

Labour Law Implications of Outsourcing in Public Sector

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Abstract Employers are increasingly resorting to the contractual delegation of certain activities to outside contractors. Legal status of employees who previously performed this work with the employer depends mainly on whether there has been the transfer of the undertaking within the meaning of Directive 2001/23/EC. According to case law of the Court of Justice of the EU, in addition to the performance of the same activities, a condition is also the transfer of essential means of work or transition of employees. Since the transition of employees in this case depends on the agreement between the contracting authority and the provider of services, terms of public procurement are very important in this regard. The article addresses the question of the application or non-application of the institution of the transfer of the undertaking in cases of outsourcing in public sector while paying attention to Slovenian and Croatian legislation and to the Directive.

Keywords: • outsourcing • public sector • transfer of undertaking • termination of employment contract • public procurement

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[https://doi.org/10.4335/15.3.705-723\(2017\)](https://doi.org/10.4335/15.3.705-723(2017))

ISSN 1581-5374 Print/1855-363X Online © 2017 Lex localis

Available online at <http://journal.lex-localis.press>.

1 Introduction

In recent decades, factors such as a rapid technological development, globalisation and the economic crisis have significantly affected the organisation of work and work-related relationships. Among other things, employers have been increasingly resorting to contractual delegation of certain (usually secondary) functions or activities to outside contractors.¹ This also applies to employers in the public sector, who are interested in outsourcing, which is supposed to contribute to the reduction of labour costs, because of budgetary costs (Berlinski, 2008; Dube and Kaplan, 2010). Certain tasks are performed as a service by outside contractors or by employees of these contractors instead of public employees employed by local self-government institutions and other public entities.

The phenomenon of outsourcing, the popularity of which has been increasing in Slovenia and Croatia as well, has considerable implications in the field of labour law. Situations can vary significantly,² and so can legal protection of employees who previously performed this work with the employer who outsourced certain activities to an outside contractor.

Legal status of employees in the case where the employer delegates his or her activity to an outside contractor is better protected, if conditions are met for a change of employer, which is regulated in the EU Member States with Directive 2001/23/EC (Grimshaw et al., 2015: 299; Mori, 2015: 152). The employment relationship with employees is transferred to the outside contractor (the transferee) and the employees retain their existing employment rights.³ Otherwise, the scope of safeguarding of employees' rights in the case of the change of employer varies among individual countries, which is a result of different interpretations of the Directive and its implementation into national legal systems (Hartzen et al., 2008, Grimshaw et al., 2015: 305, 306).

If conditions for the change of employer in the case of outsourcing are not met, the employer (contracting authority) may for business reasons terminate the employment relationship with those employees whose work is no longer needed due to outsourcing. Even if the contractor enters into employment relationship with any of these employees, he or she is not required to grant them the same rights that they had with their previous employer (contracting authority).

2 The application of Directive 2001/23/EC in the case of outsourcing

Change in the organisation of an undertaking or transfer of an undertaking or part of an undertaking from one legal entity to another has significant implications for employees of that undertaking or part of the undertaking. Directive 77/187/EEC 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 businesses⁴ was adopted with the aim to ensure adequate protection of employees,⁵ and was later amended by Directive 98/50/EC amending Directive 77/187/EEC.⁶ Both directives were repealed and replaced by a new Directive 2001/23/EC 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 Directive).⁷ The Directive establishes three pillars when it comes to the safeguarding of employees' rights: automatic transfer of the employment relationship with all the rights and obligations from the transferor to the transferee; a protection of employees against dismissal by the transferor or the transferee; and an obligation of the transferor and the transferee to inform and consult the representatives of employees (Barnard, 2012: 579).

The Directive, which was implemented into Slovenian legal system with Employment Relationship Act (ERA-1)⁸ and into Croatian legal system with Labour Act (LA),⁹ often was and still is under consideration by the Court of Justice of the EU in preliminary ruling procedure.¹⁰ These procedures often address a question of application of the Directive, i.e. a question of whether the undertaking is (may be) transferred in a particular case.

According to Article 1 of the Directive, the 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" (point a. of the first paragraph).¹¹

The Court of Justice of the EU has interpreted the notion of a legal transfer in a very broad manner. According to an extensive case law, the transfer of an undertaking (or part of an undertaking) occurs not only on the basis of a contract of sale of the undertaking, but also on the basis of some other contract, e.g. a lease contract or contract for the assignment of services.¹² In terms of the contractual assignment of services, we can identify three groups of cases, all of which (according to decisions of the Court of Justice of the EU) may fall within the scope of the Directive.¹³ The first group includes cases where the contracting authority decides that it will no longer carry out certain activity itself, but delegates the activity with a contract to an outside contractor instead - contracting out or outsourcing (*Watson Rask*, C-209/91, 12 November 1992), the second group includes cases of succession of service contracts, where upon the expiry of the contract with the first contractor the contracting authority assigns provision of the same service to another contractor (*Süzen*, C-13/95, 11 March 1997), and the third group includes cases where upon the expiry of the contract with the contractor the contracting authority once again carries out the activity with his or her own employees - in-sourcing (*Hidalgo and Others*, C-173/96 and C-247/96, 10 December 1998).

Considering the above explanation, there is no doubt that any legal transaction (therefore, a service contract as well) may constitute a legal title for the transfer of an undertaking.¹⁴ The answer to a question of whether the Directive applies in a particular case of a legal transaction depends on what counts as a transfer of an undertaking or part of an undertaking. Point b of the first paragraph of Article 1 of the currently valid directive¹⁵ states that there is a transfer within the meaning of this Directive where there is "a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary." The assessment is therefore crucial of whether the transferred economic entity has retained its identity.

For the purpose of this assessment, the Court of Justice of the EU has developed the so-called multi-factor test (a test based on several criteria). In the famous *Spijkers* case (C-24/85, 18 March 1986) the Court defined the following criteria as crucial: the type of undertaking or business to which the transfer refers; whether or not its tangible assets, such as buildings and movable property, are transferred; the value of its intangible assets at the time of the transfer; whether or not essential staff are taken over by the new employer; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the period, if any, for which those activities are suspended. The Court regularly refers to these criteria in its judgements.

Despite the initial position of the Court of Justice of the EU that none of these criteria is decisive and that national courts must make an overall assessment of the situation,¹⁶ the Court of Justice of the EU has actually focused on two criteria - the activity and the economic entity. These criteria are based on two conflicting notions of an undertaking - the first is an undertaking as an activity - labour-law approach - and the second is an undertaking as an organisation - commercial-law approach (Barnard, 2012: 592, 593).

In earlier judgements,¹⁷ the Court of Justice of the EU applied the labour-law test. It considered a question of whether the undertaking retained its identity, as indicated by the actual continuation or resumption of the same or similar activities by the new employer, as a crucial factor for the application of the Directive. This position has culminated in the case *Schmidt* (C-392/92, 14 April 1994).¹⁸ A broad interpretation of the transfer of an undertaking, which was adopted in the judgement in this case, was the subject of criticism by employers, individual commentators and governments of the largest Member States (Jeffery, 2002: 692).

This was probably the reason for the reversal of its position, which occurred in the case *Süzen* (C-13/95, 11 March 1997).¹⁹ In that and the following judgements, the Court of Justice of the EU rejected the activity test. It took the view that the mere fact that the service provided by the previous contractor is similar to the service

provided by the new contractor does not support a conclusion that the economic entity has been transferred. The economic entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or, where appropriate, the operational resources available to it.²⁰

Subsequent judgements of the Court of Justice of the EU demonstrate that in determining whether the economic entity has been transferred, it is important to distinguish between businesses (activities) that operate on the basis of assets and businesses in which assets are not important, but which depend for their operation on workforce instead. In the case of businesses that operate on the basis of assets, equipment, the transfer of an undertaking may occur only if the movable or immovable property was permanently or temporarily transferred.²¹ If the transfer of assets (and the use thereof by the transferee) had occurred, the undertaking was transferred as well, which means that the transferee shall also take over employees and safeguard all the rights thereof. This also applies in the case of outsourcing (cases *Liikene*, C-172/99, 25 January 2001, *Abler and Others*, C-340/01, 20 November 2003, *Air Pascual and Others*, C-509/14, 26 November 2015).

In certain sectors (e.g. cleaning, surveillance) the economic entity may function without any significant assets, and the maintenance of its identity therefore cannot depend on the transfer of such assets.²² In the Court's opinion, the essential element in these sectors is a workforce, which is why a group of employees who are permanently performing a certain task may amount to an economic entity (cases *Süzen*, *Hernandez Vidal and Others*, C-127/96, C-229/96 and C-74/97, 10 December 1998; *Hidalgo and Others*). In a number of such cases, the Court noted that an economic entity is maintained only if the transferee has taken over the majority of the transferor's employees (in terms of their numbers and skills) who were assigned by the transferor to a certain task (*Hidalgo and Others*, *Temco*, *Clece*, C-463/09, 20 January 2011). According to this interpretation, in relation to these activities the transfer of an undertaking (and therefore the protection of employees) actually depends on the will of the transferee or on the agreement between the transferor and the transferee on the transfer of employees, which is contrary to the spirit of the Directive, which was adopted in order to safeguard the employment relationship of employees (Barnard, 2012: 597). The essence of the Directive lies in the fact that it is intended to ensure the continuity of employment relationships and to safeguard rights of employees employed by this undertaking or part of the undertaking in the event of the transfer of an undertaking or part of an undertaking.²³ If the undertaking or part of the undertaking retains its identity in the event of a transfer, the Directive applies, and the transferee must take over all employees and ensure that they have the same rights as they had with the transferor. In the case of labour-intensive activities (taking into account this interpretation of the Court of Justice of the EU), the answer to a question of whether the undertaking or part of the undertaking has retained its identity

depends on whether or not the majority of employees were taken over by the transferee. Taking over employees, which is supposed to be a consequence of the application of the Directive, also becomes a condition determining whether the Directive applies. The inadequacy of such interpretation of the notion of a transfer of an undertaking was noted by several Advocates General in their Opinions,²⁴ and was criticised by the theory as well (Beltzer, 2007; Barnard, 2012; Titze, 2015).

Another problem concerning the application of the Directive in the case of outsourcing arises from the fact that the Court of Justice of the EU (which adopted a position that either the transfer of assets or the transfer of employees is crucial for a decision on the existence of identity of the economic entity, in addition to the performance of the same activity) did not provide any clear guidelines in relation to the assessment of whether a particular activity is to be placed among the activities based on assets or among the activities based on employees.²⁵ As demonstrated by several recent cases before the Court of Justice of the EU relating to the transfer of services, the interpretation of the Directive is still not clear in this regard and is causing problems for employees and employers in the Member States (Jeffery, 2002: 693; Schaub, et al., 2009: 1194; Thüsing, 2013: 114, 115).

3 Transfer of an undertaking in the case of outsourcing in Croatian and Slovenian law

Under Croatian legislation, the protection of employees' rights in the event of the transfer of an undertaking is regulated by Croatian Labour Act under the concept of the "transfer of (employment) contracts to a new employer". According to Article 137/1: "In the event of transfers of undertakings, economic activities or parts of undertakings or economic activities, retaining their economic integrity, to a new employer, as a result of the change of status or a legal transaction, all contracts of employment of the workers employed with the undertaking or part of undertaking being transferred, respectively who are connected with the economic activities or part of economic activities being transferred, are transferred to the new employer."

According to the LA, the transfer of contracts takes place (besides the transfers of undertakings or parts of undertakings) in the event of "a transfer of economic activity (businesses) (or parts of economic activity, businesses)". The formulation "economic activity" used in LA does not seem appropriate. An undertaking can have more establishments (in German law, *Betrieb*) in which one or more activities that are the object of business of the holder of undertaking are being performed. Establishment is a part of an undertaking which has all three elements that an undertaking has, but relates to only one part thereof (Barbić, 2002: 24). This notion of establishment allows for the conclusion that it would be more appropriate to use the term establishment (part of the establishment) than

economic activity (part of the economic activity) because the economic activity is just one element of a plant, respectively the object of the business of the holder of enterprise (Laleta, 2011: 269). Even though the LA does not mention the term “establishment”, the transfer of an undertaking and part of an undertaking that retain their economic integrity “would actually mean the transfer of establishment, whereby it is always necessary to keep in mind that for the transfer of an employment contract there must be a continuity of that part that will be transferred” (Gović, 2014: 547). The term “establishment” is used in Croatian jurisdiction as well, meaning “an establishment with jobs of those who were working in the plant”).²⁶

Therefore, despite the misleading phrasing, the definition of a transfer of an undertaking in Croatian law follows the Directive and safeguards employee's rights only in the case where the undertaking or part of the undertaking (as well as the business or part of the business) retains its economic integrity (economic identity).

Despite the fact that the notion of the transfer of an undertaking has been established in Croatian legislation for many years, not many cases can be found in Croatian case law in which the court recognised the protection of employment relationship to employees on these grounds. In several cases the Croatian Supreme Court found that there was no transfer of undertakings and, consequentially, that the provisions of LA on the transfer of employment contract do not apply.²⁷ Even in the case where a company A terminated the accounting department and contractually assigned the provision of accounting services to the outside contractor, who (under the agreement with the company A) entered into employment relationship with all employees employed in the accounting department, the Supreme Court failed to recognise employees' rights to the employees on the grounds of a change of employer.²⁸ The Court was of the opinion that the Article of LA on the transfer of employment contract to a new employer could not apply because that was not a case of the transfer of an undertaking or part of an undertaking to a new employer. According to the court's opinion, as a result of reorganisation (the transfer of accounting services to an outside contractor), the need of the company A for the work performed by those employees ceased, which is why the termination of employment contract with the employee who did not accept a less favourable employment with the outside contractor is considered lawful. Therefore, a question might arise in this case, as well as in some others, whether the Supreme Court of the RC interprets the notion of the transfer of an undertaking in accordance with the Directive.

Article 75 of Slovenian ERA-1 stipulates that "if due to the legal transfer of an undertaking or part of an undertaking carried out on the basis of an Act, another regulation, a legal transaction and/or a final court decision, or due to a merger or division, the employer is changed, the contractual and other rights and obligations

of employees arising from the employment relationships with the transferor employer that existed on the day of transfer shall be transferred to the transferee employer. "

Even though the cited provision does not explicitly provide that an undertaking or part of an undertaking has to retain its economic identity as a condition for the existence of change of employer (unlike the provision in the Directive or Croatian LA), Slovenian legal system also only protects employees within the meaning of the provision of Article 75 of ERA-1 in the cases where in the event of the transfer of an undertaking or part of an undertaking, this undertaking retains its identity. The institution of a change of employer is both in theory and in case law being interpreted in the spirit of the Directive, which was implemented with the cited provision (Blaha, 2005; Senčur Peček, 2010; Bečan et al., 2016: 443).

Slovenian courts are following guidelines of the Court of Justice of the EU regarding the existence of transfer of an undertaking in cases of outsourcing as well. In the case VIII Ips 126/2009 of 11 January 2011, the Supreme Court of the RS stated: "In activities where the transfer does not involve any transfer of assets, an essential part of the staff employed by the transferor must be transferred, which can represent a criterion for a cohesive unit (Case *Temco*, C-51/00). In the present case, the maintenance of park areas was contractually delegated for a period of one year, whereas in the event of such transfer of a service activity the other defendant's employees would also have to be transferred to the outside contractor in order for such transfer of an activity to be considered a transfer of an undertaking."²⁹

In the context of Slovenian regulation of the transfer of an undertaking, a special attention should be paid to the provision of the eighth paragraph of Article 75 of ERA-1, which provides that if the transferor employer temporarily transfers the undertaking to the transferee employer on the basis of a legal transaction, the contractual and other rights and obligations arising from the employment relationships of employees shall again be transferred to the transferor employer or to a new transferee employer after this legal transaction expires.

With this provision, Slovenian law provides better protection of employees in the event of the transfer of an undertaking than the Directive. The Directive represents a minimum standard and does not prevent Member States from adopting laws or other acts in certain area that are more favourable for employees or from promoting more favourable collective agreements.³⁰

The cited provision also applies in the case of a temporary contractual delegation of the provision of services. In the case VIII Ips 50/2015 (judgement of 25 May 2015) the Supreme Court of the RS held that "A service contract, which is concluded with the contractor for a limited period, represents a conclusion of a

legal transaction for a temporary transfer of surveillance activities. The rights and obligations concerning the transfer are not exhausted with the conclusion of the first (temporary) contractual transfer of the undertaking or activity, and these statutory provisions also apply to subsequent temporally connected contractual transfers of the activity to the same or other transferees."

In the case VIII Ips 51/2015 (which also relates to the surveillance activity) the Supreme Court of the RS stated that "subsequent contractual transfers of the activity shall be considered a transfer within the meaning of Article 75 of ERA-1, if the contents of the contractual transfer have not significantly changed, in comparison with the first transfer, in terms of the work performed by employees." As regards a question of who acquires employees upon the conclusion of a temporary contractual transfer of activity, the Supreme Court of the RS pointed out in the same case that "in the event where the activity, which is subject to a transfer, is contractually fully taken over by another transferee upon the expiry of the period of the temporary transfer, the rights and obligations of employees employed in this activity are transferred to a new transferee. The rights and obligations arising from employment relationships with these employees therefore revert to the transferor only in the case where no new transferee exists or where a new transferee fails to fully take over the activity, which would also require it to take over all the employees."

With such interpretation of the eighth paragraph of Article 75 of ERA-1, Slovenian regulation of the protection of employees in the event of a contractual transfer of services to another contractor and resumption of services by the contracting authority (insourcing)³¹ approaches the regulation in the UK, which protects employees in the case of outsourcing, the transfer of services to another contractor and insourcing, irrespective of the intention of the transferee to take over these employees or not. This is a well-known provision of Article 3. b. of The Transfer of Undertakings (Protection of Employment) Regulations 2006 from the UK (hereinafter: TUPE)³², the so-called "service provision change"³³ which was enacted in order to eliminate uncertainties relating to the application of the Directive in the case of the transfer of the provision of services in labour-intensive sectors (such as cleaning) and to ensure the safeguarding of employees in all necessary situations (Deakin and Morris, 2009: 203; Titze, 2015; Wynn-Evans, 2013).

4 Transfer of an undertaking in the case of outsourcing in the public sector

The rules relating to the protection of employees in the event of the transfer of an undertaking shall (may) also apply in cases where an undertaking or part of an undertaking is transferred from a legal entity governed by public law (e.g. municipalities or other local self-government institution) to a legal entity governed

by private law and back to the former. This is explicitly stated in the Directive³⁴ and in decisions of the Court of Justice of the EU,³⁵ which also confirmed such opinion in several cases relating to a contractual transfer of the provision of various services from legal entities governed by public law to private service providers (for example, *Clece*, *UGT-FSP*, *Abler and Others*, *Hidalgo and Others*). Outsourcing of ancillary activities (surveillance, food preparation, cleaning, transport, etc.) is a common practice in both Slovenian and Croatian public sectors.

In 2014, the Croatian Government envisaged a large-scale outsourcing of ancillary activities in the public sector based on Project Plan 2014-2016.³⁶ One of the most important goals was the consolidation of public finances and the lowering of budgetary deficit in the period of the economic crisis.³⁷ Trade unions have heavily opposed the Plan, which led to a referendum initiative for the prohibition of the outsourcing in the public sector.³⁸ The Croatian Government finally gave up on the mentioned Plan. Interestingly, one of the crucial issues emphasised in the Project Plan was the protection of the existing human resources and respectively the protection of workers and safeguarding of their acquired rights (Directive 2001/23/EC, Article 133 of LA on the transfer of undertakings and intersectoral and sectoral collective agreements). In regard to the contracting-out of ancillary activities as an economic entity (complete outsourcing) as the priority model, it was envisaged that „the service provider takes over the economic entity with all the resources“. In other words, it would have been realised through a transfer of undertakings, and respectively, through a transfer of the employment contract on a new employer, whereas „he/she is selected in a process of public procurement“. ³⁹ After the Project Plan failed in the autumn of 2014, the Croatian Government announced a reform of ancillary activities in the public sector based on a single model of in-house improvement of efficiency. However, this model included the possibility of outsourcing to a great extent.⁴⁰

The reform is based on two decisions issued in September 2014, which prohibited new employment in public services and governmental bodies.⁴¹ An analysis of the prohibition of new employment in public services shows that the intention was to improve the ancillary-technical services performance and their rationalisation by using, first and foremost, “the organisation of the work and working time of the present employees (clerks) (according to the special regulation and employment contract)”. If that is not possible, as a secondary measure, the performance of activities would be given to the external service providers, according to special regulations. New decisions dating from 2016⁴² added another condition stipulating that the outsourcing was allowed only if it is financially beneficial for the public service. As a last resort, new employment is possible, but only with the approval of the head of the public body.⁴³ The latter decision has no time limit.⁴⁴ According to the Civil Servants Act (CSA),⁴⁵ depending on the organisation and needs of the service, ancillary-technical and other services (that are necessary for a timely and

high-quality performance of the work of the public body work) can exceptionally be given to external service providers, in accordance with provisions on public procurement. The condition is, however, that security risks and financial profitability be previously assessed (Article 3 (5) of PSA). Two years ago, in December, Trade Union of civil and local servants and clerks of the Republic of Croatia has submitted to the Constitutional Court of the Republic of Croatia a proposal for a judicial review (i.e. examining the legality and constitutionality) of the Decision on the prohibition of new employment in governmental bodies (the so-called decision on the “silent outsourcing”). However, the Constitutional Court has rejected the proposal with the explanation that this question does not fall under its jurisdiction.⁴⁶

In Slovenia, local self-government institutions, state bodies and other entities governed by public law (institutions, agencies, etc.) are likewise encouraged to delegate ancillary activities to outside contractors with a view to reducing costs. Data show that in the public sector the outsourcing is the most widespread in the cleaning activity (which is entirely assigned to outside contractors in some parts of the public sector) and is also common in maintenance and information services, but is only to a lesser extent established in accounting services.⁴⁷ A review of public procurement procedures indicates that it also occurs in the activities of surveillance, transport, the provision of food and others.⁴⁸

In the public sector, a contractual transfer of services to outside contractors may only be realised through the public procurement procedure. The field of public procurement is governed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC⁴⁹ and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,⁵⁰ which were implemented into Slovenian legal order with *Zakon o javnem naročanju* (ZJN-3)- Slovenian Public Procurement Act (PPA-3)⁵¹ and into Croatian legal system with *Zakon o javnoj nabavi* - Croatian Public Procurement Act (PPA)⁵².

These directives contain no provisions that would address the question of the legal status of employees in the event of outsourcing, even though European Trade Union Confederation (ETUC) requested in its comments on the proposal of the directives that they should explicitly specify that a contractual delegation of the provision of services by a public entity constitutes a legal transfer within the meaning of Directive 2001/23/EC.⁵³ A question was also raised by the theory of the role of Directive 2001/23/EC in public procurement procedures (Barnard and De Baere, 2014: 33).

The Court of Justice of the EU in its case law clearly holds that Directive 2001/23/EC may also apply in the event of the transfer of services within the scope of the public procurement procedure. In the case *Liikene* (C-172/99, 25 January 2001)⁵⁴ The Court took the view that there may be a transfer of an undertaking within the meaning of Directive 2001/23/EC even in the case where there is no direct contractual link between two undertakings who are successively providing a service; but only if there is a transfer of an economic entity which has retained its identity. With regard to the already mentioned case law, the Court of Justice of the EU considers the identity maintained, if the property is transferred or employees are taken over (depending on the type of the service).⁵⁵

In the case of the public procurement where a municipality or other local self-government institution (as well as other public entity) is delegating a service in which employees are the key element (e.g. cleaning, surveillance), the use of the institution of a change of employer depends on whether the contractor takes over (enters into the employment relationship with) employees of the contracting authority (or the current contractor). This situation undoubtedly occurs if the contracting authority lays down in the tender specifications the obligation for the provider to take over employees. Such cases of public procurement can be found in Slovenian case law,⁵⁶ with contracting authorities typically requiring the employment of the contracting authority's employees and, more rarely, the employment of those employees who have been transferred to the current service provider on the basis of the previous tender. It is interesting that the National Review Commission regarded the requirement of employment of the contracting authority's former employees, who are employed by the current provider of services, as a disproportionate request that does not comply with the provisions of Public Procurement Act.⁵⁷ A similar (or seemingly stricter) position is clearly established in Croatian law⁵⁸, where the practice demonstrates that contracting authorities do not require employees to be taken over in cases of public procurement, and no decisions of the State Commission for Supervision of Public Procurement procedures can be found in this regard.

Otherwise, the obligation to take over employees, which is stipulated in the tender conditions or in the contract for the provision of services, is not a prerequisite for the institution of a change of employer to apply in the relation to the service in which employees are the crucial element. As can clearly be concluded on the basis of the decision issued by the Court of Justice of the EU in the case *Süzen (as well as in the case Clece, which refers to the cleaning in local self-government institutions)*, the decisive factor is whether the new service provider has actually taken over former employees of the contracting authority or the current contractor.⁵⁹ Since the chosen contractor is generally not interested in employment relationships with employees of the contracting authority (or employees of the previous contractor) in cases of simple tasks (cleaning, surveillance), this condition typically fails to be met where this is not stipulated as mandatory (is not

specified in the tender conditions). Based on such interpretation of Directive 2001/23/EC, the Directive (and therefore national regulation of a change of employer, which is being interpreted in the spirit of the Directive) is not applied exactly in the case of those employees who are in the greatest need of protection. The rules on the change of employer will be used only if the new contractor takes over the majority of employees of the contracting authority, which means that the employer will have to take over all employees (not just the majority) and will not be allowed to reduce contractual and other rights which the transferred employees acquired with the contracting authority (Senčur Peček, 2010: 305).

In regard to the continued protection of employees in public procurement procedures in the RS, the eighth paragraph of Article 75 of the ZDR-1,⁶⁰ which also refers to a temporary transfer of part of the undertaking (contractual transfer of services), is especially important. In accordance with this provision, if there is a temporary transfer of part of an undertaking (i.e. if employees of the contracting authority are transferred to the contractor in the case of labour-intensive activities),⁶¹ employees are transferred to the new contractor or back to the contracting authority (in the case of insourcing) after this contract expires. This opinion is found in the theory (Bečan et al. 2016: 442), but also in case law. The Supreme Court of the RS decided in the case VIII Ips 41/2014 (judgement of 19 May 2014), in which the contracting authority required providers of cleaning services to take over employees (an agreement on the takeover of employees was concluded as well) in the first public procurement, but did not include such obligation in the new tender after this contract expired (no agreement was concluded and the new contractor did not want to take over employees), that employees should have been transferred to the new transferee.⁶²

5 Conclusions

Contractual delegation of ancillary activities to outside contractors is very well established in both Croatian and Slovenian public sectors. To this effect, local self-government institutions and other public entities are required to carry out public procurement procedure, which is regulated in both countries in accordance with EU directives. However, legal status of employees, who had been carrying out tasks in the framework of these activities with the contracting authority before the outsourcing, at least partly differs in Croatia and in Slovenia, even though both countries have implemented Directive 2001/23/EC, which regulates the transfer of undertakings.

"The transfer of an employment contract to another employer," which is regulated by Croatian LA, is not very well established in practice in terms of a contractual transfer of the provision of services. In the case of outsourcing in labour-intensive activities in the public sector, this is due to the fact that contracting authorities do not include a requirement in the tender specification for contractors to take over

employees, employees are then not taken over by contractors, which means that (in accordance with the position of the Court of Justice of the EU) the transfer of the undertaking (and thus the safeguarding of employees' rights) does not even occur.

In Slovenian business practice, employees are granted protection on the grounds of a change of employer in the outsourcing as well (in the event of the transfer of part of the undertaking, which retains its identity). In labour-intensive activities (cleaning, surveillance) this condition is met if the service provider takes over (employs) employees of the contracting authority. This is realised especially in those cases of public procurement where the contracting authority (for example, local self-government institution) includes such condition in the tender specifications. Since the outsourcing constitutes a temporary transfer of (part of) an undertaking, which is explicitly regulated by Slovenian ZDR-1, Slovenian courts generally recognise the rights of employees arising from the institution of a change of employer when the contract on the provision of services with the first contractor expires. Workers enter into the employment relationship with a new contractor, or once again with the contracting authority. An even better solution would be an explicit legal definition of the protection of employees in the event of a contractual transfer of services (including the case of public procurement procedure), perhaps along the lines of the English TUPE. Employers (local self-government institutions and other public entities) would thus avoid legal uncertainty (regarding a question of whether a change of employer occurred or not) in all stages of the transfer of activities (in the transfer of services from one contractor to another, as well as in the insourcing), and the safeguarding of employees in the case of outsourcing would not depend on a decision of the contractor to take over the majority of the employees of the contracting authority.

Acknowledgment:

This work has been partially supported by Croatian Science Foundation under the project UIP-2014-09-9377 Flexicurity and New Forms of Employment (Challenges regarding Modernization of Croatian Labour Law).

Notes:

¹ This is the so-called outsourcing - Outside Resource Using.

² The most problematic are the cases of the so-called disguised employment relationships. These are the cases where the former employee becomes self-employed and concludes a contract on business cooperation with the former employer, but still carries out the work in the same manner, in a relationship of subordination (Kresal, 2014; Senčur Peček, 2014).

³ Even though the contractual rights and obligations of employees remain the same, the employment relationship between the transferee employer and employee differs from the relationship between the employee and the previous employer (Cooke et al., 2004).

⁴ OJ L 061; 5 March 1977.

⁵ Also with the aim to prevent the resistance of employees against corporate restructuring, which would affect the conversion of national markets into the European single market, and

to equalise the level of labour-law standards in individual Member States, thus prevent the race to the bottom (Jeffery, 2002: 670- 671).

⁶ OJ L 201; 17 July 1998.

⁷ OJ L 082; 22 March 2001.

⁸ First with ERA (Official Gazette of the RS no. 42/2002 and 103/07), now with ERA-1 (Official Gazette of the RS, no. 21/2013).

⁹ Official Gazette, no. 93/2014. (English version, by: Ministry of Labour and Pension System, <http://www.mrms.hr/wp-content/uploads/2015/03/labour-act.pdf>, 11 December 2016). This institution was regulated by the first Croatian Labour Act (1995, OG 38/95, 54/95, 65/95, 17/01, 82/01, 142/03, 30/04, 137/04, 68/05), in Article 129. The provision was much shorter.

¹⁰ This is the Directive that has been under consideration the most frequently (Barnard, 2012: 578).

¹¹ Although the reason for adoption of the Directive was mainly the regulation of the status of employees in the event of mergers and acquisitions, which had been associated with the single market, the notion of the transfer of an undertaking was already defined in a broader manner in the basic directive, so that in addition to the merger it also included the legal transfer (Jeffery, 2002: 682, 683).

¹² The legal transfer is also a transfer that occurs on the basis of an administrative or legislative act (*Sophie Redmond Stichting* C-29/91, 19 May 1992; *Temco*, C-51/00, 24 January 2002 - act by a local authority; *Martin and Others*, C-4/01, 6 November 2003; *Celtec*, C-478/03, 26 May 2005 - privatisation), on the basis of a court decision (*Abels*, C 135/83, 7 February 1985; *d'Urso*, C-362/89, 25 July 1991; *Dethier Equipment*, C-319/94, 12 March 1998; *Europieces*, C-399/96, 12 November 1998 - cases of procedures where a company was dissolved by a court decision), and even without any of these legal acts, as well as without a contract (*Merckx and Neuhuys*, C-171/94 and C-172/94, 7 March 1996).

¹³ The Court already confirmed in the mid-eighties that contracts for the provision of services fall within the scope of the Directive, whereas some Member States and business lobbies opposed this decision (Jeffery, 2002: 683).

¹⁴ The Court of Justice of the EU held that the Directive is intended to cover any legal change in the person of the employer, if the other conditions it lays down are also met. See the judgement in the case *Allen and Others*, C-234/98, 2 December 1999, point 17.

¹⁵ This formulation was included in the Directive only with the amendments of 1998 and was based on case law. The Court of Justice of the EU stated several times in its decisions that the Directive applies only in the case where the undertaking whose operation was actually continued or resumed by the new employer retains its identity.

¹⁶ See the judgement in the case *Schmidt*, C-392/92, point 16; *Süzen* C-13/95, point 14.

¹⁷ Cases *Sophie Redmond Stichting*, *Schmidt*, *Merckx and Neuhuys*.

¹⁸ The Court considered the agreement on the transfer of ancillary activity of cleaning, which was prior to the transfer carried out by a single employee, the transfer of an undertaking within the meaning of the Directive.

¹⁹ The case referred to the second-stage transfer of service provision (contracting out). A company A, which had entrusted the cleaning of its premises to B, terminated this contract and, for the performance of similar work, entered into a new contract with C, without any transfer of tangible or intangible business assets from one undertaking to the other.

²⁰ See the judgement in the case *Süzen*, point 15.

²¹ It is not decisive whether ownership of assets was transferred, but whether the new employer uses those assets to perform the same activities.

²² The judgement in the case *Süzen*, point 18.

²³ The aim of the Directive is to ensure the continued existence of the employment relationship with the transferee, without changes to its form, in order to prevent the situation where employees affected by the transfer of an undertaking would be at a disadvantage because of the transfer. See also judgements in the case *Spijkers* (points 11 and 12); in the case *Foreningen af Arbejdsledere i Danmark* (105/84, point 26); in the case *Daddy's Dance Hall* (324/86, point 9); in the case *D'Urso and Others* (point 9); in joined cases *Katsikas and Others* (C-132/91, C-138/91 and C-139/91, point 21); in the case *Europièces* (point 37); in the case *Juuri* (C-396/07, point 28); in the case *UGT-FSP* (C-151/09, point 40).

²⁴ See Opinions of Advocate General Trstenjak in the case *Clece*, point 62; Advocate General Geelhoed in the case *Abler and Others*, point 79, Advocate General Cosmas in joined cases *Hernández Vidal and Others*, point 80.

²⁵ The Court thus held that public transport services are based on assets (*Liikenne*), and so is catering in hospitals (*Abler*), while the drilling of tunnels in the mine is not asset-based (*Allen*).

²⁶ VSRH, Revr 8/09, of 21 October 2009.

²⁷ The judgements encompass the period from 2004 until today and consequently the application of Article 133 of the old Labour Act of 2010 (OG 149/09, 61/11, 73/13, 82/12, 93/14), respectively Article 129 of the Labour Act of 1995. See VSRH, Revr 8/09, of 21 October 2009, VSRH, Revr 592/07-2 of 12 September 2009 and others.

²⁸ VSRH, Revr-1904/09-2, of 23 March 2010.

²⁹ The Supreme Court also emphasised the importance of the transfer of employees (or key assets) in a number of other cases related to the transfer of part of an undertaking - for example, in cases VIII Ips 29/2012; 7 May 2012 and VIII Ips 7/2015, 25 May 2015.

³⁰ This is explicitly provided in Article 8 of Directive 2001/23/EC.

³¹ But not in the case of a contractual transfer of services to the first contractor (outsourcing). See the above-mentioned case of the Supreme Court of the RS VIII Ips 126/2009.

³² The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), SI 2006/246. These rules have amended rules from 1981 of the same name, SI 1981/1794.

³³ According to Article 3, TUPE applies to a.) a transfer of an undertaking or part of an undertaking where there is a transfer of an economic entity which retains its identity, and b.) a service provision change, which covers situations where activities cease to be carried out by a contracting authority on his or her own behalf and are carried out instead by a contractor on behalf of the contracting authority; situations where activities cease to be carried out by the first contractor and are carried out instead by the subsequent contractor on behalf of the contracting authority; and situations where activities cease to be carried out by the first or subsequent contractor and are carried out instead by the client on his own behalf. The conditions under which TUPE applies in these situations are the following: there is an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client, and the activity is not transferred only for a single specific purpose, task or a short-term duration. If the listed conditions are met, TUPE applies, which means that legal protection of employees in the event of a contractual transfer of service provision again does not depend on the will of employers.

³⁴ See point c of the first paragraph of Article 1 of the Directive. The same can be logically derived from point 14 of Article 137 of Croatian LA.

³⁵ See the cases *Redmond Stichting, Collino* (C-343/98), *Sanchez* (C-173/96, C-247/96 and 74/97), *Mayeur* (C-175/99), *Delahaye* (C- 452/02).

³⁶ Project Plan of the Croatian Government on a long-term reform measures of fiscal consolidation 2014-2016 (December 2013). <https://vlada.gov.hr/UserDocsImages/Sjednice/Arhiva/134.%20-1.pdf> 6.12.2016. It was presented at the Conference “Models of efficient management of ancillary activities in public administration – chances for a public sector and economy.

³⁷ The reform should have comprised of six types of activities in the public sector (cleaning, maintaining, laundry and ironing, food and drink processing, transport and protection). The planned measures would have included 2.300 budgetary users, with 26.500 employed persons. The annual budgetary costs of these activities (services) amount to 3.4 billion Croatian kuna (HRK).

³⁸ The referendum initiative was signed by 624.000 citizens and was forwarded to the Parliamentary procedure.

³⁹ Project Plan, slide 26.

⁴⁰ Ex vice-prime minister Milanka Opačić emphasised that both decisions aimed at reducing the number of civil servants and clerks, in both sectors, and rationalising the business using external services. <https://vlada.gov.hr/vijesti/sjednica-vlade-zabrana-novog-zaposljavanja-u-tijelima-drzavne-uprave-strucnim-sluzbama-uredima-te-javnim-sluzbama/14878>, 5 December 2016

⁴¹ Decision prohibiting new employment of civil servants and clerks in public services, OG 114/14 and 32/15

⁴² Decision prohibiting new employment of civil servants and clerks in the bodies of state administration and professional services and offices of the Government of the Republic of Croatia (OG 70/16) and Decision prohibiting new employment of civil servants and clerks in public services (OG 70/16).

⁴³ Similar conditions are prescribed for the outsourcing in the bodies of state administration (bodies of state administration and professional services and offices of the Government of the Republic of Croatia).

⁴⁴ According to the explanation of the Decision, the prohibition of the new employment of ancillary staff, besides the natural outflow of workers by pensioning, should by the end of 2015 reduce the number of employed in ancillary services in governmental and public sector for cca 2.500 persons, and gain savings of cca 10 million Kuna's. Milanka Opačić, Uštede na pomoćnom osoblju, Sindikalni list, XIX, Dec 2014, 68, p 11 <http://www.sdln.hr/upload/File/Sindikalni%20list/SLbroj68.pdf>, 7.12.2016.

⁴⁵ OG No. 92/2005, 140/2005, 142/2006, 77/2007, 107/2007, 27/2008, 34/2011, 49/2011, 150/2011, 34/2012, 38/2013, 37/2013, 1/2015, 138/2015.

⁴⁶ The Constitutional Court of the RC, U-II-7650/2014, 20 April 2016.

⁴⁷ See Materials »Funkcijska analiza subjektova javnoga sektorja, Ministarstvo za javno upravo, 19. november 2015«, page 71; available at http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/SOJ/Funkcijska_analiza/Funkcijska_analiza_-_Metodolosko_porocilo_fin.pdf

⁴⁸ See <http://www.enarocanje.si/>

⁴⁹ OJ L No. 94 of 28 March 2014, p. 65.

⁵⁰ OJ L No. 94 of 28 March 2014, p. 243.

⁵¹ Official Gazette of the RS, No. 91/2015.

⁵² OG 120/16.

⁵³ See EU public procurement framework – ETUC position, Brussels, 06-07/03/2012, available at <https://www.etuc.org/documents/eu-public-procurement-framework-%E2%80%93-etuc-position#.WHiXOfnhCUk>.

A proposal regarding the enactment of application of the institution of transfer of an undertaking in the case of concessions was presented also by a Slovenian trade union Pergam in its comments on the draft of ZJN-3. See the Letter by the trade union Pergam to the Ministry of Public Administration entitled Comments on the draft of ZJN-3 of 25 May 2015.

⁵⁴ In this case, the city of Helsinki awarded the operation of local bus routes, previously operated by a company Hakunila Liikene, to a company Liikene following a public procurement procedure. Hakunilan Liikene dismissed all 45 drivers, 33 of whom were then employed by Liikene. The company Liikene bought no buses from the company Hakunilan Liikene.

⁵⁵ In the case *Liikene*, the Court took the view that the economic entity did not retain its identity, because buses (key assets, which are necessary for the operation of this activity) were not transferred from the old to the new contractor.

⁵⁶ See, for example, a small-value procurement (surveillance) NMV237/2016, published on 13 January 2016; public procurement (cleaning) JN002088/2016-X01, published on 2 June 2016; public procurement (cleaning) JN006830/2016-B01, published on 27 October 2016; public procurement (cleaning) JN5121/2011, published on 18 May 2011; public procurement (cleaning) JN2828/2015, published on 6 June 2015 and others.

⁵⁷ See Decision No. 018-2932012-8 of 5 December 2012, which otherwise still refers to ZJN-2.

⁵⁸ Article 4 of PPA (principle of proportionality) states that providers should not be disproportionately burdened.

⁵⁹ According to the Court's opinion, it is not important for an economic entity in order to retain its identity whether the majority of employees are taken over following a contractual transfer, or whether it is the result of a unilateral decision made by the transferor to terminate the employment contracts of the transferred employees, followed by the employment of the majority of the same employees by the transferee. The Court emphasised in paragraph 38 of the case *Süzen* that "if the application of the directive depended on the fact that the contract was concluded between the transferor and the transferee, the protection of employees would be left to the discretion of the management of undertakings, for whom it would be open, by not agreeing to a contract, to avoid application of the Directive, which would be detrimental to the maintenance of transferred employees' rights that is required by Article 3.1. of the Directive." This position is unusual, considering the fact that the takeover of the transferor's employees is left to the discretion of the transferee as well.

⁶⁰ See point 2 of this article.

⁶¹ Which undoubtedly occurs in the case where the contracting authority includes in the tender documents a condition that his or her employees, who performed these tasks (cleaning, surveillance, etc.), have to be taken over.

⁶² The same view was also adopted in the judgment VIII Ips 185/2014 of 13 January 2015.

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