Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 9 June 2016 [1]

Case C-201/15

Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)
v
Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis
Intervening party:
Enosi Ergazomenon Tsimenton Chalkidas

(Request for a preliminary ruling from the Symvoulio tis Epikrateias (Council of State, Greece))

(Collective redundancies — Directive 98/59/EC — Articles 2 to 5 — Articles 49 and 63 TFEU — Requirement for prior authorisation, by the competent administrative authority, of a request to carry out collective redundancies — Requests to be considered on the basis of economic criteria — Proportionality)

1. The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit. What are the limits, then, to Member State intervention in order to ensure the job security of workers? That is the issue which the Court is called upon to resolve in the present preliminary ruling procedure.

2. Specifically, a dispute has arisen following the Greek authorities' refusal to allow the applicant in the main proceedings — a subsidiary of LafargeHolcim Ltd, an undertaking present in several Member States, including Greece — to make collective redundancies. In Greece, collective redundancies are conditional upon prior administrative authorisation. That has prompted the Symvoulio tis Epikrateias (Council of State, Greece) to ask the Court two questions regarding the compatibility of the Greek legislation with, first, Directive 98/59/EC [2] and, second, the Treaty provisions on freedom of establishment and free movement of capital (Articles 49 and 63 TFEU).

3. Against that backdrop, the present case bears witness, once again, to the enduring significance of primary law as compared with the increasing reach of secondary legislation. As we shall see, while the Greek legislation appears to be compatible with Directive 98/59, the same cannot be said as regards the fundamental freedoms safeguarded under the FEU Treaty.

1 — Original language: English.

2 — Council Directive of 20 July 1998 on the approximation of the laws of the Member States relating to collective dismissals (OJ 1998 L 225, p. 16).

I – Legal framework

A – *Directive 98/59*

4. Article 2 of Directive 98/59 (under Section II – 'Information and consultation') provides:

'1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

…

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

…

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

…

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).

…'

5. Section III of Directive 98/59 concerns the 'Procedure for collective redundancies' and contains two provisions, namely Articles 3 and 4. Under Article 3:

'1. Employers shall notify the competent public authority in writing of any projected collective redundancies.

…

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.

The workers' representatives may send any comments they may have to the competent public authority.'

6. Pursuant to Article 4 of Directive 98/59:

'1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.

Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.

2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.

3. Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.

Member States may grant the competent public authority wider powers of extension.

The employer must be informed of the extension and the grounds for it before expiry of the initial period provided for in paragraph 1.

…'

7. Article 5 of Directive 98/59 provides:

'This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.'

B – *Greek legislation*

8. Directive 98/59 was implemented in Greek law by Nomos No 1387/1983 Elenchos omadikon apolyseon kai alles diataxeis (Law No 1387/1983 on the review of collective redundancies and other provisions), of 18 August 1983, as amended ('Law No 1387/1983').[3] Article 3 of that law ('Information and consultation obligations of the employer') provides:

'1. Prior to collective redundancies, the employer must enter into consultations with the workers' representatives with the objective of investigating the possibility of avoiding or decreasing the redundancies and their adverse consequences.

3 — FEK A' 110/18-19.8.1983.

2. The employer must:

(a) provide the workers' representatives with all relevant information and

(b) notify them in writing of:

(aa) the reasons for the projected redundancies;

(bb) the number and the categories of workers to be made redundant;

(cc) the number and categories of workers normally employed;

(dd) the period over which redundancies are to take place;

(ee) the criteria for the selection of the workers to be made redundant.

…

3. Copies of those documents shall be submitted by the employer to the prefect and to the labour inspector. If the undertaking or operating unit has branches in more than one prefecture, the above documents shall be submitted to the Minister for Labour and the Soma Epitheorisis Ergasias (Labour Inspectorate) responsible for the area in which the operating unit or branch where all or most of the redundancies are scheduled to take place is located.'

9. Article 5 of Law No 1387/1983 ('Procedure for collective redundancies') provides:

'1. The period of consultation between workers and the employer shall be 20 days starting from the date of the employer's invitation for consultation addressed to the workers' representatives within the meaning of the previous article. The outcome of the consultations shall be set out in minutes signed by both parties and submitted by the employer to the prefect or the Minister for Labour, in accordance with the provisions of Article 3(3).

2. If there is agreement between the parties, the collective redundancies shall be carried out in accordance with the content of the agreement …

3. If there is no agreement between the parties, the prefect or the Minister for Labour may, by reasoned decision issued within ten days from the date on which the foregoing minutes are submitted and after taking account of the documents in the file and assessing the conditions in the labour market, the situation of the undertaking and the interests of the national economy, either extend the consultations for 20 additional days following a request by one of the interested parties or not authorise some or all of the projected redundancies. Before issuing the foregoing decision, the prefect or the Minister for Labour may request an opinion from the Epitropi Ipourgiou Ergasias [Committee of the Ministry of Labour] … or from the Anotato Symvoulio Ergasias [Supreme Labour Council], respectively. These advisory bodies, the prefect or the Minister for Labour may call before them and hear the workers' representatives … and the interested employer, as well as persons who have specialised knowledge on individual technical issues.

4. The employer may effect collective redundancies to the extent specified in the decision of the prefect or of the Minister for Labour. If no such decision is issued within the prescribed time-limits, the collective redundancies shall be effected to the extent agreed by the employer during the consultations.'

10. Lastly, under Article 6(1) of Law No 1387/1983, '[c]ollective redundancies which take place in breach of the provisions of this Law shall be invalid'.

II – Facts, procedure and the questions referred

11. Anonymi Geniki Etairia Tsimenton Iraklis ('AGET Iraklis' or 'the Company') is active in the manufacturing, distribution and marketing of cement and has three plants in Greece (Agria Volou, Aliveri and Chalcis).

12. It emerges from the order for reference that, on several occasions between November 2011 and December 2012, AGET Iraklis requested the workers and their representatives at its plant in Chalcis to attend meetings the aim of which was to readjust the plant's work schedule and provide information in view of the reduction in the plant's activities due to the reduced demand for its product. AGET Iraklis also intended that consultation should take place in order to find alternative solutions and thereby avoid collective redundancies.

13. By decision of 25 March 2013, the company's board of directors approved a programme to restructure its cement production ('the Programme'). The Programme included the permanent closure of the Chalcis plant owing, in particular, to a contraction in construction activity in Attica and excessive cement production capacity, and was intended to ensure the Company's future viability.

14. By letters of 26 March and 1 April 2013, AGET Iraklis invited the Enosi Ergazomenon Tsimenton Chalkidas (workers' union of the Company's plant at Chalcis, 'the Workers' Union') to meetings to be held, respectively, on 29 March and 4 April 2013, in order to provide information, and allow for consultation, on the Programme in order, inter alia, to investigate the possibility of avoiding or reducing redundancies and their adverse consequences.

15. As the Workers' Union did not attend those meetings, on 16 April 2013 the Company, in writing, requested from the Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis (Minister for Labour, Social Security and Welfare, 'the Minister') the authorisation to give effect to the Programme.

16. The matter was referred to the Supreme Labour Council for an opinion. On 24 April 2013, having heard the interested parties, the Supreme Labour Council recommended rejecting the Programme due to the Company's failure to provide sufficient justification, in particular, because the necessity of the projected collective redundancies was not substantiated and the Company's arguments were considered to be too vague.

17. On the basis of that recommendation, the Minister, on 26 April 2013, refused to grant the requested authorisation ('the contested decision').

18. The Company brought an application seeking the annulment of the contested decision before the Symvoulio tis Epikrateias (Council of State). Entertaining doubts, in the light of the arguments raised by the Company, on the compatibility of Article 5(3) of Law No 1387/1983 with Directive 98/59 and Articles 49 and 63 TFEU, the referring court decided on 7 April 2015 to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a national provision, such as Article 5(3) of Law No 1387/1983, which lays down as a condition in order for collective redundancies to be effected in a specific undertaking that the administrative authorities must authorise the redundancies in question on the basis of criteria as to (a) the conditions in the labour market, (b) the situation of the undertaking and (c) the interests of the national economy, compatible with Directive 98/59/EC in particular and, more generally, Articles 49 TFEU and 63 TFEU?

(2) If the answer to the first question is in the negative, is a national provision with the aforementioned content compatible with Directive 98/59/EC in particular and, more generally, Articles 49 TFEU and 63 TFEU if there are serious social reasons, such as an acute economic crisis and very high unemployment?'

19. Written submissions were lodged by the Company, the Workers' Union, the Greek Government, and by the Commission. At the hearing held on 25 April 2016, oral argument was presented by those parties, and by the EFTA Surveillance Authority ('ESA').

III – Analysis

20. The point of law submitted for consideration in the present proceedings has remained unresolved for some time. [4]

21. By its two questions, the referring court essentially wishes to know whether a provision such as Article 5(3) of Law No 1387/1983 ('the rule at issue'), which, among other things, requires employers to obtain administrative authorisation prior to carrying out collective redundancies and which makes such authorisation dependent on (i) the conditions in the labour market, (ii) the situation of the undertaking and (iii) the interests of the national economy, is compatible with, on the one hand, Directive 98/59 and, on the other hand, Articles 49 and 63 TFEU. If that is not the case, the referring court additionally wishes to know whether such a provision might be compatible with the aforementioned rules of EU law where there are serious social reasons to justify it, such as an acute economic crisis and very high unemployment.

22. Although the referring court distinguishes between its two questions based on the grounds of justification, I find it more appropriate to divide my analysis of the questions on the basis of the applicable EU rules. I will therefore commence my appraisal by interpreting Directive 98/59, before moving on to the Treaty provisions on free movement.

A – *Directive 98/59*

23. From the outset, I would call to mind that, by harmonising the rules applicable to collective redundancies, the EU legislature intended both to ensure comparable protection for workers' rights in the various Member States and to harmonise the costs which such protective rules entail for EU undertakings. [5]

24. Under Article 2(1) of Directive 98/59, employers are obliged to start consultations with the workers' representatives in good time where they are 'contemplating collective redundancies'. Pursuant to Article 2(2), the consultations must cover, inter alia, the possibility of avoiding the collective redundancies contemplated or reducing the number of workers affected. The consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken. [6] That procedure is fleshed out in Articles 3 and 4 of Directive 98/59.

25. Article 3 of Directive 98/59 gives rise to a duty of notification: employers are to notify the competent authority in writing of any projected collective redundancies and to forward a copy of the notification to the workers' representatives. The latter may then send any comments they may have to the competent public authority.

4 — See judgment of 15 February 2007 in *Athinaïki Chartopoïa*, C-270/05, EU:C:2007:101, paragraph 37.

5 — Judgment of 9 July 2015 in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 32 and the case-law cited.

6 — Judgment of 10 September 2009 in *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraphs 39, 47 and 48.

26. Article 4 of Directive 98/59 lays down a 'stand-still' obligation, the aim of which, according to paragraph 2 thereof, is to provide the competent public authority with enough time to seek solutions to the problems raised by the projected collective redundancies. Although the directive provides for a 30 day 'cooling off' period following notification of the intended redundancy measures, under Article 4(1), second subparagraph, and (3), Member States may grant the competent public authority the power to reduce that period or extend it.

27. Directive 98/59, however, does not lay down rules relating to the internal organisation of undertakings or staff management,[7] nor does it affect the employer's freedom to effect or refrain from effecting collective redundancies. Its sole object is to provide for consultation with the trade unions and for notification of the competent public authority prior to such dismissals, that is to say, to harmonise the procedure to be followed at the time of collective redundancies.[8]

28. Now, Article 5(3) of Law No 1387/1983 appears, in particular, to give effect to Article 4 of Directive 98/59 in Greek law, although the length of the 'cooling off' period has been modified. However, and more importantly, in the case of disagreement between the parties, that provision makes the carrying-out of the intended redundancy measures contingent on prior administrative authorisation (which is deemed to have been given tacitly on the expiry of a 10 day time limit). Law No 1387/1983 specifies that applications to carry out collective redundancies are to be considered on the basis of the following criteria: the conditions in the labour market, the situation of the undertaking and the interests of the national economy. Authorisation is, pursuant to Article 6 of Law No 1387/1983, a condition for the validity of the redundancy measures.

29. Therefore, it appears that Article 5(3) of Law No 1387/1983 not only implements Directive 98/59 in Greek law, but also lays down substantive requirements concerning the circumstances in which, or the conditions under which, collective dismissals may be effected. In other words, it regulates when it may be justified to put an end to an employment relationship. For the purpose of the main action, that is the part of the rule at issue which is contested.

30. However, it follows from the case-law referred to above at point 27 that Directive 98/59 does not govern the employer's freedom (or lack thereof) to effect collective redundancies. It is for national law to set the substantive conditions under which employment relationships may be terminated on a collective basis.[9]

31. Consequently, I am minded to agree with the Commission's submission that Article 5(3) of Law No 1387/1983, inasmuch as it limits the freedom of employers to effect collective redundancies, does not come within the scope of Directive 98/59. It is thus wholly unconnected to that directive.

32. As the rule at issue — or at least the part thereof which is contested — falls outwith the scope of Directive 98/59, it cannot constitute a statutory provision more favourable to workers (an instance of 'over-implementation') within the meaning of Article 5 of that directive. Accordingly, I fail to see how the rule at issue puts the effective application of the directive in jeopardy.[10]

7 — See, to that effect, judgment of 7 December 1995 in *Rockfon*, C-449/93, EU:C:1995:420, paragraph 21.

8 — See, to that effect, judgment of 7 September 2006 in *Agorastoudis and Others*, C-187/05 to C-190/05, EU:C:2006:535, paragraphs 35 and 36 and the case-law cited.

9 — This is borne out by the fact that, unlike the text ultimately adopted by the Council, Article 3 of the original Commission proposal of 8 November 1972 for a Council directive on the harmonisation of the legislation of the Member States relating to redundancies (COM(72) 1400) specifically included the power for the competent authority to refuse to authorise all or part of the dismissals notified. Commentators have noted that certain Member States were opposed to granting public authorities that power, see Freedland, M.R., 'Employment Protection: Redundancy Procedures and the EEC', *Industrial Law Journal*, vol. 5-6, Oxford University Press, Oxford, 1976, p. 27.

10 — In that regard, the case under consideration therefore must be distinguished from the circumstances of the judgments of 16 July 2009 in *Mono Car Styling*, C-12/08, EU:C:2009:466, paragraphs 35 and 36, and 18 July 2013 in *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 36. In the latter case, the Court considered — in respect of a similar employment protection directive — that measures of 'over-implementation' must comply with the Charter of Fundamental Rights of the European Union.

33. Lastly, and for the sake of completeness, I should add that it follows from the foregoing that, from the point of view of Directive 98/59, it makes no difference whether, in addition to the criteria mentioned above at point 28, serious social reasons — such as an acute economic crisis and very high unemployment — exist.

34. I therefore conclude that Directive 98/59 does not preclude a provision such as Article 5(3) of Law No 1387/1983, which requires employers to obtain administrative authorisation prior to carrying out collective redundancies. I shall devote the remainder of my analysis to the provisions of primary law mentioned by the referring court.

B – *Articles 49 and 63 TFEU*

1. Freedom of establishment and/or free movement of capital?

35. Since the questions referred for a preliminary ruling refer to both Articles 49 and 63 TFEU, it must be established whether the national legislation falls within the scope of freedom of establishment, free movement of capital or both freedoms. [11]

36. On the one hand, provisions of national law which apply to the possession, by nationals of a Member State, of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its activities, fall within the ambit *ratione materiae* of Article 49 TFEU. On the other hand, Article 63 TFEU covers, in particular, direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control, and also portfolio investments, that is to say, the acquisition of securities on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking. [12]

37. National legislation which is not limited to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Articles 49 and 63 TFEU. [13]

38. In order to determine which freedom applies (if not both), the purpose of the legislation concerned must be taken into consideration. [14]

39. Law No 1387/1983 aims, according to its title, to control collective redundancies and give effect, in Greek law, to Directive 98/59. This leads me to believe that, like the directive, it is intended to regulate the conditions under which employers may have recourse to collective redundancies and the procedure to follow in that regard.

40. It therefore essentially concerns an employment relationship.

11 — Judgment of 13 March 2014 in *Bouanich*, C-375/12, EU:C:2014:138, paragraph 24.

12 — Judgment of 21 October 2010 in *Idryma Typou*, C-81/09, EU:C:2010:622, paragraphs 47 and 48 and the case-law cited.

13 — Judgment of 21 October 2010 in *Idryma Typou*, C-81/09, EU:C:2010:622, paragraph 49 and the case-law cited.

14 — Judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 90 and the case-law cited.

41. That confirms that only Article 49 TFEU is applicable. Indeed, freedom of establishment concerns self-employed activity on the territory of any other Member State, in the form of undertakings, agencies, branches or subsidiaries.[15] That activity may require the hiring of staff to service and develop that activity, in which case it would involve an employment relationship.

42. Given its subject matter, it appears that the rule at issue is only relevant for shareholdings which involve the exercise of definite influence within the meaning of the case-law referred to in point 36 above — the most common example being majority shareholdings. A majority shareholding enables its holder to act as the ultimate employer of the workers of the subsidiary company.

43. AGET Iraklis claims that, but does not explain why, the matter also involves the free movement of capital. Indeed, I understand in this case AGET Iraklis to be a subsidiary of LafargeHolcim, meaning that the latter has a majority shareholding in the former. That majority shareholding and, accordingly, definite influence over AGET Iraklis, would rule out the application of Article 63 TFEU.

44. Be that as it may, where the freedom of establishment has been breached, it is not necessary to consider, in addition, whether the provision on free movement of capital is also infringed.[16]

45. On the basis of the foregoing, I will consider the rule at issue from the point of view of freedom of establishment.

2. The restrictive nature of the rule at issue

46. According to the Court's settled case-law, Article 49 TFEU precludes restrictions on the freedom of establishment, that is to say, any national measure liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the FEU Treaty. The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder trade within the European Union.[17]

47. A requirement for prior authorisation constitutes, in principle, such a restriction.[18] Although that line of case-law essentially concerns situations where establishments were set up rather than scaled down, to my mind the same reasoning applies. Indeed, in the main proceedings the rule at issue limits an employing undertaking's freedom to make collective redundancies since, unless the rule is complied with, those redundancies will be invalid. Such a rule thus directly interferes with the internal organisation of undertakings and with the management of their staff, possibly exposing undertakings to the risk of operating at a loss. Tellingly, the Greek Government recognises, in its written observations, that the rule at issue might be restrictive.

48. There is, moreover, a clear cross-border element: AGET Iraklis is a subsidiary of LafargeHolcim. Therefore, the arguments of the Workers' Union and the Greek Government that the main action concerns a wholly internal and/or hypothetical situation, raised at the hearing for the first time, must be rejected.[19]

15 — See, to that effect, judgment of 30 November 1995 in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 23.

16 — See, by way of example, judgment of 18 November 1999 in *X and Y*, C-200/98, EU:C:1999:566, paragraph 30.

17 — Judgment of 15 October 2015 in *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 67 and the case-law cited.

18 — Judgment of 5 December 2013 in *Venturini and Others*, C-159/12 to C-161/12, EU:C:2013:791, paragraph 32 and the case-law cited.

19 — At the hearing, it was also discussed whether the rule at issue restricted the right of establishment of LafargeHolcim or that of AGET Iraklis. However, as they belong to the same economic unit, I find that discussion to be immaterial.

49. Moreover, the provisions of EU law must be interpreted in accordance with the fundamental rights as set out in the Charter.[20] Hence, Article 49 TFEU must be interpreted in accordance with Article 16 of the Charter, laying down the freedom to conduct a business. As is apparent from the explanations provided as guidance to the interpretation of the Charter[21] which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into account for its interpretation, the freedom to conduct a business encompasses (i) freedom to exercise an economic or commercial activity; (ii) freedom of contract; and (iii) free competition.[22]

50. The restriction of the freedom of establishment identified above at point 47 also amounts to a restriction on the exercise of the freedom to conduct a business. Moreover, it restricts the freedom of contract of employers, inasmuch as they are required to seek prior authorisation before they may terminate employment contracts.

3. Justification, suitability and necessity

a) Preliminary remarks and consideration of the applicable overriding public interest

51. Under the *Gebhard* doctrine, restrictions must fulfil four conditions in order to be compatible with EU law: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.[23]

52. Moreover, it follows from Article 52(1) of the Charter and the case-law of the Court that the freedom to conduct a business guaranteed under Article 16 of the Charter is not absolute, and may be regulated.[24]

53. The rule at issue applies in a non-discriminatory way. Therefore, it is necessary to consider whether the remaining criteria — relating to justification, suitability and necessity — are met, given that this exercise, in my view, is basically one and the same under Article 49 TFEU and Article 16 of the Charter.

54. The Greek Government, supported by the Workers' Union, contends that the rule at issue is justified on the ground of the protection of workers.

55. It emerges from the questions referred that the first question asks the Court to consider whether the three criteria used in Article 5(3) of Law No 1387/1983 — that is to say, the conditions in the labour market, the situation of the undertaking and the interests of the national economy — can be said to promote the protection of workers appropriately, and in a manner which is not

20 — In any event, it is settled case-law that in order to provide a useful answer, the Court may be required to take into consideration rules of EU law to which the national court did not refer in its questions; see judgment of 26 May 2016 in *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 35 and the case-law cited.

21 — OJ 2007 C 303, p. 17.

22 — See, in this respect, inter alia, judgment of 18 July 2013 in *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraphs 30 to 32 and the case-law cited. See also European Union Agency for Fundamental Rights, *Freedom to conduct a business: exploring the dimensions of a fundamental right*, Publications Office of the European Union, Luxembourg, August 2015, p. 21.

23 — See judgments of 30 November 1995 in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37 and, to that effect, of 22 October 2009 in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 46.

24 — Under Article 52(1) of the Charter, any limitation on the exercise of the freedom to conduct a business 'must be provided for by law and respect the essence of [that freedom]. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' See also judgment of 6 September 2012 in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 54 and the case-law cited.

disproportionate. The second question referred is essentially a qualified version of the 'basic scenario' featuring in the first question: the referring court asks whether the fact that there is an acute economic crisis accompanied by unusual and extremely high unemployment rates [25] is capable of justifying the rule at issue if that is not already the case in the 'basic scenario'.

56. As the Workers' Union rightly states, from the point of view of the EU legislature, it follows from Article 9 TFEU that a high level of employment and adequate social protection are considerations which the European Union must take account of when defining and implementing its policies and activities. Correspondingly, the protection of workers has been held by the Court to be one of the overriding reasons in the public interest which may allow a Member State to derogate from the provisions on free movement in the FEU Treaty. [26] Specifically, the Court has accepted that maintaining employment in small and medium-sized undertakings may, in theory, be acceptable as a justification. [27]

57. Next, from the outset, I must point out that, when verifying whether the three criteria mentioned in Article 5(3) of Law No 1387/1983 are appropriate and do not go beyond what is necessary in order to achieve the objective of protection of workers, the Court must carry out a balancing exercise. In other words, the Court must strike a balance between the protection of workers and the freedom of establishment of employers. Similarly, this involves balancing the freedom to conduct a business enshrined in Article 16 of the Charter against other provisions contained in Title IV of the Charter ('Solidarity'). In what follows, I will attempt to provide some guidance thereon.

b) The balancing exercise: elements of reflection

58. To begin with, although Article 27 of the Charter, which concerns workers' right to information and consultation within the undertaking, appears relevant at first glance, in fact it does not add anything to the equation: according to *Association de médiation sociale*, Article 27 of the Charter must be given more specific expression in EU law or national law for that article to be fully effective. [28] On that point, it follows from the authoritative explanation relating to that provision (see point 49 above) that such specific expression can be found, inter alia, in Directive 98/59. However, as stated initially, that directive has no bearing on the lawfulness of the rule at issue. Therefore, Article 27 of the Charter is irrelevant for the purpose of the balancing test which the Court must perform. In any event, although the Workers' Union argues otherwise in its written observations, the order for reference appears to indicate that attempts have been made to inform and consult with the workers concerned on the Programme.

59. Next, the Commission's mention of Article 30 of the Charter does seem relevant, as that provision provides for protection of the workers in the event of unjustified dismissal. However, as held by the General Court, that provision does not lay down specific obligations. [29] In point of fact, the Court's finding in *Association de médiation sociale* seems in many ways equally applicable to Article 30 of the Charter. All that I can infer directly from the wording of Article 30 of the Charter is, on the one hand, that it does not guarantee a right to permanent employment and, on the other hand, that the essential question is to ascertain what amounts, for the purpose of a restructuring exercise, to a 'justified dismissal'.

25 — According to the order for reference, the unemployment rate in Greece for 2013 was 27.3%. The Greek Government adds, in its observations, that the rates for 2008 and 2014 were, respectively, 7.8% and 26.5%.

26 — See judgment of 11 December 2007 in *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 77 and the case-law cited.

27 — See judgment of 25 October 2007 in *Geurts and Vogten*, C-464/05, EU:C:2007:631, paragraph 26.

28 — Judgment of 15 January 2014, C-176/12, EU:C:2014:2, paragraph 45.

29 — See judgments of 4 December 2013 in *ETF* v *Schuerings*, T-107/11 P, EU:T:2013:624, paragraph 100, and in *ETF* v *Michel*, T-108/11 P, EU:T:2013:625, paragraph 101.

60. More specifically, besides referring to EU legislation on the protection of employees in the event of employer insolvency and of a transfer of undertakings, neither of which is of direct relevance to the matter under consideration, the explanations relating to Article 30 of the Charter (see point 49 above) state that this provision 'draws on Article 24 of the [European Social Charter (Revised)]'.[30] In the Appendix to the Social Charter — which, according to Article N of that charter, forms an integral part thereof — paragraph 3 of the section relating to Article 24 sets out a non-exhaustive number of unlawful grounds for dismissal. None of those grounds concern dismissal for purely economic reasons, nor can they be likened to such reasons.[31]

61. Under those circumstances, it seems to me that the threshold for determining what constitutes a 'justified dismissal' cannot be set too high, as the consequence of doing so would be to force an undertaking to put its restructuring plans on hold indefinitely, with the risk of remaining economically inefficient.

62. Before considering whether the rule at issue is appropriate to the objective of protecting workers and whether it goes beyond what is necessary in order to meet that objective, a number of further remarks might guide the Court when carrying out its balancing exercise.

63. First, Directive 98/59 represents a compromise reached at EU level between the need to protect workers and the consideration to be given to employers (see point 23 above). That compromise takes the form of a protective procedure (a stand-still obligation coupled with a cooling off period) which does not affect the employer's right to reorganise the employing undertaking. Unilaterally imposing additional obligations on the employers, thereby removing the workers' incentive to take part in negotiations with the employers, without providing for any compensatory safeguard mechanisms which take into account the employers' situation, risks upsetting that equilibrium from the point of view of Article 49 TFEU and Article 16 of the Charter.

64. Second, and to follow up on that point, even in a situation of 'over-implementation', in *Alemo-Herron and Others*, the Court recently had to weigh up the protection of workers against the rights of employers in relation to EU rules on the safeguarding of employees' rights in the event of a transfer of undertakings. The issue was whether those EU rules precluded a Member State from requiring a private employer taking over employees from a public employer to follow the applicable public sector collective agreements stipulated in the original employment contract ('dynamic' protection), while not having a voice at the negotiating table. The Advocate General had suggested adopting an approach which would leave it to the national court to decide whether this breached Article 16 of the Charter. However, the Court did not hesitate: it held that it did, as such a requirement seriously reduced the employer's freedom of contract in a way which adversely affected the very essence of the freedom to conduct a business.[32]

30 — Article 24 of the European Social Charter (Revised) ('The right to protection in cases of termination of employment), of 3 May 1996, ETS No 163, provides, inter alia, that 'with a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: (a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; (b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief'.

31 — The unjustified grounds for dismissal set out in the Appendix to the revised European Social Charter are the following: (a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours; (b) seeking office as, acting or having acted in the capacity of a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) maternity or parental leave; (f) temporary absence from work due to illness or injury.

32 — Judgment of 18 July 2013, C-426/11, EU:C:2013:521, paragraph 36, compared with the Opinion of Advocate General Cruz Villalón in that case (C-426/11, EU:C:2013:82, points 55 and 57).

65. The last point relating to the balancing exercise which the Court must undertake is surely the most decisive: freedom of establishment cannot be limited to the sole right for undertakings to establish themselves in other Member States. For this freedom to be truly effective, it must also give a cross-border economic group the right to scale down and, ultimately, dissolve an establishment in a Member State. In other words, to *leave* a Member State [33] — even if this is simply in order to pursue an economic activity in a Member State where it is more gainful. [34]

c) The three criteria considered in isolation

66. Turning now towards the three criteria set out in Article 5(3) of Law No 1387/1983, the first criterion relates to the interest of the national economy. Like the Commission, I find such a criterion to involve a purely economic objective which cannot justify restricting the freedom of establishment (nor the freedom to conduct a business). [35]

67. The remaining two criteria, concerning the conditions in the labour market and the situation of the undertaking, do not suffer from the same flaw. However, recourse to those criteria is, in my view, neither appropriate for achieving the objective of protecting workers, nor limited to what is strictly necessary in order to achieve that objective.

68. As for the appropriateness of the criterion relating to the conditions in the labour market, a counterfactual scenario might be helpful by way of illustration. For in fact, it is not hard to imagine what might happen in the event of an administrative refusal to allow the redundancies to be made. In the event that the economic inefficiency of the employing undertaking caused by such a refusal were to render it insolvent, that undertaking would have a clear incentive to commence proceedings for its dissolution and winding-up, after which it would no longer be bound by Directive 98/59 [36] and, presumably, would not have the funding required to remunerate the workers concerned in the event that the rule at issue were to continue to apply to such a situation. That would, incidentally, also endanger the jobs of those workers who have not been made redundant. I therefore doubt that the rule at issue might contribute, in any meaningful way, to lowering the unemployment rate.

69. In any event, the criterion relating to the labour market which, as I understand it, essentially concerns unemployment figures, is not suitable for achieving the objective of ensuring job stability for workers. Indeed, it does not remedy the problems which have made the employment situation of the workers concerned uncertain. In essence, it amounts to denying the employers' right to terminate an employment relationship on the ground that it is generally not desirable to have more unemployed persons.

70. As for the appropriateness of the criterion relating to the situation of the undertaking, the contention that the authorities of a Member State might be better suited than the management of that undertaking to determine what is most appropriate in its situation strikes me as nothing less than remarkable. At any rate, I do not find it appropriate to protect workers by letting an authority overrule the business decisions ultimately taken by the employing undertaking.

33 — See, on this issue, judgment of 16 December 2008 in *Cartesio*, C-210/06, EU:C:2008:723, paragraph 113.

34 — Perplexingly, and unlike ESA (which, in support of its view, relied on the judgment of 6 December 2007 in *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 33), on this point the Commission argued, at the hearing, that freedom of establishment is not impeded, on the one hand, when an undertaking is prevented from leaving the Member State of establishment in order to make a profit elsewhere. On the other hand, the Commission argued that said freedom is restricted when the undertaking may not simply shut down its establishment and move elsewhere. I find that distinction artificial and, at any rate, unworkable.

35 — See, inter alia, judgment of 24 March 2011 in *Commission* v *Spain*, C-400/08, EU:C:2011:172, paragraph 74 and the case-law cited.

36 — See, to that effect, judgment of 3 March 2011 in *Claes and Others*, C-235/10 to C-239/10, EU:C:2011:119, paragraph 58.

71. Moreover, as argued by the Company, the statutory criteria are unclear and afford excessively broad discretion to the administration, to the detriment of the legal certainty of the employers. This, in fact, appears to frustrate from the outset any possible attempts at reaching a friendly settlement between the employers and the workers by doing away with the need for negotiations – as witnessed in the matter under consideration. An alternative might have consisted in listing the types of dismissals considered to be unjustified, as in the case of the list which appears in paragraph 3 of the section of the Appendix to the Social Charter relating to Article 24 thereof.

72. For the sake of completeness, as the Greek Government correctly points out in its written observations, where Member States adopt a measure derogating from a principle enshrined by EU Law, they must show in each individual case that the measure complies with the principle of proportionality, accompanying their reasoning by an analysis of the proportionality of the measure and by specific evidence substantiating the arguments raised.[37] Suffice it to say in this context that I do not consider that the Greek Government has provided the Court with such an analysis and with evidence to substantiate the claim it makes that the rule at issue actually protects workers.

73. Indeed, by restricting the employer's ability to dismiss the workers collectively, the rule at issue merely gives the impression of being protective of workers. To begin with, that protection is only temporary until the employer becomes insolvent. Even more importantly, workers are best protected by an economic environment which fosters stable employment. Historically speaking, the idea of artificially maintaining employment relationships, in spite of unsound general economic foundations, has been tested and has utterly failed in certain political systems of yesteryear. That provides confirmation that, in laying down an effective yet flexible protective procedure, Directive 98/59 affords genuine protection for workers, whereas a system of prior authorisation such as that at issue, which tellingly falls outside its scope, does not.

74. This leads me to conclude that, in the matter under consideration, the idea of a balancing exercise is in fact a fallacy: protecting the workers concerned is not at odds with either the freedom of establishment or the freedom to conduct a business.

75. Hence, I consider that the rule at issue is not appropriate for achieving the objective of protecting workers. Moreover, for the same reasons, I consider it in any event to go beyond what is necessary in order to protect workers.

d) Interim conclusion

76. In light of the above, I consider the rule at issue not to be suitable for the purpose of protecting workers and, in any event, to go beyond what is necessary to achieve that purpose.

e) The backdrop consisting of an acute economic crisis and very high unemployment rates

77. Lastly, as for the second question referred concerning whether the presence of an acute economic crisis accompanied by unusual and extremely high unemployment rates might change the negative response given to the first question, my answer would again have to be 'no'.

78. Those circumstances, although clearly very serious, cannot justify restricting the freedoms of establishment and to conduct a business when the statutory criteria cannot do so on their own.

37 — Judgment of 13 December 2012 in *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 49 and the case-law cited.

79. Moreover, there are several other reasons why those circumstances cannot alter that result. First, an acute economic crisis and very high unemployment rates amount in themselves — at least in part — to purely economic factors. Second, drawing on case-law relating to Directive 98/59, I would point out that the socio-economic effects resulting from collective redundancies are felt in a given local context and social environment, not at the national level. [38] Third, there is no reason to believe that a severe economic crisis would not affect businesses just as much as workers.

80. Which brings me to my last point: in furtherance of what I have said above at point 61, and as the Commission states, in times of crisis, it is just as important to reduce all the factors which deter new undertakings from investing, as economic efficiency may help stimulate job creation and economic growth. That, I presume, is the reason why Greece, as a condition for the financial assistance provided by the European Stability Mechanism, accepted to 'undertake rigorous reviews and modernisation of collective bargaining, industrial action and, in line with the relevant EU directive and best practice, collective dismissals, along the timetable and the approach agreed with the Institutions. On the basis of these reviews, labour market policies should be aligned with international and European best practices, and should not involve a return to past policy settings which are not compatible with the goals of promoting sustainable and inclusive growth'. [39]

f) Final conclusion

81. From the reasons stated above it follows that I consider that Article 49 TFEU, interpreted in the light of Article 16 of the Charter, precludes a provision such as the rule at issue. The fact that the Member State concerned might be going through an acute economic crisis, accompanied by very high unemployment rates, does not affect this.

IV – Conclusion

82. On the basis of the foregoing, I consider that the questions referred ought to be answered to the effect that, on a proper construction, Article 49 TFEU, interpreted in the light of Article 16 of the Charter of Fundamental Rights of the European Union, precludes a provision such as Article 5(3) of Nomos No 1387/1983 Elenchos omadikon apolyseon kai alles diataxeis (Law No 1387/1983 on the review of collective redundancies and other provisions), of 18 August 1983 (FEK A' 110/18-19.8.1983), which requires employers to obtain administrative authorisation prior to carrying out collective redundancies and which makes such authorisation dependent on the conditions in the labour market, the situation of the undertaking and the interests of the national economy. The fact that the Member State concerned might be going through an acute economic crisis, accompanied by very high unemployment rates, does not affect this conclusion.

38 — See judgment of 30 April 2015 in *USDAW and Wilson*, C-80/14, EU:C:2015:291, paragraphs 51 and 64 and the case-law cited.

39 — Euro Summit Statement of 12 July 2015 (document reference SN 4070/15), p. 3, ratified by Greece as Law No 4334/2015 on urgent arrangements for the negotiation and conclusion of an agreement with the European Stability Mechanism, Official Gazette, vol. A 80 of 16 July 2015, p. 755 (English version p. 748).