OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 4 September 2008 [1]

I — Introduction

1. Mirja Juuri worked in the canteen of a metalworking company in Finland for nine years. When her employer transferred the catering sector to another undertaking, Ms Juuri's working conditions deteriorated. Community law provides a remedy for a worker in this position, but the national court is uncertain how the Community rules should be interpreted. Specifically, Directive 2001/23/EC, relating to the safeguarding of employees' rights in the event of transfers of undertakings, [2] attributes responsibility for a case such as that of Ms Juuri to her new employer. The Court of Justice must determine the extent of that responsibility, as well as its financial consequences.

2. Directive 2001/23 is part of what is called 'Community social law'. This branch of Community law offers workers a minimum level of protection, although the Member States may increase that protection. The complexity inherent in the regulation of national labour markets meant that the adoption of this legislation involved achieving wide consensus, with the result that its provisions, which are open-ended and ambiguous, often require the intervention of the Court of Justice in the form of preliminary rulings.

3. Furthermore, Community social law is characterised by its fragmented structure. It is made up of certain rules for resolving specific problems which emerge in the course of the employment relationship. Metaphorically speaking, it resembles an archipelago [3] whose small islands do not always seem to

1 — Original language: Spanish.

2 — 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, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16), which reformulates 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

3 — The expression is taken from Rodríguez-Piñero Royo, M.C., 'Transmisión de empresas y derecho europeo', in *La transmisión de empresas en Europa*, Cacucci Editore, Bari, 1999, p. 1, in which it is argued that, despite its importance, Community social law has a fairly limited impact in that it only covers aspects of this area of regulation and leaves the remainder entirely unharmonised. This results in what has been called the 'insular' or 'archipelagic structure' of Community employment law, under which only certain elements of national law receive attention; by contrast, national employment law is more 'continental' and embraces all aspects of the employment relationship.

be linked by bridges. In the present case, the Court is being asked to address questions arising on one of these islands.[4] The risk is, therefore, that while the issues of interpretation concerning the directive in question may be satisfactorily resolved, those concerning other related directives may not. For this reason, it is important to be rigorous and not to overlook connections in an area as diffuse as social law, which is more coherent, however, than it first appears.

II — Facts

4. On 5 April 1994 Mirja Juuri started working for Rautaruukki Oyj ('the transferor'), in Hämeenlinna (Finland), in the company canteen. From 10 December 1999, Ms Juuri's employment contract became permanent.

5. Although her duties were limited to the canteen, Ms Juuri came under the metalworking industry collective agreement, which was due to expire on 31 January 2003 and was automatically renewable for periods of one year unless one of the parties gave notice of termination at least two months prior to its expiry. No termination was necessary because, on 12 December 2002, a new agreement for the sector was signed, with effect from 1 February 2003.

6. On that date, when the previous agreement had already expired, the transferor handed over the running of the canteen to Amica Ravintolat Oy ('the transferee'). Once the transfer had taken place, the workers started to work for the transferee, albeit under a new collective agreement, which in this case was the agreement relating to the hotel and catering sector.

7. Ms Juuri was unhappy with her employment being governed by the hotel and catering agreement and considered herself covered by the metalworking agreement. She maintained that the change of regime had meant a reduction in her pay of EUR 300 a month, as well as the need to transfer to different workplaces. For its part, the

4 — I am reminded of Don Quixote's advice to Sancho Panza shortly before he becomes governor of the island of Barataria. Aware that his advice is only as good as the strength of his arguments, Don Quixote ends with these words: 'Let the tears of the poor man find with thee more compassion, but not more justice, than the pleadings of the rich. Strive to lay bare the truth, as well amid the promises and presents of the rich man, as amid the sobs and entreaties of the poor. When equity may and should be brought into play, press not the utmost rigour of the law against the guilty; for the reputation of the stern judge stands not higher than that of the compassionate …' Cervantes, M. de, Don Quixote, Part II, Chapter XLII, translation by John Ormsby, 1885, http://www.online-literature.com/cervantes/don_quixote/

transferee has conceded that the more recent agreement required Ms Juuri to undergo a number of changes, including carrying out her work in other workplaces, albeit temporarily, and a reduction in her pay of EUR 100 a month due to a proportional reduction in working hours.

8. Following these changes in the system of collective agreements governing her employment, Ms Juuri decided to terminate her contract of employment on 19 February 2003. Relying on Finnish employment legislation, she brought legal proceedings against the transferee, claiming compensation in respect of holiday corresponding to the notice period and further compensation equivalent to 14 months' pay for unfair dismissal. On 11 February 2005 the Helsingin Käräjäoikeus (Helsinki District Court) rejected Ms Juuri's claim. A year later, on 28 February 2006, the Helsingin hovioikeus (Helsinki Court of Appeal) upheld the judgment at first instance but Ms Juuri took her case to the Korkein oikeus (Supreme Court), which is the court now referring questions to the Court of Justice concerning the interpretation of Directive 2001/23.

III — Legal framework

A — *Community legislation*

9. Directive 2001/23 sets out a system of minimum standards in order to preserve the rights of workers in the event of transfers of undertakings, businesses or parts of undertakings or businesses. In the context of the dispute between Ms Juuri and the transferee, the relevant provisions of that directive are Articles 3(3) and 4(2).

'*Article 3*

…

3. 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.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

…

Article 4

…

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship'.

of employment is terminated because the employee's working conditions become substantially worse as a result of a transfer of the undertaking, the employer shall be regarded as responsible for ending the employment relationship.'

12. Paragraph 1(2) of Chapter 8 of the Työsopimuslaki permits an employee to terminate the employment contract if the employer is in serious breach of obligations which are of fundamental importance to the employment relationship, at least until the date of expiry of the notice period.

B — *National legislation*

10. According to the order for reference from the Korkein oikeus, Paragraph 2 of Chapter 6 of the Työsopimuslaki (Finnish Law on employment contracts) provides that 'a contract of employment concluded for an indeterminate period or otherwise in force until further notice may be terminated by the giving of notice to that effect by one of the parties.'

13. Under Paragraph 5 of the Työehtosopimuslaki (Finnish Law on collective agreements), if the employer is party to or is otherwise bound by a collective agreement, all his rights and obligations thereunder pass to his successor. The transferee is therefore obliged to comply with the provisions of the collective agreement binding upon the transferor until that collective agreement expires, and thereafter with the provisions of the collective agreement binding on it, the transferee, in accordance with Paragraph 4 of the Työehtosopimuslaki.

11. Paragraph 6 of Chapter 7 transposes Article 4(2) of Directive 2001/23 into Finnish law by providing that, 'If a contract

14. Paragraph 2 of Chapter 12 of the Työehtosopimuslaki covers the right of an

employee to obtain compensation from the employer for unfair dismissal and requires employers to pay compensation to workers dismissed on grounds other than those considered to be fair under the Työehtosopimuslaki, and to compensate employees who have terminated their contracts of their own accord.

15. Paragraph 2 of Chapter 12 of the Työsopimuslaki also indicates the extent of the compensation that the worker can claim, which ranges from 3 months' to 24 months' pay.

16. The employee is not entitled to compensation under Paragraph 2 of Chapter 12 of the Työsopimuslaki if the employer terminates the employment contract on objective and serious grounds, but even in these circumstances the employee can claim pay and other entitlements relating to the notice period. There is no right to pay or other entitlements under the employment relationship if it can be shown that the employer had especially serious grounds for terminating the employment contract with immediate effect.

17. Paragraph 1 of Chapter 12 of the Työsopimuslaki also requires an employer who, intentionally or through carelessness, breaches or fails to fulfil obligations under the employment contract or the Työsopimuslaki to compensate the employee for any losses suffered.

IV — The questions referred for a preliminary ruling

18. By a decision of 24 August 2007 in the proceedings brought by Ms Juuri against the transferee, the Korkein oikeus, referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(2) of Council Directive 2001/23/EC to be interpreted as meaning that a Member State must, in a situation in which an employee has himself given notice to terminate his contract of employment after his working conditions have become substantially worse following the transfer of an undertaking, in its law guarantee the employee the right to obtain financial compensation from the employer in the same way as in the case where the employer has unlawfully terminated the employment contract, having regard to the fact that, as permitted by Article 3(3) of the directive, the employer has observed a collective agreement, binding on the transferor and guaranteeing the employee better working conditions,

only until its expiry and the worsening of the working conditions arises from that?

(2) If the employer's responsibility in accordance with the directive is not as extensive as described in Question 1, must the responsibility of the employer nevertheless be implemented by providing compensation, for example, for pay and other benefits for the notice period to be observed by the employer?'

19. Observations were submitted, within the time-limits laid down in Article 23 of the Statute of the Court of Justice, by the Finnish Government, the Hungarian Government and the Commission.

20. At the general meeting of the Court held on 29 April 2008, the Court ordered that two written questions be submitted to the Finnish Government, the replies to which reached the Court Registry on 23 May 2008.

V — Reformulation of the questions referred for a preliminary ruling

21. The two questions referred by the supreme Finnish court both revolve around the same event: the change in employment regime following the expiry of the collective agreement for the metalworking sector. The idea of that event being the point of departure is more controversial than it might seem, as the two Governments which submitted observations in these proceedings, as well as the Commission, have addressed the point in their statements. Article 4(2) of Directive 2001/23 applies once the lawfulness of the change in regime affecting the contract of employment has been established. If the change were unlawful due to its infringement of Article 3(3) of that directive, the outcome would be different. It is therefore necessary to clarify the factual circumstances of the case before the referring court in order to determine whether there is any illegality, since the collective agreement which initially bound Ms Juuri expired on the same date as the transfer of the undertaking took place. This coincidence has given rise to doubts on the part of the Court of Justice, leading it to put a number of questions [5] to the Finnish Government and it prompts me to reformulate the questions put by the Korkein oikeus. [6]

5 — The written questions to the Finnish Government concerned only the system of entry into force and termination of the metalworking sector collective agreement.

6 — The practice of reformulating questions is very well established in the case-law of the Court of Justice and dates back to Case 16/65 *Schwarze* [1965] ECR 877. For more recent cases, see Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; Case C-66/95 *Sutton* [1997] ECR I-2163, paragraph 35; Case C-284/96 *Tabouillot* [1997] ECR I-7471, paragraphs 20 and 21; Joined cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28; Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18; Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 27; Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17; and Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, paragraph 27. In an article published in 1998, 'La cooperación entre el Tribunal de Justicia y los jueces nacionales. Límites del procedimiento prejudicial', in *Scritti in onore di G. F. Mancini,* Milan, 1998, pp. 481-482, I praised this technique of the Court of Justice. In this regard, see also Adinolfi, A., *L'accertamento in via pregiudiziale della validità di atti comunitari*, Milan, 1997, pp. 129-137, and Jimeno Bulnes, M., *La cuestión prejudicial del artículo 177 CEE*, Barcelona, 1996, pp. 365 and 366. The well-known work by Rasmussen, H., *On Law and Policy in the European Court of Justice,* Dordrecht, 1986, pp. 481-482, contains harsh criticism of the practice of reformulating questions.

22. In the present case I think it appropriate to merge the two questions put by the national court and then, after a thorough analysis of the position regarding the successive collective agreements, to go on to explain the implications in terms of compensation of Article 4(2) of Directive 2001/23.

23. I therefore propose that the Court reformulate the two questions referred as follows:

'(1) Is it in conformity with Article 3(3) of Directive 2001/23/EC to continue observance of the terms and conditions agreed in a collective agreement until the date of its expiry, where the timing of the transfer of the undertaking coincides with the timing of the expiry?

(2) Is Article 4(2) of Council Directive 2001/23 to be interpreted as requiring a Member State to ensure, by law, that the employee has the right to financial compensation from the employer or is it to be interpreted exclusively as a provision attributing responsibility.'

VI — Question 1

24. Article 3(3) of Directive 2001/23 created a means of protecting workers which offers legal certainty to employees when their employer undertakes a transfer. If there is a collective agreement prior to the transfer, workers can rely on it until its expiry or until 'the entry into force … of another collective agreement'. Member States are entitled to limit this entitlement in time, provided that they do not limit it to a period of less than one year. [7]

25. Directive 2001/23 seeks an equilibrium between the stability, in legal terms, of the employment relationship and the employer's flexibility of action. The rights of the worker continue after the transfer for a restricted period. Once the limit of the validity of these rights has been reached, the worker is entitled to take a decision in this regard, bringing Article 4(2) into play. Under that provision, the employer is regarded as responsible for the termination of the employment relationship in the event that the transfer has resulted in 'a substantial change in working conditions to the detriment of the employee'. [8] Furthermore, case-law has allowed such detrimental changes, despite the mandatory nature of the rules laid down in Directive 2001/23,

7 — Second subparagraph of Article 3(3) of Directive 2001/23.

8 — The origins of Directive 2001/23, as well as its amendments, show that the political consensus achieved accounts for the flexible nature of its provisions. In this regard, see Hardy, S. and Painter, R., 'Revising the Acquired Rights Directive', Industrial Law Journal, vol. 25, No 2, 1996.

if national law permits them in the normal course of the employment relationship, whether or not the transfer has taken place. [9]

26. Article 3(3) and Article 4(2) do not operate as airtight compartments. [10] The fact that the Community legislature offers the worker the possibility of terminating the employment contract stems from the deterioration of the relationship with the employer, which in turn is caused by a change in the rules. It seems clear that although Article 3 safeguards the original rights of the worker, it does, where appropriate, permit a change in the employment regime. It is precisely because such a change is contemplated that, under Directive 2001/23, someone is made responsible for the termination of the contract: the employer. [11] This is a way of making up for allowing exceptions to the rule prohibiting changes in working conditions. Attribution of responsibility to the transferee means that the worker's rights can be maintained, at least financially speaking. [12]

27. The consequences of the termination referred to in Article 4(2) of Directive 2001/23 as far as compensation is concerned fall to be examined under Question 2, but at this point I will borrow part of that reasoning in support of the following idea.

28. The safeguarding of workers' rights as provided for in Article 3(3) of Directive 2001/23 places a positive duty on the Member States, which ultimately falls on employers. If the conditions set out in the provision are met, the worker's conditions of employment are maintained after the transfer, either indefinitely or — within certain limits — for a set period of time. [13] However, any breach of that provision en-

9 — Taking the approach laid down in Case 324/86 *Daddy's Dance Hall* [1988] ECR 739, the Court of Justice has confirmed that: '… such an alteration is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of the Directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee, to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment' (Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 28).

10 — According to Barnard, C., *EC Employment Law*, 3rd edition, Oxford University Press, Oxford, 2006, pp. 663 to 664.

11 — On flexibility of working conditions: Arrigo, G., *Il diritto del lavoro dell'Unione europea,* volume II, Guiffrè, Milan, 2001, pp. 97-103.

12 — This flexibility is not without its problems of interpretation, as highlighted by Barnard, C., op. cit., pp. 657-658.

13 — The mandatory nature of the rights recognised by Directive 2001/23 has been confirmed by the Court on several occasions. The first was in *Daddy's Dance Hall,* where the Court stated that 'employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent. This interpretation is not affected by the fact that, as in this case, the employee obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before. ' This approach has been confirmed in Case C-362/89 *d'Urso and Others* [1991] ECR I-4105, paragraph 9; Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 28; Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraphs 42 and 43; Case C-305/94 *Rotsart de Hertaing* [1996]. ECR I-5927, paragraph 18; and Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 26.

titles the worker to demand, before the courts if necessary, the application of the employment regime prevailing prior to the transfer, or the equivalent financial compensation. [14] In the latter case, implementation is in accordance with the substantive and procedural rules of national employment law, but never losing sight of the aim of Directive 2001/23, which indicates the objective which must be sought by the national rules.

29. That being so, it is clear that the provision at issue establishes, indirectly and by way of a minimum standard, a dual system of compensation in the event of termination of an employment relationship. In the first situation envisaged, the worker terminates the contract, but the detailed requirements under Article 3(3) of Directive 2001/23 have been complied with. In the second situation envisaged, the worker's termination of the contract occurs following a breach of that provision. The gravity of the two situations differs as in the second case the worker is less protected and consequently national employment law must deal more severely with the employer. That approach would also apply in situations where, although the requirements of Article 3(3) of Directive 2001/23 have technically been complied with, the law has been circumvented, as may be the case here, although, given the preliminary nature of these proceedings, this is for the national court to determine.

30. In order to assess whether there is circumvention of the law, it is necessary to be in possession of certain factual elements which are not always available to the Court of Justice. [15] However, the case-law [16] devotes

14 — The legal effects of non-compliance fall to be determined by national law, as the Court has emphasised in Joined Cases 144/87 and 145/87 *Berg and Busschers* [1988] ECR 2559; Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraphs 26 to 28; Joined cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 21; and Case C-399/96 *Europièces* [1998] ECR I-6965, paragraph 37.

15 — 'Circumvention of the law' occurs where 'acts carried out in accordance with the terms of a legal provision seek a result which is prohibited by law …, the provision whose application it was sought to evade shall apply'. This is the definition given in Article 6.4 of the Spanish Civil Code, which is similar to Article 1344 of the Italian Civil Code, although this is limited to the field of contract: 'si reputa altresì illecita la causa quando il contratto costituisce il mezzo per eludere l'applicazione di una norma imperativa' (the object of the contract (*la causa*) shall also be unlawful where the contract constitutes a means of evading the application of a mandatory provision). Although it does not refer to circumvention, Article 39 of the Czech Civil Code describes it in similar terms: 'Neplatný je právní úkon, který svým obsahem nebo účelem odporuje zákonu nebo jej obchází anebo se příčí dobrým mravům.' (Any legal act the content or purpose of which is incompatible with or in circumvention of the law or is in contravention of good practice shall be void). In French law, circumvention of the law is more a creature of case-law than of legislation, but Article 336 of the Civil Code expressly refers to the concept. In the various national legal systems there is some confusion between the concept of 'circumvention of the law' and the concept of 'abuse of right', as well as other legal notions such as that of good faith. As noted in Miquel González, J.M., *Comentario al artículo 7*, 'Comentario del Código Civil', Ministerio de Justicia, Madrid, 1993, p. 45, 'the differences between the two concepts are not clear. The attempts by academic writers to differentiate between them have not been successful. Nor has the case-law managed to do so satisfactorily …'. I do not consider it vital to go into further detail concerning the disparities between these different notions, since the Court of Justice has not done so.

16 — The Court has left consideration of the factual elements to the national courts in those cases where circumvention of the law has been alleged (specifically, in Case 33/74 *van Binsbergen* [1974] ECR 1299, paragraph 13; Case 115/78 *Knoors* [1979] ECR 399; Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 22; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 24; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 12; and Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 21). Advocate General Tesauro gives an account of the current state of the case-law in his Opinion in Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, at points 24 and 25: 'any legal order which aspires to achieve a minimum level of completion must contain self-protection measures … to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted. This requirement is not at all alien to Community law; on the contrary, it has been repeatedly recognised in the Court's case-law … according to which "the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".' The Opinion of Advocate General Poiares Maduro in Case C-255/02 *Halifax and Others* [2006] ECR I-1609, develops this idea at points 80 and 81.

particular attention to disputes in which one of the parties acts in an abusive manner. [17] This sensitivity has also emerged in cases connected with Community social law, specifically when applying Directive 2001/23. In *Bork* [18] the Court of Justice was confronted with the dismissal of an entire workforce, which was immediately followed by the transfer of the undertaking and the re-employment of a substantial proportion of the staff previously employed, although on less favourable terms. Using its customary methodology, the Court of Justice emphasised that it is for the national court to assess the facts and then to apply the Community rules, outlining the criteria which should govern the actions of the referring court, which must weigh up 'the objective circumstances in which the dismissal took place and, in particular, in a case such as this, whether it took effect on a date close to that of the transfer and whether the employees in question were taken on again by the transferee.' [19] The outcome following the evaluation of these factors was a judgment confirming the application of Directive 2001/23 to a situation such as that in question. [20]

31. It can be seen from *Bork* that the Court of Justice allows the national court a wide margin of discretion, only to snatch it back at a later stage. By imposing specific criteria and confirming the relevance of the Community provisions to the resolution of the case, the analysis of the factual elements is minimised and the position of the national court is compromised. I do not subscribe to this approach on the part of the Court of Justice. At the very least it represents an artificial technique which puts the participants in the preliminary ruling proceedings in a difficult position, demonstrating an insatiable thirst for the limelight as well as a disrespectful attitude towards the institutional autonomy which should be accorded to the national court. [21] In the present case this type of discussion can be avoided, without affecting the authority of the Court or the prerogatives of the Korkein oikeus.

32. Whilst accepting that it is for the national court to determine whether the synchronisation of the date of the transfer of an undertaking with expiry of the collective agreement constituted circumvention of the law, the Finnish Government has provided the Court with some interesting additional information. It has been shown that the agreement by which Ms Juuri and her employer were initially bound expired on the day of the transfer. There was no tacit renewal as a new agreement for the sector,

17 — It is not appropriate to debate here whether the prohibition of circumvention of the law (or abuse of right, for that matter) is a general principle of Community law. In Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, at point 89 of my Opinion, I invited the Court to have recourse to 'the general legal principle prohibiting acts in contravention of the law', but this point, even now, needs more detailed study. Although *Halifax* seems to confirm this tendency, the debate continues. On this point, see de la Feria, R., 'Prohibition of abuse of (Community) Law: the creation of a new general principle of EC Law through tax', CML Rev, 2008, 45.

18 — Case 101/87 *Bork International* [1988] ECR 3057.

19 — Ibid.

20 — The Court indicated that Article 1(1) of the directive is to be interpreted 'as meaning that the directive applies where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the lease, with just over half of the staff that was employed in the undertaking by the former lessee, provided that the undertaking in question retains its identity.'

21 — My position with regard to the limits of replies to questions referred for a preliminary ruling and respect for the institutional autonomy of the referring court is set out in my Opinion in Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051 at point 35.

replacing the old agreement in its entirety, had been signed several months previously. The period between the ratification of the new agreement and its entry into force was very short, barely a month and a half. In addition, the conduct of the transferor prior to the transfer, particularly in dealings with the employees and their representatives, sheds light on the way in which the transaction was handled. It is for the national court to assess whether this changeover of agreements, as well as the time elapsing and the information made available to the employees, form a basis for suggesting that the transferor and the transferee circumvented the law and, in doing so, infringed the rules prohibiting changes in working conditions on the transfer of an undertaking.

33. Having embarked upon the factual analysis, the referring court must be able to rely on clear guidelines from the Court of Justice in order to arrive at the legally correct solution. The Court must not be reluctant to give its assistance and to this end I would reiterate the arguments set out at points 29 to 32 of this Opinion: if, in the light of the matters of fact and of law available to it, the Korkein oikeus confirms that the law has been circumvented, Article 3(3) of Directive 2001/23 will have been infringed. The failure to comply with this provision means that Article 4(2) of the directive must be given a more restrictive interpretation. In such circumstances, the employer would have deliberately brought about the infringement and, in consequence, would deserve to incur heavier liability.

34. Accordingly, and in reply to Question 1, I am of the view that Article 3(3) of Directive 2001/23 precludes the terms and conditions agreed in a collective agreement from ceasing to have effect upon its expiry, where the timing of the transfer of the undertaking coincides with the timing of that expiry and where the transferor and the transferee have acted in circumvention of the law. It is for the national court to determine whether the synchronisation of the date of the transfer with the date of the expiry of the collective agreement constitutes circumvention of the law.

35. It now falls to elucidate the scope and boundaries of this liability, which requires an explanation of Article 4(2) of Directive 2001/23.

VII — Question 2

36. The Finnish and Hungarian Governments and the Commission are in agreement that Article 4(2) allocates responsibility only following a significant change in the employment relationship. Directive 2001/23 is not seeking to confer any specific benefit in determining the legal status of a worker in an undertaking that has been transferred. This approach rests on the idea that the directive is an instrument of minimum

harmonisation, whose interpretation requires that the national legislature enjoy a wide margin of discretion. [22] Although I am in agreement with the main thrust of this argument, further analysis of the meaning of the provision is required. The fact that the Community may have started out on a path of minimum harmonisation does not automatically rule out some form of financial protection in favour of the worker. It is only through a detailed examination of the text that it is possible to arrive at an accurate interpretation and it is therefore helpful to break the provision down into its various component parts.

A — *Substantial change in working conditions to the detriment of the employee*

37. The basis on which the employee is entitled to terminate the contract and regard the employer as responsible for the termination is to be found in the first part of Article 4(2), which requires that the transfer should involve 'a substantial change in working conditions to the detriment of the employee'.

38. The national court is the most appropriate body to determine whether, in the present case, there was a significant change to the detriment of Ms Juuri. Notwithstanding the fact that Finnish law doubtless contains provisions which would lead the Korkein oikeus to decide one way or the other, the case-law of the Court provides some guidance for analysing whether or not there has been a change for the worse. [23] In *Merckx and Neuhuys*, [24] two employees terminated their contracts in accordance with Article 4(2) of Directive 2001/23 when their new employer refused to guarantee their previous pay, which was calculated by reference to turnover. The Court opted to assess the facts directly, stating that '[a] change in the level of remuneration awarded to an employee is a substantial change in working conditions within the meaning of that provision, even where the remuneration depends in particular on the turnover achieved'. [25]

39. Several years on, *Delahaye* [26] provided the Court with a further opportunity to make a ruling on 'substantial changes' in employment contracts, although the focus was different from that in *Merckx and Neuhuys*. In a dispute between an employee and her new employer concerning a 37% reduction in pay, the judgment did not give a definite response to the national court but confined itself to stating that 'application of the national rules governing the position of State employees entails a reduction in the

22 — *Daddy's Dance Hall*, paragraph 16; *Watson Rask and Christensen*, paragraph 27; *Martin and Others*, paragraph 41. On the Member States' margin of discretion and its parameters in sectors where there is minimum harmonisation, see Curtin, D., 'Emerging Institutional Parameters and Organised Difference in the European Union', in de Witte, B., Hanf, D. and Vos, E. (eds.), *The Many Faces of Differentiation in EU Law*, Intersentia, Antwerp, 2001, pp. 348-354, and Marciali, S., *La flexibilité du droit de l'Union européenne*, Bruylant, Brussels, 2007, pp. 61-65.

23 — Barnard, C., op. cit., pp. 656-664 gives an overview of this case-law.

24 — Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253.

25 — Ibid., paragraph 38.

26 — Case C-425/02 *Delahaye* [2004] ECR I-10823.

remuneration of the employees concerned by the transfer. Such a reduction must, if it is substantial, be regarded as a substantial change in working conditions to the detriment of the employees in question, within the meaning of Article 4(2) of the directive'. [27]

40. In *Delahaye*, by contrast with *Merckx and Neuhuys*, the Court repeated, with greater emphasis, the requirement that the change should be of a 'substantial' nature and declined to assess the facts in the main proceedings. However, both decisions were given in a similar context, characterised by a pay cut prompting the worker to terminate the contract unilaterally. In order to discern the meaning of a 'substantial' change, as specified in Directive 2001/23, it is necessary to approach the expression subjectively, from the perspective of the worker, and in the context of the worker's legal and financial circumstances. If the expression were approached objectively, by weighing up factors unrelated to the individual situation of the employee, there would be a risk of this leading to outcomes inconsistent with the objective of Directive 2001/23. In the two cases examined above, the Court of Justice directed the attention of the national court to other relevant factors which tipped the scales in favour of a unilateral termination of the employment contract. In *Delahaye*, the applicant's length of service was referred to in the judgment for the purposes of enabling the overall context of the employee to be taken into account. [28] Although paragraph 38 of the judgment in *Merckx and Neuhuys* does not refer to other relevant factors, it does make clear that the detriment caused to the position of the applicants was not solely pay-related, as the transfer of the undertaking had also resulted in a change in their workplace. [29]

41. It seems, then, that, without openly saying so, the Court has opted for a subjective definition of the phrase 'substantial change', involving an evaluation of the legal and factual circumstances surrounding the employee at the time of the termination of the contract in reliance on Article 4(2) of Directive 2001/23. It is for the national court to appraise these circumstances using the guidelines given in *Merckx and Delahaye*. When these are applied to Ms Juuri's case, we find that her remuneration was reduced in proportion to her working hours. Furthermore, the change of collective agreement may have brought about other alterations in the framework within which she was employed which would be relevant to the main proceedings as further elements for evaluating the true nature of the changes undergone. There should be added to these the occasional and temporary requirement for Ms Juuri to work in different locations. The national court has a duty to assess whether, in the legal and economic context surrounding Ms Juuri, all

27 — Ibid, paragraph 33.

28 — Ibid, paragraph 34.

29 — *Merckx and Neuhuys*, paragraph 9.

these factors constitute a substantial change to the employment contract.

B — *Attribution of responsibility to the employer: the starting point or the end of the line?*

42. Under Article 4(2) of Directive 2001/23, once it has been ascertained that there has been a substantial change in the employment relationship, 'the employer shall be regarded as having been responsible for termination'. Ms Juuri maintains that these words do not simply frame a rule for attributing responsibility but also a mandate as to the monetary value to be put on the termination. In the proceedings that have given rise to this reference for a preliminary ruling, the Korkein oikeus is concerned about the extent of Ms Juuri's compensation in the event that Directive 2001/23 goes beyond merely attributing responsibility, and is uncertain whether it should be the compensation payable under Finnish law for unfair dismissal or that corresponding to the notice period which the employer is obliged to respect.

43. I agree with the Finnish and Hungarian Governments and with the Commission that Directive 2001/23 solely and exclusively establishes a division of responsibility. Had the intention been to determine the financial consequences of the termination, the Community legislature would have done so clearly. The objective of Article 4(2) is to allocate responsibility for the termination, not to specify its legal consequences. This proposition is based on both a grammatical and a teleological analysis of Directive 2001/23, as well as on other harmonising legislation in the field of Community social law. [30]

1. Taking words seriously

44. Philological interpretation is frequently not the lawyer's best tool, but it is always the first step on the road to be travelled. Community law, a legal order which is drafted in wide range of languages, all of them official, finds powerful arguments in the literal meaning of its provisions. [31] Sometimes this can be a double-edged sword, adding confusion when it comes to deciding which rules are applic-

30 — This methodology is one which, contrary to the arguments put forward in the well-known work by Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1977, does not lead to the *only* correct answer, but it does at least lead to the *most* correct answer.

31 — The Court recognised this in Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 32: 'Whatever the reasons which might be put forward … the Court is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording.' Sometimes a simple comma turns out to be the determining factor, as in Case C-83/96 *Dega* [1997] ECR I-5001, paragraphs 13 and 14.

able to a particular case. [32] The present case belongs to this second category, where the multiplicity of languages muddies the waters rather than clarifies them. This becomes evident upon examination of the terms used in Article 4(2) of Directive 2001/23.

45. The precise words of the final part of the provision indicate that 'the employer shall be regarded as having been responsible' for the termination of the contract. The Spanish version, in common with the French, Czech and German versions, refers to the 'attribution' of responsibility. [33] Other translations establish the 'responsibility' of the employer, without referring to attribution. This is the case in the Italian, Portuguese, Polish, Bulgarian and English versions, in which, for example, the termination 'è considerata come dovuta alla responsabilità del datore di lavoro'. [34] So, some versions lay the emphasis on the *attribution* and others on the *responsibility*. [35] On a broad interpretation, the texts which tend towards 'responsibility' reflect a desire on the part of the Community legislature to go beyond simple attribution, in order to promote an autonomous meaning of the word, with a financial content which is defined by Community law rather than national law.

46. I go back to the words with which I started this section: a grammatical interpretation can, on occasion, cause more confusion than unanimous agreement. The literal meaning of written provisions is of particular importance when their analysis leads to an obvious conclusion, but not in cases such as this, where the words and their translations lead to different and contradictory outcomes. I do not think that the details of the drafting of some of the versions have significant legal implications and consequently this route can only lead to uncertainty.

32 — In the judgment of the United Kingdom Court of Appeal in *Bulmer* v *Bollinger* [1974] 1 Ch. 401 (C.A.), better known as the French Champagne Case, Lord Denning brought out the relative importance of the grammatical component in Community law: 'Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. …They must not confine themselves to the English text. They must consider, if need be, all the authentic texts …. They must divine the spirit of the treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European Court acts.'

33 — In the French version, 'la résiliation du contrat de travail ou de la relation de travail est considérée comme intervenue du fait de l'employeur'; in the Czech version, 'je zaměstnavatel považován za osobu, z jejíž strany byly pracovní smlouva nebo pracovní poměr ukončeny'; and in the German version, 'dass die Beendigung des Arbeitsvertrags oder Arbeitsverhältnisses durch den Arbeitgeber erfolgt ist'.

34 — In the Portuguese version, 'a rescisão do contrato ou da relação de trabalho considera-se como sendo da responsabilidade da entidade patronal'; in the Polish version, 'pracodawcę uważa się za odpowiedzialnego za rozwiązanie umowy o pracę lub stosunku pracy'; and in the Bulgarian version, 'работодателят се счита за отговорен за прекратяването на трудовия договор или трудовото правоотношение'; and in the English-language version, 'the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship'.

35 — The Slovak version offers an intermediate position by including both attribution and responsibility: 'zodpovednosť za skončenie pracovnej zmluvy alebo pracovnoprávneho vzťahu sa bude pripisovať zamestnávateľovi'.

47. The apparently arbitrary use of the words 'attribution' and 'responsibility' in the various official translations leads me to think that the key lies not in the literal meaning of the provision but in its goal.

2. Taking goals seriously

48. Directive 2001/23, like other Community social legislation, seeks to protect workers in the European internal market. Its function of protecting the weaker party in the employment relationship should be seen in context, namely in relation to the goal of achieving a harmonised level of protection throughout the Community, where the disparities in legislation must not impede the free movement of the factors of production. [36] Provisions of social legislation are therefore complex in terms of their aims and also in terms of their nature and effects. It is no coincidence that directives, or even minimum harmonisation directives, whose mandates allow scope for greater protection at the national level, have been the preferred vehicle in this field. [37]

49. The protective stance can be seen in the recitals to Directive 2001/23, which was adopted 'for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. [38] To this effect, the legislature resolved to remove the differences which still remained in the Member States 'as regards the extent of the protection of employees'. [39] In their interpretation of Directive 2001/23 the Court and its Advocates General have highlighted the importance of its social aspects. In his Opinion in *Luigi Spano*, Advocate General Cosmas recognises that 'this is legislation which clearly

36 — On the search for a balance between employment protection and promotion of economic activity, see Ball, C.A., 'The making of a transnational capitalist society: the European Court of Justice, social policy and individual rights under the European Community's legal order', Harvard International Law Journal, No 37, 1996, p. 307 et seq. The Court has also shown that it is very sensitive to this blending of interests in its interpretation of Community social provisions, as pointed out in O'Leary, S., *Employment Law and the European Court of Justice. Judicial Structures, Policies and Processes,* Hart Publishing, Oxford and Portland, Oregon, 2002, pp. 119-128.

37 — The use of the directive has increased in this area, but owing to the delicate nature of any intervention in this field, the legislature has frequently turned to instruments of *soft law*, as pointed out in Kenner, J., 'EC Labour Law: The Softly, Softly Approach', IJCLLIR, No 14, 1995; Goetschy, J., 'The European Employment Strategy: Genesis and Development', EJIR, No 5, 1999; Santana, M., 'La Internalización de la Estrategia Europea de Empleo en España', REDE, No 21, 2007; and Zeitlin, J. and Trubek, D. (eds.), *Governing Work and Welfare in a New Economy,* Oxford University Press, Oxford, 2003. The extensive use of *soft law* has not only legal but institutional implications, as emphasised in Senden, L., *Soft Law in European Community Law*, Hart Publishing, Oxford, 2004; Alonso García, R., 'El *soft law* comunitario', Revista de Administración Pública, No 154, 2001; Sarmiento, D., *El soft law administrativo*, Thomson-Civitas, Pamplona, 2008; Cini, M., 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', Journal of European Public Policy, No 8, 2001; Hillgenberg, H., 'A Fresh Look at Soft Law', European Journal of International Law, No 10, 1999; and Klabbers, J. The Undesirability of Soft Law', Nordic Journal of International Law, No 36, 1998.

38 — Recital 3.

39 — Recital 4.

has a social objective', [40] a statement that has been echoed in the case-law of the Court of Justice. [41]

50. This social objective, however, goes side by side with other initiatives. Directive 2001/23 — like its predecessor, Directive 77/187 — has openly sought a balance between protecting employees and promoting the organisational flexibility of undertakings. [42] To this end, Community legislation has attempted to temper the rigidity of some national legislation, whose application was a factor not only in making restructuring in certain sectors more problematic, but also in creating obstacles to free movement and fair competition within the internal market. The consensus of interests is clear from a comparison of the Commission's original drafting [43] with the version which emerged from the Council. The final text demonstrates great concern for reconciling employee protection with support for instruments of business reorganisation, a concern which is evident in the provisions at issue in the present case. At points 25 to 29 of this Opinion I describe how, after a transfer, the employee's rights can subsist for a fixed or an indeterminate period. Directive 2001/23 allows the transferee considerable freedom of action when it comes to making changes in the working conditions of staff, but it balances this flexibility with a series of measures in favour of the employee, including, most notably, the option of unilateral termination. This outcome marks an end to the reconciliation of the interests of the parties, since Directive 2001/23 adds that the employer is to be regarded as responsible for the termination if, by reason of the transfer, the worker's employment conditions deteriorate. The Commission's proposal for a directive, which dates back to 1974, confirmed that, as a result of this balancing act, Article 4 was restricted to allocating blame whilst leaving the determination of its implications to national law. [44]

51. The compromise between protection for the employee and flexibility for the employer

40 — Opinion of Advocate General Cosmas in Case C-472/93 *Luigi Spano and Others* [1995] ECR I-4321, point 15.

41 — Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12; *Daddy's Dance Hall*, paragraph 9; and Joined Cases 144/87 and 145/87 *Berg and Busschers* [1988] ECR 2559, paragraph 13.

42 — In the words of O'Leary, S., op. cit., pp. 242-243, '[t]he purpose of the Directive was to ensure that the rights of employees, in the event of a change of employer, were safeguarded. However, the Preamble also made clear that one of the principal reasons for the introduction of a minimum level of employment protection at EC level was the fear that disparities in employment protection legislation between Member States might have a deleterious effect on the transfers and mergers which it was the common market's aim to bring about as a result of greater economic integration. Thus, the Directive reflected the dual economic and social aims that characterised much of the Community's Social Action Programme. Like Article 141 EC …, Directive 77/187 [now Directive 2001/23] reflected both the Community's attempts to ameliorate "the unacceptable by-products of growth" and its intention to eliminate distortions of competition.'

43 — COM(74) 351 final, of 29 May 1974.

44 — In the explanations accompanying its proposal (p. 8), the Commission stated that '[i]f the worker does not wish to continue the employment relationship with the transferee because a merger or takeover has led to some essential change in his terms of employment, it seems only fair, as provided for in Article 3, that the worker should be treated as if his dismissal was due to the action of his employer. *The legal consequences involved, such as severance payment, compensation, etc., should again be prescribed by the laws, regulations and administrative provisions of the Member States*' (emphasis added).

is struck by leaving the system of compensation to national law. Directive 2001/23, by imposing minimum standards while allowing higher levels of protection in the national sphere, produces a sensible solution. On the one hand, it offers the employee the certainty that any deterioration in working conditions will be compensated by the transferee. On the other hand, it allocates the task of specifying the detail of the financial content of the compensation to national law. Bearing in mind the goal of Directive 2001/23, I am convinced that Article 4(2) *attributes* responsibility to the employer, rather than defining the employer as the party to whom responsibility accrues.

3. Taking directives seriously

52. There are further reasons, of a systemic nature, for interpreting Article 4(2) restrictively. Community social law as a whole reveals the intentions of the institutions at the time when Directive 2001/23 was adopted, because in cases where they intended to determine the compensation regime which would be applicable to the present applicant they have simply done so, without further ado. The inference *a contrario* is, therefore, that Article 4(2) merely assigns responsibility to the employer but does not define it.

53. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, [45] which recasts most of the Community anti-discrimination legislation, requires Member States to have in place mechanisms for compensating victims of discrimination (Article 18). In principle, it seeks the introduction of such measures as are 'necessary to ensure … compensation or reparation', provided that these are 'real and effective' and 'dissuasive and proportionate'. It can be seen that the provision introduces a clear Community dimension into national law, particularly in the fields of employment law and the law of damages. [46] Likewise, Directive 2006/54 does not merely attribute responsibility to the employer, but also prohibits the fixing of upper limits, with the aim of safeguarding the

45 — Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 (OJ 2006 L 204, p. 23).

46 — This provision systematises the earlier Article 1(5) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) amending Article 2(6) of Directive 76/207. It is worth noting that the final version of this provision is even more protective of victims of discrimination. The Commission's proposal made no reference to the real, effective and dissuasive nature of the compensation but simply prohibited any limit being set on the amount and guaranteed interest on late payment. However, in the Commission's comments on the proposal, the intention to influence the content of the responsibility seems clear: '… as regards the right of a victim of discrimination to compensation which can guarantee real and effective judicial protection, has a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained.' (COM(2000) 334 final, point 45, p. 11).

rights of victims of discrimination.[47] This is quite different from the position in the case of Article 4(2) of Directive 2001/23.

54. Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services,[48] offers a similar solution, in that Article 8, using terms resembling those of Directive 2006/54, requires Member States to introduce 'such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination …, in a way which is dissuasive and proportionate to the damage suffered.' That provision not only imposes a positive obligation on national law, but also a negative one, indicating in its final words that '[t]he fixing of a prior upper limit shall not restrict such compensation or reparation'.

55. The remainder of the harmonising social legislation is silent as to the duty to compensate inherently attaching to breach on the part of the employer. Directive 2001/23 mentions it, but not in such clear terms as Directives 2004/113 and 2006/54, which leads me to think that Article 4(2) of Directive 2001/23 strikes a happy medium by introducing a criterion of attributing responsibility but not a separate body of rules relating to that responsibility. It only remains to add — without wishing to detract from what I have said at points 25 to 29 of this Opinion — that, as stated there, Articles 3 and 4 of Directive 2001/23 are mutually complementary and, in my view, this justifies adjusting their interpretation, where they fall to be applied.

4. The exception to the general rule of attribution: an element of gradation

56. I have argued that termination of a contract of employment where Article 3(3) of Directive 2001/23 has been *complied with* should not be viewed in the same way as termination because of a *breach* of that provision. There is a difference in the

47 — This provision gives legislative expression to case-law of the Court, specifically to Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 23; Case 79/83 *Harz* [1984] ECR 1921, paragraph 26; Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 34; and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraph 40. On this method of compensation in the area of equality, see McCrudden, C., 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements', in Hepple, B. and Szyszczak, E., *Discrimination: Limits of Law,* Mansell, London, 1992.

48 — Council Directive 2004/113/EC of 13 December 2004 (OJ 2004 L 373, p. 37).

conduct of the employer which, depending on the circumstances, may demand a slightly different interpretation of Article 4(2) of Directive 2001/23. That is a consequence of the case-law of the Court, which requires the national courts to provide a certain level of procedural and substantive protection in accordance with the principles of effectiveness and equivalence, even in areas where there is minimum harmonisation. [49] Thus, where Article 3 has been complied with by the transferee at the time the transfer takes place, but the employment contract is terminated under Article 4(2), the responsibility is subject to the general rules of the relevant national employment law. In the contrary case, it is my understanding that Article 4(2), while not specifying a particular compensation regime, requires the Member State to treat the case on an individual basis, also under its domestic law.

57. The Court should not indicate to the Korkein oikeus the most appropriate compensation regime to apply to Ms Juuri's claims. However, it should give the national court some direction and indicate to it that Directive 2001/23 creates two levels of responsibility. The Community legal order is not concerned with the actual financial outcome, but it is concerned if clearly distinct situations give rise to identical legal effects. [50] It is for the national court to devise the best solution to the issue of responsibility, provided that it makes the necessary adjustments based on Article 3, read in conjunction with Article 4(2).

58. In short, the reply to Question 2 should be that Article 4(2) of Directive 2001/23 is to be interpreted as a provision attributing responsibility. The Community legal order nevertheless requires such responsibility to be gradated, according to whether Article 3 of Directive 2001/23 was complied with. To that end, the national court should apply the factors which aggravate or mitigate responsibility under national law.

49 — Ever since Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 to 21, Community law has included a measure of procedural protection at the national level, as a consequence of the fundamental right to effective judicial protection.

50 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61; and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31.

VIII — Conclusion

59. In the light of the foregoing, I suggest that the Court of Justice give the following reply to the questions referred by the Korkein oikeus for a preliminary ruling:

'(1) Article 3(3) 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 precludes the terms and conditions agreed in a collective agreement from ceasing to have effect upon its expiry, where the timing of the transfer of the undertaking coincides with that of the expiry and where the transferor and the transferee act in circumvention of the law. It is for the national court to determine whether the synchronisation of the date of the transfer with the date of the expiry of the collective agreement constitutes circumvention of the law.

(2) Article 4(2) of Council Directive 2001/23 is to be interpreted exclusively as a provision attributing responsibility. The Community legal order nevertheless requires such responsibility to be gradated, according to whether Article 3 of Directive 2001/23 was complied with. To that end, the national court should apply the factors which aggravate or mitigate responsibility under national law.'