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(IM)PERMISSIBILITY OF AMENDING THE EMPLOYMENT CONTRACT IN THE CIRCUMSTANCES OF A CHANGE OF EMPLOYER

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Abstract. *The employer and the employee voluntarily enter into an employment contract, mutually agreeing on its content and essential elements, and accordingly undertaking to perform it in its entirety as it reads. However, in case of circumstances that make the obligations of one contracting party difficult to fulfill, or in case the employment contract no longer meets the expectations of the contracting parties, labour legislation recognizes the possibility of amending the employment contract. The institute of amending the employment contract contributes to establishing a balance between the originally concluded employment contract and the circumstances that occurred after its conclusion. The difficulty of establishing a fair balance of the above interests is further complicated if the request to amend the employment contract is made in the circumstances of a change of employer. Then, the question arises whether it is permissible to amend the employment contract at all if the reason for amending the change in the legal identity of the employer, and if so, whether there are certain conditions for its validity and which aspects of the employment relationship could be subject to change. In this paper, the author addresses these and other related questions by analyzing legal solutions, judicial practice and the doctrine.*

Key words: *amending the employment contract, change of employer, transfer of undertakings*

1. INTRODUCTION

Due to a change in the legal identity of the employer, employees may encounter problems concerning a different organization of labour, operations and working conditions. Although one of the basic contract law rules is that any contract may be changed by mutual agreement of the contracting parties, most comparative labour legislations that comprise the institute of change of employer limit this seemingly widespread rule. It may be explained by the fact that most of these labour laws are based on the same legal ground: the Council

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Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or business, or parts of undertakings or businesses[1] (hereinafter: Directive 2001/23/EC) which recognizes the principle of preserving the acquired rights; in the event of a change of employer, it implies the right of employees to preserve not only the employment relationship but also the working conditions agreed when concluding the contract with the transferor (prior employer). Therefore, after amending the original employment contract, the transferee (subsequent employer) should guarantee the exercise of the employees' acquired rights and ensure the employees' protect against dismissal for reasons related to the change of employer. This primarily means that "all rights, powers, obligations and responsibilities under or in connection with contracts are transferred to the transferee" (Elias, Bowers, 1996: 43), which entails the entire legal position (contractual status) of the transferor, including the rights and obligations that he has towards employees on the basis of an individual employment contract, or another contract or legal act (e.g. decision) on employment, as well as the rights and obligations arising from a collective agreement or unilateral general legal acts adopted by transferor (e.g. labour rulebook), and the rights and obligations that employees are entitled to in connection with the employment contract or the employment relationship under the law (in the field of labour law protection and social insurance) (Dragićević, 2022: 386). In addition, the change of employer *per se* may not be a reason for the termination of the employment contract by the transferee, nor may it be a reason for changing the stipulated working conditions at the detriment of the employee. However, the question arises whether the legislator prohibits any change to the employment contract if the reason for amending the contract is the change of the employer's legal identity, or whether some additional conditions need to be met to ensure its validity. In terms of validity, there is the question how long such a ban would be valid, and whether it applies to all or only some aspects of the employment relationship. Bearing in mind the conflicting interests of the subjects of the employment relationship in this legal situation, the comprehensive regulation of these important issues is not an easy task.

2. Positions on Amending the Employment Contract

A contractual relationship is a legal bond of a personal nature because it exists between certain persons: the debtor and the creditor (Radišić, 2008: 374). These persons voluntarily (of their own free will) create a legal norm that binds them to certain mutual conduct. This norm is the result of their mutual consent and it has the force of law for the parties (Radišić, 2008: 73). The stability of contract law is very important because, if the contract content or the contracting parties could be changed freely, neither the contracting parties themselves nor any third party would be able to predict their (future) rights and obligations (Gao, 2015: 227). Thus, laws provide protection to contractual parties by prescribing liability for non-performance or delayed performance of contractual obligations. However, after the conclusion of the contract, the (business) needs of the contracting parties may change, as well as the circumstances under which the contract was concluded. It may significantly aggravate the performance of the obligation of one of the contracting parties, or undermine the purpose

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or business or parts of undertakings or businesses, *Official Journal* L 82, 22.03.2001, 16-20.

of the contract. If the circumstances change to such an extent that it is obvious that the contract no longer meets the expectations of the contracting parties, or if there is a general opinion that it would be unfair to keep it in force as it is, the obligation law rules allow the party who finds it difficult to perform the contractual obligation, or the party who cannot achieve the purpose of the contract due to changed circumstances, to seek termination of the contract (rescission). On the other hand, instead of termination/rescission, the other contracting party may offer or agree to the modification of the contract content to new circumstances, or to have respective contract conditions equitably amended.[2]

The aforementioned rules of obligation law are also applied in the field of labour law. Namely, as the bearer of management authority, the employer organizes tasks within his sphere of activity in the way he/she considers most effective for achieving the best economic results (Kovačević, 2022:45). It implies making numerous decisions, many of which concern the issues that cannot be known or predicted in advance. Hence, the employer has the legally recognized authority to manage the work of employees by issuing orders and instructions that should ensure the best possible organization of labour, as well as the use of the employees' abilities in the best interest of the working environment (Kovačević, 2016: 440). The specification of work operations and detailed designation of the scope of employees' tasks is not always possible in advance, but the employee's duty is to keep performing the tasks that are in accordance with his/her working capacity (Kovačević, 2022: 46). Thus, given the fact that the performance of these contracts extends over time, employment contracts are classified in the group of contracts involving permanent performance of obligations. For this reason, these contracts may be affected by various circumstances of an objective nature, which may aggravate the performance of the contract to such an extent that the contract no longer corresponds to the interests of the contracting parties (Živković, 2005: 10) due to "the fundamental alteration of the contract equilibrium " or "excessively onerous" performance of the obligations (Perović, 2012: 193). Therefore, the obligation law rules which are applied in the field of labour law allow for amending the contract due to changed circumstances, which entails the necessary adjustment of these rules to the special nature of the employment contract (Kovačević, 2015: 825). In that regard, it may be stated that the institute of amending the employment contract contributes to establishing a balance between the contract and the circumstances that occurred after its conclusion, which may be economic, organizational, technological or other in nature (Kovačević, 2016: 440-441).

3. On the (Im)Permissibility of Amending the Employment Contract in the Circumstances of a Change Of Employer

The first segment of the protection of employees' rights in the event of a change of employer is the rule on *ex lege* transfer of rights and obligations arising from the employment relationship contracted with the transferor (prior employer) to the transferee (subsequent employer); thus, in the case of a transfer, "the employee rights and obligations arising from his employment contract are *automatically* transferred" (Blanpain, 2010: 720). Pursuant to the provisions of Article 3 (1) of Directive 2001/23/EC, "the transferor's rights and obligations arising from a contract of employment or from an employment relationship

[2] Article 133 of the Obligations Act, *Official Gazette of the SFRY*, 29/78, 39/85, 45/89-Supreme Court decision, and 57/89, *Official Gazette of the FRY*, 31/93, *Official Gazette of SC*, 1/2003- Constitutional Charter, and *Official Gazette of RS*, 18/2020.

existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee". This rule on the continuity of the employment relationship is inspired by the idea of "universal legal succession" which has been known for centuries in civil and commercial law (Kalamatiev, Ristovski, 2019: 277). In contrast to singular succession, where the legal successor enters into one or more precisely determined rights of his legal predecessor, in universal succession, all rights that make up the property of one person are transferred from the legal predecessor to the legal successor (Kovačević Kuštrimović, Lazić, 2008: 203). This way of acquiring rights was later accepted in labour law, first in France and then in other European countries. Applied to the case of a change of employer, it means several things. *First*, the set of rights and obligations arising from the employment contract or employment relationship are transferred to the transferee as a whole (*en bloc*), not individually. As the whole (employment contract, or employment relationship) is transferred from the transferor to the transferee, the transfer of the whole implies the indirect transfer of individual rights and obligations that make up that whole (Dragićević, 2022: 354-355). *Second*, the transfer of rights and obligations rests on the statutory law. Therefore, it is not necessary to conclude "new" employment contracts because it is a matter of transferring previously concluded employment contracts, which is grounded in the statutory law (Kalamatiev, Ristovski, 2019: 277). *Third*, only one act of transfer (*uno actu*) is sufficient for the acquisition of rights and obligations as a whole, and it is not necessary to transfer each right and each obligation separately (e.g. to assign each claim separately). *Fourth*, the rights and obligations arising from the employment contract or employment relationship pass from the transferor to the transferee at a specific moment defined by the law itself. *Finally*, the rights and obligations pass from the transferor to the transferee at that given moment by force of law (*ipso iure*) (Dragićević, 2022: 355). Thus, "this type of succession does not depend on the will of the respective entities; it occurs automatically as a matter of law as soon as the prescribed conditions are met" (Kovačević, Kovács, 2019: 115). The transfer occurs without the need for any additional action by the transferor and the transferee: the succession occurs directly on the basis of the law (Cf. Radović, 2018: 119-120). Thus, it is indisputable that the introduction of rules on the automatic transfer of rights and obligations has contributed to the protection of the employee position in terms that any change in the employer's legal identity cannot affect either the employment relationship or the employee's position in it.

In addition to the *ex lege* transfer of employment contracts, one of the most important issues for both employees and employers is the issue of amending transferred employment contracts. Due to a change in the employer's legal identity, a new employer (transferee) may establish a different work organization, practices or less favorable working conditions than those that the employees enjoyed with their prior employer (transferor). Thus, the level of employees' protection would be significantly reduced if the transferee had the possibility to change the contracted working conditions. On the other hand, transferees tend to amend the employment contracts of transferred employees in order to harmonize them with the working conditions of their previously employed persons. For them, this is important in terms of administrative benefits, good industrial relations and, primarily cost savings (Barnard, 2012: 606), i.e. the achievement of economic goals. Given the conflicting interests of employees and employers, this issue is not easy to regulate in a principled way.

3.1. Labour legislation

The European Union labour law approaches the problem of protecting the rights of employees in case of a change of employer from the "static" and "dynamic" perspective. This is confirmed by the aforementioned Article 3 of Directive 2001/23/EC, which provides for the "static" protection of employees in terms of preserving the employment relationship as it exists on the day of the transfer of the undertaking, i.e. on the day of change of employer. On the other hand, the protection provided by Directive 2001/23/EC also has "dynamic" aspects in terms of the possibility of regulating working conditions after the transfer of the employment contract, in accordance with the provisions of the new collective agreement concluded with the transferee (Ales, 2019: 180). Namely, according to Article 3(3) of Directive 2001/23/EC, "following 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". In doing so, "Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year" (Article 3 (3) Directive 2001/23/EC). The obligation of the transferee to apply the collective agreement that was valid in the transferor's legal entity for at least a year is a guarantee of preserving the (prior) working conditions. Thus, the collective agreement concluded with the transferor becomes the legal ground for regulating labour relations between employees and the transferee, as a result of which is working conditions cannot deteriorate after a change of employer for the guaranteed period of one year at least (Kovačević, 2019: 239). Moreover, taking into account that the collective agreement concluded with the transferor produces indirect effects even after the deadline, some segments of this prohibition may last longer if more favorable working conditions and rights are incorporated into the original employment agreement (Blanpain, 2012: 400). However, according to the provisions of Directive 2001/23/EC, the transferee's obligation to respect the working conditions contained in the collective agreements of the transferor lasts only until the date of termination or expiry of the collective agreement, or the entry into force or application of the new collective agreement.

The first situation, which frees the transferee from the obligation to apply the collective agreement, is fairly simple. Given the fact that collective agreements in certain labour law systems are concluded for a certain period of time, upon the expiry of the validity period, the transferee ceases to be obliged to apply them (Bojić, 2017: 763). However, starting (probably) from the fact that imposing the obligation to apply the collective agreement concluded with the transferor until the expiry of its validity could be too much of a burden for the transferees (in situations where the validity period is quite long), Directive 2001/23/EC gives the opportunity to the member states to limit that period in time, but not shorter than one year. This opportunity has been used by a large number of European countries (Germany, Austria, Spain, Portugal, Poland, the Czech Republic, Italy, Cyprus, Slovenia, Latvia, Hungary, Sweden, Croatia), as well as numerous countries aspiring to EU membership (Serbia, Montenegro Gora, Republika Srpska, North Macedonia, etc.), which limit the period of application of the collective agreement (concluded with the transferor) by the transferee to a minimum of one year determined by Directive 2001/23/EC; only in France is the period of validity extended for 15 months from the date of change.[3] Thus, if the

[3] However, in some countries (such as Estonia, Luxembourg, the Netherlands and Slovakia), no time limit has been introduced for the validity of the collective agreement with the transferee from the moment of the change.

collective agreement concluded with the transferor does not expire before the expiry of the one-year period, i.e. 15 months from the date of change, upon the expiry of this period the transferee is no longer obliged to apply the said collective agreement even though it may still be valid.

Another situation in which the collective agreement concluded with the transferor ceases to be valid is the entry into force or application of the new collective agreement. In such a case, after the change has been made, the transferee can invite the representative union to negotiations with the aim of concluding a new collective agreement. This will probably occur in the event that the provisions of the new collective agreement are more favorable to the employees than the provisions of the collective agreement concluded with the transferor, as the employees cannot be expected to accept working conditions that are less favorable than the conditions stipulated in the previous collective agreement (Bojić, 2017: 763). Certainly, there is a possibility that a transferee decides to take that step in order to improve transparency and systematicity of the legal rules contained in the autonomous sources of law, and to avoid the existence of a large number of collective agreements that apply to different groups of employees. In any case, the collective agreement concluded with the transferor ceases to be valid upon the entry into force of the new collective agreement.

Bearing in mind the disparity between the static and the dynamic perspective of employee protection, it is not completely clear whether it is permissible under the provisions of Directive 2001/23/EC to change employment contracts after a change of employer, and if so, whether there are any limitations and conditions that have to be met to ensure its validity. In other words, can the transferor amend the employment contract that the employee concluded with the transferor, especially the so-called solid core, i.e. provisions on salary, title and job description, or is such a change prohibited if it is caused by the change of employer? The aforementioned issue is further complicated by the provision of Article 4 (2) of Directive 2001/23/EC, whose scope of application is not easy to understand. This Article reads: "If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship" (Article 4(2) of Directive 2001/23/EC). One of the possible interpretations of this provision could be that changes to the employment contract to the detriment of the employees are not allowed if they are caused by the change of employer itself. However, in case the employer, despite this prohibition, offers the employee an amendment to the employment contract which includes a significant change in the working conditions to the detriment of the employee, and the employee refuses to give consent, the employer can fire the employee. The possibility of refusal is also available to the employee who is subject to the employer's attempts to impose new, changed working conditions despite the fact that the employee refused to give consent to change the employment contract (Cf. Kovačević, 2015: 832). In both cases, the employer will be considered responsible for the termination of the employment relationship because then the employment relationship does not end due to the fault of the employee but because the employer unilaterally made a significant change in the working conditions to the detriment of the employee, and against the employee's will.

In their legal systems, the provisions of the collective agreement concluded with the transferor will be applied until the expiry of the period for which the contract was concluded, provided that the transferee does not conclude a new collective agreement with the representative union (Sargeant, 2001: 30-44).

However, in labour law theory and judicial practice, there are also different interpretations of the aforementioned provisions of Directive 2001/23/EC, which will be considered in the next part of the article in an attempt to provide a comprehensive answer to the question about the (im)permissibility of amending the employment contract in the circumstances of the change of employer.

3.2. Judicial practice

Serious uncertainties regarding the interpretation of the provisions of the Articles (3 and 4) of Directive 2001/23/EC prompted the national courts of the EU member states to request several preliminary judgments from the European Court of Justice, in order to clarify the normative core of Directive 2001/23/EC. This resulted in judgments in which the Court of Justice seems to have tried to find a certain balance of conflicting interests, referring at the same time to both the "static" and the "dynamic" aspects of the protection guaranteed by Directive 2001/23/EC. In this sense, the Court emphasized that the real objective of the Directive 2001/23/EC in question is to "to ensure, *as far as possible*, that the employment relationship continues unchanged with the transferee, in particular by obliging the transferee to continue to observe the terms and conditions of any collective agreement (Article 3 (2)) and by protecting workers against dismissals motivated solely by the fact of the transfer (Article 4(1))".[4] Although the Court did not explicitly indicate, it seems that the expression "*to ensure, as far as possible*" refers both to the continuation of the employment relationship as such and to continuation without changes to the contracted working conditions (Ales, 2019: 187).

Such an understanding of the stated position was confirmed by the Court of Justice in the *Daddy's Dance Hall* case, where the Court assessed that the protection offered by Directive 2001/23/EC is a matter of public policy and, therefore, independent of the will of the parties to the employment contract. The Court stated: "The rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".[5] Employees, therefore, are not entitled to waive the rights conferred on them by Directive 2001/23/EC and these rights cannot be restricted even with their consent.[6] According to the Court, this interpretation is not affected by the fact that, as in this case, "the employees obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before".[7] However, "insofar as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer".[8] Since, by virtue Article 3(1) of Directive 2001/23/EC, "the

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[4] Case C-19/83, *Knud Wendelboe and others v L.J. Music ApS, in liquidation*, ECR 1985, 00457, § 15.
[5] Case C-324/86, 10.02.1988, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* A/S, ECR 1988, 00739, § 14. This position was reiteratted in: Case C-209/91, 12. 11. 1992, *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S*, ECR 1992 I-05755, § 27-28; Case C-343/98, 14. 09. 2000, *Renato Collino and Luisella Chiappero v Telecom Italia SpA*, ECR 2000 I-06659, § 52.
[6] Case C-324/86, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* A/S, ECR 1988, 00739, § 14.
[7] *Ibid* ,paragraph 15.
[8] *Ibid*, paragraph 17.

transferee is subrogated to the transferor' s rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment".[9]

The same interpretation can be found in the *Martin* case, where the Court, after confirming that the protection guaranteed by Directive 2001/23/EC is a matter of public policy, stated that "the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".[10] The Court also pointed out "that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent",[11] and reiterated that "insofar as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer".[12] However, "since the transfer of undertaking is indeed the reason for the unfavourable alteration of the terms of early retirement offered to the employees of that entity, any consent given by some of those employees to such an alteration is invalid in principle".[13] The Court did not answer whether it is necessary to wait for a certain period of time to pass in order to consider that the transfer of the undertaking is not a reason for changing the employment contract. It also remained unclear whether the transfer of the undertaking must be the only or the main reason for changing the working conditions in order for the change to be considered illegal, or whether it is enough that the transfer was only one of the reasons for the change. Yet, on the basis of the two judgments cited above. it may be concluded that employment contracts can be amended, even in a way that is unfavorable to employees, provided that the national law allows such amendments, and that the reason for amendments is not the change of employer or some other reason related to that change. This is a true example of "balancing" performed by the Court in order to keep together "the static safeguard of working conditions and the dynamic freedom of the employer to rearrange regulations after the transfer" (Ales, 2019: 188).

More recent cases indicate that the Court of Justice is beginning to soften its approach to the detriment of employees, thus marking a new unwanted direction in the interpretation of Directive 2001/23/EC. For example, in the *Scattolon* case, the Court of Justice assessed that Article 3(3) of Directive 2001/23/EC must be interpreted as meaning that it is lawful for the transferee to apply, as of the date of the transfer, the working conditions laid down by the collective agreement in force in his legal entity, including the terms concerning remuneration.[14] Therefore, if the transferee has a collective agreement in force (signed either at the branch level or at the employer level), the provisions of that agreement can replace the collective agreement that was in effect at the transferor. According to the Court of Justice judgment, "the 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

[9] *Ibid*, paragraph 17.
[10] Case C-4/01, *Serene Martin, Rohit Daby and Brian Willis v South Bank University*, ECR 2003, I-12859, § 39.
[11] *Ibid*., paragraph 40.
[12] *Ibid*., paragraph 42.
[13] *Ibid*., paragraph 45.
[14] Case C-108/10, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca,* ECR 2011, I-07491, § 74.

cannot therefore have the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the transfer".[15]

This extraordinary position of the Court of Justice suggests that the rule on the prohibition of changing the contractual working conditions to the detriment of employees for reasons related to the change of employer, which was previously considered absolute, is not so absolute. Although the Court "denies the absoluteness of the principle of automatic substitution of the collective agreement applied by the transferor" (Ales, 2019:191) and makes the immediate replacement of the collective agreement concluded with the transferor by the collective agreement in force with the transferee conditional on respecting the working conditions that the transferred employees enjoyed before the change of employer, the Court does so by using standards *in principle*, thus leaving room for the details of the working conditions to be less favorable for the transferred employees. This opens space for different interpretations and assessments, and a large number of court proceedings where the courts will have to assess "the overall extent of the worsening conditions brought about by the new collective agreement" (Ales, 2019:191). As we may expect long processes of harmonizing the collective agreements provisions, the legal security of employees may be impaired.[16]

3.3. Legal Doctrine

As shown before, the original practice of the European Court of Justice prohibited any amendments to employment contracts to the detriment of employees for reasons related to change of the employer. In legal literature, however, there were opinions that this position of the Court (perhaps) goes too far in that it does not permit amendments to the employment contract to the detriment of the employees for reasons related to the change of employer even if the employees agreed to the amendments. In other words, the question arose as to why an employee can validly refuse the transfer of an employment contract or employment relationship to a transferee, but he/she cannot agree to the amendments to the working conditions under the amended or new employment contract? (Smith, 2001: 242). In contrast, the opposite opinion points out that, regardless of the fact that the legislator might believe (and state) that both parties to the employment contract have equal rights and opportunities to conclude and/or amend employment contracts, an employee who voluntarily agrees to amendments to the employment contract is often a myth (Smith, 2001: 243). Where there is a choice between signing an annex to the employment contract or losing the job, it is clear that the employer and the employee do not an have equal bargaining power. In this sense, "legal provisions against unfair dismissal can be easily circumvented if the employer is given the

[15] *Ibid*., paragraph 76.

[16] In addition, it seems that imposing the application of the collective agreement in force at the transferee would only make sense if it provides a greater scope of rights and more favorable working conditions than the rights and working conditions contained in the collective agreement concluded with the transferor. In some countries, such as Spain, the law stipulates that if the conditions of collective agreements enjoyed by the employees of the transferee are more favorable than the working conditions of the employees of the transferor, the employees of the transferor will enjoy better conditions (Sargeant, 2001: 33). The legislations of Cyprus, Hungary and Lithuania include similar provisions (Sargeant, 2001: 30-44). However, in the explanation of the judgment in the *Scattolon* case, the Court of Justice specifically pointed out that, under the Directive 2001/23/EC, the transferee is not obliged to apply the collective agreement that is in force in his entity to the transferred employees if his collective agreement contains greater rights and more favorable working conditions. Moreover, "that 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. Case C-108/10, 06.09.2011, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, ECR 2011, I-07491, § 77.

freedom to exert pressure on workers to resign instead of being fired" (Kovačević Perić, 2015: 370). Therefore, it is believed that, for the benefit of the employees, it is necessary to introduce a ban on waiving the rights and working conditions that existed before the change of employer, i.e. to envisage that the employee's consent to the amendments of the employment contract, which includes a change of working conditions to the detriment of the employees, will be invalid. Otherwise, if amendments to the employment contract which are generally not less favorable than those previously valid (which is the latest position of the Court of Justice) were made permissible, the question is how the comparative positions of the employee before and after the change of employer would be weighed. In addition, it places a powerful tool in the hands of the employer, who may easily get rid of unwanted or surplus employees, under the pretext of the requirements of the work process and organization (Kovačević Perić, 2015: 370).

In the event that the employer, despite the employee's refusal to accept an offer for a significant change in working conditions to the detriment of the employee, *via facti* imposes an amendment to the employment contract and the employment relationship is terminated as a result (either by the employer or the employee), the employer will be considered responsible for termination of employment. According to the views of the Court of Justice, a significant change in the working conditions implies providing the employee with worse working conditions, such as substantial reduction in the employee's remuneration or a refusal to guarantee that already existing rights will be maintained.[17] In the Court's opinion, " t does not mean that Member States must guarantee to the affected employees that their pre-existing level of financial compensation will not be affected by a transfer; it only means that if the employees' financial compensation is changed to their detriment, and any employee for that reason chooses not to continue with the employment relationship, then that counts as a 'dismissal' for which the transferee is liable under the Directive" (Countouris, Njoya, 2014: 440). In other words, reduced remuneration is the grounds for claiming compensation for unlawful dismissal but does not grant the employees an entitlement to actually receive the same level of remuneration from the transferee (Countouris, Njoya, 2014: 440). Contrary to the stated opinion that is widespread in the legal literature, Riesenhuber believes that this provision is not concerned with changes of terms and conditions of employment which are transferred to the transferee under Article 3(1) and (3) of Directive 2001/23/EC (Riesenhuber, 2012: 598). A change of these conditions to the detriment of the employee is prohibited by the Directive and would thus be unlawful. If Article 3 of Directive 2001/23/EC, in principle, prohibits any change in terms and conditions of employment, it would be inconsistent for Article 4(2) of Directive 2001/23/EC to provide a sanction only for a substantial change in working conditions. In addition, the sanction would not be adequate either: a termination triggered by a substantial change in working conditions is not only to be attributed to the employer but must also be considered unlawful (Riesenhuber, 2012: 599). Hence, Riesenhuber concludes that the scope of application of Article 4(2) of Directive 2001/23/EC can be explained in the sense that it refers to: 1) any inevitable factual changes (within the possible legal framework, e.g. under the direction of the transferee) which may be embodied in a change of workplace for example (although such changes will usually be below the threshold of "significant" changes); and 2) any permissible legal changes

[17] Joined cases C-171/94 and C-172/94, 07.03.1996, *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA*, ECR 1996 I-01253, paragraph 38; Case C-425/02, 11.11.2004, *Johanna Maria Delahaye, née Delahaye v Ministre de la Fonction publique et de la Réforme administrative*, ECR 1996 I-10823, § 35.

envisaged in the provision of Article 4(1)(1) of Directive 2001/23/EC; 3) and any permissible legal changes under Article 3(3) of Directive 2001/23/EC, such as those that occur when the applicable collective agreement changes (Riesenhuber, 2012: 599). Interpreted in this way, Article 4(2) of Directive 2001/23/EC actually provides for the extension of protection in case the permitted change in working conditions has "significant" effects that are detrimental to the employee (Riesenhuber, 2012: 599).

4. Conclusions and Final Considerations

Considering all the above, it is clear that a difficult policy decision must be made about whether to permit amendments to the employment contract in the circumstances of a change of employer and, if it is necessary, under what conditions it should be done and what aspects of the employment relationship could be subject to change. When making this decision, it seems that the starting point should be the question of whether the purpose of the provisions on preserving employment is achieved by introducing such a possibility or not. In this sense, it should be recalled once again that the primary goal of the provisions on the *ex lege* transfer of the employment contract (from the transferor to the transferee) in the event of a change of employer is to ensure the protection of the rights and obligations arising from the employment contract or employment relationship of the employees affected by changing the employer. This protection is a matter of public policy and any limitation should be carefully considered. The provisions protecting the rights of employees in case of transfer of an undertaking seek to minimize the impact of a change in the legal entity or a natural person (responsible for running the business) on the employees concerned. The purpose of these provisions is not to provide protection to transferred employees above the level of protection enjoyed by any other employee in any other employment situation. Their goal is to ensure that employees preserve the working relationship and conditions they had before the change in the legal identity of the employer. Therefore, the effect of these provisions should not be to prohibit any modification of the employment contract, without exception. Transferred employees should be in exactly the same legal position after the change of employer as before the change, and changes to the employment contract that are allowed under national legislation before the change of employer should be possible after the change, even if they are unfavorable for the employees (Smith, 2001: 245).

In this sense, the amendment of the employment contract in the circumstances of a change of employer is not allowed only if three conditions are met: 1) if it refers to essential elements of the employment contract; 2) if it is done to the detriment of employees, i.e. if it is unfavorable for employees; and 3) if the reason for changing the employment contract is the change of employer. In the legislation and jurisprudence of those countries that differentiate between the amendment of the employment contract and the amendment of the working conditions, the first condition does not have to be underscored because the amendment of the working conditions that does not concern the essential elements of the employment contract is not considered an amendment of the employment contract but an expression of the employer's authority, which the employee consents to from the moment of concluding the employment contract. Consequently, it further implies that the change of the working conditions is not considered to be a change but rather the execution of the employment contract (Kovačević, 2016: 442). In this sense, the change of the so-called of secondary elements of the employment contract would be allowed, even if the reason for

the change is the change of employer itself, provided that it does not represent an abuse of the employer's *ius ius variandi*. The second condition for the impermissibility of changes to the employment contract refers to the quality of changes; thus, the prohibition applies only to changes to the employment contract that are detrimental to the employees, even if the employee agrees to it. The latest positions of the European Court of Justice favor a more flexible approach, according to which some changes to the employment contract are allowed even if they are caused by the change of employer itself, provided that the working conditions offered are in principle not less favorable than the working conditions that were guaranteed to them before the change of employer. However, it should be noted that accepting this interpretation would mean that the court or some other competent authority must decide on the question of whether the changed working conditions are generally less favorable for the employee or not, which is certainly not an easy task. Such an approach would open space for different assessments by the competent authorities, as a result of which the legal security of employees would be undermined. Finally, the third condition for the validity of the ban on changing the employment contract is that the reason for the change is the change of employer. This means that changes to the employment contract are allowed, even if they are unfavorable for the employees, provided that the national legislation of a particular country allows such changes, and that the reason for the change in the employment contract is not the change of employer.

If all three of the aforementioned conditions are met, the amendment of the employment contract for reasons related to the change of employer is not allowed, even with the consent of the employee and at least within a guaranteed period of one year from the date of the change of employer. Considering that the protection of employees provided by Directive 2001/23/EC is a matter of public policy, it is independent of the will of the parties to the employment contract. The rules of the Directive, especially those aimed at preserving employment and working conditions, must be considered binding, and employers may not deviate from them in a way that is unfavorable for employees. Employees cannot waive the rights granted to them by the Directive, and these rights cannot be limited, even with the employees' consent. The social-economic component of the employment relationship has a wider social value because it establishes the necessary balance between economic progress and the demands of social justice and social balance (Kovačević, 2022: 48). Therefore, legislative intervention in the field of changing employment contracts for reasons related to the change of employer is extremely important for employees, as it ensures minimum predictability of working conditions and prevents possible abuses (Cf. Čolić, 2002: 137, Kovačević Perić, 2015: 370).

In case the employer, despite the aforementioned prohibition, arbitrarily changes the employment contract, there is a breach of contract, the implications of which include but are not limited to compensation claims that the employee could successfully assert (Cf. Lazarevic, 2015: 18). In this situation, it should also borne in mind that the employee can also terminate the employment contract, which is attributed to the employer. In other words, the employer is considered responsible for the termination of the employment relationship since the employment relationship in this case is not terminated due to the employee's fault but because the employer unilaterally made a significant change in working conditions to the detriment of the employee, without the employee's consent.

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(NE)DOPUŠTENOST IZMENA UGOVORA O RADU U OKOLNOSTIMA PROMENE POSLODAVCA

Poslodavac i zaposleni svojom voljom zaključuju ugovor o radu, saglasno mu odredivši sadržinu i bitne elemente, te se u skladu s tim obavezuju da ga izvršavaju u celosti onako kako glasi. Međutim, kada nastupe okolnosti zbog kojih ispunjenje obaveza jedne strane ugovora o radu postane otežano ili zbog kojih ugovor o radu više ne odgovara očekivanjima ugovornih strana, radno zakonodavstvo priznaje mogućnost njegove izmene. U tom smislu, institut izmene ugovora o radu doprinosi uspostavljanju ravnoteže između ugovora o radu kakav postoji na dan zaključenja i okolnosti koje su nastupile po njegovom zaključenju. Sva teškoća uspostavljanja pravične ravnoteže navedenih interesa se dodatno komplikuje ukoliko se zahtev za izmenu ugovora o radu postavi u okolnostima promene poslodavca. U tom smislu, postavlja se pitanje da li je uopšte dopuštena izmena ugovora o radu ako je razlog za izmenu sama promena pravnog identiteta poslodavca, te ako jeste, da li postoje određeni uslovi njene punovažnosti i koji aspekti radnog odnosa bi mogli biti podložni izmenama. U ovom radu, autor će pokušati da odgovori na ova i druga povezana pitanja analizirajući zakonska rešenja, stavove sudske prakse i doktrine.

Ključne reči: *izmene ugovora o radu, promena poslodavca, prenos.*