OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 30 September 2004 [1]

1. The present case involves two questions referred to the Court of Justice of the European Communities for a preliminary ruling by the Arbeitsgericht (Labour Court) Berlin (Federal Republic of Germany) on the interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ('the Directive'). [2]

2. In short, the national court asks the Court, first, to clarify the meaning to be given to the term 'redundancy' in the Directive and, secondly, the scope of the information and consultation obligations imposed on the employer by that directive.

I — Legal framework

Relevant Community law

3. Based on Article 100 of the EC Treaty (now Article 94 EC), the Directive was adopted for the purpose of minimising the effects which differences between national rules on collective redundancies can have on the functioning of the internal market (Recital 4). It aims to afford greater protection to workers while taking into account the need for strong economic and social development within the Community, the socio-political principles sanctioned by the 1989 Community Charter of the Fundamental Social Rights of Workers and Article 136 EC (Recitals 2 and 6).

4. The first sentence of Article 1(1) of the Directive defines the term 'collective redundancies' as 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned' where the number of redundancies effected over a specified period of time reaches a certain ratio, calculated by the Directive on the basis of the number of workers normally employed in the undertaking concerned.

1 — Original language: Italian.
2 — OJ 1998 L 225, p. 16.

5. Articles 2, 3 and 4 of the Directive specify the procedural formalities with which an employer who decides to make collective redundancies must comply.

6. Article 2 lays down that:

'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.

Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

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

(a) supply them with all relevant information and

(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;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

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).

...'

7. Article 3 then provides:

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

However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.

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.'

8. Next, Article 4 of the Directive provides that:

'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.

4. Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.'

9. Finally, Article 5 of the Directive states that:

'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.'

National law

10. Germany implemented the Directive by adopting the Kündigungsschutzgesetz (Law on Employment Protection; 'the KSchG').

11. Paragraphs 17 and 18 of the KSchG and Paragraph 102 of the Betriebsverfassungsgesetz (Law on the Organisation of Businesses; 'the BetrVG') are of importance in the present dispute.

12. Paragraph 17 of the KSchG provides that, where an employer intends to dismiss a particular number of employees [3] within a period of 30 calendar days, the employer is required (i) to supply the works council with all relevant information on, inter alia, the reasons for the projected redundancies, the period over which those redundancies are to take place, the number and categories of workers to be made redundant, and the criteria proposed for the selection of the workers to be made redundant (Paragraph 17 (2)), and (ii) to notify the labour office of its intention, attaching a copy of the notification to the works council and the opinion of the latter on the redundancies (Paragraph 17(1) and (3)).

13. Paragraph 18 of the KSchG provides that:

'(1) Redundancies which must be notified under Paragraph 17 may take effect less than one month after the labour office has received the notification only with the latter's consent; consent may be given retroactively to the time at which the application was filed.

(2) In certain cases, the labour office may decide that the redundancies shall take effect not earlier than two months after receipt of the notification.'

14. Finally, Paragraph 102 of the BetrVG provides that a redundancy made without prior consultation with the works council will be ineffective.

II — Facts and procedure

15. Mrs Junk was employed by AWO Gemeinnützige Pflegegesellschaft Südwest mbH ('AWO'), a company which provided domestic care services and had around 430 employees.

3 — In particular, the thresholds for redundancies made within the 30-day period necessary to give rise to the procedure in question laid down as follows:
'1. more than 5 employees in establishments which normally employ more than 20 and less than 60 employees;
2. 10% of employees normally employed or more than 25 employees in establishments which normally employ more than 60 and less than 500 employees;
3. at least 30 employees in establishments which normally employ at least 500 employees'.

16. According to the case-file, on 31 January 2002 AWO lodged a request for the opening of insolvency proceedings on account of financial difficulties. As of 1 February 2002, it released all its employees from their obligation to work and paid no remuneration for January 2002.

17. The provisional insolvency proceedings were opened on 5 February 2002 and the final insolvency proceedings on 1 May 2002. [4]

18. On 23 May 2002, the liquidator reached agreement with the works council that AWO cease trading and agreed a social plan as provided for in Paragraph 112 of the BetrVG.

19. By letter of 19 June 2002, the liquidator informed the works council of AWO that, as a consequence of the liquidation of the company, he intended to terminate all the remaining contracts of employment, including that of Mrs Junk, within the maximum three-month period laid down in the insolvency proceedings. Attached to the letter was a list containing the names, addresses, dates of birth, tax categories, tax-card-registered dependent child allowances, and starting dates of the employees to be dismissed.

20. That letter was received by the works council of AWO on 19 June 2002.

21. On 26 June 2002, the chairman of the works council informed the liquidator of the consent of the works council to the liquidator's proposal.

22. By letter of 27 June 2002, which Mrs Junk received on 29 June 2002, the liquidator announced his intention to terminate her contract of employment as of 30 September 2002, on grounds relating to the business.

23. On 27 August 2002, the liquidator notified the labour office of the redundancy of the workers still employed at AWO within the meaning of Paragraph 17(3) of the KSchG, and attached to the notification the opinion of the works council. That notification was received by the labour office on the same day.

4 — According to the case-file, in the period following the opening of the insolvency proceedings a large number of employees resigned, so that in mid-June 2002 there were only 176 employees still employed at AWO, and at the end of August 2002 the number was down to 172.

24. Mrs Junk challenged the notice of dismissal before the national court, claiming that it is ineffective.

25. It should be noted that, in the view of the applicant before the national court, that ineffectiveness derives from the fact that the liquidator did not properly consult the works council prior to the notice of dismissal as provided for in Paragraph 102 of the BetrVG or duly apply the information and consultation procedure for collective redundancies laid down in Paragraph 17 et seq. of the KSchG.

26. The Arbeitsgericht, having doubts about the interpretation of the Directive, stayed the proceedings pending before it and referred to the Court of Justice for a preliminary ruling under Article 234 EC the following questions:

'(1) Is Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies to be interpreted to the effect that "redundancy" within the meaning of Article 1(1)(a) thereof is to be construed as meaning the notice of dismissal as the first act in bringing the employment relationship to an end or does "redundancy" mean the termination of the employment relationship upon expiry of the period of notice?

(2) If "redundancy" is to be construed as meaning the notice of dismissal, does the Directive require that both the consultation procedure under Article 2 of the Directive and the notification procedure under Articles 3 and 4 thereof must have been concluded before the notices of dismissal are issued?'

27. The Austrian Government, United Kingdom Government and the Commission submitted written observations in the proceedings.

28. The United Kingdom Government and the Commission attended the hearing on 15 July 2004.

III — Legal analysis

A — *The first question*

29. By its first question, the national court is essentially seeking a definition of the term

'redundancy' so that it can ascertain whether the consultation and notification obligations provided for by the Directive have been complied with in the case before the national court.

30. The national court explains that the problem arises from the fact that the German version of the Directive uses the term 'Entlassung'. [5] However, continues the national court, in the German legal system that term refers to the time when a redundancy becomes effective and is clearly distinguished from the term 'Kündigung', which means, in contrast, 'notice of dismissal', or the manifestation of the employer's intention to bring the employment relationship to an end.

31. When applied to the provisions on collective redundancies, that means that, for the purpose of compliance with the procedural obligations in the Directive, the time when those obligations must have been satisfied is not the time when the 'notice of dismissal' is issued by the employer, but the time at which the employment relationship is *actually at an end*. As a consequence, the employer could notify and consult with the workers' representatives and notify the projected collective redundancies to the competent public authorities even *after* the individual notices of dismissal have been announced, provided that this is before the employment relationships are formally terminated.

32. Believing that that interpretation may be incompatible with the objective of worker protection pursued by the Directive, the national court therefore asks whether the term 'redundancy' within the meaning of Article 1(1)(a) of the Directive means instead 'notice of dismissal' ('Kündigung').

33. The United Kingdom Government has a different opinion. It puts forward arguments of a literal and teleological nature, and maintains that for the purposes of the Directive 'redundancy' refers to the time at which the employment relationship comes to an end.

34. As regards the literal argument, the United Kingdom Government notes that the Directive speaks of 'dismissals *effected*' by an employer (see Article 1(1)(a)). However, a dismissal can 'take effect' (Article 4 (1)) only when the employment relationship is terminated, that is, when the worker

5 — See the German version of Article 1(1)(a) of the Directive: 'Für die Durchführung dieser Richtlinie gelten folgende Begriffsbestimmungen:
a) "Massenentlassungen" sind Entlassungen, die ein Arbeitgeber aus einem oder mehreren Gründen, die nicht in der Person der Arbeitnehmer liegen, vornimmt und bei denen — nach Wahl der Mitgliedstaaten — die Zahl der Entlassungen ...'.

actually ceases to be employed by the employer. Indeed, up to that time the notice of dismissal can always be revoked.

35. According to the United Kingdom, that interpretation is also supported by the express distinction made in Article 4(1) between 'redundancy' and 'notice of dismissal'. The distinction between those two concepts is absolutely clear, because one refers to the time at which 'collective redundancies ... shall take effect', while the other indicates the time at which the employer communicates its intention to terminate the employment relationship in the notice of dismissal. That precludes any interpretation which puts the term 'redundancy' on the same footing as the manifestation of the intention to terminate, that is, the notice of dismissal.

36. The United Kingdom Government goes on to argue that Article 2 of the Directive merely requires that the employer begin consultations with workers' representatives 'in good time' (Article 2(1)) and that certain information is to be given to the latter also 'in good time' (Article 2(3)), without making a more specific reference to the time at which those requirements must be complied with. That provision does not therefore preclude workers' representatives from being given information and consulted also after individual notices of dismissal have been issued.

37. Finally, the interpretation proposed by the United Kingdom Government is, it argues, consistent with the purpose of the Directive. As it enables employers to carry out redundancies more quickly, that interpretation allows the requirements of the protection of workers and the preservation of the financial soundness of the undertaking to be fulfilled at the same time. The opposite interpretation, however, which would not allow employers to issue notices of dismissal before the consultation and notification procedures have been concluded, would have the result of prolonging a crisis situation and could therefore lead to the loss of other jobs and even compromise the rescue of the undertaking itself.

38. By contrast, the Austrian Government and, although less explicitly, the Commission share the national court's approach based on arguments relating to the wording and the effectiveness of the Directive.

39. Although the Commission believes, all things considered, that for the purposes of applying the consultation and notification procedures provided for by the Directive reference should be made to the notice of dismissal by the employer, it none the less maintains that the first question serves no purpose since Article 1 does not have any definition of 'redundancy' or any other useful guidance for interpreting Articles 2 to 4, which are in issue in this case, but

merely defines the 'collective' nature of a redundancy. The Court is not therefore required to reply to that question.

40. In my opinion, however, the fact that the Directive does not contain a definition of *redundancy* alone is not a sufficient ground to dismiss the first question. According to settled case-law of the Court, rightly cited by the Austrian Government, where a Community provision uses a term for which it gives no definition and makes no express reference to the law of the Member States so far as concerns the meaning and scope of that term, the need for a uniform application of Community law and the principle of equality require that the term in question be given an independent and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question. [6]

41. If that were not the case, the objective pursued by the Directive of harmonisation, although only partial, would be seriously jeopardised in so far as the protection offered by those provisions to workers in the event of collective redundancies could vary from one Member State to another according to the meaning of the term 'dismissal' in the different national legal systems.

42. In addition, as the Commission states, it is true that the outcome of the dispute before the national court depends not so much on the meaning of 'redundancy' in Article 1(1)(a) of the Directive, but on the detailed time rules for the application of the consultation (Article 2) and notification procedures (Articles 3 and 4). Those two aspects must, however, be dealt with together since, as shown by the arguments put forward by the parties, the time at which the consultation and notification obligations arise can vary fundamentally according to the meaning given to the term 'redundancy'.

43. Mrs Junk does not claim that her notice of dismissal is ineffective on the ground that the procedures laid down by the Directive were not complied with by the liquidator, but rather on the ground that the latter did not comply with them *before* informing her of his intention to terminate the employment contract. As the national court explains, there will be no infringement of the provisions on collective redundancies if the material time for the purposes of complying with the consultation and notification obligations is the end of the employment relationship; on the other hand, there will be an infringement if the notice of dismissal

6 — See, for example, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37.

is the time at which the redundancy is effected and therefore the time at which those obligations ought already to have been complied with.

44. It seems to me therefore that the definition of the term 'redundancy' in the Directive is material for the present purposes, and that in this case, like all terms of Community law, it must be given an independent and uniform interpretation which takes account of the criteria stated by the Court.

45. More specifically, I think I have to agree with the argument put forward by the Austrian Government, and indirectly by the Commission, that the term 'redundancy' must be understood as meaning the manifestation of the intention on the part of an employer to bring an employment relationship to an end.

46. In my opinion, that interpretation stems from both the wording and the spirit of the relevant provisions.

47. First of all, I note that the reference to collective redundancies which are only 'contemplated' (Article 2(1)) and to notification of 'projected collective redundancies' (Articles 3(1) and 4(1)) unequivocally indicates that the employer must begin consultations with representatives and notify the projected redundancies to the competent public authority when the redundancies are still at the *projection* stage.

48. Moreover, if employers could inform individual workers affected by the collective procedure of their intention to terminate the employment contract, thus bringing the notice period into operation, before consulting their representatives and informing the competent public authority, there would no longer be a *projected* redundancy. As the Austrian Government and the Commission have rightly pointed out, if reference could be made to a redundancy which has already been announced, the effectiveness of the consultation and notification procedures would be negated.

49. I do not think that the interpretation proposed here is contradicted by the fact, noted by the United Kingdom (see point 34 above), that Article 1(1)(a) of the Directive speaks of dismissals that have been 'effected'. That term does not have the independent value attributed to it by the United Kingdom, but is instead used as a necessary link with the words which follow. In other words, it is used to make it clear that the Directive

applies only to dismissals 'effected *by an employer*', and not also to cases of termination of the employment relationship owing to resignations by workers. [7] I do not therefore believe that any other conclusion can be drawn as regards the meaning of 'redundancy' from the use of the above term, which merely indicates *who* takes the termination measure and that, in particular, it may be inferred that that term must refer to the time at which the redundancies 'take effect' within the meaning of Article 4(1) (I shall return to this point when considering the second question; see point 62 et seq. below).

50. Similarly, I do not believe that the reference to 'notice of dismissal' in Article 4(1) is such as to affect the meaning of 'redundancy' for the purposes of applying the consultation and notification procedures. As is clear from the wording of that provision, the reference to the notice period has the sole purpose of leaving unaffected national provisions which are more favourable to individual rights with regard to notice of dismissal. In other words, such reference does not relate to the meaning of 'redundancy', but serves only to indicate that the purpose of the Directive is to harmonise some procedures applicable to collective redundancies alone, without impinging on rules governing individual redundancies.

51. The foregoing relates to the arguments of a textual nature. I would add that I consider that the interpretation of 'redundancy' which I have proposed here is also more consistent with the purpose and spirit of the Directive. It better ensures the effective protection of workers which the case-law of the Court in this area has always indicated it wishes to safeguard, both in defining the scope of the application of the Directive [8] and in interpreting the derogations provided for by it in a restrictive manner. [9]

52. Nor do I believe that that purpose can be sacrificed, as the United Kingdom Government proposes, in the name of the economic interests of the undertaking not to prolong a crisis situation which could jeopardise its rescue. This is not because those interests do not deserve protection, but because I believe that they can be sufficiently safeguarded by the power granted to the public authorities

7 — On that point, see Case 284/83 *Dansk Metalarbejderforbund* v *Nielsen & Son* [1985] ECR 553, paragraphs 8 and 11.

8 — See, for example, Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479 on the meaning of 'collective redundancies', and Case C-32/02 *Commission* v *Italy* [2003] ECR I-12063 on the meaning of 'employer'.

9 — See Case C-250/97 *Lauge and Others* [1998] ECR I-8737 on the derogation applicable to collective redundancies following termination of an establishment's operations as a result of a judicial decision.

by Article 4 of the Directive to reduce the period in which redundancies are 'blocked', a provision which I will consider more closely when examining the second question.

53. In conclusion, I can say that the term 'redundancy' in Article 1(1)(a) of the Directive refers to the manifestation of the employer's intention to bring the employment relationship to an end and that the employer cannot therefore exercise his right to terminate until he has consulted the workers' representatives and notified the projected redundancy to the competent public authority.

54. I therefore propose that the Court reply to the first question to the effect that the term 'redundancy' in Article 1(1)(a) of Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies refers to the manifestation of the employer's intention to bring the employment relationship to an end.

B — *The second question*

55. By its second question, the national court is essentially asking whether both the consultation procedure under Article 2 and the notification procedure under Articles 3 and 4 must have been *concluded* before the employer may manifest his intention to bring the employment relationship to an end.

56. In my view, the reply to that question can also be inferred from the wording of the relevant provisions.

57. I note first of all that the Directive sets out a procedural sequence which is broken down into two distinct and consecutive stages.

58. The first stage consists of the consultation with the workers' representatives which, as I have attempted to show in my reply to the first question, must precede the notice of dismissal.

59. In my opinion, that interpretation is supported and reinforced by the objective of those consultations, which are not restricted to merely 'passive' information for workers, but are conducted 'with a view to reaching an agreement' (Article 2(1)) and 'shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences' (Article 2(2)). At the least,

Article 2 therefore imposes an obligation to negotiate.

60. As the Austrian Government and the Commission have correctly observed, the attainment of that objective would be seriously hindered, if not completely frustrated, if the employer could terminate the employment relationship before the end of the consultations. In that case, the employer would certainly not be predisposed to a meaningful discussion with his counterparts for the purpose of avoiding redundancies or limiting their negative effects, since he would already have taken the decision to make the redundancies. In other words, the workers would be presented with a fait accompli, and the provision would be deprived of any practical effect.

61. The second stage consists of the notification of the projected collective redundancy to the competent public authority. In my opinion, that notification can only come after the consultation stage, given that the notification must refer to that stage (third subparagraph of Article 3(1)).

62. Secondly, I believe that that is the only solution which is consistent with the purpose of the stage in question, in which the public authority is required to 'seek solutions to the problems raised by the projected collective redundancies' (Article 4(2)), therefore principally in the absence of agreement between the parties.

63. I note further that, under Article 4(1) of the Directive, the redundancy notified to the public authority cannot in principle 'take effect' 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'.

64. The United Kingdom Government and the Commission interpret the scope of that provision differently: according to the United Kingdom Government, it is clear from the wording of Article 4(1) that it blocks only the effectiveness of the redundancy, whereas the Commission, which relies principally on the effectiveness of the notification procedure, takes the view that the employer's right to terminate is also blocked.

65. I should say at once that I am not persuaded by the Commission's argument. Against that interpretation is, I think, not only the fact, rightly pointed out by the United Kingdom Government, that Article 4 (1) refers expressly to the time when redundancies 'shall take effect', but also the reference to national provisions with regard

to 'notice of dismissal', a reference which would be meaningless if the period of suspension applied to the notice of dismissal rather than the effective termination of the employment relationship.

66. Since it is without prejudice to national provisions which are more favourable with regard to notice of dismissal, that reference safeguards the application of notice periods which are longer than the 30 days provided for by the Directive. That provision makes sense only if Article 4(1), suspending the effectiveness of the redundancy, can affect the length of the notice period. It would not be necessary, on the other hand, if it suspended the notice of dismissal, since that suspension would have the effect of deferring only the date of commencement of the notice period.

67. Nor do I think that the interpretation proposed here is contrary to the purpose of the notification stage which, unlike the stage of consultation with workers' representatives, does not relate to the principle of redundancy but rather to its consequences, or 'the *problems raised* by the ... collective redundancies' (Article 4(2)). In that stage of 'managing' the effects of redundancy, the suspension of the possibility to terminate employment relationships is therefore less necessary than in the preceding consultation stage, the main purpose of which was to avoid or reduce redundancies.

68. I therefore believe that Article 4(1) suspends the effectiveness of the redundancy, but not the announcement of the notice of dismissal. The employer may therefore announce that notice as from the notification of the collective redundancy to the competent public authority.

69. That conclusion obviously does not preclude the practice, already followed by some Member States in a manner consistent with Article 5 of the Directive, of ensuring greater protection for workers by interpreting the provision in question to mean that it suspends not only the effectiveness of the redundancy, but also the manifestation of the employer's intention to terminate the employment relationship.

70. The foregoing observations therefore lead me to propose that the Court reply to the second question to the effect that the employer may not manifest his intention to terminate the employment relationship until the consultations provided for in Article 2 of Directive 98/59 have been concluded and the projected collective redundancy has been notified under Article 3 thereof.

IV — Conclusion

71. In conclusion, I therefore propose that the Court give the following answers to the questions referred by the Arbeitsgericht Berlin:

(1) The term 'redundancy' in Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies refers to the manifestation of the employer's intention to bring the employment relationship to an end.

(2) The employer may not manifest his intention to terminate the employment relationship until the consultations provided for in Article 2 of Directive 98/59 have been concluded and the projected collective redundancy has been notified to the competent public authority under Article 3 thereof.