Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 5 February 2015 [1]

Case C-182/13

Valerie Lyttle
Sarah Louise Halliday
Clara Lyttle
Tanya McGerty
v
Bluebird UK Bidco 2 Ltd
(Request for a preliminary ruling from the Industrial Tribunals (Northern Ireland) (United Kingdom))
Case C-392/13
Andrés Rabal Cañas
v
Nexea Gestión Documental SA,
Fondo de Garantía Salarial
(Request for a preliminary ruling from the Juzgado de lo Social No 33 de Barcelona (Spain))
Case C-80/14
Union of Shop, Distributive and Allied Workers (USDAW)
B. Wilson
v
WW Realisation 1 Ltd, in liquidation
Ethel Austin Ltd
Secretary of State for Business, Innovation and Skills

(Request for a preliminary ruling from the Court of Appeal (England and Wales) (United Kingdom))

(Directive 98/59/EC — Article 1 — Collective redundancies — Concept of 'establishment' — Method of calculating the number of dismissals)

1. The three cases under consideration essentially raise the same question and, accordingly, I will deal with them all together in this Opinion, despite the fact that they have not formally been joined. The question that arises in each of these cases is: what is the exact scope, for the purposes of determining whether collective redundancies have taken place, of the concept of 'establishment' referred to in Article 1(1)(a) [2] of Directive 98/59/EC? [3]

1 — Original language: English.

2 — Matters are further complicated by the fact that reference is made to this concept in both point (i) and point (ii) of that provision. Throughout this Opinion, I will therefore refer to that concept as 'the concept at issue', but indicate, where appropriate, whether my considerations are being made with specific reference to either of those points.

3 — 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).

2. As it happens, the Court has already interpreted the concept at issue with specific reference to point (i) of Article 1(1)(a) of Directive 98/59. It has construed that concept as denoting 'the unit to which the workers made redundant are assigned to carry out their duties'.[4] In the cases previously dealt with, that interpretation benefited the workers in question. However, in the cases under consideration, the same interpretation would, prima facie, appear to entail an adverse effect for the workers concerned. Against that backdrop, the question now arises as to whether that line of case-law should also apply with specific reference to point (ii) of Article 1(1)(a) of Directive 98/59.

3. To my mind, it is vital that the Court provide a coherent interpretation — thereby facilitating the uniform application of EU law — of the concept at issue.

I – **Legal framework**

A – *Directive 98/59*

4. The provisions of Directive 75/129/EEC[5] and Directive 92/56/EEC,[6] the latter amending the former, were consolidated by Directive 98/59, which simultaneously repealed those earlier directives.

5. Article 1 of Directive 98/59 (under Section I — 'Definitions and scope') provides:

'1. For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

— at least 10 in establishments normally employing more than 20 and less than 100 workers,

— at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

— at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

…

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

4 — See judgment in *Rockfon*, C449/93, EU:C:1995:420, paragraph 32, and judgment in *Athinaïki Chartopoiïa*, C270/05, EU:C:2007:101, paragraph 25.

5 — Council Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29).

6 — Council Directive of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies (OJ 1992 L 245, p. 3).

2. This Directive shall not apply to:

(a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;' …

B – *National legal framework*

1. United Kingdom legislation

6. Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 ('the TULRCA') implements the United Kingdom's obligations under Directive 98/59 in respect of England and Wales, and Scotland.

7. Section 188(1) of the TULRCA provides that where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer is to consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

8. Where an employer fails to comply with a requirement of section 188 of the TULRCA, an employment tribunal may make a protective award under section 189(2), which, according to section 189(3), is an award ordering the employer to pay remuneration for the protected period as defined in section 189(4).

9. In Northern Ireland, Directive 98/59 is implemented by Part XIII of the Employment Rights (Northern Ireland) Order ('ERO'). Article 216 of the ERO is substantially similar to section 188(1) of the TULRCA.

2. Spanish legislation

10. Directive 98/59 is transposed into Spanish law by the Ley del Estatuto de los Trabajadores[7] ('Law on the Workers' Statute'; 'the ET'). Article 51(1) of the ET ('Collective dismissals') provides:

'For the purposes of the present Law, "collective redundancy" shall mean the termination of employment contracts on economic, technical, organisational or production grounds where, over a period of 90 days, the termination affects at least:

(a) 10 workers in undertakings employing fewer than 100 workers.

(b) 10% of the number of workers in undertakings employing between 100 and 300 workers.

(c) 30 workers in undertakings employing more than 300 workers.

7 — BOE No 75, 29 March 1995, p. 9654, as amended.

The economic grounds shall be deemed to have been established where a negative economic situation is apparent from the financial performance of the undertaking, such as where losses are actually sustained or forecast or where there is a persistent reduction in ordinary revenue or sales. In any event, a reduction shall be deemed to be persistent if, for three consecutive quarters, the level of ordinary revenue or sales in each quarter is lower than that recorded in the same quarter of the preceding year ... .

In order to calculate the number of terminations of contracts for the purposes of the first subparagraph of this paragraph, account shall also be taken of any other terminations which have occurred within the reference period on the employer's initiative, for other reasons, unrelated to the individual workers concerned and different from the grounds provided for in Article 49(1)(c) of this Law, [[8]] provided that the number of terminations is at least five …'.

II – **Facts, procedures and the questions referred**

A – *The questions referred and the events giving rise to the references*

1. Case C-182/13, *Lyttle and Others*

11. Bluebird UK Bidco 2 Ltd ('Bluebird') is the current owner of the 'Bonmarché' business. In January 2012, Bonmarché had 394 clothing stores throughout the United Kingdom and the Isle of Man, where around 4 000 workers were employed. In Northern Ireland and the Isle of Man (which were considered to constitute a single administrative unit), Bonmarché at the time operated 20 stores with 180 workers.

12. As the previous owner of Bonmarché had become insolvent and gone into administration, that business was transferred to Bluebird on 20 January 2012. In the spring of 2012, Bluebird carried out a redundancy programme throughout the United Kingdom and the Isle of Man. As a result, there are now only 265 Bonmarché stores and approximately 2 900 employees in the United Kingdom, with 8 stores and 75 employees remaining in Northern Ireland. The redundancy process which culminated in the dismissals did not begin before January 2012 and did not include any collective consultation which would have satisfied the requirements of Directive 98/59. All the relevant redundancies took effect on 12 March 2012.

13. The four claimants in Case C-182/13 form part of a group of 19 employees of the Northern Ireland Bonmarché who were made redundant during the spring of 2012 and who have brought cases before the Northern Ireland Industrial Tribunals. The four claimants worked at four different Bonmarché stores at various locations across Northern Ireland with fewer than 20 employees at each store.

14. Entertaining doubts as to the proper interpretation of Directive 98/59, the Industrial Tribunals decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) In the context of Article 1(1)(a)(ii) of [Directive 98/59], does "establishment" have the same meaning as it has in the context of Article 1(1)(a)(i)?

(2) If not, can "an establishment", for the purposes of Article 1(1)(a)(ii), be constituted by an organisational sub-unit of an undertaking which consists of or includes more than one local employment unit?

8 — Article 49(1)(c) of the ET ('Termination of the contract') provides: 'A contract of employment shall be terminated … [b]y reason of the expiry of the agreed period or the completion of the task or service which is the subject-matter of the contract ...'.

(3) In Article 1(1)(a)(ii) of the directive, does the phrase "at least 20" refer to the number of dismissals across all of the employer's establishments, or does it instead refer to the number of dismissals per establishment? (In other words, is the reference to "20" a reference to 20 in any particular establishment, or to 20 overall?)'

2. Case C-392/13, *Rabal Cañas*

15. Nexea Gestión Documental SA ('Nexea') is an undertaking which forms part of a group of companies wholly owned by a public body attached to the Ministry of Finance and Public Administration.

16. Mr Rabal Cañas began working for Nexea on 14 January 2008.

17. As of 20 July 2012, Nexea had two establishments: one in Madrid (administration department and production site) with 164 employees, and one in Barcelona (operations centre) with 20 employees. On 20 July 2012, Nexea individually terminated 14 employment contracts at the Madrid establishment. The reasons given were a reduction in turnover for three consecutive quarters, starting with the fourth quarter of 2011, with losses in that year and losses forecast for 2012. Actions contesting those terminations were dismissed by a number of judgments given by the social courts of Madrid.

18. Subsequently, in August 2012, two terminations took place at the establishment in Barcelona. In September 2012, one took place in Madrid. In October 2012, a further termination took place in Barcelona. In November 2012, three employment contracts were terminated at the Madrid establishment, and one at the establishment in Barcelona. The referring court explains that the five terminations in October and November were prompted by the expiry of temporary contracts.

19. On 20 December 2012, Mr Rabal Cañas and 12 other employees at the Barcelona establishment were informed in writing of the individual termination of their employment contracts with effect from the date of notification. The reasons given were economic, production and organisational reasons similar to those cited in relation to the 14 terminations effected on 20 July 2012 at the Madrid establishment. According to Nexea, this made it necessary to close its operations centre in Barcelona. The three remaining employees at the Barcelona establishment (the manager and two sales representatives) were affiliated to the Madrid establishment.

20. By an action lodged before the Juzgado de lo Social No 33 de Barcelona against Nexea and the Fondo de Garantía Salarial (Wages Guarantee Fund), Mr Rabal Cañas challenged the termination of his employment contract. Entertaining doubts as to the proper interpretation of Directive 98/59, that court decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Given that it includes within its ambit all "dismissals effected by an employer for one or more reasons not related to the individual workers concerned", according to the numerical threshold provided for, must the concept of "collective redundancies" in Article 1(1)(a) of Directive 98/59 be interpreted — in view of its [EU] scope — as prohibiting or precluding a national implementing or transposing provision that restricts the ambit of that concept solely to particular types of termination, namely, those based on "economic, technical, organisational or production grounds", as Article 51(1) of [the ET] does?

(2) For the purposes of calculating the number of dismissals to be taken into account in order to determine whether it is a case of "collective redundancies", as defined in Article 1(1) of Directive 98/59, in the form of either "dismissals effected by an employer" (subparagraph (a)) or "terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned ... provided that there are at least

five redundancies" ([Article 1(1), second paragraph]), must account be taken of individual terminations by reason of the expiry of fixed-term contracts (on the basis of an agreed date, task or service), as referred to in Article 49(1)(c) of [the ET]?

(3) For the purposes of the rule on the non-application of Directive 98/59 laid down in Article [1(2)(a)] thereof, is the concept of "collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks" defined exclusively by the strictly quantitative criterion in Article [1(1)(a)] or does it require the cause of the collective termination also to be derived from the same collective contractual framework for the same duration, service or task?

(4) Does the concept of "establishment", as an essential concept of [EU] law for the purposes of defining "collective redundancies" in the context of Article 1(1) of Directive 98/59, and in view of the nature of the directive of a minimum standard as provided in Article 5 thereof, lend itself to an interpretation that allows the national provision implementing or transposing that text into the national legal order — Article 51(1) of [the ET] in the case of Spain — to relate the ambit of the calculation of the numerical threshold exclusively to the "undertaking" as a whole, thereby excluding situations in which, had the "establishment" been taken as the reference unit, the numerical threshold laid down in that article would have been exceeded?'

3. Case C-80/14, *USDAW and Wilson*

21. WW Realisation 1 Limited (in liquidation) and Ethel Austin Limited were national high street retail businesses, trading respectively as 'Woolworths' and 'Ethel Austin'. They became insolvent and went into administration, as a result of which thousands of employees in the United Kingdom were dismissed.

22. USDAW is a trade union with over 430 000 members across the United Kingdom. USDAW's members work in a variety of occupations and industries and include shop workers, factory and warehouse workers, drivers and call centre workers. Mrs Wilson was employed at the Woolworths store in St Ives, Cornwall, and was the USDAW representative on Woolworths' national employee forum.

23. Following the insolvency of Woolworths and Ethel Austin, claims were made before the Liverpool and London Central Employment Tribunals against Woolworths and Ethel Austin on behalf of several thousand USDAW members who had been employed by those companies and who had been dismissed on grounds of redundancy. Protective awards were sought against the employers because of their failure to consult employees about the proposed redundancies, which was arguably a requirement under the relevant provisions of the TULRCA.

24. The Secretary of State was joined as a party to the London Central Employment Tribunal proceedings against Woolworths on the basis that, in view of the employer's insolvency, the Secretary of State has a potential liability in respect of any protective awards made pursuant to national legislation implementing Directive 2008/94/EC.[9] The Court of Appeal explains that in the event that a protective award is made against Ethel Austin or Woolworths in the main proceedings, if the employer does not satisfy that award, and an employee applies to the Secretary of State in writing, the Secretary of State will be required to pay the amount to which the employee is entitled in respect of that debt, up to a statutory limit. If the Secretary of State fails to pay all or part of the amount due, the employee is entitled to present a complaint to an employment tribunal, which has the power to make a declaration as to the amount of any payment that the Secretary of State ought to make.

9 — Directive of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version) (OJ 2008 L 283, p. 36).

25. On 2 November 2011 and 18 January 2012 respectively, the aforementioned tribunals made protective awards in favour of the former Woolworths and Ethel Austin employees, but approximately 4 500 workers were denied a protective award on the basis that they had worked at stores with fewer than 20 workers, each store being regarded as a separate establishment. On appeal, the Employment Appeal Tribunal ('the EAT') held on 30 May 2013 that, in order to construe section 188(1) of the TULRCA in a manner compatible with Directive 98/59, it was necessary to delete the words 'at one establishment'. The EAT also held that the dismissed workers could rely directly upon the directive and held the Secretary of State to be responsible for the payment of protective awards to all the workers.

26. The Secretary of State was granted leave to appeal against the EAT's decision before the Court of Appeal. Entertaining doubts as to the correct interpretation of Directive 98/59, that court decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) (a) In Article l(l)(a)(ii) of [Directive 98/59] does the phrase "at least 20" refer to the number of dismissals across all of the employer's establishments in which dismissals are effected within a 90 day period, or does it refer to the number of dismissals in each individual establishment?

(b) If Article l(l)(a)(ii) refers to the number of dismissals in each individual establishment, what is the meaning of "establishment"? In particular, should "establishment" be construed to mean the whole of the relevant retail business, being a single economic business unit, or such part of that business as is contemplating making redundancies, rather than a unit to which a worker is assigned their duties, such as each individual store.

(2) In circumstances where an employee claims a protective award against a private employer, can the Member State rely on or plead the fact that the directive does not give rise to directly effective rights against the employer in circumstances where:

(i) the private employer would, but for the failure by the Member State properly to implement the directive, have been liable to pay a protective award to the employee, because of the failure of that employer to consult in accordance with the directive; and

(ii) that employer being insolvent, in the event that a protective award is made against the private employer and is not satisfied by that employer, and an application is made to the Member State, that Member State would itself be liable to pay any such protective award to the employee under domestic legislation that implements [Directive 2008/94], subject to any limitation of liability imposed on the Member State's guarantee institution pursuant to Article 4 of that Directive?'

B – *Procedures before the Court of Justice*

27. Bluebird lodged written observations in Case C-182/13, as did USDAW and Mrs Wilson in Case C-80/14. The UK Government also lodged observations in those two cases. The Spanish Government lodged observations in Cases C-392/13 and C-80/14, while the Hungarian Government, as well as the Commission, lodged observations in all three cases.

28. A joint hearing was held on 20 November 2014, at which USDAW and Mrs Wilson, Bluebird, the Spanish and UK Governments and the Commission presented oral argument.

III – **Analysis**

A – *Introductory remarks*

29. It emerges from these cases that the main task for the Court is to determine the relevant unit — *from the employer's perspective* — for the purposes of calculating whether the thresholds under Article 1 of Directive 98/59 are met. Specifically, Question 3 in Case C-182/13 appears to be identical in substance to Question 1(a) in Case C-80/14, both focusing on the expression 'at least 20' in Article 1(1)(a)(ii) of that directive. Similarly, Questions 1 and 2 in Case C-182/13, Question 4 in Case C-392/13 and Question 1(b) in Case C-80/14 all turn on the proper interpretation of the concept at issue.

30. However, to my mind, both those points (the implications of the phrase 'at least 20' and the meaning of 'establishment') are related — as is apparent from the way in which the Court of Appeal has framed Question 1(b). Indeed, when it comes to the thresholds set in Article 1(1)(a)(ii) of Directive 98/59 which trigger the consultation procedure, asking whether it is necessary to tally up the number of dismissals in all of the employers' establishments is, to my mind, nothing more than a different way of asking for clarification as to the correct size of an 'establishment'. On that basis, I take the view that Questions 1, 2 and 3 in Case C-182/13, Question 4 in Case C-392/13 and Questions 1(a) and (b) in Case C-80/14 can all be dealt with jointly, which I will proceed to do below in points 36 to 63.

31. Apart from that main issue, two of the cases (Cases C-392/13 and C-80/14) raise distinct, secondary issues.

32. First, most of the questions asked by the Spanish court in Case C-392/13 actually concern other aspects of the concept of 'collective redundancies' as used in Directive 98/59. Indeed, the first three questions relate to the interpretation of that concept *from the workers' perspective*. To my mind, the answer to those questions either follows clearly from the case-law of the Court or is self-evident.

33. Second, Question 2 in Case C-80/14 deals with a different matter, namely the consequences under EU law of an incorrect implementation of Directive 98/59. Although it does not follow directly from the wording of that question, any answer would presuppose that the United Kingdom has not properly construed the concept at issue and accordingly failed to transpose that directive correctly into national law.

34. In addition, before addressing the principal issue, Bluebird contends that Case C-182/13 is inadmissible, as the meaning of 'establishment' is arguably clear. Moreover, the Spanish Government claims that the circumstances of Case C-392/13 do not give rise to a situation of collective redundancy under Directive 98/59 as the thresholds are arguably not met. Accordingly, the Spanish Government takes the view that Question 4 in that case is hypothetical.

35. Once again, it should be recalled that questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance.[10] The requests in both those cases for an interpretation of Directive 98/59 do not appear to be unrelated to the circumstances of the cases before the referring courts; nor do they appear to be hypothetical; nor do the orders for reference appear to be lacking the factual or legal information necessary to enable the Court to provide a useful answer. Specifically, Bluebird's argument is ill-founded, as national courts remain entirely at liberty to refer matters before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not make a request for a preliminary ruling inadmissible.[11] Moreover, contrary to the position taken by the Spanish

10 — See, inter alia, judgment in *Gruslin*, C-88/13, EU:C:2014:2205, paragraph 28 and case-law cited.

11 — See, to that effect, judgment in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and case-law cited.

Government, it seems to me that the Juzgado de lo Social No 33 wishes to know how properly to interpret the concept at issue and the thresholds laid down in Directive 98/59 for the purposes of the proceedings before it. Faced with a similar situation on another occasion, the Court did not declare the questions referred inadmissible.[12] I see no reason why the present cases ought to be dealt with any differently.

B – *The concept at issue*

1. The paradigm: *Rockfon*[13] and *Athinaïki Chartopoïïa*[14]

36. From the outset, I would call to mind that Article 1(1)(a) of Directive 98/59 defines, first and foremost, the key concept of 'collective redundancies'. That concept has remained more or less unchanged since the mid-seventies, when the first directive on collective redundancies was adopted.[15]

37. Under Directive 98/59, the definition of 'collective redundancies' is split into two parts. The first part covers the types of individual dismissals (or redundancies)[16] which, when effected in sufficient numbers, give rise to collective redundancies ('directive-relevant dismissals'). The second part covers the numerical thresholds which, when exceeded over a certain period of time, trigger the employer's duty to inform and consult with the workers pursuant to Article 2 of Directive 98/59 and prompt application of the procedure laid down in Articles 3 and 4 of that directive ('the protective procedure'). It is for the purposes of those thresholds that the concept at issue is used. Here, Directive 98/59 allows Member States to choose between *two different methods*, set out, respectively, in points (i) and (ii) of Article 1(1)(a).[17]

38. As previously mentioned, the Court has already interpreted the concept at issue in relation to point (i) of Article 1(1)(a) of Directive 98/59 as denoting 'the unit to which the workers made redundant are assigned to carry out their duties'.[18] Obviously, a term ought to have the same meaning across the board, as this enhances legal certainty.[19] Therefore, as the Court did not attach any caveats to those rulings, the interpretation of the law given by the Court in *Rockfon* in a preliminary ruling procedure, and confirmed in *Athinaïki Chartopoïïa*, must be of general application. It would be manifestly nonsensical to envisage a fluctuating interpretation of a concept underpinning a provision under a section entitled 'Definitions and scope'. To do so would clearly deprive that provision of all purpose and sit uneasily with the principle of legal certainty.

12 — See judgment in *Rodríguez Mayor and Others*, C-323/08, EU:C:2009:770, paragraphs 21 to 28.

13 — EU:C:1995:420.

14 — EU:C:2007:101.

15 — See Article 1 of Directive 75/129.

16 — I should point out that the English-language version of Directive 98/59 uses the term 'redundancy' in the expression 'collective redundancies' (appearing, inter alia, in the title of that directive), but the word 'dismissal' in Article 1(1)(a) thereof to define 'collective redundancies'. In contrast, the French-language version of the provision uses the same word ('licenciement'). To avoid doubt, note that in this Opinion I will use the words 'redundancy' and 'dismissal' interchangeably.

17 — More specifically, the *first method*, laid down in Article 1(1)(a)(i) of Directive 98/59 ('the point (i) method'), contains three alternatives, the operation of which depends on the total number of workers in the establishment concerned. It involves relating the number of directive-relevant dismissals over a shorter period (30 days), expressed as a fraction or as an absolute figure, to the total number of workers. By contrast, the *second method*, laid down in Article 1(1)(a)(ii) ('the point (ii) method'), appears — at least on the face of it — to be rather more straightforward. It requires ascertaining, over a longer period of time (90 days), whether the number of directive-relevant dismissals in a given establishment exceeds an absolute figure (19), irrespective of the total number of workers there.

18 — See footnote 4 above.

19 — See the Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1), point 6.

39. Thus, the clear assumption is that the interpretation of the concept at issue applies *erga omnes*, including in respect of point (ii) of Article 1(1)(a) of Directive 98/59. Still, given the fact that the existing case-law interprets the concept at issue only with reference to the point (i) method, and that this interpretation might ultimately be detrimental to the workers in the cases under consideration, the question now arises as to whether there is good reason to alter it in view of the circumstances of the cases referred.

2. There is no need to recommend altering the paradigm

40. In Cases C-182/13 and C-80/14, specifically, the applicants suggest nuancing the current understanding of the concept at issue as regards the point (ii) method, essentially on the basis of a purposive interpretation of Directive 98/59.

a) Reflections on the purpose of Directive 98/59

41. In this respect, the stated *purpose* of Directive 98/59 is to further the approximation of the laws of the Member States relating to collective redundancies.[20] In that process, two distinct goals emerge. It is the first of those two goals that might arguably expose to criticism or challenge the current understanding of the concept at issue (I will revert to the second goal below in point 51).

42. Directive 98/59 is intended, *on the one hand*, to provide minimum protection with regard to the information and consultation of workers in the event of collective redundancies, while Member States remain free to adopt measures more favourable to the workers (‘*the social protection aim*’).[21] The Court has therefore defined the term ‘establishment’ very ‘broadly’ — or, put differently, very purposefully — in order to limit as far as possible cases of collective redundancies which are not subject to Directive 98/59 because of the legal definition of that term at national level.[22]

43. Of relevance to Cases C-182/13 and C-80/14 is the fact that the United Kingdom opted for the point (ii) method when implementing Directive 98/59. That being so, it could be argued that the Court’s rulings in *Rockfon* and *Athinaïki Chartopoiïa* only concerned the point (i) method or, at the very least, that they dealt only with dismissals effected at one single establishment.[23] In order to promote the protection of workers, the Court might adopt an interpretation whereby all directive-relevant dismissals in an entire group, effected within the context of a single restructuring exercise, are bracketed together. Arguably, such an interpretation would not even imply interpreting points (i) and (ii) of Article 1(1)(a) of Directive 98/59 differently — that is, if one assumes that the Court’s *ratio decidendi* in those judgments was to apply only to cases involving one establishment.

44. Yet I fear that such a view is misguided.

45. In *Rockfon*, the Court was fully aware that the concept at issue could be interpreted in several ways.[24] Despite the differences in the various language versions of Directives 75/129 and 98/59, there is one thing that can be gleaned from *Rockfon* and *Athinaïki Chartopoiïa*. In holding that an ‘establishment’ is the local employment unit, the Court rejected the interpretation proffered by the eponymous employing companies. In particular, it did not find it appropriate to equate the concept at

20 — Judgment in *Commission* v *Portugal*, C-55/02, EU:C:2004:605, paragraph 47.

21 — See judgment in *Confédération générale du travail and Others*, C-385/05, EU:C:2007:37, paragraph 44. See also, in respect of Directive 75/129, judgment in *Rockfon*, EU:C:1995:420, paragraph 29.

22 — See, inter alia, judgment in *Athinaïki Chartopoiïa*, EU:C:2007:101, paragraph 26.

23 — In *Rockfon*, EU:C:1995:420, the eponymous company belonged to the Rockwell group with more than 300 workers and a shared personnel department. Rockfon A/S had a workforce of 162, of which 24 or 25 employees were dismissed. In *Athinaïki Chartopoiïa*, EU:C:2007:101, the Board of Directors of Athinaïki Chartopoiïa AE decided to shut down one of three production units with a staff of 420 people.

24 — See, to that effect, judgment in *Rockfon*, EU:C:1995:420, paragraph 30.

issue with an 'undertaking' for the purposes of Chapter 1 of Title VII of the FEU Treaty, or a corporate entity with legal personality, such as a limited liability company. Nor did the Court find it appropriate to attribute to that concept the same meaning as attaches to the right of establishment enshrined in Article 49 TFEU.

46. Accordingly, one of the lessons learnt from *Rockfon* and *Athinaïki Chartopoiïa* is that the Court does not pay any heed to the way in which the employer-entity is structured internally, focusing instead on the local employment unit.[25] To change stance now because an employer has several local employment units with fewer than 20 employees would, unlike before, pave the way for a malleable construction of that concept dependent on the employer's internal structure, and that in turn would be at odds with recital 11 in the preamble to Directive 98/59.[26]

47. Indeed, the approach argued for by the applicants in Cases C-182/13 and C-80/14 is to extend the protective procedure to *all workers* dismissed in the course of the same restructuring exercise, irrespective of the size of the establishment at which they worked. Conferring the maximum level of protection by downplaying the method of implementation would obviously be to the advantage of those workers who, under the current understanding of the concept at issue, are not entitled to any protective award. However, such an approach would not be consonant with the minimum harmonisation aim envisaged by Directive 98/59, which, as the Commission rightly stated at the hearing, does not contemplate as a starting point full protection for all — even where the number of dismissals exceeds the thresholds — as the temporal requirement must also be met.[27]

48. Moreover, I for one cannot accept the idea, spelt out at the hearing, that it might be possible to use the same unit of reference in relation to both the point (i) method and the point (ii) method, namely the 'establishment' rather than the 'undertaking', and yet still include under the point (ii) method all directive-relevant dismissals in the entire group which hail from the same restructuring exercise. That would in fact amount to creating a legal fiction with uncharted consequences for the point (i) method. It would be far more candid to suggest overturning *Rockfon* and *Athinaïki Chartopoiïa*.

49. What is more, it has not escaped my attention — nor that of the UK Government, for that matter — that the Court has been at pains to stress the socio-economic effects which collective redundancies may have *in a given local context and social environment*.[28] The Court therefore interpreted the concept at issue as relating to 'the unit to which the workers made redundant are assigned to carry out their duties';[29] in other words, *the local employment unit*. For it is precisely the local community that may wither and fade away without protection from collective redundancies. Conversely, directive-relevant local dismissals which are below the thresholds do not pose the same threat to the survival of local communities. Although the aggregate number of dismissals effected in a restructuring process might be high on the national scale, that does not say anything about how those effects are felt locally. Local jobseekers might, where they are not many, more readily be reabsorbed into the employment market.

50. Therefore, based on the foregoing, I am not convinced that the social protection aim unequivocally leads to the interpretation suggested by the applicants in Cases C-182/13 and C-80/14.

25 — See, in particular, judgments in *Rockfon*, EU:C:1995:420, paragraph 30, and *Athinaïki Chartopoiïa*, EU:C:2007:101, paragraph 28.

26 — That recital states: '… it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer'.

27 — Specifically in the case of Ethel Austin, out of approximately 1 700 workers dismissed, 490 received a protective award (meaning just over 71% did not). However, in the case of Woolworths, as the hearing confirmed, out of at least 27 000 workers dismissed, 3 233 were not entitled to a protective award (less than 12%; see paragraphs 30 and 31 of the judgment of the EAT, Cases No UKEAT/0547/12/KN and No UKEAT/0548/12/KN). As for Bluebird, it seems to emerge from the order for reference that out of 105 dismissals in the Northern Ireland region, 19 did not receive a protective award (slightly over 18%).

28 — See judgment in *Athinaïki Chartopoiïa*, EU:C:2007:101, paragraph 28.

29 — Judgments in *Rockfon*, EU:C:1995:420, paragraph 32, and *Athinaïki Chartopoiïa*, EU:C:2007:101, paragraph 25.

51. More importantly, although it ensures a minimum level of protection for workers' rights in the various Member States, Directive 98/59 also seeks, *on the other hand*, to harmonise the costs which such protective rules entail for undertakings in the European Union ('*the internal market aim*').[30] Indeed, despite increasing convergence, differences still remain which can have a direct effect on the functioning of the internal market. Judging from the tenor of certain recitals in the preamble to the directive, the EU legislature in fact understood that the social protection aim could not be dissociated from the internal market aim.[31] Accordingly, as alluded to by the Hungarian Government, that aim supports the view that it is necessary to interpret the concept at issue uniformly in order to increase transparency and foreseeability for employers who decide to restructure their businesses.

b) Other considerations

52. In addition, the suggestion that the interpretation of the concept at issue should be nuanced in the context of point (ii) of Article 1(1)(a) of Directive 98/59 must be rejected for several other reasons.

53. First, the fact that some language versions[32] refer to 'establishments' in the plural is of no importance. That is simply a generic reference. On the contrary, a number of other language versions seem deliberately more specific.[33] Those versions refer to 'establishments' in the plural in Article 1(1)(a)(i) of Directive 98/59, yet employ *the singular* in Article 1(1)(a)(ii). This more precise wording would rule out the idea that the term 'at least 20' — as referred to in Question 3 in Case C-182/13 and Question 1 in Case C-80/14 — denotes the number of dismissals across *all* of the employer's establishments.

54. Second, if one looks at the *context* of Directive 98/59, the Court has previously held that the procedural obligations set out in Articles 2 and 3 of Directive 98/59 are incumbent *only on an employing subsidiary and not on a parent company*, even if the decision to proceed with collective redundancies is taken by the latter, as the parent company does not have the status of employer.[34] Given that the obligations are imposed only on the employing subsidiary, it would be asymmetrical to require that the thresholds be calculated by reference to the entire group.

55. Moreover, regard must also be had as to how the concept at issue is used generally in EU labour law. Here, Directive 2002/14/EC[35] provides, in Article 2 ('Definitions'), for two distinct definitions of the concepts of 'undertaking' and 'establishment'. Similarly, Article 2(1)(b) (under Chapter I — 'Scope and definitions') of Directive 2008/94 refers to the 'employer's undertaking *or* business' (emphasis

30 — See judgment in *Confédération générale du travail and Others*, EU:C:2007:37, paragraph 43, and, to that effect, judgment in *Commission* v *Portugal*, EU:C:2004:605, paragraph 48 and case-law cited. Blanpain, R., observes in *Labour Law and Industrial Relations of the European Community*, Kluwer, Deventer: 1991, pp. 153 to 154 — with reference to a specific example — that Directive 75/129 was adopted in order to prevent pan-European companies from speculating as to where (that is to say, in which Member State) the costs of dismissing workers would be the lowest.

31 — I refer, in particular, to recitals 2 to 4 and 6 in the preamble to Directive 98/59: '… it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community; … despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers; … these differences can have a direct effect on the functioning of the internal market; … [t]he completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community…'. See also the judgment in *Nolan*, C-583/10, EU:C:2012:638, paragraphs 37 to 40.

32 — Such as the EN, ES, FR, IT and NL versions.

33 — Such as the DA, DE, FI, HR, HU and SV versions.

34 — Judgment in *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraphs 57 and 58.

35 — Directive of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29).

added), and Article 1(1)(a) (under Chapter I — 'Scope and definitions') of Directive 2001/23/EC [36] refers to 'transfer of an undertaking, business, or part of an undertaking or business'. This reinforces the view that when it comes to EU labour law, an undertaking is not the same as an establishment or a business.

56. Third, moving on to consider the *legislative background* to Directive 98/59, the *travaux préparatoires* for Directive 75/129 show that, when consulted, the Economic and Social Committee had suggested defining the term 'undertaking', appearing in the original Commission proposal, [37] as a 'local employment unit'. [38] In the final text, however, the term 'undertaking' was replaced with the term 'establishment' — perhaps in order to clarify that distinction. [39] In that light, the words of Advocate General Cosmas still ring just as true now as when he observed that '… if the Community legislature had wished that all an undertaking's workers, wherever they are employed, should be taken into account in determining the total number of workers on the basis of which dismissals are to be determined to be lawful or unlawful, *it should have used a more appropriate term*'. [40]

57. Furthermore, Directive 98/59 did not bring about any real changes to the legal regime previously applicable. It merely merged and consolidated Directives 75/129 and 92/56. No amendments of relevance to the concept at issue were made. More precisely, it transpires from the *travaux préparatoires* that the EU legislature did not, in fact, wish to make any substantive changes, [41] and was content to maintain the *status quo*. Had it instead considered the interpretation given by the Court in 1995 of the concept at issue to be flawed, the adoption of Directive 98/59 would have provided it with the perfect opportunity to modify that concept, as Bluebird rightly observed at the hearing. That did not happen; nor was any modification made following the judgment in *Athinaïki Chartopoiïa* or at any later stage. This is worth noting, as certain commentators had, in fact, made public what the Court's interpretation in *Rockfon* might mean for the United Kingdom [42] — even before Directive 98/59 was adopted. [43]

58. Fourth, as USDAW and Mrs Wilson observed at the hearing, it is inherent in the design of the respective thresholds set for the point (i) and the point (ii) methods that they operate differently. Both methods will provide protection for workers in certain instances and not in others. When the methods are contrasted, the argument put to the Court is that this difference of application is arbitrary. However, this modulation was intended since this choice of method, which did not appear in the original Commission proposal, was specifically inserted by the Council. What would really be arbitrary would be to interpret the point (ii) method in the manner suggested by USDAW and Mrs Wilson, as that would cause a real rift in the respective levels of protection conferred.

59. Here, I would call to mind that, as was confirmed at the hearing, the United Kingdom has not changed its chosen method of implementing the directive since the seventies, where it made a legitimate choice in opting for the point (ii) method over the point (i) method at a time when the concept at issue did not have the clear significance it has now.

36 — Council Directive of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

37 — COM(72) 1400; see, for example, draft Article 4.

38 — OJ 1973 C 100, p. 11, at p. 14.

39 — Cf. judgment in *Rockfon*, EU:C:1995:420, paragraph 33. This change, which did not occur in all the official language versions of the time, appears to have taken place in between the consultation of the Parliament and of the Economic and Social Committee.

40 — Opinion of Advocate General Cosmas in *Rockfon*, C-449/93, EU:C:1995:242, point 32. Emphasis added.

41 — See, in this respect, the minutes of the 2115th Council meeting (AGRI) held in Brussels on 20 July 1998 (Reference Nos C/98/254 and 10395/98), point IX, which state that '[t]he objective is a straightforward consolidation (or "official codification" within the meaning of [point 1 of the Inter[-]institutional Agreement of 20 December 1994 [–] Accelerated working method for official codification of legislative texts (OJ 1996 C 102, p. 2)]), without any substantive changes'.

42 — See Rubinstein, M., 'Highlights: April 2007', 2007 *Industrial Relations Law Reports*, p. 225 et seq., and Barnard, C., *EU Employment Law*, Oxford University Press, Oxford: 2012 (4th ed.), pp. 632 and 633.

43 — See, in particular, Rubinstein, M., 'Highlights: March 1996', 1996 *Industrial Relations Law Reports*, p. 113 et seq.

60. Fifth, to disregard the inherent differences between the point (i) and the point (ii) methods would rob Article 5 of Directive 98/59 of all purpose.[44] The directive only entails minimum harmonisation, meaning that Member States may enact rules which are more favourable to workers. Accordingly, Member States may, for instance, set thresholds which implement *both* the point (i) and the point (ii) method, such as a smaller number of directive-relevant dismissals over a longer period of time.

61. For all those reasons, I share the view put forward by Bluebird, the Spanish, UK and Hungarian Governments and the Commission that the concept at issue must be construed in the same way in relation to both point (i) and point (ii) of Article 1(1)(a) of Directive 98/59, that is to say, as denoting the unit to which the workers made redundant are assigned to carry out their duties. Accordingly, that directive does not require — nor does it preclude — aggregating the number of dismissals in all the employer's establishments for the purposes of verifying whether the thresholds set in Article 1(1)(a) are met. It is for the Member States to decide, where appropriate, to increase the level of protection pursuant to Article 5 of Directive 98/59, provided that, on *every* occasion (and not merely on average, as the Spanish Government suggests), it would be more favourable to the workers made redundant. It is for the national courts to verify that this is indeed the case.

62. Lastly, it should also be made clear that it is for the referring courts in all three cases to determine how exactly the local employment unit is constituted in each situation, that being a factual matter. To take an example, if an employer operates several stores in one shopping centre, it is not inconceivable that all those stores should be regarded as forming a single local employment unit. As observed by the Spanish Government, that will depend on a number of factors: (i) whether the joint entity in question can be said to have a certain degree of permanence and stability; (ii) whether it is assigned to perform one or more given tasks; and (iii) whether its workforce, technical means and organisational structure are adequate for the accomplishment of those tasks. It is not necessary for the entity to have legal, economic, financial, administrative or technological autonomy in order to be regarded as an establishment.[45]

63. In the light of the foregoing, there is no need to rule on Bluebird's request for limitation of the temporal effects of the judgment. In the event that the Court's view does not coincide with mine, that request appears at any rate unjustified, given the very strict conditions in that regard.[46]

C – *Secondary issues*

64. As was stated earlier, apart from the principal issue discussed above, Cases C-392/13 and C-80/14 raise several other issues.

1. Question 1 in Case C-392/13: the concept of 'collective redundancies'

65. By its first question, the Juzgado de lo Social No 33 essentially asks the Court to clarify whether the concept of 'collective redundancies' in Article 1(1)(a) of Directive 98/59 must be interpreted as precluding a provision of national law that restricts the ambit of that concept solely to terminations based on economic, technical, organisational or production grounds. To recapitulate, Article 1(1)(a) states that directive-relevant dismissals are those effected by an employer for one or more reasons not related to the individual workers concerned.

44 — 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.'

45 — See judgment in *Athinaïki Chartopoïïa*, EU:C:2007:101, paragraphs 27 and 28.

46 — See judgment in *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317, paragraph 57 et seq.

66. Although the Spanish Government stated at the hearing that it had opted for the point (i) method, it seems to me in fact that Spain has implemented a combination of the point (i) method and the point (ii) method: Article 51(1) of the ET provides for a variable 'three scenario'-approach covered by the point (i) method, but combined with a (longer) period of 90 days, suggestive of the point (ii) method. [47] Nevertheless, in this instance, the question is whether Article 51(1) of the ET construes the concept of 'redundancy' too narrowly. That concept, which has a uniform meaning in EU law, covers any termination of a contract of employment not sought by the worker, and therefore without his consent. [48] Moreover, case-law indicates that the expression 'reasons not related to the individual worker concerned' must be construed broadly. [49]

67. Now, Member States may, pursuant to Article 5 of Directive 98/59, grant workers greater protection by, for example, lengthening the time allowed for the tallying of directive-relevant dismissals. However, the directive is no *smörgåsbord*, meaning that it is not open to cherry-picking! Member States may not offset an increased level of protection by reducing it in other respects, for instance by interpreting the concept of 'redundancy' more restrictively. [50] Like the methods for calculating the thresholds — and therefore the thresholds themselves — that concept does not lie within their discretion. [51]

68. The first subparagraph of Article 51(1) of the ET, which purports to implement Article 1 of Directive 98/59, refers only to 'termination of employment contracts based on economic, technical, organisational or production grounds'. Such a reservation, it would seem, restricts the open-ended scope of the concept of 'redundancy'. The Spanish legislation at issue is in fact reminiscent of *Commission* v *Portugal*, in which Portugal had unlawfully restricted the same concept to dismissals for structural, technological or cyclical reasons. [52] Although the Court later, in *Rodríguez Mayor and Others*, [53] nuanced the scope of that concept somewhat in relation to the termination of contracts of employment resulting from the death of the employer, it took great care to distinguish that particular situation from the former judgment. [54] As Case C-392/13 does not involve such a special situation, I see no reason for the Court to rule any differently from *Commission* v *Portugal*. Thus, as the referring court and the Hungarian Government observe, Article 1(1)(a) of Directive 98/59 would preclude a rule of national law such as Article 51(1) of the ET.

69. However, the Spanish Government refers to the 'catch-all' provision laid down in the fifth subparagraph of Article 51(1) of the ET. It states that, apart from the coming to an end of contracts of employment concluded for limited periods of time or for specific tasks ('fixed-term contracts'), account must also be taken of any other terminations which occurred on the employer's initiative for reasons unrelated to the workers concerned, provided that the number of terminations is at least five.

47 — See judgment in *Rodríguez Mayor and Others*, EU:C:2009:770, paragraphs 22 to 24. Moreover, Spain has also provided, through the fourth subparagraph of Article 51(1) of the ET, for collective redundancies to arise where termination of employment contracts based on economic, technical, organisational or production grounds affects the entire workforce of an undertaking as a result of the total cessation of the undertaking's business activity even though the thresholds under Article 1(1) of Directive 98/59 are not met, provided that the number of workers affected is greater than five.

48 — Judgment in *Agorastoudis and Others*, C-187/05 to C-190/05, EU:C:2006:535, paragraph 28 and case-law cited.

49 — See, to that effect, judgment in *Rodríguez Mayor and Others*, EU:C:2009:770, paragraph 34.

50 — See, to that effect, judgment in *Commission* v *Italy*, 91/81, EU:C:1982:212, paragraphs 8 to 10.

51 — See, to that effect, judgment in *Confédération générale du travail and Others*, EU:C:2007:37, paragraph 47.

52 — See judgment in *Commission* v *Portugal*, EU:C:2004:605, paragraph 66 and the operative part of the judgment. See also judgment in *Commission* v *United Kingdom*, C-383/92, EU:C:1994:234, paragraphs 29 to 32.

53 — EU:C:2009:770. That case involved a question, referred for a preliminary ruling, strikingly similar to the one under consideration.

54 — Ibid., paragraph 52.

70. In that regard, I should point out that the fifth subparagraph of Article 51(1) of the ET closely resembles the second subparagraph of Article 1(1) of Directive 98/59 and appears to give effect to it. That latter provision governs 'redundancies by assimilation', which are equated with 'redundancies proper' ('redundancies proper' being characterised by the lack of consent of the worker).[55] Provided that the number of redundancies by assimilation is at least five, they become directive-relevant for the purposes of calculating the thresholds.

71. It nevertheless remains true that, when it comes to 'redundancies proper', Directive 98/59 does not require there to be a minimum of five such dismissals before they count as directive-relevant, a fact that the Spanish Government acknowledged at the hearing. Therefore, it appears that by requiring there to be at least five dismissals on grounds other than economic, technical, organisational or production grounds, Article 51(1) of the ET unduly restricts the scope of the concept of 'redundancy'. Accordingly, I propose that the Court answer Question 1 in Case C-392/13 to the effect that Article 1(1) of that directive precludes such a provision.

2. Questions 2 and 3 in Case C-392/13: applicability of Directive 98/59 to fixed-term contracts

72. By these two questions, the Juzgado de lo Social No 33 seeks guidance on the applicability of Directive 98/59 to fixed-term contracts which have come to an end, whether that be due to the passing of time or the performance of a predefined service or task.

73. Essentially, Question 2 asks whether fixed-term contracts which come to an end should be taken into account as directive-relevant dismissals for the purposes of calculating the thresholds in Article 1(1)(a) of Directive 98/59. The order for reference suggests, however, that the referring court merely wishes to know whether the directive requires that court to include those terminations in the calculation of the thresholds for the benefit of 'redundancies proper' — without necessarily applying the protective procedure to them.

74. Question 3, although hardly drafted in clear terms, appears to enquire whether Article 1(2)(a) of Directive 98/59 is limited to the collective dismissal of workers employed under fixed-term contracts where the grounds for dismissal are the same (for instance, where several fixed-term contracts expire at the end of a tourist season or following the completion of a construction project).

75. The answer to both questions, as essentially noted by the Hungarian Government and the Commission, emerges squarely from the wording of Article 1(2)(a) of Directive 98/59. That provision excludes fixed-term contracts from the scope of the directive, unless the redundancies take place prior to the date of expiry of the contracts in question, or before their completion. Given the nature of such contracts, which — the Commission rightly states — necessarily come to an end when the duration period agreed has passed, that rule seems entirely cogent. Indeed, a fixed-term contract which ends organically is not the same as the dismissal of a permanently employed worker for reasons unrelated to that worker.

76. That interpretation is not called into question by the second subparagraph of Article 1(1) of Directive 98/59. As stated above, that provision governs redundancies by assimilation. Conversely, it does not regulate fixed-term contracts, which are dealt with exclusively under Article 1(2) of the directive. While derogations must generally be construed narrowly, it is not possible to insert, by way of interpretation, an additional caveat into the wording of Article 1(2) of Directive 98/59 which was not there to begin with. This is even more true where the EU legislature has already inserted a

55 — See judgment in *Commission* v *Portugal*, EU:C:2004:605, paragraph 56. Redundancies by assimilation arise, inter alia, in circumstances in which the worker is encouraged to give his agreement, for example in exchange for financial advantages; see points 46 and 47 of the Opinion of then Advocate General Tizzano in the same case (EU:C:2004:139). For instance, workers might agree to voluntary early retirement on the employer's initiative without it being attributable to them individually; see Barnard, C., op. cit., p. 631.

specific proviso in the wording of that derogation without finding it necessary to add another. In the same vein, the Court has previously refused to interpret a similar derogation in Article 1(2) of Directive 98/59 restrictively. [56] *A fortiori*, I find myself unable to apply the exclusion of fixed-term contracts only to situations where the grounds for termination of such contracts are the same.

77. In any event, the Juzgado de lo Social No 33 is not barred from including all terminations of fixed-term contracts which come to an end in the calculation of the thresholds if that is feasible under Spanish law. As the Hungarian Government has observed, Member States are not precluded from enacting, pursuant to Article 5 of Directive 98/59, rules which are more favourable to workers.

78. For those reasons, I propose answering Questions 2 and 3 in Case C-392/13 jointly to the effect that, on a proper construction of Article 1(2)(a) of Directive 98/59, all collective redundancies effected under fixed-term contracts are excluded from the scope of that directive, save where such redundancies take place prior to the date of expiry of such contracts, or before their completion. It is irrelevant whether the grounds for termination of such contracts are the same. That does not preclude the adoption of national rules which are more favourable to workers.

3. Question 2 in Case C-80/14: beyond vertical direct effect

79. By its second question, the Court of Appeal asks whether, in the specific circumstances of that case, a Member State is precluded from arguing that a directive cannot impose obligations on private individuals if it has been implemented incorrectly. The reasons for referring this question essentially follow from the view submitted by USDAW and Mrs Wilson: a Member State cannot rely on its own incomplete implementation of Directive 98/59 in proceedings brought against insolvent private sector employers where that State may itself face subsequent claims under national legislation implementing Directive 2008/94. In other words, the argument thus appears to be that Directive 2008/94 somehow transforms the horizontal nature of the proceedings brought under Directive 98/59 into a vertical one.

80. In that light, the question referred is interesting. However, in order for the obligations arising from Directive 2008/94 to be triggered, a financial claim falling within the scope of that directive (such as a protective award) must have gone unpaid owing to the employer's insolvency. Were the Court to rule to the effect that the United Kingdom has transposed the point (ii) method incorrectly (and leaving aside the possibility of interpreting national law consistently with the directive, an issue which the Court of Appeal explicitly states is not raised by the question referred), the entitlement to a protective award presupposes that the directive has horizontal direct effect vis-à-vis private sector employers — solvent and insolvent alike. Failing such horizontal effect, USDAW and Mrs Wilson's line of argument would lead to the absurd result that workers made collectively redundant by insolvent employers would have greater rights than those made collectively redundant by solvent employers, an idea that cannot be entertained. In any event, it has not been argued that Directive 98/59 has horizontal direct effect and I fail to see how that might be the case. In those circumstances, the line of argument put forward by USDAW and Mrs Wilson seems stillborn.

81. Be that as it may, given the fact that I do not believe that the United Kingdom has failed to give proper effect to Directive 98/59, I will propose that the Court decline to answer this question.

56 — See the judgment in *Nolan*, EU:C:2012:638, paragraphs 42 and 43.

IV – **Conclusion**

82. In the light of the foregoing, I propose that the Court respond as follows to the questions referred in Case C-182/13 by the Industrial Tribunals (Northern Ireland) (United Kingdom), to Question 4 in Case C-392/13, referred by the Juzgado de lo Social No 33 de Barcelona (Spain), and to the questions referred in Case C-80/14 by the Court of Appeal (England and Wales) (United Kingdom):

— The concept of 'establishment' as referred to in Article 1(1)(a)(ii) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective dismissals has the same meaning as under Article 1(1)(a)(i) of that directive. That concept denotes the unit to which the workers made redundant are assigned to carry out their duties, which it is for the national court to determine. That does not preclude Member States from enacting implementing rules on the basis of that concept which, without lowering the level of minimum protection, are more favourable to workers. The national court is to verify that this is the case.

In Case C-392/13, I propose the Court respond as follows to Questions 1, 2 and 3:

— Article 1(1) of Directive 98/59 precludes a provision of national law, such as Article 51(1) of the Ley del Estatuto de los Trabajadores of 29 March 1995, under which there must be at least five terminations of employment contracts without the consent of the workers concerned, on grounds other than economic, technical, organisational or production grounds, before such terminations may be taken into account for the purposes of determining whether collective redundancies have taken place;

— On a proper construction of Article 1(2)(a) of Directive 98/59, all collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks are excluded from the scope of that directive, save where such redundancies take place prior to the date of expiry of such contracts or before their completion. It is irrelevant whether the grounds for the termination of such contracts are the same. That does not preclude Member States from enacting rules which, without lowering the level of minimum protection, are more favourable to workers.