Original Scientific Article
DOI: 10.5937/gakv95-41485
UDC 349.23:331.105

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# SAFEGUARDING INDIVIDUAL AND COLLECTIVE EMPLOYEE RIGHTS IN THE EVENT OF A TRANSFER OF UNDERTAKINGS[**]

***ABSTRACT***: This paper meticulously analyzes the mechanisms for safeguarding the individual and collective rights of employees in the event of a transfer to a new employer. In this context, the protection of employees is facilitated through the rules governing the automatic transfer of employment contracts from the "old" to the "new" employer while maintaining identical working conditions. Consequently, the status of employees remains unaffected irrespective of any alterations in the activities undertaken by the new employer and decisions concerning the company transfer. In this sense, the assurance of job security serves as a counterbalance to the managerial authority of the employer and the freedom of entrepreneurship. The essence of the principle of employment security is encapsulated in the prohibition of initiating dismissals by the employer in the event of structural changes. Accordingly, the successor employer assumes the rights and obligations of the predecessor while preserving the legal status, thereby safeguarding the employees impacted by the transfer. Furthermore, legal continuity remains

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[**] The paper was received on November 30, 2022, the revised version was delivered on January 14, 2023, and it was accepted for publishing on January 17, 2023.

The translation of the original article into English is provided by the *Glasnik of the Bar Association of Vojvodina.*

unbroken, even in terms of rights and obligations emanating from collective labor agreements, which continue to produce legal effects even under the successor employer.

***Keywords***: transfer of undertakings, transfer of company, employment contract

## INTRODUCTION

The evolution of information and communication technology, industrialization, and global connectivity are only some of the processes significantly impacting contemporary social trends and established market structures. To better adapt to changes in the economic environment and enhance their competitive edge, employers often seek to transform their operational and business models through status, structural, financial, and other changes. Depending on the business and investment climate, decisions regarding business consolidation and company reorganization are made to increase profits. Successful business operations with their permanent solvency, profit maximization, and achieving a competitive advantage are realized through various forms of collaboration, based on both nominate and innominate contracts within civil and commercial law.[1] As the changes in a company's status affect not only the company but also its employees, subsequent sections will be dedicated to examining their position, i.e., the ramifications that structural changes concerning the change in leadership have on their employment contracts.

## AUTOMATIC TRANSFER OF ALL EMPLOYMENT CONTRACTS

The practice of automatic transfer of employment contracts mandates that all employment contracts, and thus all rights and obligations from the employment relationship of the transferring company, i.e., the old employer, are transferred to the recipient company, i.e., the new employer. Neither the recipient company nor the transferring company can choose which employees

[1] The system of legal protection of employees in the event of a change of employer is incompatible with a planned economy where true freedom of entrepreneurship is absent. Hence, with the transition in the economic regulation system and the forfeiture of the right to a workplace, the issue of employee protection during a change of employer garnered the attention of Serbian legislators. Radovanović, D. (2020). Položaj zaposlenih u slučaju statusne promene, odnosno promene poslodavca. *Pravo i privreda,* 58 (2), 298.

will be retained and whose employment will be terminated, as the transfer of the company is not a justified reason for dismissal *per se*. Therefore, all the rights and obligations of the predecessor employer arising from the employment relationship existing on the date of the company's transfer are transferred to the successor employer by force of law. This system was introduced by Directive 77/187 EC on the harmonization of the laws of the member states regarding the safeguarding of employees' rights in the event of the transfer of a company or parts of a company.[2] This directive essentially favored the French approach to the transfer of employment contracts, which operates on the premise that the transferred funds alone are not sufficient for the successful continuation of undertakings.[3] Consequently, along with the transferred property, there had to be a transfer of all concluded work contracts. This arrangement generated cost savings for the new employer and ensured the provision of the necessary labor force, thereby introducing a level of certainty due to retaining individuals proficient in operating machines.[4]

It is crucial to highlight that the successor employer does not enter into new labor contracts with employees; instead, the effects of the "old" contracts are automatically transferred to them.[5] This rule is further affirmed by the Companies Act, which stipulates that the employees of the transferring company, who are assigned to the recipient company by the status change agreement or division plan, continue to work in that company in accordance with labor regulations.[6] In addition, while providing protection, no distinction is made between employees who have concluded an employment contract for

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[2] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

[3] The aforementioned system was introduced into French law by the Labor Law of 1928. At the other side of the spectrum were mostly Anglo-Saxon countries, emphasizing the mutual *intuitu personae* character of employment contracts. Barnard, C. (2012). *EU Employment Law.* Oxford: Oxford University Press, 578; For this reason, Great Britain strongly opposed the adoption of the Directive. Smith, N. (2001). *Labor law implication of the transfer of an undertaking*. Johannesburg : Faculty of Law of the Rand Afrikans University, 1 – 4.

[4] Smith, N. (2001). *Labor law implications of the transfer of an undertaking*. Johannesburg: Faculty of Law of the Rand Afrikans University, 4.

[5] Kalamatiev, T. (2017). Protection of employees' individual right in the event of a change of employee (transfer of undertaking) in the Republic of Macedonia. *Restructuring of companies and protection of employees' right: Views from the EU, Austria, Serbia and Macedonia – Collection of extended abstracts of contribution presented at the International conference held at the University of Belgrade Faculty and Law on March 2nd 2017 (eds. Kovačević*, Lj., Radović, M.). Belgrade: University of Belgrade Faculty of Law, 8.

[6] Companies Act, *Official Gazette of the RS* no. 36/2011, 99/2011, 83/2014, 5/2015, 95/2018, 91/2019, and 109/2021, art. 505 (1.6).

an indefinite period of time and those who have established some form of flexible employment relationship.[7]

The aforementioned solution, which has also been adopted in Serbian law, holds significant importance in preventing discriminatory behavior by employers. Establishing an employment relationship for an indefinite period is the norm, while atypical employment contracts are deemed an exception, utilized only when the needs of the employer and the work structure necessitate it.[8] However, this is not the reality in practice. Moreover, it could be argued that the institution of the standard employment contract is practically dying out. Regrettably, instead of exercising this right, employers are increasingly resorting to its abuse. Such practices undermine employment security and income stability, which contribute to a certain degree of stability and certainty in the life of each individual.

In principle, the provisions outlined in Council Directive 2001/23/EC,[9] which supplanted Directive 77/187, are applicable across all continental European countries, as well as in Norway, Iceland, and Liechtenstein.[10] The fundamental premise of Council Directive 2001/23/EC (hereinafter referred to as the Directive) is to preserve the existing rights of employees, ensuring that restructuring does not adversely affect their standing within the participating companies. The subject of the Directive is not only the transfer of the company as a whole but also extends to the partial transfer of business operations, even in scenarios where the transferred segment of the company undertakes only ancillary (supporting, secondary) activities unrelated to the core function of the company. Through this approach, the personal continuity of the company is maintained, as the fear of job loss can have detrimental impacts on an individual's social integration.

Accordingly, labor law aims to ensure the preservation of employment in all scenarios where the legal status of the employer changes. This objective is realized through the harmonization of national rights across member states,

[7] Commission Services' Working Document, Memorandum on rights of workers in cases of transfers of undertakings, point 2.1.2.

[8] On the types of employment contracts and the proclaimed principle of equality, see: Kovačević, Lj., Šunderić, B. (2017). *Priručnik za polaganje pravosudnog ispita.* Belgrade: Official Gazette, 160–161; Lubarda, B. (2016). *Radno pravo,* Fourth Edition. Belgrade: Faculty of Law, University of Belgrade, 124–127.

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

[10] Bayart, C., Bosmans, I., Koster, P. (2005). Employment Issues. Available at: *http://www.allenovery.com/SiteCollectionDocuments/International%20outsourcing%20law%20and%20practice.pdf* (accessed on August 22, 2021).

which may exhibit significantly divergent approaches to the regulation of certain labor law issues. It should be noted that the rules encapsulated in the Directive are minimal, allowing member states the latitude to further elaborate and supplement them.

Namely, for the Directive to be applicable, two conditions must be satisfied: 1) a change of employer has occurred, and 2) the identity of the company has been preserved. These conditions are to be met cumulatively. They are not further delineated by the Transfer Directive, thereby granting case law and theory a creative role.

## The Concept of Transfer of Undertakings

From the perspective of corporate law, the notion of transfer of undertakings could entail a change of legal form, capital ownership, and change of status.[11] Given that an employer can also be a natural person, the Labor Law is better suited for identifying situations indicative of a transfer in undertakings. However, this is not the case, which gives rise to numerous issues in defining the term. In essence, any situation that necessarily entails a change of the economically stronger contracting party, during the (employment) legal relationship, could be characterized as a transfer of undertakings.

The Labor Law encompasses broad and somewhat vague terminology, stating that the employer changes in the case of "status changes, i.e., changes of employer, in accordance with the law." Notably, this provision has remained unchanged since the entry into force of the 2005 Labor Law, which for the first time incorporated norms dedicated to the protection of employees in the event of a transfer in undertakings (transfer of company). This implies that the Labor Law does not exclusively delineate the situations constituting a transfer of undertakings, but also permits this possibility when stipulated by another law.[12] What stands out is the emphasis on status changes in the aforementioned definition. Essentially, the legislator references a scenario that is indisputable and most commonly used in practice. However, a transfer of undertakings can manifest in other situations as well, as suggested by the wording of the Law,

[11] Đondanović, I. (2018). *Zaštita individualnih i kolektivnih prava zaposlenih u slučaju statusne promena poslodavca*, master's thesis. Belgrade: Faculty of Law, University of Belgrade, 11; Cascio, W., Boudreau, J. (2008). *Investing in People – Financial Impact of Human Resource Initiatives*. Upper Saddle River: NJ-FT Press, 1.

[12] Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 5 – 6.

albeit these situations are not further elaborated on. It is clear that the concept of status changes is narrower than the concept of transfer of undertakings, but the space in between remains empty, and for reasons of legal security it should be addressed.[13]

Therefore, in defining the concept of transfer of undertakings, the legislator only mentions status changes and directs to other sources for additional situations where this occurs. This approach is not ideal due to the absence of other sources that explicitly address this matter. This very gap has led to divided opinions when it comes to theory, in the case of altering the legal form of a company. Consequently, there isn't a unanimous opinion on whether a change of form can be encompassed within the concept of transfer of undertakings. According to some authors, a change in legal form does not necessarily bring about a change in legal subjectivity, and by extension, a change in the entity exercising operational authority.[14]

Regarding the alteration in ownership capital, there have been radical changes that have taken steps backward. Up until the amendments to the Labor Law in 2014, the procedure of ownership transformation did not impact employees and their employment status, as jobs remained intact despite the change in the entity exercising representative and operational authority. During the transition of capital ownership, there is no alteration in the legal subjectivity of the company, and consequently, no transfer of undertakings. Aiming to preserve the existing rights of employees, provisions geared towards their protection in the event of a transfer in undertakings were also extended to the process of privatizing social enterprises. Despite the formally declared robust protection framework,[15] in practice, a large number of employees were dismissed through the so-called redundancy programs, accompanied by social programs founded on the so-called passive measures of employment policy, which amounted to only severance pay.[16]

Privatization was intended to delineate ownership status and facilitate a more profitable utilization of resources, which are the primary drivers of

[13] Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 6.

[14] Vićić, Đ. (2018). *Zaštita prava zaposlenih u slučaju spajanja i podele privrednih društava*, master's thesis. Belgrade: Faculty of Law, University of Belgrade, 13; Opposite: Ivošević, Z., Ivošević, M. (2007). *Komentar zakona o radu*. Belgrade: Official Gazette, 277.

[15] Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 7.

[16] Stošić, I. (2008). Korporativno restrukturiranje preduzeća u svetu i Srbiji. *Poslovna Ekonomija*, 8 (1), 157.

economic development. Therefore, transformation signifies not merely a shift in ownership structure, but also an enhancement in business efficiency, flexibility, and competitiveness, achievable predominantly when the majority owner is external to the company. Although the desired outcomes have not been realized, the lack of provisions addressing employees and their standing in the privatization process has been heavily criticized in theory, especially given that the deadline for executing mandatory privatization does not extend to public capital.[17] Additionally, the change in capital ownership does not equate to a transfer of undertakings in the sense of exercising the right to severance pay, which further diminishes the safeguards afforded to employees.[18]

Here, it is interesting to address the matter of applying rules for the protection of employees in the event of a status change due to spin-offs. In this scenario, there occurs a separation of the personnel element – into employees who continue to work for the employer with whom they initially concluded the employment contract and those who are impacted by the transfer and change of the preceding employer. The fact that the personal unity of the company is being disrupted and that two legally distinct entities emerge does not alter the applicability of rules aimed at protecting employees.[19] This is the only correct conclusion and indisputably justified from the employees' standpoint. All aforementioned considerations are equally applicable to the division of companies, where it must be ascertained which employees will continue working and within which new company.

## Preserving the Identity of the Company as a Condition of the "Transfer of the Company"

The other condition, provided by the Directive, can also create confusion. When should it be considered that the identity of the company is preserved? What criteria are relevant for the assessment? These inquiries were brought before the European Court of Justice, which endeavored to provide appropriate responses through its jurisprudence. The transfer of a company extends

[17] See: Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 7.

[18] Labor Law, *Official Gazette of RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 158 (4).

[19] Theemat van Loren, H.A. (1994). *The protection of workers in the case of business transfers: A comparative study of the law in the USA, UK and South Africa*. London: University College London, 145.

beyond a mere transference of rights and obligations from one entity to another, encompassing the continuation or resumption of the predecessor's activities, irrespective of their primary or ancillary nature.[20] However, the execution of the same or similar economic activities by the successor employer at the time of the company transfer does not equate to preserving the economic identity of the business entity.[21] In evaluating the fulfillment of this condition, several criteria must be considered, with four questions being pivotal: what, how, where, and in what manner. The identity of the company is preserved if the recipient company undertakes the same economic activity as the transferring company, maintaining the same business organization, employing the same methodology and working conditions, all on the same premises.[22] Additionally, the preservation of the qualification structure – encompassing the retention of employees in managerial positions, the value of the property transferred at the time of transfer, the degree of similarity of the activities assumed, and their eventual cessation – are highlighted as relevant factors.[23] Concurrently, these criteria must be collectively regarded when evaluating the fulfillment of this condition for each individual case. Hence, an employer who has taken over the business or part of the business of another employer will be his legal successor if the nature of the transferred business activity is essentially the same.

In the case of *Christel Schmidt*, the European Court of Justice ruled that the transfer of labor, manifested in the presence of merely one employee, is not a hindrance to establishing safeguards. The dispute emerged from the dismissal of *Christel Schmidt*, who was employed by the bank for the hygienic upkeep of its premises. Substituting the employee, the bank contracted a cleaning agency that extended an offer to Mrs. *Schmidt* for work at the same location, albeit under considerably inferior conditions, which she declined. This case was brought before the European Court of Justice, which posited that the transfer of labor, irrespective of the number of individuals impacted by the transfer and the property that was transferred, serves as a sufficient indicator of the fulfillment of these conditions.[24]

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[20] Dragićević, M. (2019). Pojam „prenosa preduzeća" u smislu evropskog radnog prava. *Pravo i privreda*, 7 (9), 621.

[21] Kirchner, J., Morgenroth, S., Marshall, T. (2016). *Transfer of Business and Acquired Employee Rights: A Practical Guide for Europe and Across the Globe*. Berlin: Springer, 9–11.

[22] Blancpain, R. (2013). *European Labor Law*, Thirteenth revised edition. The Hague: Wolters Kluwer, 761.

[23] *Ibid*.

[24] Judgment of the Court (Fifth Chamber) of 14 April 1994, *Schmidt*, C-392/92, EU:C:1994:134. Barnard, C. (2012). *EU Employment Law.* Oxford: Oxford University Press, 593.

The change of service provider also occurred in the case of *Ayse Süzen vs. Zehnacker Gebaeuderungung GmbH,* where a school delegated the cleaning tasks to a new company, ending the contract with the former one, which led to the termination of all employees. As in the previous case, the property was not transferred to the new employer, and while only a single person was involved in the transfer in the previous instance, this was not the case here. The European Court of Justice decided that a company previously awarded a contract does not cease to exist upon losing a client, and the business or a segment of the business cannot be deemed transferred if the contract is granted to a new company.[25] Therefore, a significant factor in evaluating the existence of a company transfer is the acquisition of the workforce, in addition to the operational work methodologies employed.

It should be underscored that the perspectives conveyed in the rulings serve as guidelines for law application, and not clear delineation boundaries, particularly when considering that the outlined solutions afford a wide range of options an employer can abuse, and are rightfully critiqued in theory. This further implies that even a minor alteration in the manner in which the employer organizes work can strip employees of protection. Consequently, numerous countries have augmented and expounded upon certain provisions of Council Directive 2001/23/EC, Serbia included, offering a broader spectrum of safeguards to employees compared to the solutions encapsulated therein.[26] Unlike Community law, the Serbian legislator does not mandate the preservation of the company's identity as a requisite for a valid transfer.

## PROTECTION OF THE INDIVIDUAL EMPLOYEE RIGHTS IN CASE OF TRANSFER OF UNDERTAKINGS

### Does an Employee Have the Right to Refuse to Work for a Successor Employer?

When delving into the position of employees amidst a transfer of undertakings, the primary consideration revolves around the rights employees retain

[25] Judgment of the Court of 11 March 1997, *Ayse Süzen v. Zehnacker*, C-13/95, EU:C:1997:141, 16.

[26] Thus, the Labor Law "does not specify the conditions for the application of the principle of employment preservation, but it is related to all transfer of undertakings cases, regardless of whether in a certain situation, the economic identity of the company is preserved or not." Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 5.

in such scenarios. A question of paramount significance is whether employees have the right to decline the continuation of their work or relationship with the new employer. The answer to this question is not simple, especially if one takes into account the different national solutions that existed before the adoption of the Directive.[27] This scenario was further exacerbated by the ambiguous terminology employed in the original text of the Directive. All this resulted in a sharp theoretical discussion and the need for a more uniform approach, which will provide minimum guarantees of protection to employees.

An employee cannot delegate the obligations borne from their employment relationship to another individual, signifying that they must personally execute all assigned tasks. The notion of transferring one's work obligations to another individual is absolutely excluded. Unlike employees, employers can transfer their rights and obligations to another person, unless the distinctive personality of the employer is indispensable for the perpetuation of the existing employment relationship.[28] In theory, there are different opinions that the employment contract can be assigned by any contracting party, provided that the other party agrees to it. This notion stems from the general rules of obligation law pertinent to bilateral contracts.[29] Given that an employment contract is bilateral in nature, the aforementioned rules should ostensibly apply to it as well.[30] However, endorsing this standpoint is contentious for several reasons. Firstly, labor law has parted from its civil law foundation, evolving into an autonomous legal discipline. This, however, does not mean that the general rules of obligation law are no longer applicable, but that they are adapted to the principles and goals of labor law. Additionally, labor law has created supplementary rules for safeguarding the economically weaker contracting party, such as delineating the legal grounds that can precipitate the termination of the employment relationship, thereby modifying the generic rules of contract law concerning the termination of bilaterally binding contracts. Secondly, the employment contract is concluded with regard to the personal characteristics, abilities, and skills of the employee, which is why they cannot delegate the rights and obligations stemming from the employment relationship to a third

[27] On two diametrically opposed approaches in earlier German and French law. See: 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*. EUI Working Paper LAW No. 20, 4.

[28] Henckel, K.C. (2016). *Cross-border transfers of undertakings*. Groningen: Ulrik Huber Institute for Private International Law, University of Groningen, 56.

[29] Law on Obligations, *Official Gazette of the SFRY*, no. 29/78, 39/85, 57/89, *Official Gazette of the FRY,* no. 31/93, *Official Gazette of SCG,* no. 1/2003. and 18/2020, Art. 145.

[30] See: Ivošević, Z., Ivošević, M. (2007). *Komentar zakona o radu,* Belgrade: Official Gazette, 278.

party.[31] Thirdly, this approach is not accepted in comparative law. A scant number of countries that were acquainted with this notion in the past have since diverged from it.

The employee's consent is mandated as a prerequisite for the validity of the transfer, but they retain the right to refuse the transfer of the employment contract to a third party. Otherwise, the right to work, being one of the fundamental principles of labor law, would be infringed. The ramifications of an employee's refusal to work for a successor employer are not delineated by Community law but are delegated to the jurisdiction of member states. Whether such conduct on the part of the employee substantiates legitimate grounds for dismissal by the employer, necessitates the employee's resignation, or should be construed as dismissal initiated by the employee, hinges on the provisions encapsulated in national laws. Neither the French nor the German legislature has stipulated the repercussions of an employee's refusal to work for a successor employer. Nonetheless, French jurisprudence endeavors to bridge this gap by correlating the consequences of an employee's refusal to continue working with their dismissal.[32] In contrast, German courts construe the employee's resolution not to perpetuate the employment relationship with the successor employer as the continuation of the employment contract with the predecessor employer, provided that the latter continues operations.[33]

According to the Serbian Labor Law, the predecessor employer is obliged to inform the employees whose employment contract is being transferred so that they can declare whether or not they agree to this transfer. The employee has three courses of action: they may accept the transfer of the employment contract and convey this acceptance in writing to the predecessor employer, or they may reject the transfer of the employment contract (active procedure). Additionally, they may opt not to respond to the proposed transfer within the legally stipulated timeframe (passive procedure). Should the employee explicitly express their rejection of the employment contract transfer in writing, or

[31] Krajeski, D. (2019). *L' "Intuitus personae" dans les contrats*. Thèse. Toulouse: Toulouse Capitole Publications, 89.

[32] Pélissier, J., Auzero, G., Dockès, E. (1990). Les restructurations d'entreprises et leur effets sur l'emploi, *Revue internationale de droit comparé,* 42(1), 353. Certain French scholars critique this judicial stance, highlighting the incongruity in interpreting an employee's refusal as a resignation, when, contrarily, the employee desires to continue their employment, albeit with the original employer with whom the contract was initially concluded. See.: Mouly, J. (2007). Une nouvelle rupture du contract de travial produisant les effets d'une demission: le du salarié de passer au service du repreneur. *Recuel Dalloz,* 33 (2), 472.

[33] See: Hartzén, AC., 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*. EUI Working Paper LAW No. 20, 12.

fail to respond within five days, the predecessor employer can terminate the employment contract.[34] Given that "can" does not equate to "must," this raises a valid question about the status of an employee whose employment contract has not been terminated by the employer.[35]

In theory, there is a viewpoint that this legal gap can be bridged by the employment of an employee who thus establishes an employment relationship with the successor employer.[36] This interpretation stems from the rule that a concluded employment contract is not sufficient to establish an employment relationship and that the relationship is effectively nullified if the employee does not begin working. *Argumentum a contrario*, beginning work is construed as establishing a de facto indefinite employment relationship, even in the absence of a formal contract with the successor employer. However, it seems that the second approach is more acceptable. Here the employment contract is considered assigned to the successor employer only if the employee agrees to the transfer of the contract. In all other cases, the transfer is not considered applicable to the specific employee's contract.[37]

## Prohibition of Dismissal

In addition to addressing the transfer of employment contracts, the Directive also covers safeguarding employees against dismissals that result from company restructuring. Therefore, the prohibition on dismissals is limited to status changes and other cases of both contractual and any other transfer of a company accompanied by the transfer of rights and obligations

[34] Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 149 (2). This term is significantly longer in German law and amounts to one month. See: *Bürgerliches Gesetzbuch*. Available at: *http://www.gesetze-im-internet.de/bgb/* . Art. 613a(6). In our jurisdiction, the protocol upon receiving a letter of objection to the contract transfer during an acquisition is dictated by the predecessor employer, whereas German law accords the choice between the predecessor and successor employer. This arrangement appears more logical and should be embraced in our system, considering that the duty to inform employees about the company transfer encumbers both the predecessor and successor employer.

[35] This dilemma is resolved in Montenegrin law, which provides for the obligation to cancel the employment contract of the employee. See: Labor Law of Montenegro, *Official Gazette of Montenegro,* no. 74/2019. and 8/2021, Art. 108 (4).

[36] Ivošević, Z., Ivošević, M. (2007). *Komentar zakona o radu*. Belgrade: Official Gazette, 279.

[37] Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Labor and social law,* 21 (1), 10.

from an employment relationship. This means that a change in the holder of these rights and obligations is not a valid reason for dismissal by either the predecessor or the successor employer.[38] Such provisions assure a degree of security for employees, ensuring they are not adversely impacted by the changes, namely, that they will not lose their jobs when the employer decides to transfer the entire business or a part thereof (such as a plant, factory, or facility) to another company. This leads to the conclusion that this prohibition does not extend to dismissals arising from technological, economic, or organizational changes that necessitate the elimination of certain jobs, nor does it cover terminations due to an employee's performance, abilities, or conduct.[39]

In comparative law, any company reorganizations or structural changes must be clearly explained, particularly regarding the implications for employment contracts and the company's operations. The employer initiating the termination of employment must articulate the specific effects that economic changes within the company will have on the employees' positions and their overall status.[40]

In addition to the aforementioned limitations, the principle of employment preservation also has a time limit, which comes down to the realization of a status change. Once this occurs, the principle's purpose is deemed fulfilled, allowing the employer (who was not involved in the status change) to terminate employment contracts, provided they comply with established notice periods and grounds for termination. Moreover, the successor employer must honor pre-existing entitlements related to termination rights that stem from events prior to the transfer of undertakings. These may include severance pay, as stipulated by Serbian law [41], or work-related accidents, as recognized in comparative law.[42] This protection extends to employees who are under a valid employment contract at the time of the company's transfer.[43]

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[38] Council Directive 2001/23/EC, Art. 4(1).

[39] Kirchner, J., Morgenroth, S., Marshall, T. (2016). *Transfer of Business and Acquired Employee Rights: A Practical Guide for Europe and Across the Globe*. Berlin : Springer, 12.

[40] Henckel, K.C. (2016). *Cross-border transfers of undertakings*. Groningen: Ulrik Huber Institute for Private International Law, University of Groningen, 67; Kovačević, Lj. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: Faculty of Law, University of Belgrade, 400 – 402.

[41] When calculating severance pay for employees dismissed due to economic reasons, the duration of their employment with the previous employer is also considered. See: Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 158(3).

[42] Smith, N. (2001). *Labour law implication of the transfer of an undertaking*. Johannesburg: Faculty of Law of the Rand Afrikans University, 32.

[43] Lamponen, H. (2008). *The principle on employee protection in a merger and a transfer of an undertaking* . Helsinki: Helsinki University Print, 178.

The Serbian legislator's failure to directly regulate the protection of employees from termination in the event of a transfer of undertakings is unacceptable, given that the absence of such rules opens up ample opportunities for abuse, particularly reflected in "terminations by the predecessor employer immediately before the transfer of undertakings, as well as dismissals of employees shortly after the transfer of undertakings, aimed at facilitating restructuring."[44] The employer's decision to terminate an employee must not be motivated by the transfer in any way. With this in mind, some European countries have sought to limit the right of the predecessor employer to initiate the termination of the employment relationship during a certain period immediately preceding the restructuring, as well as during the period after the transfer of the enterprise by the successor employer, in order to ensure more comprehensive protection.

In each specific case, it is necessary to establish a violation of the principle of employment preservation. The dismissal of an employee during a period close to restructuring can be a significant indicator of the abuse of disciplinary and operational authority by the predecessor employer. Given that this is a challenging task accompanied by numerous problems, from defining the fair scope of restrictions to the methods of sanctioning in case of violation. The prevailing approach much simpler for implementation is reduced to merely defining the transfer of an enterprise as an undisputed prohibited reason for dismissal, without delving into details in terms of determining the approximate period during which the termination of the employment contract is not allowed.[45]

Employees who were dismissed a few days before a transfer, and have not established an employment relationship with the successor employer, or have done so but under less favorable conditions, can seek protection against unlawful dismissal from the successor employer.[46] Moreover, if working conditions significantly change after a transfer, resulting in the initiation of termination of the employment relationship by an employee, the effects of such actions will be equated with an unjustified dismissal by the employer. Furthermore, refusing an offer to transfer to a lower hierarchical position

[44] Kovačević, Lj. (2017). Usklađivanje domaćeg zakonodavstva i prakse sa radnim pravom Evropske Unije – primer zaštite prava zaposlenih u slučaju promene poslodavca. *Radno i socijalno pravo,* 21 (1), 10.

[45] Lamponen, H. (2008). *The principle on employee protection in a merger and a transfer of an undertaking.* Helsinki: Helsinki University Print, 180.

[46] Commission report on Council Directive 2001/23/EC of 12 March on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses, 3.1.3.

immediately after the change of employer cannot constitute a justified reason for dismissal.[47]

## SAFEGUARDING COLLECTIVE EMPLOYEE RIGHTS IN THE EVENT OF A TRANSFER OF UNDERTAKINGS

As the rights and obligations from the employment relationship are governed not only by the employment contract but also by a collective agreement, the issue of the validity of this autonomous source in case of a transfer in undertakings becomes particularly relevant. A collective agreement is concluded between the subjects of the collective employment relationship, which further regulates their rights, obligations, and responsibilities in relation to the law. This is a unique source of law found only in the field of labor law.[48] Comparative legal analysis shows that labor law subjects are left with the freedom to regulate their mutual relationship. Greater autonomy leads to better results in those countries where union activism is particularly pronounced. Especially since a collective agreement cannot stipulate working conditions and employee rights that are less favorable than the minimum set by law.[49] The legislator sets the lower limit which can then be moved, but exclusively in favor of the workers, and never to their detriment.

The conclusion of the collective agreement is preceded by negotiations between the representatives of the employees and the employer. Successfully concluded negotiations result in a contract that reconciles the interests of two seemingly incompatible realms: labor and capital. "Collective bargaining is nothing more than the struggle of one party (workers, union) to gain as much as possible from the other party (employer) and vice versa".[50] The essence of negotiations is reflected in the fact that each party makes concessions to reach a compromise. Employees collectively strive to secure more favorable working conditions, which individually they could not achieve, due to the imbalance in

[47] Etukakpan, E.S. (2012). *Transfer of Undertakings: The Tension Between Business Rescue And Employment Protection In Corporate Insolvency*. Nottingham : Nottingham Trent University, 170.

[48] Herman, V., Ćuprija, M. (2011). *Osnove radnog prava*. Osijek: Faculty of Law Osijek, 39.

[49] On the mutual relationship between autonomous and heteronomous sources of law. See: Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 8.

[50] Učur, Đ. M. (1991). Kolektivno pregovaranje i proširenje primjene kolektivnog ugovora (oktroiranje kolektivnog ugovora). *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* 27 (1), 548.

bargaining power stemming from the employer's economic superiority. Collective action leads to greater opportunities for success, which is reflected in reaching a satisfactory employment standard, i.e. in its increase. Without the freedom of association, a right constitutionally guaranteed, collective bargaining would be impossible. These are conditional rights, as the exercise of one right necessitates the prior realization of another.[51] This provides safeguards for the workers as a collective, while individual employee interests become integrated into the group.[52]

The collective agreement is a general act and applies to all of the employer's employees, regardless of whether they are members of the union that signed the collective agreement.[53] Furthermore, the contract's effect extends to those who became employees after its conclusion.[54] This approach is accepted by Anglo-Saxon countries, while in France and Germany, for example, different "labor law regimes" are constituted depending on the trade union organization of employees.[55]

If the conditions for concluding a collective agreement are not met, specifically regarding the existence of a representative trade union within the employer, it is replaced by the labor regulations, as a unilateral act of the employer. The Labor Law stipulates that in addition to the employment contract, the successor employer also takes over the general acts of the predecessor employer that are in effect on the day of the company's transfer.[56] This ensures the continuity of previously agreed working conditions, thereby additionally safeguarding employees. Even if the specific provision regarding the transfer of employees was not explicitly stated, the same result would be achieved through the rules concerning the effects of status changes. These involve the successor stepping into the entire spectrum of rights and obligations of their predecessor. Consequently, the recipient company enters into

[51] Kalamatiev, T. (2012). Kolektivna prava u Zakonu o radnim odnosima Republike Makedonije. *Radno i oscijalno pravo,* 16 (1), 122.

[52] "In a collective agreement, the collective interest is not merely the sum of individual interests, but rather the interest of the entire workforce." Učur, Đ. M. (1991). Kolektivno pregovaranje i proširenje primjene kolektivnog ugovora (oktroiranje kolektivnog ugovora). *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* 27 (1), 545.

[53] Katić-Bukumirić, R. (2011). Kolektivni ugovor kao sredstvo odgovornog poslovanja. *Pravo i privreda*, 7 (9), 444.

[54] Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 262.

[55] Učur, Đ. M. (1991). Kolektivno pregovaranje i proširenje primjene kolektivnog ugovora (oktroiranje kolektivnog ugovora). *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* 27 (1), 553.

[56] Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 147.

all the legal relationships of the transferring company, thereby inheriting its employment relations as a result of universal succession.[57]

It is a standard practice that the collective agreement itself specifies its content, commencement of application, and duration. Our law has deviated from the general principle of an open-ended validity period for collective agreements. Thus, under the current legal framework, a collective agreement is concluded for a term that cannot exceed three years. This limits the autonomy of the will of the contractual parties by restricting the agreement's validity to a specific period. This represents a significant shift in our legal system from the previous option of entering into collective agreements for an indefinite period.[58] This approach has not been adopted by neighboring countries; instead, they have rightly established that a collective agreement remains in effect as long as the contracting parties wish.[59]

Despite this, the duty to adhere to the collective agreement in the event of a company transfer extends for a minimum period of one year following the change. For instance, the collective agreement of NIS a.d. Novi Sad specifies that in the case of a status change or any other organizational alteration, its provisions shall apply to all employees for a period of at least three years.[60]

The duration for which the successor must apply the collective agreement depends on the term for which it was initially concluded. This rule is inapplicable if the collective agreement with the predecessor employer expires before the minimum one-year period is reached. The same holds true when a new collective agreement is established between the successor employer and a representative trade union.[61]

However, a question arises when the successor employer already has an existing collective agreement. Does this mean the employer must apply two different collective agreements depending on which employees are involved? Applying different working conditions, particularly in determining wages for employees working in the same roles for the same employer, may initially

[57] Radović, M. (2018). Creditor Protection in Restructurings in Serbia. *Stakeholder Protection in Restructuring – Selected Company and Labor Law Issues* (eds. Kovàcs, E., Winner, M.). Wien: Nomos, Hart Publishing, 69–70.

[58] Katić-Bukumirić, R. (2011). Kolektivni ugovor kao sredstvo odgovornog poslovanja. *Pravo i privreda*, 7 (9), 446.

[59] Labor Law of Montenegro, Art. 187. Croatian law is on the same track, with the fact that it stipulates that a collective agreement for a fixed period cannot be concluded for a period longer than five years. See: Croatian Labor Law, *Narodne Novine*, no. 93/14, 127/17*,* Art. 198.

[60] Collective agreement for NIS a.d. Novi Sad, published in *"Official Gazette of RS",* no. 12 of February 1, 2007, Art. 95.

[61] Labor Law, *Official Gazette of the RS,* no. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 13/17. and 95/18, Art. 150.

appear discriminatory. Such an assessment would certainly be incorrect considering that the employees affected by the transfer must be granted all rights and conditions previously agreed upon. However, if the terms of the previous collective agreement are less favorable for employees, it would be appropriate to apply the collective agreement offering a more favorable treatment.[62]

The significance of the collective agreement in facilitating a compromise, a key prerequisite for the successful operation of companies, is further emphasized by the Corporate Governance Code.[63] The aim is to achieve social dialogue by informing employees and actively involving them in collective negotiations, providing necessary resources, and ensuring certain rights, primarily the right to representation via unions.

The Directive does not preclude the application of the so-called theory of acquired rights to bankruptcy proceedings. This allows labor law rules, designed to protect employees in the event of a company transfer, to extend their scope of application.[64] The underlying reason is to prevent bankruptcy from being used as a pretext to bypass the individual and collective rights of employees.

## CONCLUSION

Every company aspires to periodically reorganize to achieve optimal business results. Restructuring, in this context, aims to enhance efficiency and adapt to new market opportunities, thus reorganization isn't inherently negative. Companies undertake reorganization to improve market positioning, driven by internal changes necessitated by market demands. However, changes in business operations can impact employees and their socio-economic status and consequently, labor law faces a challenging task. It aims to balance two conflicting objectives: fostering greater labor market flexibility, and protecting employees, the more vulnerable party in employment relations, by ensuring job security. An alternate approach would be unjustifiable, as employees gain

[62] Kovačević, Lj. (2018). Individual Rights of Employees in Transfers of Undertakings in Serbia. *Stakeholder Protection in Restructuring – Selected Company and Labor Law Issues* (eds. Kovàcs, E., Winner, M.). Wien: Nomos, Hart Publishing, 241. This is, for instance, the case in Spanish law. See: Spanish *Código laboral y de la seguridad social*, para. 44.

[63] Corporate Governance Code, *Official Gazette,* no. 99/2012.

[64] Council Directive 2001/23/EC, Art. 5 (3) (4). Great Britain and some African countries took advantage of this opportunity. In: Smith, N. (2001). *Labor law implications of the transfer of an undertaking*. Johannesburg : Faculty of Law of the Rand Afrikans University, 370.

nothing if they lose their jobs despite the new employer's continued operations. Therefore, a legal rule has been established that mandates the transfer of all employees' employment contracts by law following a decision to transfer a company. While the Labor Law of the Republic of Serbia exceeds community standards in this field by safeguarding employees in all scenarios involving a change in the more dominant party of the employment relationship, the established rules are often not implemented in practice. It's crucial to remember that employee protection has historically relied on identical, unimproved provisions. Therefore, it's especially important to precisely define the scenarios that constitute a transfer in undertakings, and whether every change in company ownership qualifies as such.

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