clause about the *intuitu personae* nature of the employment contract regarding the employer.

Finally, and depending on the circumstances of the case, it is possible to consider that the worker exercised – or intended to exercise – this right of opposition in order only to bargain and to get a better payment or work conditions, especially in comparison with other impacted workers. In such cases, the abuse of right clause shall apply (article 334 of the PCCode).

[43] See also article 52 (1) of the Charter.
English and French versions of the CPR are available at: http://www.parlamento.pt.

1.4. Effective date of the transfer

When analysing the ToEU, two possible moments may be considered as operating the transfer of the employer position: either (i) the moment when the legal act or transaction that is the basis of the transfer is considered complete (for instance, the signing of a contract to sale and purchase assets or of a new contract for the provision of services with a new firm); or (ii) the moment when the new firm takes on the economic unit.

In my view, the transfer of the legal position of employer takes place on the date in which the transferee (or new firm) initiates the preparatory procedures to continue the activity (for instance, renovation works and contacts with a view to hiring new workers) or, at the maximum, from the date from which the transferee (or new firm) commits to taking on the activity (for instance, the date of initiation of the activity established in the contract for sale and purchase of assets), regardless of whether or not the activity is indeed initiated[44].

2. Effects

2.1. Individual effects

2.1.1. Transfer of the legal position of employer

With the ToEU, there is an automatic transfer of the legal position of employer, and the transferor cannot retain workers assigned to the economic unit that was transferred, nor can the transferee refuse the admission of those workers[45].

For the worker, everything happens as if the ToEU had not occurred, that is, the transferee receives the worker with the working conditions implemented by the transferor with regard to seniority, professional category, remuneration, allowances, working time, vacation, workplace, etc.

[44] CJEU 25.7.1991 (GIUSEPPE D'URSO) case no. C-362/89, CJEU 14.11.1996 (HERTAING) case no. C-305/94, CJEU 26.5.2005 (CELTEC) case no. C-478/03. See also CARVALHO MARTINS, D. (2013) pp. 313-314.
[45] Article 3 (1) of the III Directive. Inter alia, CJEU 5.5.1988 (BERG AND BESSELSEN) cases no. 144/87 and 145/87, CJEU 25.7.1991 (GIUSEPPE D'URSO), case no. C-362/89, CJEU 14.11.1996 (HERTAING), case no. C-305/94, and CJEU 7.12.1995 (SPANO) case no. C-472/93.

For the transferor, everything happens as if the contract had been terminated on the date of the ToEU, without prejudice to being jointly and severally liable towards the transferee for obligations that were due up to the date of the transfer during the year that follows it (article 285 (1) and (2) of the PLC of 2009)[46].

2.1.2. Protection against dismissal

In its essence, this legal mechanism aims to avoid dismissals exclusively due to the ToEU. It seeks to maintain the employment contracts with the transferee and to ensure that the rights and obligations of the workers are not altered solely due to the ToEU. After the change of employer, the transferee may exercise the powers given to the employer by the law to adapt and conform the performance of work, insofar as they are not solely (or mainly) based on the ToEU [47].

The worker cannot be dismissed or deprived of his or her working conditions due to the ToEU[48], but the transferor and the transferee may promote the dismissals or the changes to working conditions that are necessary, to the extent that they comply with the respective proceedings and there are other grounds on which their decision in based. Thus, after the transfer, the transferee may, for instance, initiate collective dismissal proceedings covering all of their workers, including those that were transferred, or carry out a disciplinary dismissal based on acts or behaviours of the worker prior to the ToEU.

2.1.3. Information duties

In case of a direct transfer (see 1.2.4. above), the transferor and the transferee should inform the representatives of their respective workers – in this case, the trade union delegate at the economic unit – of the date of and the reasons for the transfer, its legal, economic and social implications for the workers and the measures envisaged with regard to them. This information should be provided in a timely manner before the transfer or at least 10 days

[46] CARVALHO MARTINS, D. (2013) pp. 315-323.
[47] Article 4 (1) of the III Directive. See also CARVALHO MARTINS, D. (2013) p. 327.
[48] Article 4 (2) of the III Directive. See also CARVALHO MARTINS, D. (2013) p. 327. About the problems raised by the time limit for bringing proceedings of dismissal in Deutschland, GABRYS, E (2014) *Die Klagefrist im Falle einer Kündigung wegen des Betriebsübergangs*, MV-Wissenschaft, pp. 1-10, 50-64.

before compliance with the consultation duties regarding the envisaged measures (article 286 (1), (2) and (3) of the PLC of 2009)[49/50].

A breach of the information and consultation duties has no impact on the moment, the implementation or the validity of the ToEU, nor on the modification of the legal position of employer, constituting only a minor administrative offence punishable with an administrative fine (article 286 (5) of the PLC of 2009)[51].

In case of an indirect transfer or of bringing the services back in-house (see 1.2.4. above), the transferor and the transferee should also comply with these information and consultation duties, unless the contracting entity did not provide the transferor with any data about the granting of the economic unit to another person or did not give the transferee figures about the current activity of the economic unit[52/53].

In my opinion, the transferor should also inform the transferee – and in case of a foreseeable indirect transfer or service provision of change, the renter, the assigning entity or the beneficiary of the services – about the working conditions that are applicable to the workers assigned to the economic unit, in order to avoid any claim from the transferee or the contracting entity based on the lack of knowledge without fault or on the breach of confidence (article 227 and 762 (2) of the PCCode). Namely, the transferor should provide information on the following: a) identification, age and address; b) effective date of the employment contract (or seniority); c) type of employment contract; d) professional category; e) remuneration and employment related benefits; f) normal working period and working time; g) right to vacation and corresponding allowance; h) work incapacity, if applicable; i) collective bargaining instrument, if applicable; j) pending or closed disciplinary proceedings, if a disciplinary penalty has been applied; and l) pending judicial proceedings initiated by the transferor against the worker or by the latter against the former. Lack of compliance with this

[49] Article 7 (1) and (2) of the III Directive.
[50] Although it is not expressly mentioned by the Directive, nor by the PLC of 2009, the employer shall inform the concerned workers about the identity of the new owner or manager of the economic unit and, if applicable, about their company group, unless such information is classified and confidential (articles 106 (1) and (3) (a), 126 of the PLC of 2009 and article 762 (2) of the PCCode). As a matter of fact, the identity of the employer is relevant for example to assess the exercise of the right to oppose based on the solvability of the transferee.
[51] To be set between € 204,00 and € 1.530,00.
[52] This solution still applies when the contracting entity does not provide any information, but the transferor and the transferee are aware, or should have been aware, of a potential ToEU (e.g. in a call for tenders regarding an activity that is currently being carried out).
[53] This could also be applicable in a case of service provision change.

information duty may determine civil liability for the transferor, but it does not impair the ToEU [54].

2.2. Collective effects

2.2.1. The after-effect of a CLRI

The Directive mandates a temporary extension of the application of the CLRI after the ToEU in order to guarantee that, at least momentarily, the worker will not suffer any significant change on working conditions based only on the ToEU, mainly caused by the change of an applicable CLRI[55]. As article 3 (3) of the Directive reads, [f]*ollowing the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement*. Besides, *Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year*.

Acknowledging the possibility of a better interpretation, I believe that such provision intends to establish the following legal framework: if, at the moment of a ToEU, the date of termination or expiry of a collective bargaining agreement exceeds one year, the MSs may restrict the after-effect up to such time-limit. In other words, the transferred workers will have the same work conditions as the non-transferred workers until the date of termination or expiry of the collective agreement that was in force at the date of the ToEU. As an option for the MSs, this parity situation could be limited to a minimum of one year in case of a longer date of termination or expiry[56]. This represents a fair balance between the need to protect both the worker and the business freedom to create and to run an economic unit. This understanding prevents the workers concerned from being placed in a less favourable position solely as a result of the ToEU, which was one of the purposes of the European Law[57], while at the same time protecting the interests of the transferee, notably in harmonizing the work

[54] Article 3 (2) of the III Directive. See also, CARVALHO MARTINS, D. (2013) pp. 335-336.
[55] Not only at least at the transfer date as suggestively mentioned by RAY, J-E (2013) p. 249.
[56] This minimum limit could not be deemed as an open-ended limit; that is to say, the minimum 12-month-period does not ensure a lifetime protection to the impacted workers, regardless the duration of the CBA applicable to the transferor at the time of the ToEU. If the CBA expires beforehand to the "minimum limit", the later does not apply. If the CBA expires later than the "minimum limit", the later shall apply.
[57] E.g. CJEU 11.7.1985 (MIKKELSEN) case no. 105/84 and CJEU 17.12.1987 (MØLLE KRO) case no. 287/86.

conditions in order to avoid differentiations between colleagues that may harm the "work atmosphere"[58]/[59].

This can be illustrated by looking at the Portuguese legal framework[60]:

Between 1976 and 1992, there was a provision that stated that, in case of a ToEU, the CLRI that was binding for transferor was applicable to the transferee until the term of its period of validity (article 9 (3) of the Decree-Law no. 164-A/76, of 28 of February, and article 9 of the Decree-Law no. 519-C1/79, of 29 of December).

In 1992, a minimum period of 12 months for the after-effects was introduced, to be respected unless the collective labour regulation instrument was replaced by a new one[61]. This was perhaps a first attempt to transpose article 3 (2) of the I Directive. I would stress that the full incorporation of the Directives on ToEU only occurred with PLC of 2003 (articles 318 to 321 and 555)[62].

From the PLC of 2003 onwards, the provision remained the same[63], with a "slight" variation:

[58] It could be stressed that a longer – or even open-ended – after-effect of a CBA does not impair such goal, because the transferee could implement an upward harmonization. I believe that in most cases such option would be unaffordable and in the overwhelming majority of the cases would be a strong disincentive to investment.

[59] JÚLIO GOMES refers that the ToEUR could entail dangerous effects to the workers concerned. Firstly, the after-effect of the collective labour could be temporarily limited; secondly, the supplementary insurance schemes and pension funds are not covered by the Directive (GOMES, J. (2007) *Direito do Trabalho*, Vol. I, Coimbra, p.829).

[60] The Portuguese collective bargaining system is based on the affiliation principle (article 496 of the PLC of 2009), that is, a CBA is applicable as long as the workers are affiliated with signatory trade unions and, in addition, the employers are affiliated with employers' associations or are a party to the CBA. The Extension Ordinance is an administrative act issued by the Government that aims to extend the scope of a CBA to those not affiliated within a sector of activity or profession (articles 2 and 476 et. seq. of the PLC of 2009).
About the Portuguese labour law reform, in particular covering the collective labour system, PALMA RAMALHO, R. (2013) "Portuguese Labour Law and Industrial Relations during the Crisis", ILO working paper no. 54, available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf, VASCONCELOS, J. (2014) "Economic Crisis and Labour Law Reforms in Portugal", available at http://islssl.org/wp-content/uploads/2014/10/RoundTable2-Portugal-JoanaVasconcelos.pdf, and CARVALHO MARTINS, D. (2014) "Labour Law in Portugal between 2011 and 2014", available at http://islssl.org/wp-content/uploads/2014/08/Portuguese-National-Report.pdf.
In the last years, several European countries introduced several reforms in the social system, remarkably in the industrial relations area, based on economic and financial reasons. About that topic, ABRANTES, JOSÉ JOÃO (2013) "Welfare State and globalisation of the economic area", Juridical Tribune (Tribuna Juridica), available at: http://www.tribunajuridica.eu/arhiva/An3v1/art9_en.pdf.

[61] This amendment was a reflex of the Social Dialogue Agreement (1990). See also, the PSC uniform ruling 1/2000, of 2 of February, about the replacement of previous collective labour regulation instrument.

[62] In 1986, Portugal becomes member of the EU and therefore only fully incorporated the III Directive on the approximation of the laws of the MSs relating to the safeguarding of workers' rights in the event of a ToEU.

[63] PALMA RAMALHO, R. (2012) *Tratado de Direito do Trabalho*, Parte III, Almedina, p. 298.
Probably the main change was to make clear that the transferee does not become a party of the collective labour instrument. In other words, the ToEUR only extends its scope of application to cover the transferee (GONÇALVES

(i) PLC of 2003: in case of a ToEU, the collective bargaining instrument that binds the transferor is applicable to the transferee until the term of its period of validity and at least for 12 months counting from the date of transfer, except if in the meantime another collective bargaining instrument becomes applicable to the transferee;

(ii) PLC of 2009: in case of a ToEU, the collective bargaining instrument that binds the transferor is applicable to the transferee until the term of its period of validity or at least for 12 months counting from the date of transfer, except if in the meantime another collective bargaining instrument becomes applicable to the transferee[64].

According to one possible approach, article 498 (1) of the PLC of 2009 would have the following interpretation:

(i) On a fixed-term CBA, the after-effect will last until the date of termination or expire;

(ii) On an open-ended CBA, the after-effect will last for 12 months;

(iii) In both cases, a new CBA could supersede the applicable CBA at the time of the ToEU [65].

Alternatively, article 498 (1) of the PLC of 2009 would impose a minimum length of 12 months to the after-effects, albeit the CLRI having a shorter term, in order to give a time frame to the transferee to negotiate and execute a new CBA without detriment to the workers concerned. Nevertheless, if the transferee would negotiate and execute a new CBA prior to the end of 12-monht-period, the former CBA would be no longer applicable to the transferred workers[66].

DA SILVA, L. (2008) "Nótula sobre os efeitos colectivos da transmissão da empresa", in *Estudos de Direito do Trabalho (Código do Trabalho)*, Vol. I, Almedina, 2nd ed., pp. 260-263, and GONÇALVES DA SILVA, L. (2013) Explanation on article 498 of the PLC of 2009, in *Código do Trabalho Anotado*, 9th ed., pp. 986-987).

[64] On the subject, PALMA RAMALHO said that the PLC of 2009 transformed the 12-month-period from the main rule to a subsidiary provision (PALMA RAMALHO, R. (2012) p. 300). On the opposite, JÚLIO GOMES argued that the word variation had no effect on the legal framework; according to this Author, the 12-month period is a minimum limit to the after-effect of a CBA (GOMES, J. (2010) "Novas, novíssimas e não tão novas questões sobre a transmissão da unidade económica em Direito do Trabalho" in *Novos Estudos de Direito do Trabalho*, Coimbra, pp. 106-107). With the same view, AMORIM MAGALHÃES, J. / PICHEL, P. (2013) "Reflexões em torno das cláusulas contratuais de reenvio dinâmicas no contexto da transmissão da unidade económica a propósito do Acórdão do TJUE Mark Alemo-Herron e o. contra Parkwood Leisure, Ltd (Processo C-426/11), in QL, no 42, p. 693-694.

[65] PALMA RAMALHO, R. (2012) pp. 299-300.

[66] FURTADO MARTINS, P. (2011) "Efeitos da aquisição de empresas nas relações de trabalho", in Aquisições de empresas, Coimbra, pp. 211 ff. and in *O Contrato de Trabalho no Contexto da Empresa, do Direito Comercial e*

In my view, the after-effect of a CLRI may be overcome by the application of another CLRI negotiated and executed (i) by the transferee with a representative trade union after the ToEU, (ii) by an employer's association in which the transferee became affiliated after the ToEU, (iii) by an employer's association after the ToEU in case the transferee was already affiliated, and (iv) by other collective actors with bargaining power which scope was extended by an extension ordinance.

In the absence of these circumstances, the Portuguese system seams to impose a minimum time of the after-effects (12 months), even though the CLRI will expire within, for instance, 6 months after the ToEU. Such solution leaves the transferred workers better off than the non-transferred workers that were, for example, allocated to another economic unit. Should it be understood that the Portuguese lawmaker wanted to overprotect the transferred workers and to overburden the transferee? Could such solution be an incentive to boost the collective bargaining practices? I believe that the aim of the ToEUR is to maintain the work conditions for a foreseeable period of time, unless there is a new CBA applicable to the workforce: the date of termination or expiry of a CBA or 12 months after the ToEU, whichever occurs earliest[67]. The limitation to a minimum of 12-months is subsidiary or applicable when (i) the termination or expiry of the existing CBA occurs, or (ii) a new CBA enters into force, within a period of one year after the ToEU [68].

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do Direito das Sociedades Comerciais, CEJ, pp. 69-71, http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/o_contrato_de_trabalho_no_contexto_da_empresa_do_direito_comercial_e_do_direito_das_sociedades_comerciais.pdf?id=9&username=guest.

[67] The "ratio decidendi" of the recent case MARK ALEMO-HERRON may help to re-evaluate article 498 (1) of the PLC of 2009, which would clearly set up a maximum length to the after-effect, instead of a minimum duration that may be overcome by a new collective labour regulation instrument.

[68] CJEU 9.3.2006 (WERHOF) case no. C-499/04, §30.

Besides, article 3(3) of III Directive *cannot impose on the transferee the obligation to observe those working conditions after the agreed date of expiry of the collective agreement, as after that date the agreement is no longer in force* (CJEU 27.11.2008 (MIRJA JUURI) case no. C-396/07, §33). In this case, the date of expiry of the CBA coincides with the date of the ToEU. However, if the CBA expires on the day following the ToEU, should the transferee comply with its terms and conditions for at least one year? I am afraid that such understanding is not in line with the III Directive. Further to other CJEU ruling, [t]*hat second subparagraph does not therefore prevent the working conditions in the collective agreement to which the employees concerned were subject before the transfer from ceasing to be applicable before the expiry of one year after the transfer, or indeed immediately on the date on which the transfer takes place, in the presence of one of the situations referred to in the first subparagraph of Article 3(2), namely the termination or expiry of the collective agreement or the entry into force or application of another collective agreement*; (…) it is lawful for the transferee to apply, from the date of the transfer, the working conditions laid down by the collective agreement in force with him, including those concerning remuneration; however, the Directive prevents workers from being placed in a less favourable position solely as a result of the ToEU; *Implementation of the option to replace, with immediate effect, the conditions which the transferred workers enjoy under the collective agreement with the transferor with those laid down by the collective agreement in force with the transferee cannot therefore have the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the*

Regarding this issue, the following questions could also be raised:

(i) Will the transferee become part of the CLRI applicable to the transferor (rather, will he step into the shoes of the transferor)?

(ii) Will the transferee be subject to the post-transfer amendments of the CLRI – or to a new CLRI –, which is biding for the transferor?

Portuguese scholarship responds negatively to the first question[69]. The regulation does not give the transferor the quality of party to a CBA. It is interesting to see the difference between the individual and collective labour relations: in the former, the transferee "walks around in the skin" of the transferor; in the latter, the transferor is only subject to the effects of a CBA.

Relating to the second question, I think that the transferor must respect the work conditions (individually and collectively agreed), as they existed at the time of the ToEU.

The Portuguese collective bargaining system is based on the affiliation principle (article 496 of the PLC of 2009), without prejudice of the extension of the CBA to non-affiliated members through Extension Ordinances (articles 2 and 476 et. seq. of the PLC of 2009). Considering that we have had, for many years, a systematic practice of issuing (almost) indiscriminately Extension Ordinances together with a really favourable scheme for the survival of CBA, it is really difficult to find a company or a sector not – at least partially – covered by a CLRI[70/71].

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transfer. If it were otherwise, achievement of the objective pursued by Directive 77/187 could easily be called into question in any sector governed by collective agreements, which would undermine the effectiveness of that directive. Nevertheless, the Directive *cannot usefully be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking*. In fact, the Directive *does not prevent there being certain differences in salary treatment between the workers transferred and those who were already, at the time of the transfer, employed by the transferee. Whilst other instruments and principles of law might prove relevant in order to examine the legality of such differences, Directive 77/187 itself is aimed merely at avoiding workers being placed, solely by reason of a transfer to another employer, in an unfavourable position compared with that which they previously enjoyed* (CJEU 6.9.2011 (IVANA SCATTOLON) case no. C-108/10, §§73-77). As for SIMON DEAKIN and GILLIAN S. MORRIS, this *approach would seem to give the transferee some leeway in implementing terms and conditions which involve offsetting gains and losses for the employees affected* (DEAKIN, S. / MORRIS, G. S. (2012) *Labour Law*, Hart, 6th ed., p. 250).
Following FURTADO MARTINS, the 12-month-period is an overall ceiling to the after-effect of a CBA in the event of a ToEU, notably when a new one does not replace that CBA. The Directive allows the MSs to establish an overall ceiling, which could never be less than 12 months (FURTADO MARTINS, P. (2011) CEJ, p. 70).

[69] MENEZES LEITÃO, L. (2014) *Direito do Trabalho*, Almedina, 14th ed., p. 600, ROMANO MARTINEZ, P. (2015) *Direito do Trabalho*, Almedina, 7th ed., p. 1144, PALMA RAMALHO, R. (2012) p. 298, LOBO XAVIER, B. (2014) *Manual de Direito do Trabalho*, Verbo, 2th ed., p. 741-744, GONÇALVES DA SILVA, L. (2008) pp. 260-263, and (2013) pp. 986-987, FURTADO MARTINS, P. (2011) CEJ, pp. 65-68. In France, e.g., RAY, J-E (2013) p. 250.

[70] Even when the issue of an Extension Ordinance is not possible (v.g., when there is no trade union or employers' association) the Government may decree an Ordinance for Minimum Conditions (articles 517-518 of PLC of 2009).

There are three main possibilities to consider, as follows: (i) the transferee is directly covered by the CBA applicable to the transferor[72]; (ii) the transferee is not directly covered by it; and (iii) neither the transferor nor the transferee are covered by a CBA, but the employment contract executed between the transferor and the workers established one of the following clauses: a) the employment relationship will be governed by a particular CBA (static clause); or b) the employment relationship will be governed by CBA negotiated and agree from time to time by the employers' association Y (dynamic clause).

In the first case, the application of the CBA to the transferee does not derive from the ToEUR, but from the collective bargaining system. In the second and third cases, the ToEUR must be applied.

Nonetheless, will the transferee be subject to the post-transfer amendments of the CBA – or to a new CBA – biding for the transferor? As for scenarios (ii) and (iii) (a), the ruling in the case WERHOF is to be followed: *a clause referring to a collective agreement cannot have a wider scope than the agreement to which it refers*; in fact, *the wording of the Directive does not in any way indicate that the Community legislature intended that the transferee be bound by collective agreements other than the one in force at the time of the transfer and, consequently, that the terms and conditions be subsequently amended through the application of a new collective agreement concluded after the transfer*. The CJEU held that this understanding is in line with the scope of the Directive – *to safeguard the rights and obligations of employees in force on the day of the transfer*[73] – and protects the position of the transferee, notably allowing him/her to do the necessary changes to run his/her business. Therefore, an

[71] The Portuguese MoU (available at http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf) established, inter alia, two main goals: (i) to define clear criteria to be followed for the extension of collective agreements and commit to them. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non- affiliated firms will have to be among these criteria. The representativeness of negotiating organisations will be assessed on the basis of both quantitative and qualitative indicators; and (ii) the desirability of shortening the survival ("sobrevigência") of contracts that are expired but not renewed.
Regarding the first, were approved the Council of Ministers Resolutions no. 90/2012, of 31 of October, and no. 43/2014, of 27 of June. The recent one intended to ease the issue of Extension Ordinances, which is a backward step in relation to the system implemented in 2012, but it is not definitely a return to the past.
As for the second issue, see Law no. 55/2014, of 25 of August, which also creates a legal instrument to suspend the application of CBA in case of business crisis.

[72] Which is an important case in the cleaning sector, because it grants the application of ToEUR to service provision changes in a labour-intensive sector.

[73] CJEU clearly stated that *the Directive was not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements* (CJEU 9.3.2006 (WERHOF) case no. C-499/04, § 29)

amendment introduced to the CBA binding for the transferor after the ToEU – or even a new CBA – cannot be applicable to the transferee[74]/[75].

As for case (iii) (b), see point 3.1.4 below.

2.2.1. Extension of the term of office of representatives of the workers

The second collective effect is the preservation of the status and function of the representatives of workers, when the economic unit preserves its autonomy after the transfer, and to the extent that the requirements necessary for the creation of the collective representation structure in question are observable (article 287 (1) of the PLC of 2009)[76]. Following the CJEU, an economic unit preserves its autonomy when the *powers granted to those in charge of that entity, within the organisational structures of the transferor, namely the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer, remain, within the organisational structures of the transferee, essentially unchanged. The mere change of those ultimately in charge cannot in itself be detrimental to the autonomy of the entity transferred, except where those who have become ultimately in charge have available to them powers which enable them to organise directly the activities of the employees of that entity and therefore to substitute their decision making within that entity for that of those immediately in charge of the employees*[77].

When the economic unit is integrated into the economic unit of the transferee, in which there is no representation of workers, the representatives shall remain in office for a two-month-

[74] CJEU 9.3.2006 (WERHOF) case no. C-499/04, §§ 28-31). According to the CJEU, a dynamic interpretation harms the fundamental right not to join an association, which is a part of the freedom of association (article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). In the other hand, a static interpretation fully safeguards such fundamental right considering the non-application of future changes of the CBA (CJEU 9.3.2006 (WERHOF) case no. C-499/04, §§ 32-36).
[75] For an opposite view, AMORIM MAGALHÃES, J. / PICHEL, P. (2013) p. 691-692.
[76] Article 6 (1) § 1 of the III Directive.
[77] CJEU 29.7.2010 (UGT-FSP) case no. C-151/09, § 56.

period after the ToEU or until the newly elected representation of workers take up their duties (article 287 (2) of the PLC of 2009)[78].

If the term of office expires as a result of the ToEU, the representatives of workers shall continue to enjoy the protection provided by article 410 (3) to (6) of the PCL of 2009 and by the CLRI until the date when their term of office would expire under normal circumstances (article 287 (4) of the PLC of 2009)[79].

3. Recent Rulings

3.1. Case Mark Alemo-Herron 18.7.2013 (C-426/11)

3.1.1. The dispute and the question

In 2002, public sector company A contracted with private sector company B its leisure services. In May 2004, company B sold the economic unit to company C, also from the private sector. In June 2004, the third party X reached a new CBA with retroactive effect as from April 1st, 2004 and to continue in force until March 31, 2007. Company C refused to grant the pay increase set in the new CBA.

One must bear in mind that the employment contract contained the following clause:

> *During your employment with* [company A]*, your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the* [third party X] (…)*, supplemented by agreements reached locally through* [company A]*'s negotiating committees*[80].

[78] Article 6 (1) § 2 of the III Directive. In case of cancellation of the elections, the former representatives will remain in office for an additional two-month-period.
[79] Article 6 (1) § 4 of the III Directive.
As for article 410 (3) of the PLC of 2009, the dismissal of a candidate or of a person who is or has been engaged as member of the social bodies of a trade union less than three years ago is presumed to be unlawful. Regarding article 410 (4) of the PLC of 2009, the protective order to suspend the dismissal is only denied when the Court concludes for a serious likelihood of a good reason to justify the dismissal. According to article 410 (5) of the PLC of 2009, the labour legal suit to appreciate the dismissal has urgent nature. Finally, article 410 (6) of the PLC of 2009 states that in case of an unlawful dismissal, the person is entitled to opt between the reinstatement in their position and a compensation from 30 up to 60 days of basic salary and seniority allowance per year of seniority, unless the CLRI establishes otherwise, with a minimum limit of 6 months.
[80] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, §§ 9-14.

Consequently, the question was whether article 3 of the III Directive must be interpreted as precluding the MSs from providing, in the event of a ToEU, *that dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee*[81].

3.1.2. Opinion of the Advocate General

According to the Advocate General, until the WERHOF ruling a dynamic approach was generally accepted: *contractual terms containing an explicit reference to future collective agreements reached by a particular collective bargaining body were, by virtue of the directive and its implementing legislation, binding on the transferee employer following the transfer of an undertaking*. In the main proceedings, the parties have even recognized that was a *common contractual practice followed mainly in the public sector*[82].

The Advocate General argued that the WERHOF case was different from the one under analysis[83]; besides, it did not make a general ruling to avoid dynamic clauses[84], Thus, the AG considered that in the context of a ToEU, *there is no obstacle to Member States allowing the transfer of dynamic clauses referring to future collective agreements on the basis of* the III Directive[85].

In the UK, where such question was raised and there was no after-effect limitation, the courts generally admitted that the ToEU could also include the transfer of a dynamic clause referring to a later CBA and, unlike other national legal systems, the UK *does not give collective agreements legal effect as a matter of law, since it is by virtue of an explicit or implicit*

[81] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 20.
[82] OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, §§ 6 and 34.
[83] *Mr Werhof was a German metal industry worker whose contract of employment at the time of the transfer contained a static clause referring to a collective agreement. In other words, Mr Werhof's contract of employment referred to pay conditions agreed in a specific collective agreement that was in force at the time of the transfer.* (…) *Furthermore. The Federal Republic of Germany had availed itself of the option given to Member States under the second subparagraph of Article 3(3) of Directive 2001/23 and had limited the period of validity of agreements applicable at the time of transfer to a maximum of one year* (OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 27).
[84] The case Werhof rejected only *an interpretation whereby the directive would require Member States to give dynamic protection even where the contract contains a static clause, and all the more so where the Member state concerned limits the effects of agreements existing at the time of the transfer to a period of one year* (OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 31).
[85] OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, §§ 19-20, 39.

reference to an agreement in a contract of employment that such agreements have legal effects[86].

Thus, for the Advocate General, *a dynamic clause referring to a future agreement is the result of a contract between the parties that can be amended at any time*, without detriment of the employer's freedom of association or to any other provision of UK law[87].

Besides, the expectations created by dynamic clauses for the workers *are markedly different from those generated by a static clause*. As a matter of fact, there are no expectations but rather certainties emerging from an agreement signed between the employer and the worker in accordance with the law in force[88].

Toward the question of whether the freedom to conduct a business (article 16 of the Charter) is at stake when the transferee is indefinitely bound by terms and conditions of employment, which he/she did not negotiate or agree with, answered the Advocate General that *European Union law, and in particular Article 16 of the Charter of Fundamental Rights of the European Union, does not preclude national legislation that requires the transferee of an undertaking to accept the existing and future terms and conditions agreed by a collective bargaining body, provided that the requirement is not unconditional and irreversible*[89].

3.1.3. Judgment of the CJEU

According to the CJEU, and following the WERHOF case, article 3 of the III Directive does not preclude the situation where the transferee, who is not a party of the CBA, *is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business*[90].

Moreover, the III Directive does not, according to its article 8, affect the right of the MSs to *apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social*

[86] OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 36. See also, SMITH, I. / BAKER, A. (2013) *Employment Law*, Oxford, 11th ed., p. 607, DEAKIN, S. / MORRIS, G. S. (2012) pp. 251, 907-911.
[87] OAG 19.2.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 37.
[88] *Ibid* § 38.
[89] *Ibid* § 58.
[90] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 22.

partners more favourable to employees, in particular the dynamic clauses that normally grant more favourable work conditions[91].

However, the ToEUR *does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations*[92].

The case pertains to a ToEU from a public to a private entity. Therefore, as held by the CJEU, *the continuation of the transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors*. Particularly, some private sector conditions were not compatible with dynamic clauses contained in a CBA applicable to the public sector. That type of clause *is liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other*[93].

Additionally, the provisions must be interpreted in the light of the general scheme and purpose of the Directive and respecting the fundamental rights and observing the principles recognized in particular by the Charter, notably in this case the freedom to conduct a business (article 16), which includes the freedom of contract. Hence, the transferee must take part of the bargaining system in order to expose and defend its interests[94].

Considering that in the main proceedings the transferee was unable to participate in the collective bargaining process, its contractual freedom was *seriously reduced to the point that such a limitation* [was] *liable to adversely affect the very essence of its freedom to conduct a business*[95].

[91] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, §§ 23-24.
[92] *Ibid* § 25.
[93] *Ibid* §§ 26-29.
[94] *Ibid* §§ 30-33.
[95] *Ibid* §§ 34-35.

As *per* the CJEU, a combined interpretation of articles 3 and 8 of the III Directive cannot allow the MSs *to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business*[96].

In sum, article 3 of the III Directive precludes the MSs from providing, in the event of a ToEU, *that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer*[97].

3.1.4. Comments

Confronted with a Directive that aims to safeguard the workers' rights in the event of a ToEU, the CJEU tried to reach a new balance between both sides of the fence, *in a manner consistent with the fundamental rights as set out by the Charter of Fundamental Rights of the European Union*[98]. In this case, article 16 of the Charter (freedom to conduct a business, which covers the freedom of contract) was most prominent in the court's reasoning[99].

This ruling reminds me of the "LAVAL QUARTET"[100], regarding the conflicts between the economic freedoms of employers and the social rights of workers:

a) LAVAL case (temporary posting of workers; construction sector; freedom to provide services): the right to take collective actions to force an employer established in other MS to enter into negotiations with the trade union is liable to make it less attractive, or more difficult, for said company to carry out its activity in the hosting MS; thus, it constitutes a restriction on the freedom to provide services (article 56 of the TFEU); *a fortiori*, when the company may be forced to bargain the minimum wages with local trade unions for unspecified duration with *lack of provisions, of any kind, which are*

[96] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, § 36.
[97] *Ibid* § 37.
[98] *Ibid* § 30.
[99] *Ibid* §§ 31-32.
[100] MALMBERG, J. (2010) "The impact of the CJEU judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action", Directorate General For Internal Plicies, p. 3, available at http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf.

sufficiently precise and accessible they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay. Consequently, the restriction to the freedom to provide a service based on the right to take collective actions was not deemed as justified[101].

b) VIKING case (reflagging a vessel; freedom of establishment): the right to take collective actions – in particular, the right to strike – in order to force the employer to enter into a CBA, *the terms of which are liable to deter it from exercising freedom of establishment* (article 49 of the TFEU), *is not excluded from the scope of that article*[102]. The restriction is allowed, provided that it respects the Gebhard-formula[103]: it must (i) be applied in a non-discriminatory manner; (ii) be justified by imperative requirements in the general interest (v.g. protection of workers); (iii) be suitable for securing the attainment of the objective that they pursue; and must (iv) not go beyond what is necessary in order to attain it[104/105].

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[101] CJEU 18.12.2007 (LAVAL) case no. C-341/05, §§ 99-100 and 110.
The Swedish Labour Court *considered it to be established that there is a general legal principle within EU law that damages may be awarded between private parties upon a violation of a Treaty provision. One prerequisite for such horizontal liability is, according to the Labour Court, that the specific of EU rule that has been violated, has horizontal direct effect. Further, the breach of that rule must be sufficiently serious and there must be a direct causal link between the breach and the loss or damage sustained by the individuals. Since Laval had not proved that it had suffered economic harm to the amount claimed, the economic damages were denied. Laval was awarded punitive damages of around 50 000 Euro. Three out of seven judges were of a dissenting opinion* (MALMBERG, J. (2010) p.10). The trade unions applied to the Supreme Court without any success. A complaint was filed to the European Committee of Social Rights (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, complaint no. 85/2012, p. 19, available at http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC85CaseDoc1_en.pdf). The Committee concluded, by a vast majority, that there was a violation of articles 6 (2) and (4) of the European Social Charter: *With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:* (…) 2. *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;* (…) 4. *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into* (decision available at http://hudoc.esc.coe.int).
According to VELDMAN, [t]*he restraints on autonomous collective bargaining and collective action are aggravated by the fact that trade unions may be faced with claims for damages by the employer if it were to transpire that their action was unjustified under European law* (VELDMAN, A. (2013) "The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR", Utrecht Law Review, Vol. 9, Issue 1, January, p. 110, available at http://www.utrechtlawreview.org).
Regarding BARNARD, the focus of the CJEU on the market access model *has provided litigants with the tools to challenge many key pillars of national labour law* (BARNARD, C. (2011) p. 125).
[102] CJEU 11.12.2007 (VIKING) case no. C-438/05, §§ 47 and 55.
[103] CJEU 30.11.1995 (REINHARD GEBHARD) case no. C-55/94, §§ 37.
[104] CJEU 11.12.2007 (VIKING) case no. C-438/05, § 75.
[105] As *per* the CJEU, *it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree* (CJEU 11.12.2007 (VIKING) case no. C-438/05, § 52). It is not easy to figure out how a collective action could be harmless to the employer. In the other hand, a collective action with a light effect is nothing more than just

c) RÜFFERT case (temporary posting of workers; construction sector; freedom to provide services): *by requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the 'Buildings and public works' collective agreement* [without general effect]*, a law* (…) *may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction* on freedom to provide services (article 56 of the TFEU). In this case, the restriction is not deemed justified by the protection of workers because there is no *evidence to support the conclusion that the protection resulting from such a rate of pay* (…) *is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract*[106]; and

d) COMMISSION VS LUXEMBOURG case (temporary posting of workers; construction sector; freedom to provide services): the public policy exception *is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States*. Regarding this, either the legal provisions concerning the drawing up and implementation of a CB or the provisions established in a CBA do not fall under the definition of such concept[107].

Five main assertions may be drawn from this group of cases: (i) collective actions may be a restriction to economic freedoms, which needs to be justified according to the Gebhard-formula[108/109]; (ii) collective action is a fundamental right with different degrees of protection

poetry. Regarding VELDMAN's words, *without 'equality of arms' for both sides of industry the system of voluntary collective bargaining would simply not work* (VELDMAN, A. (2013) p. 108).
Furthermore, the collective action *has the effect of making less attractive, or even pointless,* [the exercise of the] *right to freedom of establishment, inasmuch as such action prevents* [the Company and its subsidiary] *from enjoying the same treatment in the host Member State as other economic operators established in that State* (CJEU 11.12.2007 (VIKING) case no. C-438/05, § 72).
Regarding DE VRIES, the ECJ left little room for the trade unions to justify their actions (DE VRIES, S. A. (2013) "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice", Utrecht Law Review, Vol. 9, Issue 1, January, p. 182, available at http://www.utrechtlawreview.org).
[106] CJEU 3.4.2008 (RÜFFERT) case no. C-346/06, § 37-40.
[107] CJEU 19.6.2008 (COMMISSION VS LUXEMBOURG) case no. C-319/06, §§ 30, 65-66.
[108] CJEU 30.11.1995 (REINHARD GEBHARD) case no. C-55/94, §§ 37. According to this, trade unions are obliged to consider other less restrictive means before initiating a strike (DE VRIES, S. A. (2013) p. 182).
[109] According to an interesting perspective from DE VRIES: *Where in Strasbourg* [ECtHR] *the proponents of economic rights might have to justify a restriction on human rights, in Luxembourg* [CJEU] *the fundamental,*

depending on the economic freedom affected (narrower scope for the right of collective action within the freedom to provide services than within the freedom of establishment) and on the kind of collective action concerned (less amplitude for secondary collective actions than for primary collective actions); (iii) the Posting of Workers Directive works as a maximum free movement services directive[110]; and (iv) the *free movement provisions have horizontal direct effect*, remarkably against trade unions[111].

After the LAVAL QUARTET, the Lisbon Treaty, which came into force on 1.12.2009, vested the Charter of Fundamental Rights of the European Union with the same legal value as the Treaties (article 6 (1) §1 of the TEU). More, it declared that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 6 (2) of the TEU) and that the [f]*undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law* (article 6 (3) of the TEU). Thus, a new hope for an innovative balance between social rights and economic freedoms was (re)born[112].

One should keep in mind that finding a balance between fundamental rights in order to make both parties happier could be compared to trying to burn a candle simultaneously at both ends without getting one's fingers burnt and avoiding destroying the candle. The principle of proportionality (article 52 (1) of the Charter) may help in the task, but it will always be necessary to look at the circumstances of the case.

The LAVAL QUARTET – chiefly VIKING and LAVAL cases – was discussed (and criticised) thoroughly. As *per* MONTI REPORT, the LAVAL QUARTET *revived an old split that had never*

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human rights proponents will have to justify their actions and establish that the restriction on free movement is justified on the basis of protecting fundamental rights (DE VRIES, S. A. (2013) p. 187). With similar view see VELDMAN, A. (2013) p. 104.
Besides, the approach turns the fundamental right in a last resort, *which may in fact undermine the fundamentality of this social right* (DE VRIES, S. A. (2013) p. 189). With similar perspective see VELDMAN, A. (2013) pp. 109 and 113-114.

[110] MALMBERG, J. (2010) pp. 6-7.

[111] DE VRIES, S. A. (2013) p. 182 and VELDMAN, A. (2013) p. 108.

[112] MALMBERG, J. (2010) p. 12.
These three developments suggest that time has come for a break with the pure market orientation of the past and an attempt to achieve a more genuine balance between the economic and the social (BARNARD, C. (2011) "The European Court of Justice as a common law court, Viking and Laval in the United Kingdom", NZA Beilage, no. 3, November, p. 124)
[T]*he position of fundamental rights in EU law has been given a new impetus by the inclusion of Article 6 TEU* (DE VRIES, S. A. (2013) pp. 184 and 188).

been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level[113]. *Inter alia*, this Report proposed *a targeted intervention to better coordinate the interaction between social rights and economic freedoms within the EU system. The issue is to guarantee adequate space of action for trade unions and workers to defend their interests and protect their rights in industrial actions without feeling unduly constrained by single market rules*[114]. A couple years later, the European Commission delivered a Proposal for Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (MONTI REPORT II), in which it was proposed (i) a new balance between the economic freedoms and the fundamental right to take collective actions, putting both in the same level of importance (article 2); (ii) dispute resolution mechanisms to solve labour disputes (article 3); and (iii) an alert mechanism for exceptional cases (article 4)[115]. The European Commission withdrew this proposal after several claims of breach of the subsidiarity principle[116].

This issue is particularly sensitive and the perfect balance is utopic. As stated by CATHERINE BARNARD, *with balancing comes winners and losers. But for all the critics of the Court's*

[113] MONTI, M. (2010), "A New Strategy for the Single Market, At the Service of Europe's Economy and Society", p. 68 available at http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

[114] Two proposals: (i) a provision to guarantee the right to strike modelled on art. 2 of Council Regulation (EC) no. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (*This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States*); and (ii) a mechanism for mutual information and informal solutions of labour disputes regarding the cross-border posting of workers.
In the Directive on Services in the Internal Market (Directive 2006/123/EC of 12 December 2006) similar provisions to the first proposal were introduced: (i) *This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States* (article 1 (6)); and (ii) *This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law* (article 1 (7)). According to recital 14, [t]*his Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Member States' social security legislation* (MONTI, M. (2010) pp. 71-72).

[115] COM (2012) 130 final.

[116] COM (2013) 566 final, pp. 6-8.

decision there are a large number who also thought the Court got the balance about right. The decision in Laval (…) *did not involve a total disregard of rights; rights were discussed, the EU Charter and other human rights documents were cited, and a balance was stuck*[117].

The same occurred in MARK ALEMO-HERRON case: a strong concern on a fair balance of rights and interests is still present.

It could be argued that the CJEU cited the Charter only to reinforce the economic side of the "world of labour", forgetting other fundamental rights and principles, such as the right of collective bargaining and action (article 28), the principles of "pacta sunt servanda"[118] or of good faith[119]; or even putting aside that the realisation of an internal market and the liberalization of trade are tools to increase welfare and promote sustainable development (article 3 (1) and (3) of the TEU)[120].

In the event of a ToEU there are three leading actors (transferor, transferee, and the worker affected) and several supporting actors (workers' representatives, trade unions and employers' associations, and the remaining workers of the transferor and the transferee). A fair balance is chiefly concerned with the main actors but needs to consider the entire legal framework. A similar effort was made when trying to define a right to oppose the change of the employers' legal position (see above, 1.3.3). Now, it could be said that this judgement will definitely jeopardize the worker's right of opposition. On the contrary, it appears to me that the freedom of contract was raised as a fundamental right – or, at least, as a relevant interest to be protected – within the scope of the freedom to conduct a business; coherently, the CJUE is no longer able to deny it to individuals. The employer, natural person or a firm, is entitled to the freedom of contract, but is not the worker as well? Could freedom of contract be more strongly restricted in the case of a worker than of an employer? The answer should be in the negative[121]. Even though the ToEUR functions primarily as a distortion to the freedom of contract – i.e., to the power to freely bargain and mutually define the terms and conditions of

[117] BARNARD, C. (2014) "European Developments", Industrial Law Journal, Vol. 43, no. 2, July, p. 209.
[118] CJEU 16.6.1998 (RACKE) cases no. C-162/96, §8 of the summary.
[119] CJEU 15.7.1960 (EVA VON LACHMÜLLER) cases no. 43/59, 45/59 and 48/59, §6 of the summary.
[120] DE VRIES, S. A. (2013) p. 177.
[121] Among others, this critic could be addressed: in several countries the worker is not free to decide the terms and conditions of his/her employment contract. In fact, the worker belongs to the "weaker part family" (e.g. worker and consumer) and thus the legislation normally establishes several mandatory rules as minimum standards. However this kind of limitations is applicable to both sides (employer and worker) and sometimes the employer could be subject to administrative fines in case of breach those mandatory rules, but not the worker.

an agreement – in order to protect the worker, through the maintenance of his/her employment contract with the transferee of an economic unit, it can work to protect the workers' freedom of contract through the right to oppose the change of employer[122].

As regards the CJEU ruling about the banishment of dynamic clauses when the transferee is not able to participate or to influence the bargaining of a CBA, was a fair balance reached? For the Court, the provisions of the Directive are to be read in accordance with its scheme and goals (teleological and systematic interpretation), but also respecting those fundamental rights and principals established, inter alia, in the Charter (interpretation in line with an "European Bill of Rights").

The transferee steps into the shoes – the position of employer – of the transferor. A first approach determines that the reference to new collective bargaining rules will also be applicable to the transferee as if the ToEU never happened, since the III Directive aims to maintain the employment contract untouched. According to this, the contractual freedom of the transferee shall be restricted to maximize a lifetime protection of workers[123]. A second approach considers – besides the contractual freedom – that the right of collective bargaining of the employer (article 28 of the Charter) also includes the right not to conclude a CBA and, therefore, to not be covered by it. According to this view, the contractual freedom and the right of collective bargaining of the worker shall be severely restricted to maximize the benefits of the transferee.

I believe that the CJEU found a spot in the middle of the bridge: the transferee is obliged to respect the terms and conditions of a CBA in force at the time of a ToEU, but not to assume the risk of work conditions negotiated and agreed after the ToEU. Firstly, the worker cannot be placed in a worse position. Secondly, the transferee will have more predictability in assessing the value of the economic unit considering that the reduction of uncertainties promotes the investment, the innovation and the development of businesses and consequently

[122] Ironically, sometimes the civil law schemes could protect the worker more than the labour law does.
The obligation to motivate the exercise of the worker's right to oppose respects the goal of the balance of interests.

[123] Even if the transferee could revoke, by mutual agreement, the dynamic rule, the contractual freedom is not preserved. Normally the individuals do not negotiate only to lose. If the dynamic clause gives better conditions to workers, they will not renounce to them without a fair compensation. It could be argued that during the execution the employment contract the worker will sign every agreement proposed by the employer fearing to lose their job. Thus, the bargain for a fair compensation will not be an obstacle for the transferee. In such case, the labour authorities and the trade unions shall assume their responsibilities in order to enforce the protection of the worker.

will tend to boost the creation of sustainable employment[124]. Lastly, the change of work conditions – e.g. working time and salaries – will not depend on the (good) will of third-parties lacking heteronomous decision-making power (or public authority), allowing the transferee to take part and to look after its interests and those of other workers not covered by the CBA.

This ruling is also relevant for privatization processes[125]. Indeed, the Court held that the transferee of an economic unit from the public sector must have the ability to introduce the necessary adjustments and changes in the work conditions in order to reduce the differences between the public and private sectors. Thus, a dynamic clause to a CBA applicable to the public sector *is liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other*[126].

3.2. Case Österreichischer Gewerkschaftsbund 11.9.2014 (C-328/13)

3.2.1. The dispute and the question

In a group of companies there were two CBAs: the parent company's CBA and the subsidiary's CBA. On 30 April 2012, *in order to make good operating losses, the parent company decided to transfer, with effect from 1 July 2012, its aviation activity to that subsidiary, by a transfer of business, so that the employees carrying out that activity would be subject to the conditions laid down in the subsidiary's collective agreement, which were less advantageous than those of the parent company's collective agreement. In that context, the Wirtschaftskammer* [Austrian Chamber of Commerce — sectorial federation of bus, air and boat transport] *rescinded that agreement with effect from 30 June 2012, the Gewerkschaftsbund* [Austrian Confederation of Trade Unions] *then rescinding the subsidiary's collective agreement with effect from the same date. Following those rescissions, the new employer of the employees concerned by the transfer of business, namely the subsidiary, applied internal rules adopted unilaterally, which gave rise to a consequent*

[124] Among others, a critic can be relevant: the genetic of labour law is to protect the worker, not the employer and its business. Nowadays, even with an astonishing technological development, the large majority of companies will not survive without the human activity, notably the subordinated one. Besides, a sustainable work environment is highly dependent on financially viable projects. Thereby, protecting the interests of the employer is also a way to defend "an employment with rights".
[125] It seams that the III Directive not only admits the adjustments in case of privatization, but also imposes it to guarantee the fair balance (AMORIM MAGALHÃES, J. / PICHEL, P. (2013) p. 702).
[126] CJEU 18.7.2013 (MARK ALEMO-HERRON) case no. C-426/11, §§ 26-29.

deterioration in the conditions of employment and a significant reduction in the remuneration of the employees concerned by the transfer of business[127].

Consequently, the question was whether article 3(3) of the III Directive *must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before they were terminated, constitute 'terms and conditions agreed in any collective agreement' so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned*[128].

3.2.2. Opinion of the Advocate General

According to the Advocate General, the III Directive requires MSs *to maintain the effects of a collective agreement even where those effects are the result of a national provision which extends them until the conclusion of a new collective agreement, or until the conclusion of bilateral agreements between the parties* (…). [T]*his outcome is the most consistent with the objective of the directive, which is to strike a balance between the undertaking's interests and the employees' interests during a transfer of undertakings, a situation in which employees are placed in a vulnerable position which the directive seeks to rectify*[129].

The Advocate General argued that the European regime is to guarantee a common legal framework – *minimum rules* – to regulate the effects – and not the employment contract formation – of the employment relationship in the event of a ToEU. Strictly speaking, [t]*he decisive fact is the existence of a right or an obligation, but not the formal origin of that right or obligation*. Indeed, Article 3 (3) of the III Directive states that the transferee will continue to *observe the terms and conditions agreed in any collective agreement*. Consequently, the *existence or otherwise of a collective agreement must be established on the basis of the rules of national law*[130].

[127] CJEU 11.9.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 10.
According to the order for reference, employees who joined the undertaking before 1 April 2004 had their salaries reduced by between 40% and 54%, although Wirtschaftskammer disputes those figures (OAG 3.6.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 11).
[128] CJEU 11.9.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 21.
[129] OAG 3.6.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 33.
[130] *Ibid* §§ 37, 39, 40, 41, 43.

In light of this, what *the Court is required to determine is whether 'the terms and conditions agreed in any collective agreement'* (…) *include the terms and conditions arising from a collective agreement with continuing effect*. As mentioned by the Advocate General, *as far as Austria is concerned, a collective agreement with continuing effect is a weaker and temporary extension of the effects of a pre-existing agreement*. *It is weaker in so far as its provisions may be waived individually by agreement between the parties. It is temporary because it ceases to apply when a new collective agreement is concluded.* Nonetheless, the outstanding point for Austria and other MSs with similar regimes is that the CBA has a continuous effect – yet interim and fragile – in the cases specifically provided for in the law – and not by virtue of an individual agreement between the parties – with the aim to *maintaining legal certainty in the employment relationship*. As *per* the Advocate General, the legal status of worker shall remain the same after the ToEU, regardless of its source: (i) employment contract; (ii) CBA; or (iii) the mere extension of pre-existing terms and conditions agreed in a CBA[131].

Besides, in accordance with the WERHOF case, [t]*he existence of an express statutory provision, which is in force when the contract is concluded and stipulates that the rights and obligations established in the collective agreement are to continue to be observed in a weaker, temporary form in the interests of legal certainty, is far from being a 'mere expectation' or a 'hypothetical advantage flowing from future changes to collective agreements'*. Furthermore, [i]*n those circumstances, the parties to an employment relationship do not include in their assets a mere expectation but rather a real and genuine advantage: the certainty that, unless there is a new collective agreement or express agreement, the collective agreement will continue to take effect, albeit in the form indicated*[132].

More, the final sentence of the article 3 (3) – *until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement* – does not impair the interpretation proposed by the Advocate General: *in situations where national law has provided expressly, prior to the termination or expiry of a collective agreement, for the continuation of that agreement, Article 3(3) must be interpreted in such way that it secures a balance in the contractual relationship, not only with regard to the*

[131] OAG 3.6.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, §§ 44, 45. 46, 49.
[132] *Ibid* §§ 50, 51.

subject-matter of both parties' obligations but also with regard to their period of validity. (…) *It is precisely in the interests of that balance that the national provision at issue has sought to prevent the rupture of the legal framework provided for in a collective agreement governing the employment relationship*[133].

Finally, the III Directive allows the MSs to limit the after-effect in case of a ToEU, *provided that that period is not less than one year*. *In those circumstances, it is reasonable for a collective agreement with continuing effect to secure the continued observance of the pre-existing terms and conditions, on the weaker, temporary terms set out above. The practice of each Member State where the concept of continuing effect exists will determine, in the light of experience in employment relationships, whether the continuing effect of a collective agreement should be limited in time. That is a matter which, naturally, falls to each Member State to decide*[134].

In sum, this was the suggested understanding of the Advocate General regarding article 3 (3) of the III Directive: *the terms and conditions agreed in a collective agreement also include the terms and conditions which continue to be observed over a period of time as a result of a provision of national law preceding the termination of the collective agreement, pursuant to which the continuing effect of that collective agreement is ensured, in a weaker, temporary form, after it has been terminated*[135].

3.2.3. Judgment of the CJEU

The CJEU followed previous case law according to which the III Directive seeks only a *partial harmonization* (…) *by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred*[136].

Following the opinion of the Advocate General, the CJEU held that the III Directive intends to maintain the terms and conditions of a CBA – and not the CBA itself –, *without the specific origin of their application being decisive*. Then *it is sufficient that such terms and conditions*

[133] OAG 3.6.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, §§ 52, 53.
[134] *Ibid* § 54.
[135] *Ibid* § 55.
[136] CJEU 11.9.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 22. See also, CJEU 14.9.2000 (COLLINO) case no. C-343/98, § 37, and CJEU 27.11.2008 (MIRJA JUURI) case no. C-396/07, § 23.

have been put in place by a collective agreement and effectively bind the transferor and the employees transferred[137]. This solution prevents the *workers from being placed in a less favourable position solely as a result of the transfer*[138].

Moreover, *the rule maintaining the effects of a collective agreement* (…) *is intended, in the interests of the employees, to avoid a sudden rupture of the standard framework of the agreement governing the employment relationship. If the terms and conditions subject to that rule were excluded from the scope of Article 3(3) of Directive 2001/23, the transfer alone would have the effect which that rule seeks to avoid*[139]. For the CJEU, such view is in accordance with the aim of the III Directive: *to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other and from which it is clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations*[140]. The after-effect rule has a limited and temporary scope of application, *since it maintains only the legal effects of a collective agreement on the employment relationships directly subject to it before its rescission or a new individual agreement is concluded with the employees concerned. In those circumstances, it does not appear that such a rule hinders the transferee's ability to make the adjustments and changes necessary to carry on its operations*[141].

In sum, article 3(3) of the III Directive *must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute 'terms and conditions agreed in any collective agreement' so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned*[142].

3.2.4. Comments

[137] CJEU 11.9.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, §§ 23-25.
[138] *Ibid* § 27 and CJEU 6.9.2011 (IVANA SCATTOLON) case no. C-108/10, §§73-77.
[139] CJEU 11.9.2014 (ÖSTERREICHISCHER GEWERKSCHAFTSBUND) case no. C-328/13, § 28.
[140] *Ibid* § 29.
[141] *Ibid* § 30.
[142] *Ibid,* § 31.

Apparently, the CJEU took a step back in comparison with WERHOF and MARK ALEMO-HERRON cases. Indeed, in the past, the Court had held that the transferee is only obliged to the terms and conditions in force at the date of the ToEU; now, it decided to include within the scope of article 3 (3) of the III Directive the continuing effects of an expired CBA ("Nachwirkungen des Kollektivvertrags" or "sobrevigência da convenção coletiva de trabalho").

There is probably another suitable approach. Regarding the main proceedings, the main goal of the ToEU was, manifestly, to make good operational losses of the economic unit, which was transferred to a transferee that was bound by a "friendlier" CBA. Certainly, this could not be a relevant interest to be accommodated within the scope of the III Directive, because it constitutes a clear subversion of the immanent values of the ToEUR: to prevent workers subject to a ToEU from being placed in a less favourable position solely as a result of such transfer. In other words, the ToEU could not produce an automatic decrease of the level of protection of workers. Even in the absence of a continued effect of the CBA provided under the applicable law, I believe that no other solution could be given to similar disputes to the main proceedings. Actually, article 54 of the Charter grants the prohibition of the abuse of rights: [n]*othing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein*. Thus, the freedom to conduct a business, the contractual freedom or the right of collective bargaining, could not lead to bypass a CBA, even within a statutory period of continuing effect. Regarding this judgment, the objective of reducing costs or to improve the profit margins is not a relevant protected interest within the scope of the III Directive.

Another aspect worth commenting is that the CJEU seems to admit the replacement of the applicable CBA through an individual agreement signed with the workers after the ToEU. Literally, this means a direct substitution of collective terms and conditions directly or indirectly in force at the time of the ToEU by individual agreements. In order not to undermine the ToEUR, this possibility needs to be understood in accordance to the scheme and goals of the III Directive (teleological and systematic interpretation), but also respecting fundamental rights and principals established, inter alia, in the Charter (interpretation in line with an "European Bill of Rights"), and at every moment considering the national collective bargaining systems.

In Portugal, it is assumed that the after-effect of a CBA may be overcome, within the 12-month-period after the ToEU, by:

a) The application of another CBA negotiated and executed by:
   (i) The transferee with a representative trade union, after the ToEU;
   (ii) An employers' association in which the transferee become affiliated after the ToEU;
   (iii) An employers' association after the ToEU in the case that the transferee was already affiliated; and
   (iv) Other collective actors with bargaining power which scope was extended by an extension ordinance.

b) Individual agreements with the transferred workers provided that they grant more favourable conditions to these workers in the particular case (e.g., an agreement to apply the current CBA applicable to the transferor). In such case, the impacted workers will have, at least, the same level of protection.

After the expiration of the 12-month-period after the ToEU, the situation will fall out of the scope of the III Directive and will be ruled under the Portuguese system of sources of labour law.

4. Seven conclusions

§1.º The application of the ToEUR depends on the verification of the following positive conditions: a) existence of an economic unit; b) effective link of the worker with the economic unit; c) validity of the employment contract at the time of the transfer of the economic unit; d) change of owner or operator of the economic unit; and e) assumption of the operation by the transferee; and

§2.º Also on the non-verification of the following negative conditions: a) lawful termination of the employment contract; b) change of workplace lawfully decided by the transferor up until the moment of the transfer; c) exercise of the right of the worker to oppose the transfer of the legal position of employer.

§3.º The ToEUR produces individual and collective effects, but with different methods: transmission of the employment contract and statutory extension, respectively.

§4.º The individual effects are: (i) transfer of the legal position of employer; (ii) protection against dismissal; and (iii) information duties. The collective effects are: (i) after-effect of a CLRI; (ii) extension of the term of office of the representatives of the workers.

§5.º The III Directive seeks only a partial harmonization. Therefore, the regime shall be subject to an integrated interpretation – seeking a fair balance – considering the following steps: (i) the system and goals of the Directive (teleological and systematic interpretation); (ii) the fundamental rights and principals established, inter alia, in the Charter (interpretation in line with an "European Bill of Rights"), notably the freedom to conduct a business, the contractual freedom and the right to collective actions; and (iii) the national collective bargaining system, provided that it does not conflict with the other two.

§6.º As a rule, the transferee is only covered by the terms and condition established, directly or indirectly, in a CBA at the time of a ToEU, unless he/she is, in theory, able to influence the collective bargaining and the agreement of new terms and conditions.

§7.º The reality challenges the Law every day and every second, in different latitudes and longitudes. Therefore, finding a fair balance between fundamental rights is a permanent "work-in-progress", without forgetting the circumstances of each particular case. The floor now is for the leading actors.