OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 12 September 2006 [1]

I — Introduction

1. Can a national law, for the purpose of implementing certain provisions of labour law, exclude certain categories of employee from the calculation of the size of an undertaking's workforce, notwithstanding the provisions of Directive 2002/14/EC 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 [2] and those of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies? [3]

2. That, in essence, is the subject-matter of the two questions referred to the Court by the Conseil d'État (France), following actions for annulment brought by five French trades unions against Ordonnance (Order) No 2005-892 of 2 August 2005 adapting the rules on the calculation of the size of an undertaking's workforce ('Order No 2005-892'). [4] I should like to point out at the outset that this case provides the Court with the opportunity to interpret Directive 2002/14, sometimes also referred to as the 'Vilvoorde' Directive, [5] for the first time.

II — Relevant legislation

A — *Community law*

1. Directive 98/59

3. For the purposes of Directive 98/59, Article 1(1) thereof provides:

1 — Original language: French.

2 — OJ L 80, p. 29.

3 — OJ L 225, p. 16.

4 — JORF (*Journal officiel de la République française*) of 3 August 2005, p. 12687.

5 — In reference to the town in the Brussels suburbs where the Renault car assembly factory was closed down in July 1997. That closure provoked an unprecedented wave of reaction in Europe and led, in particular, to the adoption by the Commission in 1998 of the draft directive establishing a general framework for informing and consulting employees in the European Community (OJ 1999 C 2, p. 3).

'(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;

(b) "workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.

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. Article 2(1) of that directive provides that, '[w]here an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement'.

5. Moreover, under Article 3 of Directive 98/59, employers are required to notify the competent public authority in writing of any projected collective redundancies. A copy of that notification must be sent to the workers' representatives, who may then send any comments they may have to the competent public authority.

2. Directive 2002/14

6. Article 1(1) of Directive 2002/14 provides that 'the purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community'.

7. Article 2(d) of Directive 2002/14 states that '"employee" means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice'.

8. Article 3 of Directive 2002/14 provides:

'1. This Directive shall apply, according to the choice made by Member States, to:

(a) undertakings employing at least 50 employees in any one Member State, or

(b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.

...'

9. In that respect, recital (19) in the preamble to the same directive states that the purpose of the general framework established by the directive is, in particular, 'to avoid any administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings' and that, to that end, 'the scope of this directive should be restricted, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees'.

10. Article 4 of Directive 2002/14 provides that, in accordance with the principles set out in Article 1, and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States must determine the practical arrangements for exercising the right to information and consultation at the appropriate level.

11. Article 9(1) of Directive 2002/14 states that the latter is to be without prejudice to the specific information and consultation procedures set out in Article 2 of Directive 98/59.

12. Lastly, Article 11 of Directive 2002/14 states:

'1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this directive not later than 23 March 2005 or shall ensure that management and labour introduce by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by this directive at all times. They shall forthwith inform the Commission thereof.

...'

B — *National legislation*

13. Under Article L. 421-1 of the French Code du Travail (Labour Code), staff delegates must be provided in all establishments where there are at least 11 employees.

14. Furthermore, Articles L. 321-1 to L. 321-17 of the French Labour Code provide that, in the event of a redundancy procedure implemented for economic reasons, employees must be consulted if an undertaking employs more than 10 employees.

15. Prior to the adoption of Order No 2005-892, Article L. 620-10 of the French Labour Code read as follows:

'For the purpose of implementing the provisions of this Code, the size of an undertaking's workforce shall be calculated in accordance with the following provisions:

Employees with a full-time contract of indefinite duration and homeworkers shall be taken fully into account in calculating the size of an undertaking's workforce.

Employees with a fixed-term contract, employees with an intermittent employment contract, employees provided to the undertaking by an outside undertaking, including temporary employees, shall be taken into account in calculating the size of an undertaking's workforce pro-rata to the amount of time they have spent at the undertaking during the preceding 12 months. However,

employees with a fixed-term contract, a temporary contract or those provided by an outside undertaking shall be excluded from the calculation of the size of the workforce where they replace an employee who is absent or whose employment contract has been suspended.

Part-time employees, whatever the nature of their employment contract, shall be taken into account by dividing the total number of working hours laid down in their employment contracts by the statutory or standard working hours.'

16. Article 1 of Order No 2005-892 introduced a new subparagraph to Article L. 620-10 of the French Labour Code. That subparagraph provides:

'An employee engaged after 22 June 2005 who is under 26 years of age shall not be taken into account in calculating the size of the workforce of the undertaking by which he is employed until he reaches the age of 26, whatever the nature of his contract with the undertaking. This provision cannot have the effect of abolishing a staff representation body or an authority to represent staff. The provisions of this subparagraph shall be applicable until 31 December 2007.'

III — The main proceedings and the questions referred

17. In order to remedy the employment situation in France, the Prime Minister presented an emergency employment plan to Parliament in his General Policy Statement of 8 June 2005. In order to enable those measures to enter into force on 1 September 2005, the Government sought authorisation to legislate by *ordonnance* (order).

18. Article 1 of Law No 2005-846 of 26 July 2005 therefore authorised the Government to adopt, by order, any measure intended to 'adapt the rules on the calculation of workforce numbers used to implement employment law provisions or financial obligations imposed by other laws in order to encourage undertakings, as from 22 June 2005, to take on employees aged under 26.'

19. On 2 August 2005, the Government adopted Order No 2005-892, Article 1 of which inserted an additional subparagraph into Article L. 620-10 of the French Labour Code, which subparagraph is reproduced in point 16 above.

20. The Confédération générale du travail (CGT), the Confédération française démocratique du travail (CFDT), the Confédéra-

tion française de l'encadrement (CGC), the Confédération française des travailleurs chrétiens (CFTC) and the Confédération générale du travail — Force ouvrière (CGT-FO) brought actions to annul Article 1 of Order No 2005-892.

21. In support of those actions before the Conseil d'État, the applicants submitted, in particular, that the amendments to the rules on the calculation of workforce numbers, as laid down in Order No 2005-892, infringed the objectives of Directives 98/59 and 2002/14.

22. The national court points out that, although Article 1 of Order No 2005-892 does not directly have the effect of excluding the application of the national provisions transposing Directives 98/59 and 2002/14 into French law, it is nevertheless the case that, in respect of establishments which employ more than 20 employees, but fewer than 11 of whom are aged 26 or over, application of the contested provision may have the consequence of relieving the employer of certain obligations under those two directives.

23. Considering none the less that some doubts remained as to how the abovementioned directives should be interpreted, the Conseil d'État decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) In view of the purpose of Directive 2002/14/EC 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 — Joint declaration of the European Parliament, the Council and the Commission on employee representation, which, as set out in Article 1(1) thereof, is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community, must the transfer to the Member States of responsibility for determining the method for calculating the thresholds of employees employed, which is set out in that directive, be regarded as allowing those States to defer taking account of certain categories of employee for the application of those thresholds?

(2) To what extent may Directive 98/59 of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies be interpreted as authorising an arrangement with the effect that some establishments normally employing more than 20 employees will be relieved, albeit temporarily, of the obligation to create a structure for the representation of employees because of rules for the calculation of staff numbers that exclude taking account of some categories of employee for the application of the provisions organising that representation?'

IV — Procedure before the Court

24. In its decision, the national court asked the Court to apply an accelerated procedure to the reference for a preliminary ruling in accordance with the first subparagraph of Article 104a of the Rules of Procedure.

25. By order of 21 November 2005, the President of the Court rejected that request.

26. The applicants in the main proceedings — the French Government and the Commission of the European Communities — submitted written observations before the Court under Article 20 of the Statute. Those parties also presented oral argument at the hearing which took place on 7 June 2006.

V — Examination of the questions referred

A — *The first question*

1. Preliminary remarks

27. First of all, in order properly to define the issues raised by the national court, it should be pointed out, firstly, that, as was rightly noted by the Commission, Order No 2005-892 introduces no discrimination between employees, whether or not they are under 26 years of age. Indeed, it is common ground that employees who are under 26 years of age retain the individual rights they derive from their status as employees under national law.

28. However, although Order No 2005-892 states that it cannot result in the *abolition* of an existing staff representation body or authority to represent staff, the rights capable of being affected by the contested provision are those which the employees of an undertaking or establishment derive as a body from Directive 2002/14 by reason of the information and consultation owed to them by their employer. For, as I shall argue later, it is the entirety of the employees in an establishment or undertaking — and not just those under the age of 26 — who, under Order No 2005-892, may in certain circumstances be deprived of the rights arising from Directive 2002/14.

29. Next, it would in my view be helpful to add some semantic clarification to the question referred by the national court. The national court asks the Court about legislation such as that at issue in the main

proceedings which, it says, requires undertakings 'to defer taking account of certain categories of employee' for the purposes of applying the thresholds laid down by Directive 2002/14. However, as I see it, that description is not entirely correct. Order No 2005-892 does not, on my analysis, require undertakings to defer taking account of a single category of persons, namely employees under 26 years of age. After all, as soon as the employees referred to in Order No 2005-892 reach the age of 26, and are therefore counted as part of an undertaking's workforce for the purposes of ascertaining whether the thresholds have been exceeded, they cease by definition to belong to the category of persons aged under 26 years of age. It is not therefore a question of 'deferring' the taking into account of the category of employees under 26 years of age, but rather of excluding that category, for the period during which Order No 2005-892 is applicable, from the calculation to establish the number of employees on the workforce of an undertaking for the purposes of ascertaining whether the threshold laid down by national law pursuant to Directive 2002/14 has been exceeded.

30. Moreover, it should be noted that, both in its written pleadings and at the hearing, the French Government referred on several occasions to the exclusive nature of Order No 2005-892, and that the second question referred by the national court classifies that measure as legislation which establishes 'rules on the calculation of workforce numbers that exclude the taking into account' of the category of employees under 26 years of age.

31. I therefore propose that the Court should reword the first question referred by the national court in such a way that it asks whether, taking into account the purpose of Directive 2002/14, the second subparagraph of Article 3(1) of that directive is to be interpreted as meaning that the power conferred on Member States to 'determin[e] the method for calculating the thresholds of employees employed' also includes the power to exclude, including temporarily, an entire category of employees (in this case, those under 26 years of age).

32. It should be noted here that the applicants in the main proceedings — who submitted joint observations before the Court — and the Commission propose a negative response to that question.

33. The French Government, on the other hand, considers that the second subparagraph of Article 3(1) of Directive 2002/14 authorises it temporarily to exclude an entire category of employee provided that that exclusion is justified by objectives in the general interest, and is necessary and proportionate in relation to the pursuit of those objectives. The French Government takes the view that those conditions are manifestly satisfied in this case, since:

— the objective pursued by Order No 2005-892, to combat youth unemploy-

ment, is compatible with the objective set out in recital (19) in the preamble to Directive 2002/14 and with the pursuit of a high level of employment in the Community;

— the measure, being applicable for a limited period of time, is proportionate to the objective pursued;

— the impact of the contested provision is confined to undertakings with a maximum of 20 employees fewer than 11 of whom are over 26 years of age;

— application of the contested provision cannot have the consequence of abolishing an existing staff representation body or an authority to represent staff.

34. In the light of the foregoing preliminary observations and information, I take the view that the first question referred by the national court can be answered by identifying the scope of Article 3(1) of Directive 2002/14, the second subparagraph of which confers on Member States responsibility for determining 'the method for calculating the thresholds of employees employed'. That analysis will be carried out below.

2. Scope of Article 3(1) of Directive 2002/14

35. It should be pointed out that, under the *first* subparagraph of Article 3(1) of Directive 2002/14, the entities in relation to which Member States must introduce practical arrangements for informing and consulting employees, as provided for by the directive, are, according to the choice made by Member States, undertakings employing at least 50 employees in any one Member State or establishments employing at least 20 employees. Once that choice has been made, the directive allows Member States to retain or adopt provisions more favourable to employees laid down in national law.

36. In this regard, I would also point out that, as is clear from the provisions of the French Labour Code cited above, the French Republic opted for the second alternative under the first subparagraph of Article 3(1) of Directive 2002/14, whilst lowering the threshold above which there is a requirement to inform and consult employees to establishments employing at least 11 employees.

37. In my opinion, the first subparagraph of Article 3(1) of Directive 2002/14, to the extent that it refers to thresholds of 'employees', must be read in conjunction with Article 2(d) of that directive, which defines the meaning of 'employee' under the directive. According to that provision, 'employee' means 'any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice'.

38. However, for the purposes of Directive 2002/14, a person who satisfies the definition set out in Article 2(d) of that directive, that is to say one who is protected as an employee under national law, must necessarily be taken into account in calculating the number of employees for the purposes of applying the thresholds laid down in the first subparagraph of Article 3(1) of the Directive 2002/14. Therefore, that person must, by reason of his very status as employee within the meaning of the directive, be included in the calculation to establish the number of employees on the workforce of the establishment or undertaking concerned for the purposes of applying the thresholds laid down in that directive.

39. In the main proceedings, it is common ground that the employees covered by Article 1 of Order No 2005-892 are protected, as such, by French labour law. On the basis of the joint interpretation of the first subparagraph of Article 3(1) and Article 2(d) of Directive 2002/14, employees covered by Article 1 of that order should therefore be taken into account in the employees employed by establishments located in France for the purposes of applying the relevant threshold of employees laid down in Directive 2002/14.

40. I should like to point out that Directive 2002/14 does not provide any possibility for the Member States to derogate from its provisions, other than that in Article 3(3) concerning the crews of seagoing vessels, which is not relevant to the main proceedings.

41. That said, it should none the less be ascertained whether, as the French Government submits, the *second* subparagraph of Article 3(1) of Directive 2002/14 grants Member States the possibility, such as that provided for in the legislation at issue in the main proceedings, of excluding an entire category of employee from the calculation to establish the size of an undertaking's workforce for the purposes of applying the relevant threshold of employees laid down in the directive.

42. The second subparagraph of Article 3(1) of Directive 2002/14 gives the Member States responsibility for determining 'the method for calculating the thresholds of employees employed'.

43. In that regard, I would like to point out that that provision transferred to the Member States only the *determination* of the 'method for calculating the thresholds of employees employed' and not the actual definition of that expression.

44. Indeed, I am convinced that Directive 2002/14 was not intended to give the Member States responsibility for defining that expression. The phrase cited in the preceding paragraph comes from the article defining the 'scope' of the directive, which cannot fall within the discretion of the law of the Member States. The uniform application of Community law therefore requires that the terms of that provision of Community law must be given an autonomous and uniform interpretation throughout the Community, which must take into account the context of the provision and the purpose of the legislation in question. [6]

45. In general, it must be acknowledged that the scope of the expression contained in the second subparagraph of Article 3(1) of Directive 2002/14 does not appear to be very clear. Indeed, it is the vague nature of the expression contained in that provision which forms the basis of the first question referred by the national court.

46. After all, although, in referring to the 'the method for calculating the thresholds', that provision seems to relate solely to what might be called 'threshold rules', that is to say the arrangements for calculating the reference period to be taken into consideration for the purposes of establishing whether the thresholds have been exceeded (for example, a given point in time, a period of activity of several months or years or an average over several months or years of activity), it could also be suggested, as the applicants in the main proceedings and the Commission do, that that expression also refers to the method for calculating the *size of the workforce* of the establishment (that is to say the rules on how to account for employees linked to their establishment by various types of employment contract, in particular part-time or fixed-term contracts), since the threshold is expressed by reference to a specific number of employees. In the points that follow, the latter rules will, for ease of reference, be called 'rules of adjustment'.

47. An examination of all the language versions of the second subparagraph of Article 3(1) of Directive 2002/14 does not, in my view, provide any further clarification as to the exact scope of the expression contained in that provision, since the overwhelming majority of those versions refer to the 'thresholds' of employees employed, [7]

6 — See in particular to that effect the judgment in Case C-188/03 *Junk* [2005] ECR I-885, paragraph 29, and the case-law cited there.

7 — This is true of the German ('Schwelle'), English ('threshold'), Danish ('tærsklerne'), Greek ('ορίων'), Italian ('soglie'), Latvian ('sliekšņi'), Maltese ('tal-limiti'), Polish ('progu'), Portuguese ('limiares'), Slovakian ('limitu'), Slovene ('praga') and Swedish ('tröskel') versions.

though some refer to the 'number' of employees employed. [8] Moreover, since the preparatory documents relating to the directive do not make clear its authors' intention with regard to the scope of the expression at issue, [9] they too provide no useful guidance on the interpretation to be given to that expression. [10]

48. However, it seems to me that the scope of the second subparagraph of Article 3(1) of Directive 2002/14 can be inferred from the logic behind its insertion.

49. In this regard, it is necessary to start by stating a fact: the alternative thresholds referred to in the first subparagraph of Article 3(1) of Directive 2002/14 can be applied in practice only if 'threshold rules' and 'rules of adjustment' are laid down. For, if no such rules are adopted, it is impossible for the establishments and undertakings covered by the directive to determine when and whether they exceed the thresholds of employees laid down in the directive.

50. Faced with that fact, the Community legislature had three options.

51. The first would have been to lay down 'threshold rules' and 'rules of adjustment' in a provision of Directive 2002/14 itself. Indeed, Community social law provides an illustration, or at the very least a partial one, of a directive which does just that. [11]

52. The second option might have been to make no provision in the text of Directive 2002/14, the directive's silence meaning that, by virtue of their residual powers, the Member States would implicitly have retained the right to adopt both those types of rules in order to be able to ensure the practical application of the provisions of the directive. As I shall say in my proposed answer to the second question referred by the national court, this is the case with Directive 98/59.

8 — As do the Spanish ('número'), Finnish ('määrä') and Netherlands ('aantal') versions.

9 — It seems that the expression contained in the second subparagraph of Article 3(1) of Directive 2002/14 first appeared in the Commission's amended proposal of 23 May 2001 [COM(2001) 296 final], following amendments proposed by the European Parliament, although no explanation is given for the terminology used.

10 — See to this effect the judgments in Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115 and Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 167.

11 — Namely Article 2(2) of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1994 L 254, p. 64), which states that the prescribed thresholds for the size of the workforce are to be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

53. The solution adopted by Directive 2002/14 corresponds to the third option which was available to the Community legislature: taking the view that it was neither possible nor practical to establish 'threshold rules' and 'rules of adjustment' in the directive itself, the Community legislature *explicitly* conferred on the Member States responsibility for adopting those measures. [12]

54. Irrespective of the choice made in Directive 2002/14, it is quite clear that the logic behind the need to adopt 'threshold rules' and 'rules of adjustment' is to ensure, in a straightforward but essential way, the practical application of the thresholds laid down in the directive and, accordingly, to ensure the *application* of the directive.

55. However, giving the Member States the power to establish the arrangements for applying a threshold of employees is very different from authorising them, as the French Government is effectively suggesting, to determine which employees qualify for inclusion in the 'basis of assessment' for calculating the threshold of employees by excluding from that basis of assessment an entire category of employee.

56. It follows, in my view, that the second subparagraph of Article 3(1) of Directive 2002/14 cannot be interpreted as allowing a Member State to *exclude* the application of the provisions of that directive, by removing an entire category of employee from the calculation of the number of employees employed by establishments falling within the scope of that directive, for the purposes of applying the threshold of 20 employees laid down by that directive.

57. That assessment applies *a fortiori* where, as in the case of the legislation at issue in the main proceedings, the criterion used to exclude those employees from that calculation is based on a factor entirely unrelated to the actual size of the establishment concerned.

58. Of course, I am not saying that a Member State should be entitled to exclude

12 — Community law also provides another such example, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), the relevant provision of which is without doubt worded more explicitly. Clause 7 of the framework agreement provides that fixed-term workers are to be taken into consideration in calculating the threshold (in particular that provided for by Community legislation) and transfers to the Member States responsibility for defining the *arrangements for the application* of that calculation. It should be noted that, before the Conseil d'État, the applicants in the main proceedings did not rely on that directive in support of their action contesting Order No 2005-892, in so far as the latter applies to fixed-term employees under 26 years of age.

employees within the meaning of Directive 2002/14 — and therefore protected as such under national law — from the calculation of the size of an establishment's workforce on the basis of a criterion that is related to the working time spent in that establishment. For, in that situation too, the principle that every employee within the meaning of Directive 2002/14 must be taken into consideration in the calculation to establish the number of employees employed for the purposes of applying the directive still holds good.

59. However, my reference to the actual size of the establishment is intended to explain why a rule on the adjustment of the number of employees, in particular one based on the working time spent in the establishment in question, may be regarded as falling within the scope of the second subparagraph of Article 3(1) of Directive 2002/14. After all, in the absence of such a rule of adjustment, every employee, however much time he spends in the establishment, would have to be accounted for as a single unit for the purposes of ascertaining whether the threshold of 20 employees laid down in the directive has been exceeded. However, the consequence of such a situation could be that establishments whose actual size is below the threshold laid down in the directive would nevertheless be required to introduce the practical arrangements for information and consultation of employees provided for by the directive. Without prejudice to the choice given to the Member States of adopting measures more favourable to employees, the right of the Member States to adopt 'rules of adjustment' forms part of the objective, set out in the recital (19) in the preamble to Directive 2002/14, to the effect that the thresholds laid down by that measure have been fixed with a view to avoiding any constraints on the development of small and medium-sized undertakings. It is therefore necessary to recognise, expressly in the context of the interpretation of the second subparagraph of Article 3(1) of Directive 2002/14 proposed above, that the Member States retain the power to adopt rules on the adjustment of the number of employees to reflect the actual size of the establishment (or undertaking). I would also like to point out that that interpretation of the provision in question would also make it possible to examine whether or not a rule on the adjustment of the number of employees adopted by a Member State is disproportionate. [13]

60. That brief digression aside, the fact remains that legislation such as that at issue in the main proceedings, which falls within neither the category of 'threshold rules' nor that of 'rules of adjustment' and does not serve to enable the relevant threshold of employees laid down in the first subparagraph of Article 3(1) of Directive 2002/14 to be applied in practice, does not fall within the scope of the second subparagraph of that article of the directive and is incompatible with the latter.

13 — To illustrate this observation, I have in mind a national rule which, for the purposes of calculating the size of an establishment's workforce, provides, for example, that 20 part-time employees equate to a single full-time employee for the purposes of applying the threshold of 20 employees laid down in Directive 2002/14. Such a rule would, in my view, be clearly disproportionate.

61. That conclusion cannot be called into question by the two principal arguments put forward by the French Government, to the effect, firstly, that the French legislature's objective of seeking to encourage small and medium-sized undertakings, by reducing the charges imposed on them, to recruit more persons under 26 years of age is compatible with the objective of Directive 2002/14, and, secondly, that there are in practice very few situations in which the application of Article 1 of Order No 2005-892 would be capable of denying employees the rights deriving from the directive.

62. With regard to the first argument, and in so far as the objective cited by the French Government relates essentially to combating unemployment among persons under 26 years of age, although it is true that Directive 2002/14 does not preclude that laudable objective, the Member State is nevertheless still required to comply in full with the provisions of that measure.

63. In so far as the objective cited by the French Government has more to do with reducing the charges on small and medium-sized undertakings, it should be pointed out that, by laying down the thresholds provided for in the first subparagraph of Article 3(1) of Directive 2002/14, the directive already pursues the objective claimed by the French Government: recital (19) in the preamble to Directive 2002/14 makes this clear when it states that the purpose of the general framework established by the directive is, in particular, 'to avoid any administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings' and that, to that end, 'the scope of this Directive should be restricted, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees'. Moreover, it should be noted that Order No 2005-892 does not apply only to small and medium-sized undertakings, but to all establishments within French territory. Furthermore, the fact that, in France, as the French Government explained at the hearing, numerous charges imposed on undertakings, such as the payment of higher employer's contributions or the establishment of works rules, are dictated by whether or not the workforce thresholds have been exceeded falls exclusively within the scope of the provisions of national law and, in any event, cannot exempt that Member State from the obligation to comply in full with the provisions of Directive 2002/14.

64. With regard to the second argument, I take the view, first of all, that the objective interpretation of a legal rule does not sit easily with reasoning based on probabilities such as that proposed by the French Government.

65. Next, it must be pointed out that, under Article 11(1) of Directive 2002/14, the

Member States must take 'all necessary steps enabling them to guarantee the results imposed by this Directive at all times'. Now, even if, as the French Government argues, the application of Order No 2005-892 disregards the minimum requirements on information and consultation of employees laid down by the directive only in very limited circumstances, [14] the fact remains that the French State, by excluding the category of employees under 26 years of age from the calculation of the size of an establishment's workforce, ceases, albeit only temporarily, to be fully able to ensure that all the establishments within French territory which fall within the scope of Directive 2002/14 are able to inform and consult the employees employed by them.

66. Finally, if the French Government's interpretation were to be adopted, Member States could decide tomorrow, for example, that they wish to exclude from the calculation of the size of an undertaking's workforce various categories of employee, such as part-time employees, those over 50 years of age or employees with a handicap. It is obvious that any cumulative exclusion of entire categories of employee by the Member States would ultimately reduce drastically the circumstances in which undertakings and establishments which fall within the scope of Directive 2002/14 are required to give effect to the rights of employees to be informed and consulted provided for in that directive and would adversely affect the uniform application within the Community of the provisions of that legislation.

67. In the light of the foregoing considerations, I propose that the Court should answer the first question referred by the national court in the negative, to the effect that, having regard to the purpose of Directive 2002/14, the transfer to the Member States of responsibility for determining the method for calculating the thresholds of employees employed, under the second subparagraph of Article 3(1) of Directive 2002/14, cannot be interpreted as allowing those States temporarily to exclude certain categories of employee for the purposes of applying those thresholds.

B — *The second question*

68. By its second question, the national court essentially asks the Court to state

14 — Namely in situations where the establishments at issue employ a number of employees which, irrespective of their ages, is equal to or higher than the threshold of 20 employees laid down by Directive 2002/14, which fact would ordinarily trigger the rights arising from that provision, but, at the same time, employ fewer than 11 employees over 26 years of age (and thus do not exceed the threshold under the French Labour Code read in conjunction with Article 1 of Order No 2005-892).

whether, and to what extent, Directive 98/59 authorises the adoption of a national measure the effect of which is that certain establishments usually employing more than 20 employees are relieved, albeit temporarily, of the obligation to create a structure for the representation of employees because of rules on the calculation of the size of the workforce that exclude the taking into account of certain categories of employee for the purposes of applying the provisions organising such representation.

69. Directive 98/59 reproduces Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, [15] as amended.

70. The essential purpose of Directive 98/59 is to guarantee to employees within the Community, by means of common rules introducing regulated procedures for consultation and collective redundancy, that workers' representatives [16] are informed and consulted in good time by an employer who is contemplating collective redundancies. The scope *ratione personae* of that obligation on the employer is limited, however, to the establishments which meet the thresholds established in Directive 98/59. [17] Those thresholds relate, on the one hand, to the size of the establishment's workforce, that is to say establishments with at least 20 employees and, on the other hand, to the number of employees affected by the collective redundancy within those establishments, in accordance with Article 1 of Directive 98/59. Although, contrary to what is suggested by the national court, that directive does not require, at least not directly and formally, the introduction of a structure for the representation of employees, it does imply that, as a precondition for informing and consulting workers' representatives in the context of collective redundancies, the Member States must adopt the measures necessary to ensure the appointment of those representatives.

71. It follows from the observations of the parties to this case that Order No 2005-892 does not affect the calculation of the number of employees whose redundancy is contemplated. As I have already pointed out, that

15 — OJ 1975 L 48, p. 29. Recital (1) in the preamble to Directive 98/59 states that 'for reasons of clarity and rationality Council Directive 75/129 should be consolidated'.

16 — Article 1(b) of Directive 98/59 defines 'workers' representatives' as 'the workers' representatives provided for by the laws or practices of the Member States'.

17 — It should be noted that Directive 98/59 does not define the meaning of 'establishment' for the purposes of that measure, or that of 'employer', and it does not indicate when 'redundancy' occurs, though these terms have been clarified by the Court in its judgments in Case C-449/93 *Rockfon* [1995] ECR I-4291, Case C-32/02 *Commission* v *Italy* [2003] ECR I-12063 and *Junk*, respectively.

order also states that it cannot result in the abolition of any existing staff representation bodies or authority to represent staff.

72. As I have already highlighted in the context of my observations on the first question referred by the Conseil d'État, Order No 2005-892 does affect the calculation of the number of employees in an establishment in that it temporarily excludes from that calculation employees under 26 years of age.

73. Although, in France, Articles L. 321-1 et seq. of the Labour Code provide that the consultation of employees during the implementation of a redundancy procedure for economic reasons is to be introduced where an undertaking employs more than 10 employees, [18] the fact remains that the outcome of Order No 2005-892 may be that employees are deprived of the rights which they derive from Directive 98/59 where the establishment concerned employs more than 20 employees — and thus exceeds the threshold of 20 employees laid down in the directive, irrespective of the age of those employees — but has fewer than 11 employees over 26 years of age, pursuant to the rules laid down by the French Labour Code and Article 1 of Order No 2005-892.

74. For, in that situation, since the establishment concerned is exempt from the obligation to organise the appointment of workers' representatives, there would be no workers' representative to inform and consult prior to the collective redundancy contemplated, contrary to the protection conferred on employees by Directive 98/59.

75. It is to be noted that, unlike Directive 2002/14, Directive 98/59 includes no definition of 'employee' and no provision analogous to the second subparagraph of Article 3(1) of Directive 2002/14.

76. In their written observations and at the hearing, the parties debated the question whether the provisions of Directive 2002/14, which, I would reiterate, establishes a general framework for informing and consulting employees, were intended to clarify the provisions of Directive 98/59, or even to fill any gaps in those provisions, in particular the definition of 'employee' and the application by analogy, if that is the case, of the second subparagraph of Article 3(1) of Directive 2002/14.

18 — In its judgment in Case 91/81 *Commission* v *Italy* [1982] ECR 2133, paragraph 11, the Court ruled that the provisions of Directive 75/129 'are ... intended to serve to establish a common body of rules applicable in all the Member States, whilst leaving to the Member States power to apply or introduce provisions which are more favourable to workers'. Such a power now exists under Article 5 of Directive 98/59.

77. The applicants in the main proceedings and the French Government have suggested that that question should be answered in the affirmative.

78. At the hearing, the Commission firmly opposed the extension proposed by the other parties to this case. It argued in particular that the two directives at issue were founded on different legal bases and that Directive 98/59, founded on the former Article 100 of the EC Treaty (now Article 94 EC), allows the Member States far less discretion than the provisions of Directive 2002/14, the legal basis for which is Article 137(2) EC. The Commission also pointed out that the approach suggested by the other parties to this case was precluded on grounds of chronology and for reasons linked to the autonomy of the scope of each of those directives, as illustrated by Article 9 of Directive 2002/14.

79. Although the argument based on Article 9 of Directive 2002/14 is not particularly convincing in so far as that provision applies only to the links that Directive 2002/14 has with Article 2 of Directive 98/59 and not with the other provisions of Directive 98/59, I am, on the other hand, not unsympathetic to the other objections raised by the Commission, if only because there are certain hazards in automatically seeking to interpret the provisions of one measure in the light of another which was adopted nearly four years after the first.

80. An illustration of the difficulty and the perilous nature of the approach proposed by the applicants in the main proceedings and the French Government is provided by comparing the two meanings of 'establishment' in Directives 98/59 and 2002/14 respectively. Since that term is not defined in the provisions of Directive 98/59, the Court held, in its judgment in *Rockfon*, cited above, that the term 'establishment', as used in the directive, could not be defined by reference to the laws of the Member States and must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties, irrespective of whether the unit in question is endowed with a management which can independently effect collective redundancies. [19] Directive 2002/14, on the other hand, by laying down in Article 2(b) that 'establishment' means 'a unit of business defined in accordance with national law and practice ... where an economic activity is carried out on an ongoing basis with human and material resources', opted for a different meaning of that term defined by express reference to the national law and practice of the Member States.

19 — Judgment in *Rockfon*, (paragraphs 25 and 32). The judgment relates more specifically to Directive 75/129, consolidated by Directive 98/59.

81. Admittedly, that example does not mean that it would be impossible, in the context of Directive 98/59, to define the meaning of 'employee' in exactly the same way as that term is defined in Directive 2002/14. Moreover, with regard to the threshold of 20 employees laid down by Directive 98/59, the Member States, notwithstanding the silence of that measure, have of necessity had to introduce 'threshold rules' and 'rules of adjustment', like those referred to in the second subparagraph of Article 3(1) of Directive 2002/14, in order to ensure the practical application of Directive 98/59.

82. Nevertheless, the definitions contained in Directive 2002/14 are not intended to extend to Directive 98/59, not least in the absence of clear evidence that that was the express intention of the authors of Directive 2002/14.

83. Also, from a more pragmatic point of view, I think that the Court is perfectly capable of providing an answer which will be of use to the national court without having to rule on the disagreement between the parties with regard to the links between Directive 2002/14 and Directive 98/59.

84. After all, even if it were regarded as conceivable to extend to Directive 98/59 the meaning of 'employee' and the expression contained in the second subparagraph of Article 3(1) of Directive 2002/14 as I have proposed that they should be interpreted above, that extension would in no way alter the answer to be given to the second question referred by the national court.

85. In both that event and the event of a refusal to interpret Directive 98/59 in the light of Directive 2002/14, legislation such as that in the main proceedings is, in my view, contrary to Directive 98/59. For, by removing an entire category of employee from the calculation of the threshold of 20 employees, legislation such as that in the main proceedings would allow certain establishments to escape the obligation to follow the procedures for the protection of workers laid down by Directive 98/59. Such legislation would therefore be capable of denying groups of workers the right to be informed and consulted, which they have as a matter of course under that measure, [20] even though Directive 98/59 allows no exception under which Member States might be entitled to circumvent the obligation to inform and consult workers' representatives which it safeguards. [21]

20 — See to that effect the judgment in *Rockfon*, cited above (paragraph 30).

21 — See to that effect, with regard to Directive 75/129, the Opinion of Advocate General Van Gerven in Joined Cases C-382/92 and C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2435, point 10.

VI — Conclusion

86. In the light of the foregoing considerations, I propose that the Court should rule as follows on the questions referred by the Conseil d'État in this case:

(1) Having regard to the purpose of Directive 2002/14/EC 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, the transfer to the Member States of responsibility for determining the method for calculating the thresholds of employees employed, under the second subparagraph of Article 3(1) of Directive 2002/14, cannot be interpreted as allowing those States temporarily to exclude certain categories of employee for the purposes of applying those thresholds.

(2) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding a national measure the effect of which is that certain establishments usually employing more than 20 employees will be relieved, albeit temporarily, of the obligation to ensure that employees are represented because of rules on the calculation of the size of the workforce that exclude the taking into account of certain categories of employee for the purposes of applying the provisions organising such representation.