## POLAND C

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**STATEMENT FOR CLAIMANT**

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## LIST OF REFERENCES TO LEGAL SOURCES AND DOCTRINE

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#### 1.1 HUNGARIAN LEGISLATION

* Act I of 2012 on the Labour Code, adopted by the Parliament on 13 December 2011.
* Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, adopted by the Parliament on 22 December 2003.

#### 1.2 EU LEGISLATION

* 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 (hereinafter: the “**2001/23 Directive”**).
* Consolidated version of the treaty on the functioning of the European Union of 26 October 2012, OJ C 326/50.
* Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter: the “**2000/78 Directive**)”.
* Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
* Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
* Charter of Fundamental Rights of the European Union [2012] OJ C325/391 (hereinafter the Charter).

#### 1.3 ILO LEGISLATION

* ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

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#### 3. CASE-LAW

#### 3.1 CJEU CASE-LAW

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* C-105/84 Foreningen a/ Arbejdsledere i Danmark v Danmols Inventar [1985], ECR/2639.
* C-24/85, Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV [1986], ECR/1986/01119.
* C-287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, [1987], ECR/1987/-05465.
* C-101/87, P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S, [1988], ECR/1988/I-03057.
* C-144 and 145/87, Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, [1988], ECR/1988/-02559.
* C-324/86, Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S, [1988], ECR/1988/-00739.
* C-362/89 D’Urso [1991], ECR/I-4105.
* C-29/91, Dr. Sophie Redmond Stichting v Hendrikus Bartol and others [1992], ECR/1992:220.
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* C-209/91, Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S [1992], ECR/I-5755.
* C- C-171/94 et C-172/94, Albert Merckx et Patrick Neuhuys contre Ford Motors Company Belgium SA. [1996], ECR/C:1996:87.
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* C-176/12 Association de médiation sociale v Union locale des syndicats CGT and Others. [2014].
* C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português [2015].

## 3.2 HUNGARIAN CASE-LAW

* BH 2003/435 the Supreme Court of Hungary.

**3.3. ECtHR CASE-LAW**

* 552/10, I.B. v. Greece, [2013] ECHR 283.
* 20605/92 Halford v. The United Kingdom [1997] ECHR 32.
* 34369/97 Thlimmenos v. Greece.
* 38162/07 Naidin v. Romania [2010] ECHR 682.

## STATEMENT OF RELEVANT FACTS

1. Proving that the transfer of part of the undertaking within the meaning of the Directive 2001/23 between Employer X and Employer Y took place

* Employer X leased the real estate needed for the catering and as also accessories and tools from certain institutions.
* The Employer X operated several restaurants. In the same building where Plaintiffs were employed, the Employer X also carried out exclusive veterinary service and related official epidemiological tasks.
* Plaintiffs' scope of duties were: waiter, kitchen worker and bartender. In the morning and afternoon Plaintiffs worked at the bar, but at noon welcomed guests and served meals. In case of the high number of guests they worked in the kitchen as well.
* The owner of the real estate terminated the Employer’s X lease contract on 01.11.2015 with 30 days of notice period.
* On 01.11.2015 the landlord also entered into a preliminary lease contract with Company Y. At 01.01.2016 the final lease contract between Company Y and the landlord was made.
* Employer Y undertook in the preliminary contract with the landlord that in the real estate he will operate an exclusive Italian restaurant and bar.
* The owner of the real estate and Y agreed that lessor would give all the equipment present at the kitchen to the lessee.
* Employer Y employed 5 waiters who had worked at X.
* On 10.11.2015 Employer X terminated the employment relationship of 12 waiters, 2 cooks and chef, including the Plaintiffs. The declared reason for employment termination was the termination of the lease contract between the lessor and Employer X.
* Employer Y conducted a renovation, which lasted 3 months. Altogether, all operation at the premises ceased for 4 months – between 01.12.2015 and 02.04.2016.
* Employer Y operates an exclusive Italian restaurant and bar from 02.04.2016.
* Plaintiff I worked for Employer Y after 2 April 2016 as a waiter.

1. Proving that the exclusive reason for the termination of the Plaintiffs’ employment contracts was the transfer of part of undertaking

* The owner of the real estate terminated the Employer’s X lease contract on 01.11.2015 with 30 days of notice period and at the same time concluded the new lease agreement with Y (the preliminary contract on 1.11.2015 and the final lease contract on 1 January 2016).
* On 10.11.2015 Employer X terminated the employment relationship with fifteen employees, among them to Plaintiffs I and II. The notice was given due to leasing contract termination. The group of terminated employees consisted of 12 waiters, 2 cooks and 1 chef.
* As a result of the notice, the Plaintiff I's notice period lasted 70 days and the employment relationship lasted until 20.01.2016 and the Plaintiff II's notice period lasted 60 days, and the employment relationship lasted until 10.01.2016.
* The Employer Y employed Plaintiff I and other four waiters previously employed by X.

1. Proving that Plaintiff I acquired the right to the jubilee award

* Plaintiffs worked for Employer X at the restaurant with permanent employment contracts.
* The jubilee award was regulated in first and second collective agreement concluded between Trade Union A and Employer X.
* Plaintiff I was employed from 1.01.1996 and on the 01.01.2016 reached 20 years of seniority.
* The Plaintiff I’s employment contract lasted on 1.01.2016.

1. Proving that Employer Y is obliged to pay the jubilee award to Plaintiff I

* The facts mentioned above in sec. 1 and additionally:
* The collective agreement effective till 31.12.2016 was concluded with the Trade Union A and contained the jubilee award clause providing the right to a 3 months’ wage after 20 years of service.
* On 01.01.2016, the new collective agreement between Employer X and Trade Union A entered into force. This collective agreement guaranteed the jubilee award of 4 months’ wage.

1. Proving that Employer Y did not fulfil cooperation duties towards Trade Union A

* Employer Y did not inform the Trade Union A about the meeting held on 15.12.2015.
* New pay conditions after the transfer of a part of an undertaking, opposite to former practice, have been notified without consultation.
* Employer Y asked Trade Union B to inform Trade Union A about the most important decisions and facts to fulfil the obligation of Employer Y to inform the workers. Employer Y did not comply with the obligation himself.

1. Proving Employer Y discriminated waiters on the base of their age

* On 15.12.2015 during the meeting for employees Employer Y announced that they planned to work with young, dynamic team of employees, so they would employ only 5 waiters under the age of 40.
* It was notified that they did not need the services of Plaintiff II (61 years old), but they did need the services of younger Plaintiff I (39 years old).
* Plaintiff I (then 39 years old) was employed by Company Y and worked for them after 02.04.2016. Plaintiff II (then 61 years old) did not perform work for Company Y.

## DESCRIPTION OF RELEVANT LEGISLATION

#### 1. JURISDICTION

The case does not demonstrate a trans-border element. Due to this fact the Hungarian court has jurisdiction on the base of art. 4 (1), art. 21 (1), art. 63 Regulation 1215/2012.

**Regulation No 1215/2012 Article 4 (1):**

*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality,* ***be sued in the courts of that Member State****.*

**Regulation No 1215/2012 Article 21 (1):**

*An employer domiciled in a Member State may be sued: (a)* ***in the courts of the Member State in which he is domiciled****; or (b) in another Member State: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.*

**Regulation No 1215/2012 Article 63 (1):**

*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.*

#### 2. APPLICABLE LAW

The case has not disclosed a trans- border element and there is no conflict of law. That is why the Plaintiffs state that on the basis of art. 8(2) of Regulation 593/2008 the Court shall apply Hungarian law meeting requirements imposed by EU.

**Regulation No 593/2008 (Rome I) Article 8(2):**

*To the extent that the law applicable to the individual employment contract has not been chosen by the parties,* ***the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract****. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*

The Directive 2001/23/EC guarantees protection of employees when there is transfer of an undertaking or part of an undertaking in which they work, as well as the obligations of the transferor and transferee.

Article 1(2) clarifies that the Directive applies to any transfer of an undertaking situated in the territorial scope of the Treaty.

**The Directive 2001/23/EC Article 1(2):**

*This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred* ***is situated within the territorial scope of the Treaty****.*

It is worth to mention that the level of protection guaranteed by the Directive is minimum protection, since Member States are free to apply regulations which are more favourable to employees, as confirmed by Article 8 of the Directive.

**The Directive 2001/23/EC Article 8:**

*This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employee.*

#### 3. AD CLAIM 1

Article 1(1) determines when the transfer of undertaking (or part thereof) takes place within the meaning of the Directive 2001/23/EC.

**The Directive 2001/23/EC Article 1(1):**

(a*) This Directive shall apply* ***to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.***

*(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive* ***where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.***

*(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.*

Art. 4 of the Directive 2001/23/EC states that that transfer of the undertaking and part of the undertaking themselves cannot be the only legal basis for an employer’s unilateral termination of the employment relationship.

**The Directive 2001/23/EC Article 4:**

*1.The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes (in the workforce).*

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

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

**Act I of 2012 on the Labour Code Section 36(1):**

*Rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (****organized grouping of material or other resources****)* ***by way of a legal transaction*** *are transferred to the transferee employer.*

#### 4. AD CLAIM 2

The relevant directives, including the Council Directive 2001/23/EC of 12 March 2001 (Directive), have been fully incorporated into Hungarian law and are included in the Labour Code[[1]](#footnote-1).

**Act I of 2012 on the Labour Code Section 36(1):**

*Rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources)* ***by way of a legal transaction*** *are transferred to the transferee employer.*

**Act I of 2012 on the Labour Code Section 39:**

*The transferring the receiving employer* ***shall be jointly and severally liable*** *in respect of obligations towards employees which arose before the date of transfer, if the employee submits the claim within one year from the date of transfer.*

**Act I of 2012 on the Labour Code Section 282**

*(1) In the case of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship existing at the time of transfer for a period of one year after the date of transfer.*

*(2) The obligation referred to in Subsection (1) shall not apply to the employer if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer.*

**The Directive 2001/23/EC preamble:**

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

**The Directive 2001/23/EC Article 3(1) and (3):**

*1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship* ***existing on the date of a transfer shall****, by reason of such transfer,* ***be transferred to the transferee****.*

*Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.*

*3.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.*

#### 5. Ad claim 3

1. **Act I of 2012 on the Labour Code Section 38:**
2. (*1) Within fifteen days following the time of transfer, the receiving employer shall inform in writing the workers affected concerning the transfer of employment upon the transfer of enterprise, disclosing the employer’s identification data, and on changes in working conditions under Subsection (1) of Section 46.*
3. *(2) If the transferring employer has no works council – due to lacking the number of employees specified in Subsection (1) of Section 236 – and no shop steward had been elected either, the transferring or – if so agreed by the employers – the receiving employer shall inform in writing the employees concerned not more than fifteen days before the date of transfer of the following:*
4. *a) the date or proposed date of the transfer;*
5. *b) the reason for the transfer;*
6. *c) the legal, economic and social implications of the transfer for the employees; and*
7. *d) any measures envisaged in relation to the employees.*

**The Directive 2001/23/EC Article 6(1):**

*If the undertaking, business or part of an undertaking or business preserves its autonomy,* ***the status and function of the representatives or of the representation of the employees*** *affected by the transfer* ***shall be preserved on the same terms*** *and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.*

**The Directive 2001/23/EC Article 7(1):**

*The transferor and transferee* ***shall be required to inform the representatives of their respective employees affected by the transfer*** *of the following: — the date or proposed date of the transfer, — the reasons for the transfer, — the legal, economic and social implications of the transfer for the employees, — any measures envisaged in relation to the employees.*

*The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.*

*The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.*

**The Directive 2001/23/EC Article 7(4):**

*Where the transferor or the transferee envisages measures in relation to his employees,* ***he shall consult the representatives of this employees in good time on such measures with a view to reaching an agreement****.*

#### 6. Ad claim 4

Moreover, also Charter of Fundamental Rights in the EU prohibits any form of discrimination under the closed catalogue of article 21.

**The Charter Article 21:**

*1.* ***Any discrimination based on any ground such as*** *sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation* ***shall be prohibited.***

*2.Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*

The principle of non-discrimination on grounds of age must be regarded as a general principle of Community law[[2]](#footnote-2). Directive 2000/78 specifies framework for combating discrimination on the grounds of i.e. age in the field of employment and occupation.

**Directive 2000/78/EC Article 1:**

***The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of*** *religion or belief, disability,* ***age*** *or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*

**Directive 2000/78/EC Article 2(1 and 2):**

*Concept of discrimination*

*1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.*

*2. For the purposes of paragraph 1:*

***(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;***

*(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:*

*(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or*

*(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.*

**Directive 2000/78/EC Article 4:**

*Occupational requirements*

*1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

**Directive 2000/78/EC Article 6(1):**

*Justification of differences of treatment on grounds of age*

*1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

*Such differences of treatment may include, among others:*

*(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*

*(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*

*(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*

**Directive 2000/78/EC Article 10 (1):**

*Burden of proof*

*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination****, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.***

**Act CXXV Article 7 (1):**

***Direct negative discrimination****, indirect negative discrimination, harassment, unlawful segregation, retribution, and any orders issued therefor* ***mean a breach of the principle of equal treatment,*** *especially as set out in Chapter III.*

**Act CXXV Article 8:**

*Provisions that result in a person or a group* ***is treated less favourably than another person or group in a comparable situation because of his/her*** *[…] o)* ***age****[…]* ***are considered direct discrimination.***

## QUESTIONS

#### 1. Claim 1 [both Plaintiffs’ claim to declare the transfer of enterprise]

1. Did the transfer of part of the undertaking occur?
2. What is the date of the transfer?
3. Where the Plaintiffs employed at the date of the transfer?

#### 2. Claim 2 [Plaintiff I’s claim to oblige employer Y to pay him jubilee award]

1. Did Plaintiff I obtain the right to the jubilee award?
2. When did Plaintiff I obtain the right to jubilee award?
3. Should Employer Y pay the jubilee award to Plaintiff I?
4. What is the amount of the Plaintiff I’s jubilee award?

#### 3. Claim 3 [Plaintiff I’s claim on the lack of cooperation with Trade Union A]

1. Did Employer Y have a legal duty to cooperate with Trade Union A (inform and consult them about the transfer and its effects)?
2. If answered in the affirmative, did Employer Y fulfil these duties?

#### 4. Claim 4 [Plaintiff II’s claim the age discrimination]

1. Did the declaration of willingness to employ 5 waiters under age of 40 and the refusal to employ Plaintiff II who was 61 years, followed by the employment of Plaintiff I (then 39 years old) and the refusal to employ Plaintiff II (then 61 years old), constitute the discrimination based on age?
2. Did the willingness of Employer Y to work with young and dynamic team of employees (waiters) constitute the legitimate aim justifying the refusal to employ Plaintiff II?

## SUMMARY OF ARGUMENTS

#### 1. Ad claim 1

Plaintiffs will argue that the case present the existence of a transfer of a part of enterprise between Employer X and Employer Y within the meaning of the Directive 2001/23/EC.

It will be argued that the date of the transfer is 01.01.2016, as this is the date on which responsibility as employer for carrying on the restaurant transferred moves from the Employer X to Employer Y[[3]](#footnote-3).

It will be argued that both Plaintiffs were employed in the transferred part of undertaking at the date of the transfer.

Subsequently, it will be argue that the transfer of part of undertaking, where Plaintiffs were employed, constituted itself ground for termination of their employment contract.

#### 2. Ad claim 2

The Plaintiff I will argue that the jubilee award for the 20 years of service should be paid on 01.01.2016.

Plaintiff I will argue that he acquired the right to jubilee award of 6000 EUR (4 months’ wage of 1500 EUR).

Plaintiff I will argue that Employer Y (transferee in this case) should pay the jubilee award, because he became the employer of Plaintiff I as a result of the transfer of a part of an undertaking in which Plaintiff I was employed and is obliged to respect the terms and conditions agreed in any collective agreement applicable to Employer X (transferor in this case).

#### 3. Ad claim 3

The Plaintiff I will argue that Employer Y did not comply with the obligation to inform and consult with the Trade Union A about the transfer and its effects in good time before the transfer.

#### 4. Ad claim 4

The Plaintiff II will argue that Employer Y discriminate waiters on the base of age.

## ARGUMENTS

#### THE APPLICABLE LAW

Transferred part of undertaking is situated in Budapest, Hungary, therefore falling within the scope of the Directive 2001/23.

#### 1. THERE ****WAS**** A TRANSFER OF UNDERTAKING BETWEEN COMPANY X AND Y

The Plaintiffs plead for establishing existence of a transfer of a part of enterprise with the Employer “Y” as a receiving employer (“transferee”).

#### 

#### ****1.1 A LEGAL TRANSFER - LACK OF CONTRACTUAL LINK****

Plaintiffs state that a transfer of an undertaking within the meaning of Directive 2001/23 took place. According to the Article 1(1):

1. transfer of an undertaking, business, or part of an undertaking or business to another employer must be as a result of a legal transfer or merger.

There has been given a sufficiently flexible interpretation to the concept of legal transfer. CJEU has held that the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking[[4]](#footnote-4).

It is clear from the case-law that a transaction does not necessarily need to be concluded directly by and between the transferor and transferee. For example, according to *Süzen* case **no „*direct contractual relationship*”** has to exist between the transferor and the transferee[[5]](#footnote-5). Moreover, in *Daddy's Dance Hall* case the CJEU held that the 2001/23 Directive applies to the termination of a lease of a restaurant followed by the conclusion of a new management contract with another operator[[6]](#footnote-6). In *Bork International* case, termination of a lease followed by owner’s selling his enterprise was recognized as a transfer of enterprise[[7]](#footnote-7). What is more, in *Merckx* case CJEU declared the legal transfer in situation where a contract of motor vehicle dealership concluded with one undertaking is terminated and a new dealership is awarded to another undertaking pursuing the same activities[[8]](#footnote-8). What is more, in *Abler* case the CJEU stated that the transfer may take place **through the intermediary** of a third party such as the owner or the person putting up the capital[[9]](#footnote-9). Last but not least, it results from the CJEU case *Ny Mølle Kro* that regardless of whether the ownership of the undertaking is transferred or not, the 2001/23 Directive is applicable[[10]](#footnote-10). What is more, also the Supreme Court of Hungary in the case BH 2003/435 held that in the event of the transfer of employees upon a business transfer, the succession of employer’s rights and obligations applies to the transferee even if the transfer **was not concluded directly between the two employers** but through a third party[[11]](#footnote-11).

Having said that, in order to declare the transfer of an undertaking in present case, it was unnecessary for Employer X and Employer Y to have established a direct contractual link between them. The 2001/23 Directive can still apply even if the change arises through the inclusion of the landlord. The transfer of property, a transfer of a lease or rental agreement may all amount to “transfer” within the meaning of 2001/23 Directive. The absence of a direct contractual link between the transferor and the transferee cannot preclude the application of 2001/23 Directive if an overall assessment of the transaction indicates a transfer within the meaning of the Directive.

#### 1.2 A TRANSFER OF AN ECONOMIC ENTITY

According to the Article 1(1) of the 2001/23 Directive 'economic entity' is an 'organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'[[12]](#footnote-12). In present case Employer X conducted several businesses. In the same building where Plaintiffs were employed, the Employer X also carried out exclusive veterinary services. Plaintiffs would like to stress that in the circumstances of this case the transfer of part of undertaking (concerning restaurant services) took place between Employer X and Employer Y.

Thus, we have to consider whether we can speak of ‘a part of undertaking'. The terms “business/part of business” are not defined in the 2001/23 Directive, so that have to be interpreted and defined by EU law. In the *Scattolon* case the following definition of an undertaking has been provided: "the term ‘undertaking’ [...] covers **any economic entity** organized on a stable basis, **whatever its legal status and method of financing**[[13]](#footnote-13). Any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will therefore constitute such an entity". Moreover, according to *Watson Rask* case the protection prescribed by the 2001/23 Directive applies in particular, where the transfer relates **only to a part of an undertaking**[[14]](#footnote-14). Due to the fact that an employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking to which he is assigned to carry out his duties that protection extends to the employees assigned to that part of undertaking[[15]](#footnote-15).

The Plaintiffs were assigned to restaurant as a part of Employer X’s undertaking. According to the facts of the case, the restaurant was merely an ancillary activity for the transferor, because the Employer X also carried out exclusive veterinary service. However, this fact cannot have the effect of precluding the applicability of the 2001/23 Directive[[16]](#footnote-16). It is due to the circumstances, that the restaurant is easily distinguishable from Employer’s X other types of activities (veterinary services) and has employees assigned to it.

Moreover, in this case the reason for the legal transfer was the termination of the lease agreement of the real estate in which Employer X operates the restaurant and the conclusion of the lease agreement for the same premises with Employer Y who undertook to operate there the restaurant and bar. There was **no transfer of administrative functions** (issuing the official permission for pets to travel) form Employer X. Thus, art. 1(c) Directive 2001/23 will not apply to this case.

#### 1.3. IDENTITY

In order for the transfer of undertaking rules to apply, the business unit that is a subject to the transfer must retain its identity after the transfer. To determine whether or not the business unit retains its identity, a complex review of the ‘*Spijkers* criteria’ must be carried out:

**(1)** “*the type of undertaking or business*”,

**(2)** “*whether or not the business’s tangible assets, such as building and movable property, are transferred*”,

**(3)** “*the value of its intangible assets at the time of the transfer*”,

**(4)** “*whether or not the majority of its employees are taken over by the new employer*”,

**(5)** “*whether or not its customers are transferred*”,

**(6)** “*the degree of similarity between the activities carried on before and after the transfer*” and

**(7)** “*the period, if any, for which those activities were suspended*”[[17]](#footnote-17)*.*

These criteria address all relevant circumstances of a transfer, particularly the type of activities, the transfer of material resources, the value of non-material resources transferred, the transfer of key staff, the transfer of customers, the degree or extent of identity or similarity of the activities carried on before and after the transfer and the period of interruption of the business unit’s operation. According to *Süzen* case, all those circumstances are merely single factors in the **overall assessment** which must be made and **cannot therefore be considered in isolation**[[18]](#footnote-18). What is important, the absence of one or more factors **does not necessarily exclude transfer**.

Thus, we need to examine whether these factors are present in the case.

#### 1.3.1 THE TYPES OF UNDERTAKINGS AND ACTIVITIES CARRIED OUT ARE SIMILAR.

Firstly, we have to underline the similarity between activities. Both of undertakings are restaurants. There is only a change in its menu after the transfer - from a lunch cafeteria to an Italian restaurant - so that the operation was actually continued with almost the same activities carried out by Defendant Y.

From the facts of the case we cannot presume whether the day schedule of the restaurants has changed significantly. As it was at Employer’s X restaurant Plaintiffs worked there all day long. In the morning and afternoon they worked at the bar, but at noon welcomed guests and served meals. Besides the fact that Employer's Y restaurant is an exclusive Italian one, the employees scope of duties will remain the same. They still serve meals and work at the restaurant's bar. The only change is in the type of the meals from simple canteen snacks to Italian menu.

If the Court finds the above insufficient, the *Stiching* case should be referred to. In that case CJEU noticed continuation in the activities of drug abuse foundations, even though the first one provided more extensive services[[19]](#footnote-19). The similarity of the help provided to drug addicts was a decisive factor.

#### 1.3.2 THERE WAS A TRANSFER OF TANGIBLE ASSETS

What is more, the tangible assets such as buildings and movable property have also been transferred. Tangible assets include all physical assets such as building, the machines, the furnishing.

The Defendant Y restaurant is located in the same real estate as previous one where Plaintiffs worked. There is no change in location between those two activities.

Subsequently, we can assume that the equipment was also transferred, as the contract concluded between the lessor and Defendant Y provided explicitly that all kitchen equipment is left at the disposal of Company Y which will be free to use it. According to the CJEU, catering is a sector “***based essentially on equipment***”[[20]](#footnote-20). Therefore, the tangible assets needed for the activity in question, such as the premises, access to water and energy as well small and large equipment were undoubtedly taken over by Defendant Y. Besides the fact, that Defendant Y conducted a major renovation of the real estate and probably would change the furnishings, for sure will use „*the same premises, water and energy*” as Employer X as well as the general equipment for the kitchen.

#### 1.3.3 THE IMPORTANCE OF THE TRANSFER OF INTANGIBLE ASSETS

Intangible assets include, for example, licensing rights, know-how, distribution rights or goodwill.

As it was stated above, according to CJEU catering cannot be regarded as an activity based essentially on manpower, since it requires a significant amount of equipment. In the present case the legal similarity with regard to possession of buildings and equipment is recognised. That is why in the present case the transfer of intangible assets do not constitute a decisive factor to establish the transfer of undertaking or a part of an undertaking.

#### 1.3.4 THERE WAS A TRANSFER OF A PART OF EMPLOYEES

The fact that Employer Y did not need all staff does not preclude the transfer of part of the undertaking[[21]](#footnote-21). Besides, some waiters were offered work by Company Y before the transfer took place (Company Y called a meeting on 15 December 2015), what proves that, firstly, there was a need for their services and secondly, that Employer Y planned to continue the restaurant business in the leased premises.

The fact that a famous Italian chef was hired by Employer Y to head the kitchen so the restaurant will be organized and managed differently also as such does not prevent the application of 2001/23 Directive. In order to interpret the condition relating to preservation of the identity of an economic entity, not only the organisational element should be taken into account **but also the element of pursuing an economic activity**. Consequently, even though an Italian chef was hired, considering the character of catering services, this is rather similarity (or even identity) of location, infrastructure and equipment and using it by Employer Y for the same purpose as Employer X that should be decisive. Additionally, CJEU in *Klarenberg* case stated that is not the retention of the specific organisation imposed by the employer on the various elements of production which are transferred, but rather the **retention of the functional link of interdependence and complementarity** between those elements[[22]](#footnote-22).

#### 1.3.5 THERE WAS A TRANSFER OF CUSTOMERS

The transfer of customer base can also be a factor in retaining identity of an undertaking. The conventional way of transferring the customer base is to take over the customer file or dealership.

According to the facts of the case, it can be said that there has been also a transfer of customers. Similarly as the undertaking run by Employer X, the Italian restaurant operates mainly as an in-house restaurant[[23]](#footnote-23). The change of the menu does not preclude the fact that the restaurant will probably have its constant guests - employees that work nearby. As a rule, the transfer of customers base coincides with the similarity of the activity because the customer base usually remains the same when the purpose of the undertaking remains the same[[24]](#footnote-24).

#### 1.3.6 BREAK IN OPERATION WAS INSUFFICIENT TO CONCLUDE THAT THERE WAS NO TRANSFER OF UNDERTAKING

What is more, the temporary closure of the undertaking (due to the renovation of the building) and the resulting absence of staff at the time **do not of themselves preclude the possibility that there has been a transfer of an undertaking** within the meaning of Article 1(1) of 2001/23 Directive[[25]](#footnote-25). In *Allen* case CJEU stated that a transfer of an undertaking is a complex legal and practical operation which may **take some time to complete**[[26]](#footnote-26). Furthermore, in *Ferreira da Silva* case CJEU declared the transfer of undertaking in situation when there was **almost 3 months of suspension**[[27]](#footnote-27).

Summing up, all prerequisites of a transfer of an undertaking were met in the case at hand. Those circumstances **cannot therefore be considered in isolation**[[28]](#footnote-28). What is important, the absence of one or more factors **does not necessarily exclude transfer**.

This then, supports Plaintiffs’ statement of the existence of the transfer of a part of undertaking.

#### 1.4 THE DATE OF THE TRANSFER OF A PART OF UNDERTAKING

Plaintiffs will argue that the date of the transfer is 01.01.2016.

In the *Celtec* case CJEU stated that ‘date of a transfer’ in article 3(1) of 2001/23 Directive must be interpreted within the meaning of Article 1(1). The term ‘date of a transfer’ in Article 3(1) must be understood as referring to the **date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee**. What is more, that date is a particular point in time which “***cannot be postponed to another date at the will of the transferor or transferee*”**[[29]](#footnote-29).

In present case 01.01.2016 is the date when the final lease contract between Company Y and the owner of the real estate was concluded. It is also the date when the responsibility for carrying on the business as the employer was transferred to Company Y.

There is no possibility that the transfer took place on the 15.12.2015. This is merely the date of a meeting with X’s employees.

The day of 02.04.2016 when the Employer Y started to operate the restaurant cannot be the date of the transfer either. From 01.01.2016 till 02.04.2016 Employer Y was already in the possession of the real estate and renovated it all. The responsibilities were transferred to Y far before 02.04.2016.

#### 1.5 PLAINTIFFS’ EMPLOYMENT CONTRACTS EXISTED ON THE DATE OF TRANSFER

According to settled case-law, the aim of 2001/23 Directive is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership[[30]](#footnote-30).

As it was mentioned above the date of the transfer is 01.01.2016 so that contracts of employment or employment relationships existing on that date between the transferor and the workers assigned to the undertaking, are deemed to be handed over on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect[[31]](#footnote-31). The transfer of the contracts of employment necessarily takes place on the same date as the transfer of undertaking and cannot be postponed to another date at the will of the transferor or transferee[[32]](#footnote-32). By the mere fact of the transfer contracts of employment are automatically transferred with all duties and rights that applied in respect of the employee. Both Plaintiffs were employed by X at the transferred part of X’s undertaking at the date of transfer. Thus, they became the Y’s employees at the date of transfer.

#### 2. DEFENDANT Y IS OBLIGED TO PAY THE JUBILEE AWARD TO PLAINTIFF I

The Plaintiff I brings a claim to oblige the Employer Y to pay the jubilee award.

#### 2.1. NOTICE PERIOD OF PLAINTIFF I

As a result of the notice which was handed over, the Plaintiff I’s notice period lasted 70 days and the employment relationship continued until 20.01.2016. Both collective agreements negotiated by Trade Union A provided Plaintiff I the right to a jubilee award. The second collective agreement of Trade Union A was in force since 01.01.2016.

The jubilee award should be granted after 20 years of service – in case of Plaintiff I on 01.01.2016[[33]](#footnote-33).

The outcome of the transfer of enterprise was the termination of employment relationship. Nevertheless, termination notice period lasted long enough to grant Plaintiff I a jubilee award, as he was still an employee on the date of the transfer - namely on the 01.01.2016. Judicial remedies can only be sought by those employees, whose contracts of employment or employment relationships are in force on the date of the transfer[[34]](#footnote-34). In this case, Plaintiff I was undoubtedly a party to an employment relationship with the transferor – Company X at the date of transfer.

Undeniably, the reason given by Employer X was leasing agreement termination by the lessor – although the real, indirect cause of notice was the transfer of enterprise. The CJEU case-law provided in *Arbejdsledere[[35]](#footnote-35)* and then in *Ny* *Molle Kro[[36]](#footnote-36)* held that when interpreting the notion of the *'employee'*, we must remain in compliance with the mandatory provisions of the 2001/23 Directive concerning protection of employees from dismissal because of the transfer. As shown above, the transfer of enterprise cannot constitute a sole reason for dismissal, hence Plaintiff I should be able to seek effective judicial protection granted by art. 47 of the EU Charter of Fundamental Rights and enshrined in art. 3 and 4 of the 2001/23 Directive, in terms of jubilee award.

#### 2.2 REGULATION OF AWARDS IN COLLECTIVE AGREEMENTS

#### 2.2.1 TRANSFER OF RIGHTS AND OBLIGATIONS FROM COLLECTIVE AGREEMENTS

Art. 3 of 2001/23 Directive imposes an obligation, on the transferee, in the form of an *ipso iure* transfer of employment rights and obligations independent of the will of the parties[[37]](#footnote-37).

Furthermore, according to art. 3(3) of 2001/23 Directive, the transferee is placed under an obligation to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until date of expiry or the entry into force of another agreements. The obligation prevails only for the duration of the collective agreement[[38]](#footnote-38).

The minimal period for observing such terms and conditions by the transferee, that may be required by a Member State, is one year. Hungarian Labour Code implements this regulation in its Section 282 safeguarding the maintenance of working conditions.

In this case, Plaintiff I and Employer X are bound by the first collective agreement at least until 01.01.2016 and all 20 years of Plaintiff I’s work service passed before that date. On 1.01.2016 the second collective agreement entered into force, previously concluded between Employer X and Trade Union A. Both collective agreements granted a jubilee award after 20 years of work.

In *Juuri* case, the CJEU stated that the transferee could not be obliged to observe the working conditions laid down in the collective agreement, since it was no longer in force[[39]](#footnote-39). Howbeit, in this case the first collective agreement expired on the date of the transfer. The moment of expiry of the first collective agreement was at the same time the moment of coming into force of the second collective agreement. Summing up, the protection granted by collective agreements negotiated between Trade Union A and Employer X is undoubtedly continuous. Also the ***effet utile*** of all EU regulations provides that they must be interpreted in accordance with their aim, so that they remain effective in every situation, including such as presented in this case, where two subsequent collective agreements almost ‘overlap’. A transferee cannot be bound by a future agreement if he had not participated in the negotiation procedure[[40]](#footnote-40), however, in case of Plaintiff I, the collective agreement was concluded **before** the date of the transfer, between Trade Union A and Employer X and it was binding for Employer X **both before and on** **the date of the transfer**. The fact that terms and conditions agreed in this agreement enter into force on the date of transfer is irrelevant. Any different interpretation would be **contrary to the purpose** of 2001/23 Directive, which is to protect employees in the event of a change of employer and to ensure that their rights are safeguarded (point 3 of preamble of 2001/23 Directive) and to the ***effet utile***. This understanding has been developed further in the Opinion of Advocate General to Juuri case, where the workers were protected as the weaker party[[41]](#footnote-41).

Furthermore, when comparing both collective agreements in terms of employee’s right to a jubilee award, it is obvious that parties who concluded these agreements, intended to retain the employees’ right also after the 01.01.2016. The new collective agreement not only guaranteed this right, **but also increased the amount of jubilee award due**. At the same time, it cannot be argued that the increase in the amount of the jubilee award was done because of the transfer, as the Trade Union A **had no information about the anticipated transfer** to Employer Y (Employer Y had not informed them before the transfer).

Also, the transferee's freedom to conduct a business is not violated. The 2001/23 Directive balances the freedom to conduct business with the protection of employees in the event of transfer by stating one year limit. According to art. 3(3) Employer Y is obliged to comply with the conditions of the collective agreement negotiated beforehand by Trade Union A and Employer X for at least one year. It means that not until 01.01.2017 the Employer Y would be free to determine the shape of employment relationship of the employees transferred. The amount of jubilee award was due on 01.01.2016 but for the period of service that ended before the transfer, on 31.12.2015.

As CJEU stated in *Collino and Chiappero* case:

[…] *Article 3(1) of the Directive is to be interpreted as meaning that, in calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account* ***the entire length of service*** *of the employees transferred, both in his employment and that of the transferor, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship*[[42]](#footnote-42)*.*

Taking this judgement into consideration, it must be concluded that the jubilee award is due because the Plaintiff I has been working in the same place for twenty years without any intention to change his employer and has a justified reason to expect that he acquired the right to a jubilee award on 01.01.016. Moreover, the second collective agreement was concluded in 2015 without any intention as to the transfer of part of undertaking and any extraordinary consequences in that regard.

#### 2.2.3 THE RIGHT TO THE JUBILEE AWARD

Considering the above, the jubilee award is due in the amount of 4 months' wage guaranteed by the second collective agreement negotiated by Trade Union A, and should be paid by the Employer Y. The Court shall decide whether the jubilee award is to be paid by the Employer Y because of the date of its acquisition, or because of the joint and several liability concept of transferring employers. The jubilee award would be paid by Y alone, if the obligation arose at the date of the transfer. It would however, be paid by Employers X and Y jointly and severally, in such circumstances where the acquisition took place before the date of the transfer. In this case, the circumstances of collective agreements transition and the date of the transfer, all arising within one day might rise doubts. At any rate, the decision of the Court concerning the temporal scope of this claim, would not change a fact that Employer Y is obligated to pay jubilee award amounting to EUR 6000.

Pursuant to Section 39 of Hungarian Labour Code, the transferee and the receiving employer shall be **jointly and severally liable** in respect of obligations towards employees which arose before the date of transfer, if the employee submits the claim within one year from the date of transfer. Any alternative assumption would violate the art. 3(1) of 2001/23 Directive. This protection results from the principle, according to which employer's obligations towards the dismissed employee are automatically transferred[[43]](#footnote-43). Therefore, Plaintiff I sues Employer Y in exercising his right given by Section 39 to receive the jubilee award acquired before the transfer took place and payable at the date of transfer.

#### 3. THERE WAS NO COOPERATION BETWEEN DEFENDANT Y AND TRADE UNION A

The Plaintiff I pleads to establish the cooperation of Employer Y (transferee) with Trade Union A (transferor's trade union) in order to improve working and pay conditions.

#### 3.1. INFORMATION DUTY

According to art. 7(1) of 2001/23 Directive the transferor and the transferee are required to inform the representatives of their respective employees affected by the transfer of the date, the reasons, the social implications and any measures in relation to employees.

This regulation has been implemented in the Section 38 of the Hungarian Labour Code establishing the obligation for the transferee to inform employees about the transfer and changes in working conditions, e.g. base wage and benefits listed in Section 46, Subsection 1(b), within 15 days following the time of the transfer.

In this case neither the transferring, nor the receiving employer informed the former workers of Employer X about the transfer, undoubtedly violating obligation provided in Section 38 which requires written form of information.

In this case the information procedure should involve Trade Union A acting on behalf of X’s workers – as the employees' representation. The existence of Trade Union A and an obligation to share information with this representation falls within the scope of regular *'collective duty of information'*[[44]](#footnote-44). This rule states that transferor and the transferee are obliged to inform their respective employee representatives (here Trade Union A and Trade Union B) about the details of the projected transfer.

Such information should have been given in *'good time'* before the transfer is carried out, as stated in the art. 7(1) of 2001/23 Directive. The relevant time for sharing the information shall be determined in accordance with par. 2 and 3 of this article and with respect to both the transferor and the transferee[[45]](#footnote-45). According to the Hungarian Labour Code *good time* is a period of 15 days.

As to the representatives, the 2001/23 Directive does not preclude whether the representatives of employees, engaged in the information and consultation procedure, should be appointed representatives or trade unions[[46]](#footnote-46).

In this case the information shall be given to Trade Union A by Employer X before the transfer and to the representatives of employees after the transfer. It obviously appears from the facts of the case that the Trade Union A still represents former X’s employees at the Company Y. According to art. 6 of 2001/23 Directive the status and function of the representatives or of the representation of the employees affected by the transfer **shall be preserved** **on the same terms and subject to the same conditions as existed before the date of the transfer**. Hence, the **Trade Union A** **preserves the status of transferred employees' representation**.

The transferee shall provide information about certain conditions of the transfer in due time, but before the employees would become affected by the implications of the transfer of undertaking[[47]](#footnote-47). In this case, the transferee (Employer Y) did not inform Trade Union A about the meeting on 15.12.2015. No further information was also given after the transfer on 01.01.2016. Therefore, Trade Union A remained uninformed by the Employer Y.

Consequences of violation of art. 7(1) and art. 7(2) of 2001/23 Directive to inform and consult employees differ between Member States. Several countries provided employees with a right to compensation in case where such a violation would occur[[48]](#footnote-48). These are i.a. Denmark, Germany and Greece. Sometimes penal provisions are applied towards employers, e.g. in France. This concept of penalties for the lack of cooperation between the employer and transferring employees indicates the **protective role** of the 2001/23 Directive. Moreover, the article 9 of this Directive states that Member States shall enable all employees and their representatives to pursue their claims to judicial proceedings.

Even though the Hungarian law does not afford any right to compensation for lack of cooperation[[49]](#footnote-49), Plaintiff I claims that in the absence of cooperation with Trade Union A, his decisions on employment relationship would have been made differently, had he been informed about the upcoming changes. Therefore, he asks the Court to declare that the lack of cooperation with Trade Union A representing employees transferred influenced the employees’ right to question the legality of termination of his employment contract.

#### 3.2 MEETING ON 15th DECEMBER 2015

The 2001/23 Directive creates a certain framework regarding the 'representative of employees' which should be more precisely provided in the laws or practices of the Member States (art. 2(1)(c)). The only condition set forth by the directive 2001/23 is the **independence of employee unit**[[50]](#footnote-50). Hence, as long as the representative body preserves its autonomy, it also retains its pre-transfer rights.

A meeting was called by Employer Y, acting as the new lessee, on 15.12.2015, but only for employees working as waiters and cooks. The absence of employee representatives during this meeting, casts doubts on the existence of any information procedure that Employers X and Y were supposed to pursue. Indeed, during the meeting, certain employees of Employer X were present, however employees *per se* cannot be regarded as the representatives because on 15.12.2015 they acted as a random group rather than a representation regulated by provisions of Hungarian law.

Although the obligation of information has not been duly fulfilled in this case, the necessity to call a meeting for employees was assumed by Employer Y, thereby Employer Y *per facta concludentia* recognised the existence of transfer of enterprise and his information requirements intertwined therewith. According to the Section 38 of the Hungarian Labour Code, the obligation to inform employees about the changes caused by the transfer has to be complied with in writing. Even if the 15.12.2015 meeting would have been considered as an information sharing, it still failed to meet requirement of written notification.

#### 3.3 CONSULTATION DUTY

Consultation duty is regulated in art. 7(2) of 2001/23 Directive. Where the transferor or the transferee envisages measures in relation to 'his' employees, he must also consult the employees' representatives on such measures with a view to reaching an agreement[[51]](#footnote-51). In this context measures consist of any legal, economic or social changes that have an impact on employees[[52]](#footnote-52).

This instrument is mandatory for the employers, but the effect itself is not regulated. Balancing between the interests of transferred employees and the employer's fundamental right to freedom of contract as a core component of the art. 16 of the EU Charter on Fundamental Rights which guarantees the freedom to conduct a business[[53]](#footnote-53), the consultation duty provided in 2001/23 Directive cannot be strictly regulated. Therefore, the consultation procedure must take place, the results though might vary.

In such circumstances, it is obvious that such an instrument should have been treated with considerable respect by the transferee, especially if there were no possible negative consequences for the employer. The consultation procedure should have been conducted with the representatives of employees, namely the Trade Union A. Instead, Employer Y preferred to impose new, deteriorated pay conditions on transferred employees resulting from a collective agreement negotiated by Trade Union B without any participation of transferred employees.

#### 4.1 PLAINTIFF II SUFFERED AGE DISCRIMINATION DURING THE RECRUITMENT

Plaintiff II wants the Court to declare that they suffered age discrimination.

Age discrimination occurs when a person of a particular age is treated unfavourably “because of” his or her age[[54]](#footnote-54). In present case there is no doubt that Employer Y is responsible for of direct discrimination on the grounds of age that took place during recruitment. Employer Y decided to hire only waiters under the age of 40. It appears from the facts of the case that on 15.12.2015, during the meeting with X’s employees, Employer Y announced that it planned to work with a *young, dynamic team* of employees, so they would employ only 5 waiters under the age of 40. They made it clear that they did not need the services of Plaintiff II who was 61 years old (and judged as too old), but they did need the services of younger Plaintiff I being 39 years old. After that, Plaintiff I was employed by the Employer Y, but Plaintiff II was not.

The formulation of employment offers and advertisement has to be **strictly neutral** **without indication of any preference or limitation based on age**, unless the situation is covered by a statutory exemption or justification[[55]](#footnote-55). In that case however, Defendant Y explicitly admitted using the age criterion when recruiting.

The act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, adopted by the Hungarian Parliament on 22 December 2003 states in art. 7 that direct negative discrimination means a breach of the principle of equal treatment. In art. 8 of this act it is indicated that any provisions that result in a person or a group being treated less favourably than another person or group in a comparable situation because of his/her age are considered direct discrimination. No exception to that rule have been found in Hungarian regulations.

The principle of non-discrimination on grounds of age must be also regarded as a general principle of Community law[[56]](#footnote-56) . What is more, the Charter of Fundamental Rights in the EU prohibits any form of discrimination under the catalogue of article 21. The principle of non-discrimination laid down in Article 21 gives the individual the fundamental right that we can apply in a horizontal relation. In the AMS case, the CJEU stated that the principle of non‑discrimination on the grounds of age, laid down in Article 21(1) of the Charter, is **sufficient in itself** to confer on individuals an individual right which they may **invoke as such**[[57]](#footnote-57).

The age cannot be a decisive factor neither when employing nor when terminating employment with an employee. The prohibition of discrimination on grounds of age as laid down in Directive 2000/78, particularly in Articles 1 and 6 thereof, is sufficiently precise and unconditional as to satisfy the substantive conditions for direct effect[[58]](#footnote-58).

However, according to Directive 2000/78, there is a possibility of justification of differences of treatment on grounds of age if within the context of national law, they are objectively and reasonably justified by a legitimate aim. Differences in treatment in connection with age may be justified under certain circumstances[[59]](#footnote-59). It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited[[60]](#footnote-60).

Employer Y wanted to work in a “*young, dynamic team*” which constituted subjective and unique criteria for choosing staff in this case. No requirements for the job that could be considered as a genuine and determining occupational requirement were mentioned. Plaintiff II argues that difference in treatment between workers was caused only by purely individual reasons and cannot be reasonably justified[[61]](#footnote-61).

Also, the European Court of Human Rights has recognised the individual right to work – especially its ‘non-discrimination’ aspect[[62]](#footnote-62). The ECtHR has accepted the age as one of discriminatory criteria enshrined in the art. 14 of the Charter of Human Rights[[63]](#footnote-63). In a number of cases it was confirmed that failure to hire, appoint or promote a person may constitute a breach of the principle of non-discrimination in the art. 14 (and potentially other articles, including freedom of thought or the right to respect private life) and such inequality may be only justified by a “***legitimate aim***” and cannot be “***disproportionate***”[[64]](#footnote-64). In the *I.B. v. Greece* case, an employee was dismissed due to having contracted HIV. The reason for his termination was the need to ensure “*smooth functioning of the company*” (whilst this case provides the need to have a young and dynamic team as the reason for failure to hire Plaintiff II). The ECtHR found that an “*adequate explanation*” must be provided each time the employer’s interests are to outweigh the employee’s interests. The case “***failed to strike a correct balance between the rights of the two parties***” and it was found that claimant was subject to discrimination[[65]](#footnote-65).

The Plaintiff II also believes that unclear operational needs of the Company Y and their subjective need to build a young and dynamic team constitute an insufficient explanation and therefore, the Defendant’s interests should not outweigh the interests of the Plaintiff II in this case.

Summing, there was the discrimination on basis of age is in breach of the national law, Directive 2000/78 and EU law.

Considering that the Plaintiff II has presented sufficient facts from which it can be presumed the direct discrimination based on age, thus, according to art. 10 of the Directive 200/78, the burden of proof has been transferred to the Employer Y.

## PLEADINGS

* 1. declaration of the transfer of enterprise (Plaintiff I, Plaintiff II)
  2. 6000 EUR of jubilee award (Plaintiff I)
  3. declaration of the lack of cooperation with Trade Union A (Plaintiff I)
  4. declaration of age discrimination (Plaintiff II)

1. Kirchner J. Morgenroth S., Marshall T. , Transfer of Business and Acquired Employee Rights: A Practical Guide for Europe and Across the Globe, Berlin 2016, p.235. [↑](#footnote-ref-1)
2. C-144/04 Mangold, par. 75. [↑](#footnote-ref-2)
3. C-478/03 Celtec Ltd , par. 44. [↑](#footnote-ref-3)
4. Joined Cases C-171/94 et C-172/94, Albert Merckx et Patrick Neuhuys contre Ford Motors Company Belgium SA., par. 28.; Case C-29/91, Dr. Sophie Redmond Stichting v Hendrikus Bartol and others, par. 10,11.; C- 101/87 Bork International v Foreningen af Arbejdsledere i Danmark, par. 13. [↑](#footnote-ref-4)
5. C-13/95 Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice,par. 11,12. [↑](#footnote-ref-5)
6. C -324/86 Daddy’s Dance Hall [1988] ECR 00739, par. 10, 11. [↑](#footnote-ref-6)
7. C- 101/87 Bork International ν Foreningen af Arbejdsledere i Danmark, par. 14, 20 . [↑](#footnote-ref-7)
8. Joined Cases C-171/94 et C-172/94, Albert Merckx et Patrick Neuhuys contre Ford Motors Company Belgium SA. , par. 30. [↑](#footnote-ref-8)
9. C-340/01 Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH, par. 39. [↑](#footnote-ref-9)
10. C-287/86 Ny Mølle Kro, par. 12. [↑](#footnote-ref-10)
11. BH 2003/435 the Supreme Court of Hungary. [↑](#footnote-ref-11)
12. This aspect is also underlined in section 36 of Hungarian Labour Code. [↑](#footnote-ref-12)
13. C-108/10, Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca, par. 42. [↑](#footnote-ref-13)
14. C-209/91, Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S, par. 16. [↑](#footnote-ref-14)
15. C-186/83 Botzen v Rotterdamsche Droogdok Maatschappij, par. 15. [↑](#footnote-ref-15)
16. C-209/91, Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S, par. 17. [↑](#footnote-ref-16)
17. C-24/85, Jozef Maria Antonius v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV, par. 13. [↑](#footnote-ref-17)
18. C-13/95 Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, par. 14. [↑](#footnote-ref-18)
19. C-29/91 Stichting, par. 14-16. [↑](#footnote-ref-19)
20. C-340/01 Carlito Abler and Others v Sodexho MM Catering GmbH, par. 36. [↑](#footnote-ref-20)
21. C-340/01 Carlito Abler and Others v Sodexho MM Catering GmbH, par. 37, C- 101/87 Bork International ν Foreningen af Arbejdsledere i Danmark, par. 20. [↑](#footnote-ref-21)
22. C-466/07, Dietmar Klarenberg v Ferrotron Technologies GmbH, par. 45,46. [↑](#footnote-ref-22)
23. Questions for clarification issued by HS MCC Case Committee, p. 3. [↑](#footnote-ref-23)
24. Thüsing G., *European Labour Law*, München 2013, p.115. [↑](#footnote-ref-24)
25. C-287/86 Ny Mølle Kro, par. 19, 22.; C- 101/87 Bork International ν Foreningen af Arbejdsledere i Danmark, par. 16. [↑](#footnote-ref-25)
26. C-234/98, Allen and Others, par. 32. [↑](#footnote-ref-26)
27. C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português, par. 23. [↑](#footnote-ref-27)
28. C-13/95 Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, par. 14. [↑](#footnote-ref-28)
29. C-478/03 *Celtec Ltd*, par. 29-31, 36, 44. [↑](#footnote-ref-29)
30. C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português , par. 25. [↑](#footnote-ref-30)
31. C-478/03 Celtec Ltd, par. 44. [↑](#footnote-ref-31)
32. C-305/94, Rotsart de Hertaing / Benoidt and IGC Housing Service , par. 26. [↑](#footnote-ref-32)
33. Questions for clarification issued by HS MCC Case Committee, p. 1. [↑](#footnote-ref-33)
34. P. Watson, *EU Social and Employment Law, Second Edition*, Oxford 2014, p. 152. [↑](#footnote-ref-34)
35. C-105/84, Foreningen a/ Arbejdsledere i Danmark v Danmols Inventar, par. 18, 19. [↑](#footnote-ref-35)
36. C-287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, par. 25, 26. [↑](#footnote-ref-36)
37. K. Riesenhuber, *European Employment Law, A Systematic Exposition*, Cambridge 2012, p. 588 [↑](#footnote-ref-37)
38. P. Watson, *EU Social and Employment Law, Second Edition*, Oxford, 2014, p. 168. [↑](#footnote-ref-38)
39. C-396/07 **Mirja Juuri v Fazer Amica Oy , p**ar. 33-35. [↑](#footnote-ref-39)
40. C-426/11 Mark Alemo-Herron and Others vs. Parkwood Leisure Ltd, par. 36, 37. [↑](#footnote-ref-40)
41. Opinion of Advocate General Ruiz-Jarabo Colomber to C-396/07, par. 48, 49. [↑](#footnote-ref-41)
42. C-343/98 Renato Collino, Luisella Chiappero vs. Telecom Italia SpA, par. 53. [↑](#footnote-ref-42)
43. C-101/87, **P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S.**, par. 18. [↑](#footnote-ref-43)
44. K. Riesenhuber, *European Employment Law, A Systematic Exposition*, Cambridge 2012, p. 601-602. [↑](#footnote-ref-44)
45. *Ibidem*, p. 601. [↑](#footnote-ref-45)
46. Ł. Pisarczyk, *Przejście zakładu pracy na innego pracodawcę*, Warszawa 2013, p. 98. [↑](#footnote-ref-46)
47. *Ibidem*, p. 98. [↑](#footnote-ref-47)
48. *Ibidem*, p. 104. [↑](#footnote-ref-48)
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50. K. Riesenhuber, *European Employment Law*, *A Systematic Exposition*, Cambridge 2012, p. 603. [↑](#footnote-ref-50)
51. K. Riesenhuber, *European Employment Law*, A Systematic Exposition, Cambridge 2012, p. 601; C. v. Alvensleben, *Die Rechte der Arbeitnehmer bei Betriebsübergang in Europäischen Gemeinschaftsrecht*, 121 sq. [↑](#footnote-ref-51)
52. *Ibidem*. [↑](#footnote-ref-52)
53. J. Prassl, *Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 Alemo-Herron and others v Parkwood Leisure Ltd,* Industrial Law Journal, Ind Law J (2013) 42 (4): 434-446. [↑](#footnote-ref-53)
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55. Schlachter M., *The Prohibition of Age Discrimination in Labour Relations, Reports to the XVIIIth International Congress of Comparative Law,* Waschington D.C. 2010,p.51*.* [↑](#footnote-ref-55)
56. C-144/04 Werner Mangold vs. Rüdiger Helm, par. 75. [↑](#footnote-ref-56)
57. C-176/12 Association de médiation sociale (AMS) v Union locale des syndicats CGT and Others, par. 47. [↑](#footnote-ref-57)
58. C-411/05. Palacios de la Villa v Cortefiel Servicios SA, par. 114. [↑](#footnote-ref-58)
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60. Article 6 of Directive 2000/78. [↑](#footnote-ref-60)
61. C-388, Age Concern England , par.46, 65. [↑](#footnote-ref-61)
62. O’Connell, R., *The right to work in the ECHR*, European Human Rights Law Review 2012, p.7. [↑](#footnote-ref-62)
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64. 20605/92 Halford v. The United Kingdom, [34369/97](http://hudoc.echr.coe.int/eng#{"appno":["34369/97"]}) Thlimmenos v. Greece, 38162/07 Naidin v. Romania. [↑](#footnote-ref-64)
65. 552/10, I.B. v. Greece, ECHR 283. [↑](#footnote-ref-65)