OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 6 May 2010 [1]

1. By this reference for a preliminary ruling, the Court is asked once again to interpret Council Directive 2001/23/EC 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, business or parts of undertakings or businesses ('Directive 2001/23'). [2] On this occasion, however, the issue raised is one on which the Court has not yet ruled, that is to say, the meaning of the expression 'preserves its autonomy' in Article 6(1) of the directive.

Legal framework

European Union law

2. Recital 3 to Directive 2001/23 states that 'it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

3. Recital 5 recalls that 'the Community Charter of the Fundamental Social Rights of Workers adopted on 9 December 1989 ("Social Charter") states, in points 7, 17 and 18 in particular that: the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practice in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers".

1 — Original language: English.

2 — OJ 2001 L 82, p. 16. The directive codifies and replaces Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26) ('Directive 77/187'), which was in turn amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88) ('Directive 98/50'). I refer below to those directives jointly as 'the Acquired Rights Directives'.

4. Article 1 of that directive governs its scope of application. It provides:

‘1 (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. …’

5. Article 2 of the directive sets out certain definitions. So far as relevant to this Opinion, it states:

‘1. For the purposes of this Directive:

(a) “transferor” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) “transferee” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

(c) “representatives of employees” and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States;

(d) “employee” shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

…’

6. Article 3 forms part of Chapter II, entitled 'Safeguarding of employees' rights'. By virtue of Article 3(1), the rights and obligations of a transferor arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, to be transferred to the transferee.

7. Article 3(3) lays down rules as to collective agreements where a transfer takes place. It provides:

'Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

…'

8. Article 6 of the directive concerns the status and function of the representatives or of the representation of the employees following a transfer. It states:

'1. If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employees' representation are fulfilled.

The first subparagraph shall not [apply] if, under the laws, regulations, administrative provisions or practice in the Member States, or by agreement with the representatives of the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

Where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority), Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for

the reconstitution or reappointment of the representation of employees in accordance with national law or practice.

2. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.'

National law

9. Article 67(1) *in fine* of the Estatuto de los Trabajadores (Spanish Workers' Statute) provides:

'partial elections may be organised [within an undertaking] following departures or dismissals or in order to adjust the representation of employees following an increase in the size of the workforce. Collective agreements may provide for the measures necessary in order to adapt the representation of the employees to significant reductions in the workforce that may occur within an undertaking. If no such provision is made, such an adaptation shall be the subject of an agreement between the undertaking and the representatives of the employees.'

Facts, main proceedings and the question referred

10. By Decree 5983/80 of the Office of the Mayor of La Línea de la Concepción of 25 August 2008, it was decided that certain previously outsourced municipal public services should be taken back in-house. Specifically, all of the staff of the undertakings providing the following outsourced services were to be taken over: (i) caretaker services in public-sector schools, (ii) cleaning of public-sector schools, (iii) road cleaning, and (iv) maintenance of parks and gardens.

11. Those services had, until then, been provided by four separate companies operating in the private sector. The 20 individuals who are co-defendants in the main proceedings were the legal representatives of the employees covered by the transfer prior to the services being taken back in-house.

12. On 10 September 2008, in response to various requests made by the individuals concerned, the municipal authority refused to recognise their status as employee representatives. It appears from the order for reference that this refusal was based on the ground that: 'since the employees referred to now form part of the municipal staff, such representatives must be considered to have ceased to carry out their functions, independently of

the respect for the guarantees which the law provides for them.'

13. The order for reference also records that the applicant in the main proceedings, the UGT-FSP (the trade union representing the employees concerned) then sought various clarifications from the defendant authority concerning that decision. Thereafter, on 13 November 2008, the trade union brought proceedings before the Juzgado de lo Social Único de Algeciras (Social Court, Algeciras) in which it requested that court to declare, inter alia, that the representatives in question were entitled to retain their mandates until these expired in the course of time.

14. The order for reference is laconic in its description of the factual background to the transaction which resulted in the services concerned being taken back in-house.

15. It states merely that, once the various outsourced public services were taken back in-house by the municipal authorities, the employees who were part of the staff of the undertakings which until then had provided the outsourced public services were taken on by that municipal authority and 'integrated' into its staff, but that those same employees all continue in the same posts and carry out the same duties as before, in the same places of work and under the orders of the same immediate superiors, without any significant changes in their working conditions, the sole difference being that now those ultimately in charge are the relevant publicly elected officials (councillors or mayor).

16. By referring to the employees in question as being 'integrated' into the staff of the new employer, I understand the national court to be indicating merely that those employees now form part of the staff of the new employer. It is not attempting, at this stage in the proceedings before it, to adjudicate on the degree to which the employees concerned have been absorbed into the staff of the new employer.

17. The order for reference is silent on the question whether the national court has made a finding as whether there was a transfer of the services in question for the purposes of Directive 2001/23. In particular, it does not record whether, as part of the arrangements for the taking back of the services in-house, any tangible assets were transferred or, indeed, the extent to which the provision of those services required the use of such assets.

18. Since it took the view that an interpretation of the concept of 'autonomy' referred to in Article 6 of Directive 2001/23 was necessary in order for it to give a ruling in the main proceedings, the Juzgado de lo Social Único de Algeciras decided to stay the proceedings before it and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the requirement that autonomy be preserved – referred to in Article 6(1) of [Directive 2001/23] – met in a factual situation (such as that in the main proceedings) in which, following the recovery of various outsourced public services by a municipal

authority, the employees who were part of the staff of the actual undertakings which until then had provided the outsourced municipal services are taken on by that municipal administration and integrated into its staff, but it is those same employees (without exception) who continue to hold the same posts and carry out the same duties as before, in the same places of work and under the orders of the same immediate superiors, without significant changes in the working conditions, the sole difference being that now those in overall charge are the relevant publicly elected officials (councillors or mayor)?'

19. Written observations have been submitted by the Ministerio Fiscal (Public Attorney), the Spanish Government and the European Commission. No hearing has been requested and none has been held.

Analysis

Preliminary point

20. Although the Public Attorney criticises the national court for making a reference (since, in his view, the meaning of Article 6(1) of Directive 2001/23 is very clear), he does not challenge the pertinence of the question referred or suggest that the reference is inadmissible. For my part, I have no doubts on that score. The reference is plainly admissible.

The concept of a 'transfer' under Article 1 of Directive 2001/23

21. Although the question referred by the national court relates only to issues arising in relation to employee representation under Article 6 of Directive 2001/23, it is necessary also to give some consideration to the concept of a 'transfer' in terms of Article 1.

22. This is for two reasons. First, in its written observations the Spanish Government queries whether there has in fact been a relevant transfer in the circumstances described in the order for reference. The Commission invites the Court to proceed on the basis that there has been such a transfer. Second, an understanding of what is meant by the reference, in Article 1(1)(b), to the economic entity transferred retaining its 'identity' is in my view essential to a proper understanding

of the concept of 'autonomy' referred to in Article 6(1).

23. In its observations, the Spanish Government refers in some detail to the Court's case-law relating to the question of when there is, and when there is not, a transfer under the directive. That reasoning, as I understand it, proceeds from an assumption that in order to determine whether an undertaking transferred preserves its autonomy for the purposes of Article 6, it is sufficient to determine whether the undertaking has been transferred within the meaning of Article 1(1)(b).

24. I shall consider the interrelationship of those two articles below. [3] First of all, given that the question whether the transaction at issue in the main proceedings amounted to a transfer under Article 1(1)(b) of the directive has been raised, I shall turn to address that point.

25. In so doing, I do not propose in this Opinion to carry out an extensive review of the Court's case-law to date. Such an exercise has been undertaken by numerous Advocates General, most recently by Advocate General Mengozzi in his Opinion in *Klarenberg*. [4]

26. Rather, I intend simply to make brief reference to those elements enumerated in the legislation and particularly in the Court's case-law to which the national court should have regard in order to eliminate any doubt, if doubt there be, as to whether the transfer in the present case was one to which Article 1(1)(b) of the directive applied, and hence the transfer of an undertaking. Unless that question can be answered in the affirmative, the issue of autonomy under Article 6 does not arise.

27. Generally, the Acquired Rights Directives have been held to apply whenever, in the context of contractual relations, 'there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking'. [5] A change of that kind is essential in order for there to be a transfer of an undertaking for the purposes of Directive 2001/23. [6] This does not, of course, preclude the employment relationship being carried across from the former employer to the new employer under a mere transfer of assets, but the consequences of such a transfer will be a matter for national law alone.

3 — See point 48 et seq. below.

4 — Case C-466/07 [2009] ECR I-803, at point 20 et seq.

5 — See, in particular, Case 324/86 *Tellerup* [1988] ECR 739, '*Daddy's Dance Hall*', paragraph 9.

6 — For the sake of economy, I use the term 'undertaking', both here and below, to include a business, part of an undertaking and part of a business, and shall refer to a transfer to which the Acquired Rights Directives apply as a 'relevant transfer'.

28. The Court has held that the Acquired Rights Directives are intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor. [7]

29. As regards the form which the 'legal transfer' referred to in Article 1(a) of Directive 2001/23 must take, the Court has adopted a flexible interpretation, in keeping with the objective of the directive. [8] I therefore consider that the fact that the change of ownership and direction that took place in the present case was effected by means of a Decree issued by the responsible Mayor is, in itself, no impediment to the application of the directive.

30. In *Spijkers*, [9] the Court held that the decisive criterion for establishing whether a relevant transfer has taken place is that there must have been a transfer of an economic entity which *retains its identity*. According to that judgment, the wording of which has been reiterated in all subsequent case-law, 'it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended'. None the less, all of those circumstances 'are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation'. [10]

31. The list of factors set out by the Court in *Spijkers* has stood the test of time. It is necessary, however, to have regard to the type of undertaking transferred and the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed. [11] Since ruling in *Schmidt* [12] in 1994, the Court has been required on a number of occasions to give detailed consideration to the issues which arise where the transfer involves contracted-out activities, such as those in question in the main proceedings. The following principles

7 — See Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 28 and the case-law cited. See also recital 3 to Directive 2001/23.

8 — See Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 24 and the case-law cited.

9 — Case 24/85 [1986] ECR 1119.

10 — Paragraphs 11 and 13.

11 — See, to that effect, Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 31.

12 — Case C-392/92 [1994] ECR I-1311.

can be derived from the case-law which addresses those issues.

32. First of all, it is clear that a relevant transfer can take place notwithstanding the fact that the transferee is a public-sector body, [13] or that the transfer in question involves services which are contracted out to the private sector. [14] The Acquired Rights Directives will also apply even though the activity in question is ancillary to the transferor's activities in general and is not connected with its objects. [15]

33. Nor does the fact that the transfer comprises the taking-back in-house by the former contracting authority of services previously performed on its behalf by a private-sector company or companies preclude there being a relevant transfer. [16] The same applies to the fact that the activity in question is non-profit-making. It is clear that such an activity may be an economic activity for the purposes of the Acquired Rights Directives. [17]

34. Moreover, the Court has recognised that, in cases involving contracted-out activities, the requirement laid down in *Spijkers* to have regard to the transfer of the business's tangible assets may be unrealistic. The reason is simple. Businesses engaged in this type of activity may in fact have no assets, or have only assets whose importance is negligible in relation to the overall conduct of their activities. Thus, in *Schmidt*, the Court held that 'the absence of [tangible] assets [does not preclude] the existence of a transfer'. [18] It went on to state, in its judgment in *Süzen*, [19] that 'where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets'. [20]

35. That does not mean that in every case involving a transfer of contracted-out services the assets become irrelevant. The services concerned must be labour intensive in order for the principle outlined in point 33 above to apply. Conversely, where the activities carried on by the service providers require the use of substantial plant and equipment and cannot be regarded as essentially based on manpower, the absence of a transfer to a significant extent of those assets will lead to the

13 — See Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraph 33, and Article 1(1)(c) of Directive 2001/23.

14 — *Schmidt*, cited in footnote 12 above, paragraph 20.

15 — Ibid., paragraph 14. See also Article 1(1)(c) of Directive 2001/23.

16 — Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 35.

17 — See *Mayeur*, cited in footnote 13 above, paragraph 40.

18 — Paragraph 16. It is rather difficult to conceive of the transfer of an undertaking involving less, in the way of tangible assets, than in that case.

19 — Case C-13/95 [1997] ECR I-1259.

20 — Paragraph 18.

conclusion that the entity transferred does not retain its identity. [21]

36. Similarly, the transfer in question must in every case be one of a stable economic entity, that is to say, 'an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'. [22]

37. However, the fact that any assets used in the activities of the business or undertaking concerned are made available by the contracting authority to the original service provider, and are subsequently made available by the contracting authority to the transferee as part of the arrangements for the transfer, need not prevent the transfer being a relevant transfer. [23] It is not essential that the assets concerned be for the 'independent commercial use' of the contractor, either before or after the transfer. [24]

38. The fact that the entire workforce allocated to the business or undertaking in question has moved across as part of the transfer may be a relevant factor to be taken into consideration particularly where, as in the present case, the activities concerned are likely to be labour intensive. Again, however, it cannot be determinative. [25]

39. I should, however, make it clear that in referring to the assets (if any) used in the businesses concerned, what is relevant is any plant, machinery and/or equipment that is actually used in order to provide the services in question. Contrary to what the Spanish Government appears to suggest in its observations, the fact that there was no transfer in the case in the main proceedings of the assets *in relation to which the services were provided*, such as school buildings, streets, parks and civic gardens, has no bearing whatsoever on the issue.

40. It is for the national court, not the Court of Justice, to make the necessary factual appraisal, in the light of these criteria, to establish whether a relevant transfer has taken place. If and to the extent that the national court has not yet made such an assessment, it will require to do so before addressing the issues covered by the remainder of this Opinion.

21 — Case C-172/99 *Liikenne* [2001] ECR I-745, paragraphs 39 and 42.

22 — See *Mayeur*, cited in footnote 13 above, paragraph 32 and the case-law cited. See also Article 1(1)(b) of Directive 2001/23.

23 — Case C-340/01 *Abler* [2003] ECR I-14023, paragraph 43.

24 — Joined Cases C-232/04 and C-233/04 *Güney-Görres and Demir* [2005] ECR I-11237, paragraph 41.

25 — See the Opinion of Advocate General La Pergola in *Süzen*, cited in footnote 19 above, point 10. See also the Opinion of Advocate General Cosmas in *Hernández Vidal and Others*, cited in footnote 16 above, point 80.

The concept of 'autonomy' under Article 6 of Directive 2001/23

41. While the concept of a 'transfer' under Article 1 of the Acquired Rights Directives has been the subject of a significant volume of case-law, this is the first occasion on which the Court has been asked to give a ruling on the interpretation of the notion of 'autonomy' in the context of employee representation under Article 6 of Directive 2001/23.

42. It is plain that the role of employee representation in the operation of the Acquired Rights Directives, and indeed in the wider field of the social policy of the European Union generally, is an important one. Such representation is essential to the 'information and consultation of workers' which Article 137 EC seeks to promote and forms an integral part of the 'dialogue between management and labour' referred to in Article 136 EC. [26]

43. Nor are the Acquired Rights Directives the only secondary legislation adopted by the Community legislature in which the importance of that role is apparent. In particular, Directive 2002/14 makes provision for information and/or consultation at the appropriate level 'on the recent and probable development of the undertaking's ... activities and economic situation', 'on the situation, structure and possible development of employment within the undertaking ... and on any anticipatory measures envisaged, in particular where there is a threat to employment', and 'on decisions likely to lead to substantial changes in work organisation or in contractual relations ...' [27] Article 4(2)(c) of that directive makes it clear that such information and consultation extends to matters covered by Directive 2001/23. [28]

44. The importance of employee representation is also reflected in the Court's case-law.

26 — Similar principles are reflected, inter alia, in the Community Charter of the Fundamental Social Rights of Workers, Articles 7, 17 and 18 of which are referred to in recital 5 to Directive 2001/23 (see point 1 above).

27 — 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 (OJ 2002 L 80, p. 29), Article 4(2)(a), (b) and (c).

28 — See also 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); Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22) and, for the sake of completeness, Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ 2003 L 207, p. 25); and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

In *Maurissen*, [29] the Court held that 'the freedom to engage in trade union activities constitutes a general principle of labour law'. [30] In *Commission* v *United Kingdom*, [31] the Court ruled that a Member State is under a duty to ensure that its national legal system provides for the appointment of employee representatives for the purposes of the provisions as to information and consultation on the transfer of an undertaking contained in Article 6 of Directive 77/187 (now Article 7 of Directive 2001/23). [32]

The application of Directive 2001/23 to an undertaking which has been transferred

45. In order for Directive 2001/23 to apply to a transfer, the undertaking, business or part of a business transferred must *retain its identity immediately following the transfer*, in accordance with the tests referred to in points 26 to 39 above. That directive does not, however, require that a transferred undertaking be preserved in amber for evermore. It merely sets out certain specific provisions which the new employer is required to observe in order to protect the rights of the employees transferred.

46. Any changes made by the new employer to the entity transferred may be purely cosmetic. If so, their impact, if any, on the workforce in question is likely to be minimal. In other cases, their effect may be more profound. An employer who has recently taken over an undertaking as a result of a relevant transfer may well wish to carry out significant restructuring operations. The taking of such measures by the new employer may be of considerable interest, not to say concern, to the employees transferred. In such circumstances, the role played by their representatives will assume a high, and possibly fundamental, degree of importance. [33] In that regard, it is significant that Article 3(3) of Directive 2001/23 provides for the terms and conditions of any collective agreement applying to the employees transferred to be binding on the new employer for a minimum of one year following the transfer.

29 — Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1990] ECR I-95.

30 — Paragraph 21.

31 — Case C-382/92 [1994] ECR I-2435.

32 — Paragraph 24.

33 — In that context, it must be borne in mind that the directive does not provide that transferred employees may never, in any circumstances, be dismissed; indeed, Article 4(1) expressly states that 'this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'.

47. It is against that general background that the reference in Article 6 of that directive to the undertaking or business preserving its autonomy falls to be construed.

Are the concepts of 'identity' under Article 1(1)(b) and 'autonomy' under Article 6 of Directive 2001/23 to be construed in the same way?

48. The Spanish Government submits that the concept of 'autonomy' under Article 6 of Directive 2001/23 must be interpreted as being equivalent to or coextensive with the notion of a transfer in which the economic activity transferred 'retains its identity' and which is thus a relevant transfer for the purposes of Article 1.

49. I cannot agree with that argument.

50. It is clear from the wording of Article 6 that what is meant by 'autonomy' under Article 6 and 'identity' under Article 1 cannot be the same. Were the position to be otherwise, neither the introductory wording to the first subparagraph of Article 6(1) ('*if* the undertaking, business or part of an undertaking or business *preserves its autonomy*' [34]) nor the reference in the fourth subparagraph of Article 6(1) to the situation where an undertaking does *not* preserve its autonomy would make any sense. [35]

51. It is plain that the question whether an undertaking has preserved its autonomy for the purposes of Article 6 falls to be addressed *after it has been determined* that a relevant transfer has taken place for the purposes of Article 1.

52. It follows that the concept of 'autonomy' must be given a separate interpretation. It cannot merely be construed in such a way that it is given the same meaning as the notion of 'identity' under Article 1(1)(b).

53. Suppose an undertaking that retains its identity is transferred (and thus a relevant transfer takes place for the purposes of Article 1(1)(b), read in conjunction with Article 1(1)(a)). What happens next? It seems to me that, broadly speaking, there are two possibilities. Subsequent to the transfer, the entity that was transferred may be broken up and absorbed into the transferee's business. Alternatively, it may continue to operate as an identifiable entity within the transferee undertaking.

34 — Emphasis added.

35 — See, in that regard, *Klarenberg*, cited in footnote 4 above, paragraph 50. The final words of that paragraph are clearly intended to encompass both cases in which the economic entity transferred retains its autonomy (thus triggering Article 6(1), first subparagraph) and those in which it does not (covered by Article 6(1), fourth subparagraph).

54. It seems to me that one must approach the task of defining 'autonomy' in Article 6 against that background. However, the interpretation preferred must also reflect the essential importance that employee representation plays in the working of any undertaking or business. [36] It must reflect the objective of Directive 2001/23 that the 'working conditions' (to use the term generally) of the employees transferred should, in so far as possible and practicable, be unaffected by the transfer. It must also, however, reflect the operational reality that, following the transfer, the new employer may make organisational changes. As a result, maintaining separate representation of the employees transferred may no longer be sensible or appropriate as a way of reflecting the interests of the workforce.

55. In its 1997 Memorandum, [37] the Commission stated that the requirement of autonomy was satisfied where the business transferred 'continues to exist as a separate operating unit rather than being absorbed by a more complex structure'. [38] An almost identical approach was taken in the Commission's 2007 report, [39] where the phrase 'continues to exist as a distinct operational unit and is not absorbed by a more complex operational structure' is used. [40]

56. In its written observations in the present case, the Commission proposes a slightly fuller test. It submits, referring to *Klarenberg*, [41] that the test for determining whether an entity has preserved its autonomy is whether, following the transfer, it retains the specific organisational structure imposed by the transferor on the various elements of production which are transferred. Conversely, an entity does not preserve its autonomy where, notwithstanding the maintenance of the functional link of interdependence and complementarity between the elements of production transferred (such a link being required for the entity transferred to retain its identity following the transfer), those elements are integrated into a new and different organisational structure following the transfer.

57. The Commission submits that such an approach is in conformity with the aims underlying Article 6. That article makes the continuation of the mandate and functions of the employee representatives conditional on the preservation of the entity's autonomy because, if that autonomy should disappear,

36 — See points 42 to 44 above.

37 — Commission Memorandum of 4 March 1997 on acquired rights of workers in cases of transfers of undertakings (COM(97) 85 final).

38 — Point 2.7.

39 — Commission Report on Directive 2001/23 of 18 June 2007 (COM(2007) 334 final).

40 — I do not think that any significance should be attributed to the slight change in wording (in English, at least) as between the two Commission documents. The French-language versions of those documents are, for practical purposes, the same.

41 — Cited in footnote 4 above. See paragraphs 47 and 48.

the employees concerned will find themselves absorbed within the organisation of the transferee undertaking alongside the existing workforce, who will already have their own representation. It would plainly be 'pointless, counter-productive and a potential source of conflict' to have different representatives for employees providing the same services and carrying out similar functions. It is equally plain, however, that the mere replacement of those ultimately in charge of the undertaking does not give rise to issues of that nature. Thus, it should not justify terminating the mandates of the representatives concerned.

58. The Commission also submits that the interpretation it proposes is necessary in order to give the first subparagraph of Article 6(1) of Directive 2001/23 practical effect. After all, the transfer of an undertaking is almost always accompanied by the replacement of those ultimately in charge.

59. I agree with the Commission, subject to one important qualification. In my view, it is essential that the test to be applied should have regard to the organisational reality of the entity concerned following the transfer. A change which is purely cosmetic in nature will not affect that reality. Nor will a minor change, which does not affect the substance of that organisational structure in a material way. If any change, however cosmetic or minor, were deemed sufficient to undermine a transferred entity's autonomy, it would be easy for an unscrupulous employer to deprive the employees transferred of the benefit of their continuing representation. That would run counter to the spirit and the objective of Directive 2001/23.

60. The Spanish Government submits, for its part, that an element to be taken into account in determining whether autonomy is preserved following a transfer is that of the identity of the workforce who elected the representatives concerned. In other words, as I understand the argument, where an identifiable grouping of employees has elected a set of representatives prior to a transfer and that grouping remains a discrete unit following the transfer, it is sensible to conclude that autonomy has been preserved.

61. I agree that such a test may be useful in practice, provided it is applied with caution. It would be wrong, for example, to require complete identity. According to the Spanish Government, the national legislation governing the term of the representatives' mandate provides for a period of appointment of four years. [42] In many cases, it must be a real possibility that the make-up of the grouping of employees concerned will already have changed, if not beyond recognition, at least

42 — Article 67(3) of the Spanish Workers' Statute.

significantly, by the time the undertaking is transferred.

62. The above observations are sufficient to answer the specific question referred by the national court, namely what is meant by the term 'autonomy' in Article 6 of Directive 2001/23. In order, however, to give a useful answer to the national court and to deal adequately with the various elements advanced by the Spanish Government, it is necessary to consider Article 6 as a whole: in particular, the range of circumstances in which employee representation is to continue following a relevant transfer and, where it continues, on what terms.

The structure of Article 6

63. Article 6 of Directive 2001/23 is divided into five parts (of which the first four appear as subparagraphs of Article 6(1) and the final point as Article 6(2)). The first part applies where the undertaking preserves its autonomy following the transfer. In that event, 'the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement' (the first subparagraph of Article 6(1)). In other words, provided that the undertaking preserves its autonomy, the status quo applies. The employees transferred continue to be represented after the transfer precisely as they were prior to the transfer taking effect, by virtue of the national rules applying to such representation.

64. That part is, however, subject to two exceptions. The first of these arises by virtue of the words in the first subparagraph of Article 6(1) itself, 'provided that the conditions necessary for the constitution of the employees' representation are fulfilled'. I shall address that exception later. [43]

65. The second part also operates by way of exception to the first part. It applies where, under the relevant national provisions or practice in the Member State concerned or under the terms of an agreement entered into with the representatives of the employees transferred, the 'conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled'

43 — See points 70 and 74 below.

(the second subparagraph of Article 6(1)). In such a case, the provisions of the first subparagraph do not apply. The reason for this is obvious. Because the employees concerned will be looked after by newly-appointed representatives, it is no longer necessary to preserve the status and functions of their former representatives. The policy requirement laid down in the first part thus falls away.

66. The third part arises only in cases where the transferor is insolvent. There, the Member States 'may' take steps to ensure that the employees are properly represented until new representatives are elected or designated following the transfer (the third subparagraph of Article 6(1)). Since the issue of insolvency does not arise in the proceedings before the national court, I shall not consider it further.

67. The fourth part applies where the transferred undertaking, business or part of an undertaking or business does not preserve its autonomy. Should that be the case, the Member States are under a duty to take the measures necessary to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for their representation to be reconstituted or for representatives to be reappointed (the fourth subparagraph of Article 6(1)).

68. So far, the structure of Article 6 is clear. Leaving cases of insolvency aside, in every case involving a relevant transfer, the employees transferred are to be represented following the transfer. That representation will be constituted (i) by a 'carrying forward' of their existing representation (where the undertaking preserves its autonomy and the conditions necessary for new representation do not arise), or (ii) (where those conditions do arise) by new representation, or (iii) (where the undertaking does not preserve its autonomy) by a form of 'holding operation' whereby the employees continue to be properly represented for such time as is necessary in order for the representation to be reconstituted or for representatives to be reappointed.

69. In certain cases, however, a somewhat lower level of protection is envisaged.

70. The fifth part concerns the situation described in Article 6(2). It applies where 'as a result of a transfer' the term of office of the employee representatives expires. In such circumstances, the Member States are under a duty to ensure that representatives of the employees transferred continue to enjoy the protection conferred by national law and practice. An example of the circumstances in which this provision may apply is to be found in the exception set out in the first paragraph of Article 6(1), which makes the carrying over of employee representation subject to the condition that 'the provisions necessary for

the constitution of the employees' representation are fulfilled.'

71. The provision is necessary because the Acquired Rights Directives are (or were) intended only to achieve partial harmonisation of the employment laws of the Member States. [44] Given the wide variations in terms of law and practice as between the Member States in this area, anything else would have been impossible to achieve. This is reflected, for example, in recital 5 to Directive 2001/86, [45] which refers to 'the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies.'

72. As a result, Directive 2001/23 may apply differently to different situations – in particular where, as here, one party to the transfer is a public-sector body. Thus, in *Mayeur*, the Court was required to address a situation involving the transfer of activities to a public-sector employer which resulted in the dismissal of the applicant in the main proceedings. It held that the directive applied to the transfer. However, it did not go on to hold that, where national law provided for contracts of employment to be terminated on a transfer from the private to the public sector, such a provision was inherently incompatible with Directive 77/187. Rather, it held that any dismissal arising by virtue of the implementation of that law would amount to a substantial change in working conditions in accordance with what is now Article 4(2) of Directive 2001/23, with the result that the dismissal must be regarded as resulting from the action of the new, public-sector, employer. [46]

73. Similarly, in *Delahaye*, [47] where an employee's salary was reduced as a result of national rules applying in the case of a transfer from a private-sector to a public-sector employer, the Court, after noting that Directive 77/187 did not preclude the application of a national rule which provides for the termination of employment contracts governed by private law in the event of a transfer of an activity to a legal person governed by public law, went on to hold that the same must apply where the application of national rules governing the position of State employees

44 — See, as regards Directive 77/187, inter alia *Daddy's Dance Hall*, cited in footnote 5 above, paragraph 16, and Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 41. See, as regards Directive 2001/23, *Juuri*, cited in footnote 7 above, paragraph 23.

45 — Cited in footnote 28 above.

46 — Paragraph 56.

47 — Case C-425/02 [2004] ECR I-10823.

entailed a reduction in the remuneration of the employees concerned by the transfer. [48]

74. Just as national rules having the result that the remuneration payable to an employee following a relevant transfer is to be reduced, or even that he or she may be dismissed subject to appropriate safeguards, may not be incompatible with Directive 2001/23, so the directive also does not preclude the operation of national rules which may lead, directly or indirectly, to the 'carrying across' of the employee representation scheme being prevented. I understand, for example, that this may be the case under some national legal systems, under which the provisions governing the representation of employees in the public sector differ from those applying to employees in the private sector. That is the purpose behind the exception laid down at the end of the first subparagraph of Article 6(1).

75. That does not mean, of course, that the employees concerned in such circumstances are left entirely unprotected. Article 6(2) ensures that that will not be the case. However, what precise protection will be afforded in a given case and, indeed, whether the relevant provisions apply, is a matter for the laws and/or practice of the Member States.

76. Two further lines of argument put forward by the Spanish Government remain to be considered.

48 — Paragraphs 32 and 33.

Dual representation of the workforce

77. First, the Spanish Government argues that an interpretation of the concept of 'autonomy' under Article 6(1) of Directive 2001/23 that would have the effect of continuing the existing representation of the employees in the present case would create a form of 'dual representation' within the workforce of the new employer. Given that the existing workforce would already be appropriately represented, this would create a serious practical problem. Such a result cannot therefore be acceptable.

78. If and to the extent that that factual situation is one to which the first subparagraph of Article 6(1) applies, such dual representation is an inevitable consequence of the application of Article 6(1); and the employer must simply accept it.

79. If, however, the true position is that the provisions of the second or the fourth subparagraph of Article 6(1) or of Article 6(2) apply, the issue of dual representation will either not arise or, if it does, the period for which it lasts should be relatively short.

80. The Spanish Government's first argument should therefore be rejected.

Discrimination and the principle of equal treatment, the right to engage in trade union activities and the need to have regard to the interests of the transferee

81. Second, the Spanish Government maintains that, if it were to be assumed that autonomy is preserved in the present case, the result would be discriminatory as regards the employee representatives and trade union representatives of the existing workforce of the new employer. The absence of any new elections resulting from the transfer would lead to an organisational imbalance within the new employer, to the detriment not only of the trade union which is already represented within that entity but also of the legal representatives of the workforce concerned. Such an imbalance would contravene the principle of equal treatment and would impair the freedom of the legal representatives of the existing workforce of the commune to engage in trade union activities. In addition, such a result would fail to have regard to the economic harm done to the new employer which would result from the need to provide the representatives of the transferred employees with what the order for reference terms 'union hours' time in which to pursue their activities. [49]

82. I cannot accept those arguments.

83. It is true that the application of the first subparagraph of Article 6(1) of Directive 2001/23 to the transferred employees might result in a degree of what the Spanish Government terms 'organisational imbalance' within the new employer's organisation. One effect of carrying across the representation of those employees might indeed be to add to the administrative burdens involved in the representation of the workforce already employed by the new employer.

84. Such an effect must, however, be seen in the context of Directive 2001/23 as a whole, the primary purpose of which is, as I have already recalled, to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor. [50] By virtue of the directive, not only rights relating to employee representation but also the terms and conditions of employment of the workforce of the entity transferred will be carried across to the new employment relationship as a result of the transfer. Those terms and conditions of employment may be better or worse (in whole or in part) than those relating to the existing workforce of the new

49 — According to the Commission, Article 68 of the Spanish Workers' Statute provides for employee representatives to be given a monthly credit of union hours varying according to the size of the undertaking concerned. In the case of an undertaking with up to 100 employees, for example, the credit is 15 hours. In the case of an undertaking having more than 751 employees, the credit is 40 hours.

50 — See point 28 above.

employer. Inevitably, some imbalance is likely to arise. That is a result not of any inherent unlawfulness in the operation of Article 6(1) of Directive 2001/23 but in the operation of the directive as a whole.

85. With respect to the submissions concerning alleged discrimination and breach of the principle of equal treatment, it is settled case-law that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [51]

86. In addressing issues of comparability, the Court has ruled that it is necessary to have regard to all the issues which characterise the situations in question. [52] Those elements, and hence their comparability, 'must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question.' [53]

87. Here, such distinction as may arise does so in the context of the implementation of Directive 2001/23, and in the light of its primary objective. In that context, it seems to me that there is in fact no discrimination and no breach of the principle of equal treatment. The two sets of employees concerned are not in comparable situations in terms of the Community policy which applies. The result of the application of that policy is to create two different situations within the same undertaking. The first of these is constituted by the new employees whose terms and conditions have been transferred by operation of law. The second is represented by the existing workforce. Different rules may justifiably apply.

88. Even if the two situations at issue were comparable, I am of the view that any resulting difference in those situations would be objectively justified in the light of the purpose of Directive 2001/23 to ensure, in so far as possible and practicable, that the new employees are not disadvantaged by reason of the transfer.

89. With respect to the argument that the freedom of the existing workforce to engage in trade union activities would be impaired, the Court has indeed held that that freedom constitutes a 'general principle of labour law'. However, I cannot see anything in the reasoning advanced by the Spanish Government to suggest that such a freedom would be

51 — See, for example, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95, and Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 39.

52 — See Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 25.

53 — Ibid., paragraph 26 and the case-law cited.

materially impaired or unjustifiably impaired in the circumstances described.

90. As regards the argument relating to the potential damage caused to the new employer, while it is true that the Court has accepted that the interests of that employer may have to be taken into account, [54] such an approach cannot, in my view, be elevated into an overriding principle of interpretation of the directive such as to negate the clear wording of its provisions and undermine their *effet utile*.

Application to the proceedings before the national court

91. It will of course be for the national court to apply the principles laid down in the Court's judgment in this case to the facts of the case before it, having regard in particular to the national rules and practices that are relevant.

92. The following matters are, however, likely to be relevant to any assessment of autonomy to be undertaken by the national court:

— the continuity of the functions and the services provided by the employees transferred;

— the extent to which the employees transferred continue to form a discrete operating unit in their employment within the transferee undertaking (here, the municipal authority);

— the extent to which the immediate superiors of those employees remain the same;

— the extent to which the electorate of employees which appointed the representatives concerned remains the same (although, for the reasons mentioned in point 61 above, this is a test which must be applied broadly);

54 — Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 31.

— the extent to which any significant restructuring operations carried out by the transferee following the transfer may have resulted in the entity transferred losing its organisational and financial independence.

93. Conversely, I wish to emphasise that the national court should not have regard to merely minor restructuring operations that have been carried out by the transferee following the transfer. For example, a relocation of the premises from which the employees carry out their jobs would, on its own, be highly unlikely to have any meaningful effect on the preservation of autonomy. The same would apply to any change in the identity of the customer base for which the employees transferred carried out their duties.

94. Any change in those ultimately in charge of the transferred employees is likewise a factor to be ignored. As the Commission rightly observes, a change of this nature is virtually inevitable following any relevant transfer.

95. Finally, the Spanish Government has suggested that the rules laid down in Article 67(1) of the Spanish Workers' Statute [55] mean that it is the second, rather than the first, subparagraph of Article 6(1) of Directive 2001/23 that should apply to the representation of the employees transferred. It may be that application of those rules will have the result that 'the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled'. Whether or not that is actually the case is a matter for the national court.

55 — See point 9 above.

Conclusion

96. In the light of the above considerations, I am of the opinion that the Court should answer the question referred by the Juzgado de lo Social Único de Algeciras as follows:

'For the purposes of Article 6(1) of Council Directive 2001/23/EC 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, business or parts of undertakings or businesses, an undertaking, business or part of an undertaking or business preserves its autonomy if, following the transfer, it retains the specific organisational structure imposed by the transferor on the various elements of production which are transferred. Conversely, an entity does not preserve its autonomy if, notwithstanding the maintenance of the functional link of interdependence and complementarity between the elements of production transferred, those elements are integrated into a new and different organisational structure following the transfer. In applying that test, it is necessary to have regard to the organisational reality of the entity concerned following the transfer.'