A COMPARATIVE STUDY ON THE TRANSFER OF WORKPLACE (OR BUSINESS) AND PROTECTION OF EMPLOYEES(*)

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ABSTRACT

There are various regulations on the protection of employee (worker) in the situation of transfer of workplace or business in Turkish legislation. First, Article 202 of Turkish Code of Obligations (TCO) dated 2011, provides this issue in general. Furthermore Articles 428 and 429 regulate the conveyance of workplace and employment contracts. Article 6 of the Employment Act (EA) 2003, which provides the conveyance of workplace partly or fully, is based on the European Union (EU) Directive no. 2001/23/EC relating to the safeguarding of employees' rights in the situation of transfers of undertakings, businesses or parts of undertakings or businesses (also named as Acquired Rights Directive). Finally, Article 178 of Turkish Commercial Code (TCC) 2011 regulates the transfer of employment relationships in the case of organizational changes of companies such as merger, division and conversion (restructure of companies). Among these three Acts, the provisions relating to the transfer of workplace or business are partly in compliance with each other. On the other hand, in English law, the status of the employees in the transfer of business is laid down in revised the Transfer of Undertakings- Protection of Employment (TUPE) Regulations 2006. TUPE Regulations are also based on the EU Directive 2001/23/EC. There are similarities between Turkish and English legislations concerning the rights of the employees. These similarities and differences are examined in this article. Consequently, some arguments are proposed.

Keywords

Transfer of Business Place, The Rights of Employee, Several Liability.

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İŞYERİNİN (VEYA İŞLETMENİN) DEVRİ VE İŞÇİLERİN KORUNMASINA İLİŞKİN KARŞILAŞTIRMALI BİR İNCELEME

ÖZET

İşyerinin (İngilizcede genellikle "business" yani "işletme" veya "iş" kavramı bu anlamda kullanılmaktadır) devri durumunda işçinin korunması konusunda Türk mevzuatında çeşitli düzenlemeler mevcuttur. İlk olarak 2011 tarihli 6098 sayılı Türk Borçlar Kanunu (TBK) m.202 genel olarak işletmenin devrini düzenlemiştir. TBK m.428 ve 429 hükümleri de işyerinin ve hizmet sözleşmesinin devrini ve işçilerin haklarını düzenlemiştir. Öte yandan 2003 tarihli, 4857 sayılı İş Kanunu'nun *"işyerinin veya bir bölümünün devrini"* düzenlenen 6. maddesi, AB'nin 2001/23/EC sayılı "İşyerinin Devri Durumunda İşçi Haklarının Korunması (Kazanılmış Haklar Yönergesi: Acquired Rights Directive) olarak da geçmektedir) Yönergesi esas alınarak hazırlanmıştır. Son olarak 2011 tarih ve 6102 sayılı Türk Ticaret Kanunu'nun (TTK) 178. maddesi birleşme, bölünme ve tür değiştirme gibi yapısal değişikliklerde iş ilişkilerinin geçmesini düzenlemiştir. Üç farklı Kanun'daki bu düzenlemeler kendi içinde kısmen uyumludur. Öte yandan İngiliz hukuk sisteminde, işyerinin devri halinde işçinin statüsü ilkin 1981 tarihli TUPE (The Transfer of Undertakings- Protection of Employment: Yükümlülüklerin Devri- İşin Korunmasına Dair Düzenlemeler) ile ele alınmıştır. Türk hukukundaki düzenlemeler ile İngiliz TUPE düzenlemeleri benzeş olmakla birlikte farklılıklar da mevcuttur. Çalışmada sayılan tüm düzenlemeler incelenmiş, karşılaştırma yapılmış, bazı sonuçlara ulaşılmış ve önerilerde bulunulmuştur.

Anahtar Kelimeler

İşyerinin Devri, İşçi Hakları, Müteselsil Sorumluluk.

INTRODUCTION

In modern legal systems the first and foremost duty of law is to protect the parties in weaker positions compared to the corresponding ones. In this context, the employees, the consumers, the children need legal protection.

The employment law regulates the relationship between the employees and employers and obviously has a doctrine that aims to protect basically the rights of the employee. This does not mean that the employee shall always be protected even if he/she breaches the contractual relationship. However, the employees face the possibility of losing their job at any time and for any reason. Therefore, the protection of employees' rights is essential. In addition, "job security" has a great importance and needs to be considered as the crux of every employment contract and this principle has legal, historic, economic and social basis. The employee, who is vulnerable to various dangers including workplace accidents or dismissals without a reasonable ground, should be protected by the laws of that community.

The protection of employees in the situation of the transfer of workplace or business[1] has a particular importance. The employee gets worried when a transfer of business is planned by the employer. Because the employee usually have no idea about the attitude of the new employer and the new business conditions. Therefore, as it is explained below, many legislations impose on the employers a requirement to inform and consult the employees or their representatives about the transfer plan and possible consequences.

Whereas some legislations have an individual regulation pertaining to the rights of employees in the situation of the transfer of business e.g. English legislation, some legislations have specific provisions in employment acts, e.g. Turkish legislation. Furthermore, Turkish legislations have various rules in various acts.

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[1] In Turkish there are various terms as "İşletme (business)" or "işyeri (workplace, business place)", which are used in various statutes. In this study we prefer to use "business" in the sense of "işletme" and "work place" in the sense of "işyeri".

In Turkish law, this topic is regulated in many different statutes. There are various provisions in Turkish Code of Obligations (TCO) 2011, in Employment Act (EA) 2003 and in Turkish Commercial Code (TCC) 2011, aiming to protect the rights of the employees in case of a transfer of business.

In English law the basic regulation relating to the rights of the employees in the situation of the transfer of business are laid down in the Transfer of Undertakings-Protection of Employees (TUPE) Regulations 2006.

The main purpose of this study is to compare the rules of Turkish and English legislations with respect to the rights of employees in transfer of the business. As is known the Turkish law is a part of civil law system where the English law is rooted back to common law and legislation. The basic difference between them is that the civil law system is based on legislation where the common law is based on precedents. Despite of the difference in these two legal systems, the rules relating to the transfer of business are quite similar.

Before getting into the details of this study, the first point to raise at this stage is to clarify the terms "employee" and "business" in Turkish law. The term "employee" is defined in Article 2 of the EA 2003 as "a real person who works on an employment contract". Generally speaking, the rights and obligations of the employees and employers as well as employment relationships are laid down in EA 2003 however Article 4 of EA 2003 under the title of "exceptions" exclude some businesses and employees. There are some other laws relating to these groups of businesses and employees. On the other hand, Articles 428 and 429 of TCO 2011 provide the rights of the employees in general, therefore the excluded groups of employees in EA 2003 may be subject to the provisions of TCO 2011 in the situation of transfer of business and transfer of employment contract successively.

Beside the provisions of EA 2003 and TCO 2011, third law in Turkish legislation is the Turkish Commercial Code (TCC) 2011, which regulates the transfer of assets or businesses and the rights and liabilities of transferor and transferee as well as the rights of the employees in the situation of transfer of workplace due to merger, division and conversion of the companies.

As can be deduced from what is mentioned above, Turkish legislation is quite comprehensive on the rights of employees in the situation of transfer of business. Various acts have provisions on the transfer of business and sometimes they may be in conflict with each other.

In English law, the basic provisions relating to the transfer of business and the rights of employees are laid down in TUPE (Transfer of Undertakings- Protection of Employees) Regulations.

This study consists of three sections. In the first section, the sources of Turkish Legislation on the transfer of business are studied. Considering the varieties of rules concerning the transfer of business it is important to have an idea of this variation. In the second section, different Codes and Acts in Turkish Law regarding the transfer of business and rights of employees are studied. In the third section the rules regarding the rights of employees in English Law are introduced. In this part the similarities and the differences between the two legislations are also explored. In the final part, some arguments are proposed.

I. THE SOURCES OF TURKISH LEGISLATION ON THE TRANSFER OF BUSINESS OR WORK PLACE

There are basically three sources on the transfer of business or work place in Turkish legislation, which led the law-makers to lay down five different provisions in three different Acts, namely as Code of Obligations 2011 Articles 202, 428 and 429; Employment Act 2003 Article 6 and Turkish Commercial Code 2011 Article 178.

The first legal document which is used as a source is the Council Directive 2001/23/EC, the second one is the Swiss Code of Obligations Article 333 and the last one is the Swiss Merger Act 2003. Among these three sources the Swiss Merger Act Article 76 under the title of "Transfer of employment relationships" and Article 77 under the title of "Consultation with the employees' representation body" refer to Swiss Code of Obligations Article 333 and 333a. Therefore, we have not evaluated the Articles 76 and 77 as they refer to Swiss Code of Obligations. We have tried to summarize the rules in Directive 2001/23/EC and Swiss Code of Obligations concerning the transfer of business and the rights of employees.

A. COUNCIL DIRECTIVE 2001/23/EC OF 12 MARCH 2001[2]

Before mentioning the rules in Turkish and English law on the rights of the employees in the situation of a transfer of business, it is more beneficial to study the European Council Directive 2001/23/EC[3].

To mention about the history of EU Directives on safeguarding of employees' rights, we should first take a look at Directive 77/187/EEC dated 1977. Directive 77/187/EEC had obviously a narrower perspective with respect to Directive 2001/23/EC. There are significant differences between the two Directives. These differences intel alia, are:

1. The term of "economic entity" was introduced in the new one.
2. The obligations of the transferor and transferee were held joint and several in the new one.
3. The notification by the transferor to transferee of the rights and obligations that are to be transferred was introduced in the new one.
4. The observation of collective agreement was introduced as well.

Both Directives clearly laid down major rules like the transfer of undertaking shall not constitute a ground for dismissal and where there happens a termination of employment contract due to a substantial change in the working conditions after the transfer detriment of the employee, the transferee shall be held responsible.

In Chapter III of the Directive, the matter of information and consultation principles are laid down. The transferor and transferee are obliged to inform the representatives of the employees effected by the transfer. The aim of this rule is to ensure the employees be aware of the reasons of transfer, its legal, economic and social implications.

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2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0023> l.a.d. 03.12.2021.

3 Directive 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.

The above-mentioned rules are the pillars for the protection of employees in the situation of transfer of business. As we have mentioned before some of these rules have been directly copied where some of them have not at all. Despite the critics for the missing ones the law makers have taken no measure to comply with them.

B. SWISS CODE OF OBLIGATIONS ARTICLE 333

Swiss Code of Obligations is a code that contains the rules regarding the law of obligations, the employment law and the commercial law. The formulation of this Code is very different from Turkish laws. In Turkish legislation, there exist an individual Code of Obligations dated 2011, an Employment Act dated 2003 and a Commercial Code dated 2011. All these three regulations are based on Swiss Code of Obligations. Article 333 of the Swiss Code of Obligations regulates the rights of employees in the situation of the transfer of business. In Article 333, it is stated that if a company or a part of it is transferred, the employment relationship and the rights pertaining to this relationship are also transferred. But the employee has a right to refuse this transfer. If the employee refuses the transfer the contract terminates at the legal notice day. Interestingly, the right of refusal is not included in Article 6 of EA 2003 but included in Article 178 of TCC.

In Article 333 of Swiss Code of Obligations, beside the individual contracts, the collective employment contracts are also regulated. In this context, if the contract is a collective contract the new employer is supposed to comply with it for one year.

The liability of the transferor and transferee is another important issue provided in Article 333. According to this article, both parties shall be liable for the possible demands by an employee before the transfer or on the date the contract is terminated under normal conditions or because of refusal of transfer.

In 1993 Article 333a and in 2013 Article 333b were inserted into the Code. Article 333a provides the information and consultancy to the representative of the employees on the reasons of transfer and its legal, economic and social impacts. Article 333b. provides the transfer of a company on insolvency.

The following outcomes may be deducted from the provisions stated above:

1. The employee has a right to refuse the transfer. If he does so, the employment relationship ends on expiry of the statutory notice period. The grounds of the right of refusal by the employee to the transfer of business are explained as the protection of the right of identity and the characteristics of privacy of the employment relationship[4].
2. The representatives are to be informed about the reasons and impacts of the transfer.

In Swiss Code of Obligations, the provisions laid down in Article 3 are almost in compliance with the Directive 2001/23/EC. But the matter of *economic entity* is not ever mentioned in Swiss Code.

As we have tried to highlight the sources of Turkish Laws concerning the rights of the employees, we may not discuss the provisions of different Turkish Codes and Statutes.

II. THE RIGHTS OF EMPLOYEES IN TURKISH LAW IN THE SITUATION OF TRANSFER OF BUSINESS

A. IN GENERAL

Historically, Turkish civil law has been mostly based on Swiss civil law. Civil Code 2001, Code of Obligations 2011, Commercial Code 2011 and Employment Act 2003, all were copied from Swiss Civil Code 1907 and Swiss Code of Obligations 1911 with some attributions to EU regulations and German Law. During the renewal of the Code of Obligations, not only the Swiss Codes and EU regulations but also precedents of Supreme Court (Court of Cassation) were taken into consideration as well. That is why one can see the influence of EU Directives and precedents beside the provisions of Swiss Code.

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[4] See **Astarlı, Muhittin** (2013) "Karşılaştırmalı Hukukta ve Türk Hukukunda İşyeri Devrinde İşçinin İş İlişkisinin Devralan İşverene Geçişine İtiraz Hakkı", Çalışma ve Toplum Dergisi, Vol: 1, No: 36, pp. 69-106, p. 72. <https://www.calismatoplum.org/Content/pdf/calismatoplum-1450-96c32c7b.pdf> l.a.d. 9.5.2021.

The topic of this study is the transfer of workplace or business and the rights of employee. In all legal systems the employee is protected against the employer and it should be so because the employer is far more powerful than the employee economically and socially. Therefore, all law systems try to establish a balance between the parties.

There are basically three statutes relating to this subject. The first one is Turkish Code of Obligations 2011, the second is the Employment Act 2003 and the third one is the Turkish Commercial Code 2011. The reason why we start with TCO 2011 is that the rules of this Code are deemed as general rules and may be implemented where there is a legal gap. It encompasses generic rules.

B. THE RULES RELATING TO THE TRANSFER OF BUSINESS IN TURKISH CODE OF OBLIGATIONS 2011

The Turkish Code of Obligations no.6098 dated 11.01.2011 and became effective on 01.07.2012, includes a number of provisions concerning the transfer of workplace or business and the rights of the employees. In this Code, there are three provisions directly or indirectly relate to the rights of employees. In this context, Article 202 with the title of "transfer of assets and business" is directly connected to the rights of the employees. Article 428 of TCO has the title of "total or partial transfer of workplace". Finally, Article 429 provides the rights of employee in the situation of the transfer of employment act. In the following parts we have reviewed all these three provisions.

1. Transfer of Assets or Business (Article 202 of the TCO)

The TCO Article 202 is related to transfer of asset or business. Here the important point to raise is s*everal liability for two years*. In this context the transferor and the transferee shall be severally liable for these debts for the first two years from the transfer date. This period starts for mature debts from the date of announcement and for unmatured debts from the date of maturity. Several liability for two years shall not commence unless the obligation of announcement or publicity is carried out by the transferee.

One may ask the relationship between this provision and the rights of the employees. The liabilities of a business include the debts to the employees as

well. For that reason, when a business is transferred with its assets and liabilities, the liabilities to the employees are deemed within the liabilities of the business as well. Therefore, the transferor and transferee are severally liable for these debts for the first two years. But this two-year period starts for the debts due at the time of transfer and for the debts that will be due in future. The parties, while drafting the contract, may not exclude the debts of the business. This assures the rights of the creditors and the employees.

2. Transfer of Workplace (Article 428 of TCO)

Article 428 of TCO, with the title of "Total or partial Transfer of Workplace" is directly related to the rights of employees. The legal logic laid down in Article 202 is similar to this provision. Here, again major points in this article can be explained as below:

a) When a workplace is transferred to a third party totally or partially, the employment contracts at the date of transfer are also transferred with all related rights and liabilities.

b) Regarding the rights of the employee connected with service period, the date of contract with the transferor shall be deemed effective date.

c) The transferor and transferee shall be severally liable for the debts borne before the transfer and due on the date of transfer. However, the liability of the transferor from these debts shall be limited to two years from the date of transfer.

This article was copied from Swiss Code of Obligations Article 333. But there are some differences between the two provisions. These differences may be listed as:

a) In Swiss Code of Obligations Article 333, paragraph 1 second sentence, the provision about the "*collective employment contract"* was not included into Turkish version.

b) In Swiss Code Article 333, paragraph 2 the issue of "refusal of the transfer by the employee" was not included in Turkish version.

c) Paraph. 3 of the Swiss Code Article 333 was restated in Turkish version lacking some issues. While the transferors and transferees are held liable severally and jointly in Swiss version, they are held only severally in Turkish statement. Also, in Swiss version it is stated that "while the claims of a worker which becomes mature before to the transfer or which becomes mature between that period and the date on which the employment relationship could normally be expired or is expired.

d) In paraph. 4 of Article 333 of the Swiss Code, it is stated that "the employer may not pass the rights arising from a work relationship to a third party unless otherwise conceded or mandated by the circumstances", a provision which was not included in the Turkish version.

3. Transfer of Employment Contracts (Article 429 of TCO 2011)

Article 429 of TCO 2011 provides the transfer of employment contract separately. In this context, "the employment contract may be passed to another employer indefinitely only by the written approval of the employee". Again, after the transfer, the transferee becomes the employer of the employment contract together with all rights and liabilities thereof. As seen in this provision, the consent of the employee is sought for passage of employment contract. However, the consequences where the employee does not give approval are not specified.

C. THE RULES CONCERNING THE TRANSFER OF WORKPLACE IN THE EMPLOYMENT ACT 2003

The rules relating to the transfer of workplace are laid down in Article 6 of EA 2003. Before introducing this issue, we need to clarify some innovations brought up with this Act. In the preceding Act no.1475 EA 1971, the term of "workplace" was defined though a narrow and solid perspective. In other terms that definition was stated like "a place where the business is performed is called a workplace (Article 1.1)". In the present Act, a workplace is defined as "a unit where the tangible and nontangible elements together with the employees are organized in order to produce goods and services by the employers is called a workplace (Article 2.1)". This new definition is a more comprehensive one and gave a more con-

temporary perspective to the term of "workplace". It is not only a "physical place" but a "place" where the elements of a business composing the tangible items including the production tools, nontangible items including the preparation of contracts, market surveys and any other activity relating to business is performed by the employees and employers in an organized manner. Hence, the term "workplace" is meant a place where any activity relating to business is run.

Article 6, which regulates the rules for the transfer of a workplace or a part of it, is a thoroughly new provision. It is based on the Directive 2001/23/EC. It lays down the rules concerning the transfer of business place under the title of "Transfer of business place or a part of it". According to this article, if the workplace or part of it is transferred to another person with a legal transaction, all employment contracts present on the date of transfer is transferred to the transferee together with all rights and debts. The transferee is obliged to treat for the rights based on service period of the employee according to the beginning date of the contract with transferor.

In this article, the transferor and transferee are held jointly liable for the debts borne before and due on the date of transfer. However, the liability of the transferor is limited to two years for these debts.

Interestingly, in the event that the legal personality terminates due to merger, division or conversion, joint liability rules do not apply.

The transferor or transferee may not terminate the employment contract solely due to the transfer of full or partial transfer of business place and for the employee the transfer may not constitute a basis for rightful dismissal. The right of termination of the contract by the transferor or transferee due to economic and technological reasons or based on the requirement of work reorganization or the rights of immediate termination on rightful reasons of employees or employers are reserved.

Finally, the abovementioned provisions may not be applied to the full or partial transfer of business place to a third party in the situation of liquidation of assets due to insolvency.

While the rules of transfer of business place are said to be based on 2001/23/EC Directive (ARD) there are certain issues that were not transferred from the said Directive. These issues can be listed as below.

1. The Doctrine of Economic Entity

Directive Article 1 1(b) focuses on the term "economic entity" to refer to a business. "Economic entity" can be defined as "*an existence which preserves its identity, in other words it is a systematic body of resources which aims to perpetuate an economic activity*"[5]. If the economic entity is not transferred, the conveyance of a business may not be mentioned at all[6]. In another definition of economic entity, it is stated that "each business entity is independent from its owner and different from others as well"[7]. The Turkish Court of Cassation adopted the doctrine of "economic entity" in a decision stating that "... Transfer means the whole or partly transfer of an enterprise or business which has an economic entity, through preserving its own peculiarity... Economic entity is meant an integrity of organization that pursues a technical purpose in the manufacture of goods or services"[8]. In this statement the term of integrity actually implies that an organization is a whole, if it is going to be split for example into two parts, both parts should keep their functionality.

Despite the fact that economic entity was emphasized in this provision it was not included in Article 6 of EA 2003.

According to Süzek, the lack of preservation of identity does not mean that this condition will not be sought in Turkish Law as he emphasizes that the con-

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5 **Butcher**, **Robert Mecrate** (2008) New TUPE Regulations, London, Thorogood Reports, p. 12.

6 **Süzek**, **Sarper** (2018) İş Hukuku, 15. Baskı (Tıpkı Basım), İstanbul, Beta, p. 204.

7 **Saraa, Made/ Saputra, Komang Adi Kurniawan/ Utama, I Wayan Kartika Jaya** (2020) "Financial Statements of Micro, Small and Medium Enterprises Based on the Concept of an Economic Entity", Journal of Hunan University (Natural Sciences), Vol: 47, No: 12, pp. 125-132, p. 126, <http://jonuns.com/index.php/journal/article/view/490/487#> l.a.d. 24.05.2022.

8 **Süzek** (2018), p. 204, see fn. 27, **Süzek, Sarper** (2013) "İşyerinin Devri ve Hukuki Sonuçları", Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 15, Özel S., pp. 311-330, p. 314, <https://dergipark.org.tr/en/pub/deuhfd/issue/46930/588782> l.a.d. 20.09.2021.

tinuity of employment contracts is based on the existence of business where the employee may continue to work right after the transfer[9]. Süzek interestingly points that even the transfer of some parts of the criteria would suffice for the completion of transfer provided that they characterize the business[10]. The word characterization usually relates to the core of business, the main item that characterizes the business. In some cases, it is the manpower, in others it is the machinery and manpower together. It can also be the intellectual property that is the mainstream of business.

While talking about the economic entity, we need to explore whether the transfer of a part of business violates the economic entity. In this context, we need to refer to some decisions of the Court of Cassation. In a case dated 06.09.2009 and Decision no.19553 the defendant (employer) was accused of transferring a part of business (security business) to another employer and laid off the plaintiff without a legal ground[11]. The plaintiff claimed reemployment award. Whereas the local court gave a reemployment award, the Court of Cassation overturned that award on the ground of redundancy and stated that employer had a right to lay off the employees in the case of redundancy.

The connection between this case and our topic is the issue of partly transfer of business and the concept of economic entity. The question here is whether the transfer of security service is meant to be a transfer of a part of business and its connection with the concept of economic entity. The transfer of security service, which is not a core but ancillary activity of the business, was deemed as not a transfer of a part of business but was deemed as an employer-sub employer by Bakırcı, a conclusion that we do not agree with[12]. Yet this conclusion does not comply with the definition stated in the Directive as "... central or ancillary".

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9 **Süzek** (2018), p. 204.

10 **Süzek** (2018), p. 204.

11 **Bakırcı**, **Kadriye** (2010) "Asıl İşveren Alt İşveren İlişkisinin İşyeri Bölümünün Devriyle Bağlantısı Asıl İşveren Alt İşveren İlişkisi Kurulurken İş Sözleşmelerinin Feshi", Sicil Dergisi, Yıl: 5, S: 2, pp. 114-127, p. 114.

12 See, **Bakırcı**, p. 124.

2. Information and Consultation

The information and consultation matters were first discussed in Council Directive 77/187/EEC of 14 February 1977[13]. According to Article 6, the representatives were supposed to inform the employees on the reasons for the transfer, the legal, economic and social implications of the transfer for the employees and measures envisaged in relation to the employee. In this context the transferor was obliged to give this information in good time before the transfer was performed.

The same provision was included in 2001/23/EC Directive in Article 7 with some amendments. In this new version, the representative is supposed to inform the employee on "the date or proposed date of the transfer" in addition to other information.

Why do we emphasize the issue of information and consultation by the employees?

In modern labor law, it is deemed vital that the employees take place in the discussions of managerial issues It is also deemed as appropriate for the employees to be consulted on the issues relating to the business[14]. Today the concept of "social dialogue" is adopted by all European countries[15]. ILO (International Labour Organization) has defined social dialogue as a tool that includes all types of negotiation, consultation or information shared among representatives of governments, employers and workers... (ILO Thesaurus). These issues were not included into the EA, which we believe an important absence in Article 6 of the EA 2003. On the other hand, there is a connection between the issue of information and consultation and the right of refusal. As Astarlı has rightfully stated that the worker needs to be informed before making his judgment on the use of

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[13] Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

[14] **Karaca, Ercüment** (2009) İşyeri Devrinin İş Sözleşmelerine Etkisi ve İşverenlerin Hukuki Sorumluluğu, İstanbul, Beta, p. 252; **Süzek**, p. 112.

[15] See **Karaca**, p. 252. There are numerous Directive of EU relating to this concept.

the right of refusal[16]. Moreover, if there is no representative of the workers, the undertaking of information is supposed to be done to every and each worker[17]. Hence, it is deemed appropriate to include the institution of the representatives of the employees into EA and thereby provision of the undertaking of information and consultation[18].

3. Joint and Several Liability

In Directive Article 3, there is no provision on the joint and several liability of the transferor and the transferee however this matter was left to the discretion of the member states.

D. THE RIGHTS OF EMPLOYEES IN THE SITUATION OF PASSAGE OF EMPLOYMENT RELATIONS DUE TO MERGER, DIVISION OR CONVERSION (ARTICLE 178 OF TURKISH COMMERCIAL CODE 2011)

Turkish Company Law rules are set out in the second Book of Turkish Commercial Code 2011 between the Articles of 124- 644. The matters relating to merger, division and conversion, which are also called as structural changes, are set out between the Articles of 134-194. The provisions concerning structural changes are transferred from Swiss Federal Merger Act (Fusionsgesetz: FUSG) 2003[19]. Of course, the EU Directive 2001/23EC has also an impact on the rules regarding this issue[20].

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16 **Astarlı, Muhittin** (2013) "Karşılaştırmalı Hukuk Işığında İşyeri Devrinde İşverenin İşçiyi Bilgilendirme Yükümlülüğü, (Bilgilendirme)", Türkiye Barolar Birliği, Vol: 1, No: 36, p. 154, <http://portal.ubap.org.tr/App_Themes/Dergi/2013-104-1246.pdf> l.a.d. 09.11.2022.

17 **Astarlı** (Bilgilendirme), p. 155.

18 **Süzek** (2018), p. 203; **Süzek** (2013), p. 312; **Çelik, Nuri/Caniklioğlu, Nurşen/Canbolat, Talat** (2017) İş Hukuku Dersleri, Yenilenmiş 30. Bası, İstanbul, Beta, p. 121.

19 See Legislative Intention (Gerekçe) article 134/2. The reason why the Swiss Act is preferred is explained with the closeness of Swiss Company Law to Turkish Company Law with respect to German and French Company Laws, <https://www.muglabarosu.org.tr/Upload/files/pdf/TTK%20Madde%20Gerek%C3%A7eleri.pdf> l.a.d. 10.12.2021.

20 **Uşan, Muhammed Fatih/Erdoğan, Canan** (2022) "Ticaret Şirketlerinin Birleşmesi veya Bölünmesinde İşverenlerin İşçi Alacaklarından sorumluluğu", Ticaret ve Fikri Mülkiyet Hukuku Dergisi, Vol: 8, No: 1, pp. 1-27, p. 2, <https://dergipark.org.tr/tr/download/article-file/2120985> l.a.d. 08.11.2022.

The rights of the employees in the situation of merger, division or conversion (called as restructure of companies) of companies are provided in Article 178 of TCC 2011. The term restructure is meant either merger, division or conversion. Article 178, under the title of "passage of employment relations" regulates the rights of the employees not only in divisions but also in merger or conversion as referred in Article 158 and 190 of TCC 2011. This article is a very comprehensive one. However, the basic principles are almost the same as those laid down in Directive. In this context, it is stated that employment contracts pass to the transferee with all rights and liabilities that came out until transfer date if the employee does not refuse. Here as seen the right of refusal is granted to the employee. If an employee refuses, the employment relationship ends on expiry of the statutory notice period, until then the transferee and employee are obliged to perform the contract.

Several liability is envisaged between the transferor and transferee for the due debts before the transfer or shall be due by the expiry date or on the date of termination because of the refusal of the employee.

Since this article lays down passage of employment relations in the restructure of the companies, it also regulates the liability of the partners. In this context, the partners of the transferred company liable for the debts borne before the transfer shall continue to be severally liable for the debts borne from the employment contract and due until the date of transfer as well as for the debts that would be due if the employment contract normally terminated or shall be due until the termination date because of objection[21].

Although this article was copied from Swiss Code of Obligations Article 333, the second sentence of paragraph 1 was not included[22]. On the other hand, paragh. 5 and 6 were included into the Turkish version. Here we need to point

[21] The point to remind here is that this paragraph regards only the mergers or division of a general or limited partnership. Because only in these types of companies shall the partners be liable for the debts of the company according to Turkish company law.

[22] Para. 1 second sentence of article 333 states that "where the transferred relationship is governed by a collective employment contract, the acquirer is obliged to abide by it for one year unless it expires or is terminated sooner".

out one more and a very important issue. Swiss Code of Obligations, Article 333.a and 333b were not included at all.

There are mainly two issues here: The first one is, the employment contract passes to the transferee in merger, division or conversion of the companies. The Second one is, an employee may object to the merger, division or conversion decision. In such a case, the service contract terminates at the end of the period of legal dismissal but the transferee and employee are obliged to perform the contract by that time.

Another issue to point out on which rules are to be implemented in a dispute between an employee and employer in case of a merger, division or conversion, say whether Article 6 of EA 2003 or Article 178 of TCC 2011 needs to be clarified. The rules of TCC on this dispute are more peculiar than that one in EA 2003, beside this Code is newer than EA 2003 by date.

E. COMPARISON BETWEEN TCC 2011 ARTICLE 178 AND EA 2003 ARTICLE 6

1. Similarities Between the Two Provisions

a. In both provisions, it is stated that the employment relationships between the parties in the transferred business pass to the transferee per se with all rights and liabilities.

b. Both provisions state that the transferor and transferee shall be liable for the credits of employees severally.

2. Differences Between the Two Provisions

a. Right of Refusal

One of the most significant differences between two provisions is the right of refusal of the employee to transfer in the situation of merger, division and conversion as stated in TCC 2011 Article 178 and does not exist in EA 2003 Article 6[23]. If

[23] **Çelik/Caniklioğlu/Canbolat**, p. 127. The right of refusal is firstly legislated in article 178 of TCC 2011; See **Uşan/Erdoğan**, p. 7; **Sarıkaya**, **Sinan** (2017) "Ticaret Şirketlerinin Yapı Değişikliklerinde İş İlişkilerinin Geçmesi, İş Güvencesi ve İşe İade Davaları", (Doktora Tezi), Marmara Üniversitesi, Sosyal Bilimler Enstitüsü, p. 11. <https://www.academia.edu/12566349

the employee objects to the restructure, i.e., merger, division or conversion, the employment contract shall terminate at the end of the legal dismissal period. In EA 2003, there is no such provision as the objection of the employee in the situation of transfer. Some authors propose a justification like the right of objection is not laid down just because the transfer of business does not constitute a material change in working conditions[24]. Literally, the refusal of an employee to merger, division or conversion may not hinder the merger, division or conversion operation but it may prevent an employee to work for an employer he does not to work for[25]. This is a manifestation of a freedom to choose whomever an employee would work for.

b. Basis for Termination

While it is stated in Article 6 of EA 2003 that the transfer of business does not constitute a rightful basis for abolition for the employee, the objection of the employee shall be a basis for the termination of the contract according to the Article 178 of TCC 2011.

c. Liability of the Partners

Article 178 of TCC states that the partners who are liable for the liabilities of the transferring company shall remain to be severally liable for the debts after the restructure. In Article 6/3 of the EA 2003, in the situation of termination of the legal personality the liability rule does not apply to these companies. At first sight, these two rules seem contradicting. But this approach is not true. Because, the rule at Article 6/3 applies to legal personality but not to the partners.

d. The Scope of Joint Liability

Clearly the liability of the transferor and transferee in Article 178 of TCC 2011 is provided in a larger sense than that of Article 6 of EA 2003. According to

/Ticaret_%C5%9Eirketlerinin_Yap%C4%B1_De%C4%9Fi%C5%9Fikliklerinde_%C4%B0%C5%9F_%C4%B0li%C5%9Fkilerinin_Ge%C3%A7mesi> l.a.d. 07.11.2022.

[24] **Mollamahmutoğlu, Hamdi/Astarlı**, **Muhittin/Baysal**, **Ulaş** (2014) İş Hukuku, Ankara, Lykeıon Yayınları, p. 272- 273.

[25] **Çakrak, Recep** (2017) "Ticari Şirketlerin Yapı Değişikliği Sonucunda İş İlişkisinin Geçmesi: "İşçinin İtiraz Hakkı", Karatahta İş Yazıları Dergisi, S: 7, pp. 147-159, p. 148.

Article 178 of TCC, the employee is entitled to object to merger, division or conversion. If the employee objects to merger, division or conversion, the joint liability of the transferor and transferee continues until the end of the date of legal dismissal. In Article 6 of EA, it is stated that the transferor and transferee are severally[26] liable for the debts due by the date of transfer. Additionally, the liability of the transferor for these debts is limited to two years. In other words, according to Article 6 of EA 2003, the transferor and transferee shall be severally held liable only for two years after the transfer. But in Article 178 of TCC 2011 there no such two-year limitation[27].

As seen above there is a conflict between the provisions of TCC and EA with respect to the right of objection. While the TCC Article 178 entitles the employee to object to merger, division or conversion, the EA 2003 Article 6 does not.

At first sight there seems to be a conflict between the two provisions. TCC was adopted in 2011 and EA was adopted in 2003. Therefore, TCC is more recent than the EA 2003. If the scope of the Acts were the same it would be said that TCC would prevail EA 2003 with respect to the right of objection, because of general Act and special Act relationship. But here is no general-special Act relationship between the two Acts. However, there is a general-special provision relationship solely between Article 178 of TCC 2011 and Article 6 of EA 2003. From this perspective, Article 178 of TCC 2011 is a special provision compared to Article 6 of EA 2003 because it provides the transfer of business and rights of employees only in merger, division and conversion[28]. In this sense Article 178 of TCC is special provision where article 6 of EA is a general provision[29]. Hence any business transfer except for merger, division and conversion are subject to

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[26] Literally the word "jointly" is used but in literature it is argued that this should be interpreted as "severally". See **Süzek** (2018), p. 206; **Çelik/Caniklioğlu/Canbolat**, p. 125. It is hard to say if the term "jointly" is used intentionally or by mistake however it is obvious that it was meant "severally".

[27] **Uşan/Erdoğan**, p. 7.

[28] **Çelik /Caniklioğlu/Canbolat**, p. 127.

[29] **Uşan/Erdoğan**, p. 7; see fn. 26.

Article 6 of EA. We need to point that Article 178 of TCC is broader in the sense of liability but narrower in practice[30].

III. THE TRANSFER OF BUSINESS AND PROTECTION OF EMPLOYEES IN ENGLISH LAW

Common law, by character, is prone to protect the rights of employees in employment relationship. There are two basic acts in English law relating to the employee-employer relationships. The first one is the Employment Rights Act 1996 and the second one is the TUPE Regulations.

The Employment Rights Act 1996 sets out the rules on employment relationships. However, the basic document concerning the transfer of business is the TUPE Regulations[31]. TUPE Regulations first appeared in 1981[32] but it was revoked completely by TUPE Regulations 2006. Therefore, we will attribute to TUPE 2006.

TUPE 2006 is also based on the Council Directive 2001/23/EC just like the Turkish EA 2003 Article 6 and TCC 2011 Article 178. As can be inferred from the following explanations, most of the TUPE Regulations rules are identical to Directive.

Let's try to paraphrase the significant features of TUPE Regulations.

A. THE FEATURES OF TUPE REGULATIONS

1. Preservation of employee status after the transfer

The first thing to bring out about TUPE Regulations is that the employees *automatically* become the employees of the new employer on the same terms and conditions[33].

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30 **Çelik/Caniklioğlu/Canbolat**, p. 127.

31 <https://www.legislation.gov.uk/uksi/2006/246/contents/made> l.a.d. 15.12.2021.

32 <https://www.legislation.gov.uk/uksi/1981/1794/pdfs/uksi_19811794_en.pdf> l.a.d. 15.12.2021.

33 **Guide to TUPE** (2006), p. 6, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271496/bis-09-1013-guide-to-tupe-regulations-2006.pdf> l.a.d. 01.12.2021.

2. Economic entity

The concept of economic entity is another thing to consider for the application of TUPE Regulations 2006. An economic entity test will be the best tool to determine whether an identifiable set of resources are assigned to a business or to a part of it and that set of resources retains its identity after the transfer[34]. In Article 3(2) "economic entity" is defined as we have already stated previously[35]. This definition is in compliance with Article 1, 1 (b) of the Directive. In this definition, the term of "grouping of resources" marks either workers or assets or both[36].

In TUPE Regulations it is stated that the transfer of a business is subject to the consent of the employee. At common law the rights of an employee may not be transferred without the consent of the employee[37].

3. Informing the transferee on the employee liability

In section 11 of the Regulations, it is stated that the transferor shall notify to the transferee the employee liability information of any person employed by him. What is more interesting is that according to section 12, the transferee may complain to the employment tribunal if the transferor does not comply with section 11, in other words does not provide with the information thereof[38]. Section 11 is in compliance with Article 3(2) of the Directive[39].

4. Information and consultation to the representative of employees

In compliance with section 13 of the TUPE Regulations, the transferor is supposed to provide information and consultation to the representative of employees about

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34 **Guide**, p. 6.

35 See page 3.

36 **Butcher**, p. 13.

37 **Smit**, **Nicola** (2001) "Labour Law Implications of a Transfer of an Undertaking" (Doctorate), Rand Afrikaans University, p. 1.

38 **McMullen**, **John** (2006) "Transfer of undertakings: content and structure of the TUPE Regulations", No: 66, pp. 10-15, p. 13, <https://sas-space.sas.ac.uk/2937/1/Amicus66_McMullen.pdf> l.a.d. 12.05.2022.

39 **McMullen**, p. 13.

the details of the transfer. These details include the date, the reasons of transfer, the legal, economic and social implications on employees. For the question on the identification of the representatives, 3rd paragraph of section 13 states that the representatives are the representatives of the trade union. This section is in compliance with the EC 2001/23 Directive Article 7. If the employer fails to comply with section 13, a complaint may be presented to an employment tribunal as per section 15 (1).

CONCLUSION

In conclusion, Turkish law concerning the rights of employees in the situation of the transfer of business includes a number of provisions in various statutes. These provisions are copied from Directive 2001/23/EC and Swiss Code of Obligations Article 333. However, it is hard to say that all provisions were copied in accordance with the rules of the said references. For some reasons some of them were excluded and this has been criticized by the authors. On the other hand, there is not an exact unanimity between the provisions of various statutes in Turkish legislation. Despite the fact that there are many provisions regarding the rights of the employees in the situation of the transfer of business in Turkish law, some important rules that exist in EU Directive have never been included in Turkish versions. These missing issues may be listed as the doctrine of economic entity, provision of information and consultancy to the representatives of the employees about the transfer of business and its possible impacts in general terms. On the other hand, the lacking of the right of objection by the employee to transfer of business is an important shortage in EA 2003 Article 6[40].

Another issue is the discrepancy between the various provisions of different acts. There should be compatibility between the provisions of those acts. In other terms, Article 6 of the EA 2003 ought to be in compliance with the TCO Articles 428 and 429. As a matter of fact, there should be an alignment between all provisions.

In English law, TUPE as a whole is identical to Directive 2001/23/EC. However, after the Brexit, it is not clear yet what amendments shall be put into force.

[40] **Uşan/Erdoğan**, p. 23.

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