



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 3 June 2014¹

Case C-328/13

Österreichischer Gewerkschaftsbund
v
Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und
Schiffahrtsunternehmen

(Request for a preliminary ruling from the Oberster Gerichtshof, Austria)

(Social policy — Directive 2001/23/EC — Safeguarding of employees' rights in the event of transfers of undertakings — Article 3(3) — Termination, prior to the transfer, of the collective agreement applicable to the transferor and transferee — Continuing effect of the collective agreement — Effects on the transferee)

1. The Austrian Oberster Gerichtshof (Supreme Court) has referred to the Court of Justice for a preliminary ruling two questions concerning the interpretation of Article 3(3) of Directive 2001/23/EC.² In particular, the referring court asks whether a collective agreement which remains in force conditionally, over a period of time, after it has been terminated (collective agreement with 'continuing effect') constitutes a 'collective agreement' within the meaning of that directive. Underlying the question is the fact that, in Austria, such collective agreements with 'continuing effect' remain in force until either the conclusion of an individual agreement between the employer and the employees or the conclusion of a new collective agreement.

2. It is accepted that employees are entitled under Directive 2001/23 to the maintenance of their terms and conditions of employment when there is a transfer of an undertaking. Accordingly, it is of crucial importance to clarify whether a collective agreement with continuing effect, as defined above, is a natural continuation of a pre-existing collective agreement or whether, on the other hand, it must be treated as a new collective agreement, which would make it impossible to continue to observe the terms and conditions of employment previously provided for in the earlier collective agreement.

¹ — Original language: Spanish.

² — Council Directive of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

I – Legal framework

A – EU law

3. Directive 2001/23 lays down common rules governing the rights and obligations of the transferor undertaking and that undertaking's employees in the case of a transfer. For the purposes of the present proceedings, Article 3(1), (3) and (4) are particularly relevant:

‘Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

...

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.

4.

- (a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.
- (b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).'

4. The provisions cited above do not preclude the Member States from adopting measures providing for greater protection for employees, as Article 8 of Directive 2001/23 stipulates:

‘Article 8

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.’

B – *National law*

5. Paragraph 8 of the Law governing employment relationships and the labour structure of undertakings (Arbeitsverfassungsgesetz, BGBl. 22/1974) defines the parties to a collective agreement in the following terms:

‘Within the geographical, material and personal scope of a collective agreement, unless provision is made to the contrary, the following shall be parties:

1. Employers and employees who were parties to the agreement at the time of its adoption or became parties subsequently;

2. Employers to which an undertaking or part of an undertaking is transferred by one of the employers referred to in subparagraph 1.’

6. Paragraph 13 of that law provides for the possibility that a collective agreement will continue to take effect after it has been terminated, subject to the following conditions:

‘The legal effects of the collective agreement shall continue after its termination in respect of employment relationships which were covered by it immediately before its termination unless a new collective agreement takes effect in respect of those employment relationships or a new individual agreement is concluded with the employees concerned.’

7. Paragraph 4(1) of the Law on the adaptation of the provisions governing contracts of employment (Arbeitsvertragsrechtsanpassungsgesetz, BGBl. 459/1993) transposes Article 3(3) of Directive 2001/23 in the following terms:

‘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.’

II – **The facts**

8. The Wirtschaftskammer Österreich, Fachverband der Autobus-, Luftfahrt- und Schifffahrtsunternehmen (‘Wirtschaftskammer’) and the Österreichischer Gewerkschaftsbund (‘Gewerkschaftsbund’) negotiated and concluded, on behalf of an undertaking belonging to an air transport group, a collective agreement applicable to all the undertakings in the group which do not operate solely regional transport (‘the collective agreement for the parent company’). In addition, the Wirtschaftskammer and the Gewerkschaftsbund concluded another collective agreement applicable only to a subsidiary of the group (‘the collective agreement for the subsidiary company’).

9. On 30 April 2012, as a result of the serious losses sustained by the group, the parent company’s management board decided to transfer the airline operations to the subsidiary company. To that end, there was a transfer of an undertaking to the subsidiary with the aim of making the employees involved in the airline operations subject to the less favourable terms and conditions of employment under the collective agreement applying to that subsidiary.

10. With effect from the date of the transfer, the Wirtschaftskammer terminated the collective agreement for the parent company. In accordance with Paragraph 13 of the Arbeitsverfassungsgesetz, the terminated agreement continued to have the same effects as it had prior to termination — the so-called ‘continuing effect’ of the agreement, which continues over a period of time until the conclusion of a new collective agreement or an express agreement between the parties.

11. Following the transfer of the undertaking and the termination of the collective agreement, the new employer began unilaterally applying company guidelines in accordance with which the conditions relating to the salaries of the transferred employees became significantly less favourable. According to the order for reference, employees who joined the undertaking before 1 April 2004 had their salaries reduced by between 40% and 54%, although Wirtschaftskammer disputes those figures.

12. The Gewerkschaftsbund, representing the transferred employees, does not agree with the subsidiary's decision and claims that the effects of the terminated agreement should continue as a result of its continuing effect. However, the Wirtschaftskammer, representing the subsidiary, submits that the agreement with continuing effect is not a 'collective agreement' within the meaning of Article 3(3) of Directive 2001/23 or Paragraph 4(1) of the Arbeitsvertragsrechtsanpassungsgesetz. This is the subject-matter of proceedings before the Austrian Oberster Gerichtshof, which have, in turn, given rise to the present request for a preliminary ruling.

III – The request for a preliminary ruling and the procedure before the Court of Justice

13. The request for a preliminary ruling from the Oberster Gerichtshof was received at the Court Registry on 17 June 2013. The following questions are raised:

'Is the wording of Article 3(3) of Directive 2001/23, according to which the "terms and conditions" agreed in any collective agreement and applicable to the transferor must continue to be observed "on the same terms" until the "date of termination or expiry of the collective agreement", to be interpreted as also covering terms and conditions laid down by a collective agreement which have continuing effect indefinitely under national law, despite the termination of the collective agreement, until another collective agreement takes effect or the employees concerned have concluded new individual agreements?

Is Article 3(3) of Directive 2001/23 to be interpreted to the effect that "application of another collective agreement" of the transferee is to be understood as including the continuing effect of the likewise terminated collective agreement of the transferee in the abovementioned sense?

14. Written observations were submitted by the parties to the main proceedings, the Governments of the Federal Republic of Germany and the Hellenic Republic, and the Commission.

IV – Analysis

A – Admissibility

15. The Wirtschaftskammer has raised a number of pleas contesting the admissibility of the request for a preliminary ruling from the Oberster Gerichtshof.

16. First, the Wirtschaftskammer submits that the conditions laid down in Article 267 TFEU are not satisfied, since the questions raised by the referring court do not concern either the interpretation or the validity of Directive 2001/23, but rather its application. Secondly, the Wirtschaftskammer submits that the referring court is unable to assess the facts or to guarantee the *inter partes* principle, which means that it does not have the status of a 'court or tribunal'. Thirdly, the Wirtschaftskammer submits that the questions formulated are hypothetical and are not relevant to the outcome of the proceedings.

17. As regards the assertion that the questions formulated concern the application rather than the interpretation of Directive 2001/23, I believe that this plea is unfounded. The questions formulated by the Oberster Gerichtshof unequivocally raise an issue of interpretation, namely that of Article 3(3) of the directive. The referring court is uncertain whether the concept of ‘collective agreement’ referred to in that provision also encompasses collective agreements with so-called ‘continuing effect’. This is a question the scope of which is clearly limited to the interpretation of the European Union provision, a task which falls within the jurisdiction to give preliminary rulings conferred on the Court of Justice by Article 267 TFEU.

18. As regards the argument that the referring court is unable to assess factual material and that there is the risk of infringement of the *inter partes* principle in the main proceedings, I believe that this is also unfounded. The Court previously had occasion to examine in *Österreichischer Gewerkschaftsbund*³ whether, in the exercise of its jurisdiction to give advisory opinions on employment matters, the Oberster Gerichtshof acted as a ‘court or tribunal’ within the meaning of Article 267 TFEU. Admittedly, in that case the Court of Justice did not refer expressly to the fact that the referring court is unable to assess facts or to the fact that the *inter partes* principle is limited. However, I do not believe that those two features of the proceedings justify a different approach to the one taken by the Court in that case in 1998.

19. It is accepted that the Court has given a very broad interpretation of the criteria required in order for a court or tribunal to seek a preliminary ruling under Article 267 TFEU. The aim of that approach is simply to ensure maximum uniformity in the interpretation of EU law, together with an effective guarantee of the rights which EU law confers on individuals. In his Opinion in *De Coster*, Advocate General Ruiz-Jarabo Colomer set out clearly the reasons of judicial policy on which that approach to the preliminary-ruling jurisdiction laid down in Article 267 TFEU is founded.⁴

20. As the Court has previously had occasion to declare, the requirement that the procedure based on Article 267 TFEU must be *inter partes* is aimed at ensuring that there is a *minimum exchange of argument* between the parties to the proceedings so that the request for a preliminary ruling accurately reflects the uncertainty that has arisen in the course of the proceedings.⁵ That requirement of a minimum exchange of argument led the Court to recognise the jurisdiction to seek preliminary rulings of, *inter alia*, the German Federal Public Procurement Awards Supervisory Board⁶ and the Spanish economic administrative courts, both bodies in relation to which the nature of the *inter partes* principle differs from that in ordinary judicial proceedings.

21. Accordingly, the fact that both parties to the proceedings before the Oberster Gerichtshof, in a procedure for an advisory opinion on an employment matter of the present kind, have had the opportunity to submit written observations on equal terms is sufficient for the Court to find that the requirement that the main proceedings must be *inter partes* is satisfied. The argument put forward by the Wirtschaftskammer, to the effect that the facts included in the order for reference bear no relation to the actual facts, without it being possible, according to the Wirtschaftskammer, for those facts to be contested in the main proceedings, does not call into question the status of the Oberster Gerichtshof as a court or tribunal within the meaning of Article 267 TFEU.

3 — *Österreichischer Gewerkschaftsbund*, C-195/98, EU:C:2000:655.

4 — Opinion in *De Coster*, C-17/00, EU:C:2001:366, points 73 and 74.

5 — See *Corsica Ferries*, C-18/93, EU:C:1994:195, paragraph 12; *Job Centre*, C-111/94, EU:C:1995:340, paragraph 9; and *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 31; see also the orders in *Borker*, 138/80, EU:C:1980:162, paragraph 4, and *Greis Unterweger*, C-318/85, EU:C:1986:106, paragraph 4.

6 — *Dorsch Consult* (EU:C:1997:413), paragraph 31; *Pardini*, C-338/85, EU:C:1988:194; and *Corbiau*, C-24/92, EU:C:1993:118.

22. The third and final plea concerns the allegedly hypothetical nature of the questions referred. This plea is based on the fact that the referring court relies in its assessment on facts the veracity of which the Wirtschaftskammer calls into question, and on the advisory, non-binding nature of the Oberster Gerichtshof's decisions in proceedings for an advisory opinion on an employment matter.

23. I do not believe that this plea should be upheld either. The case-law of the Court categorically states that a request for a preliminary ruling will be inadmissible if 'it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'.⁷ Those conditions have always been interpreted strictly.

24. From that perspective, it can hardly be claimed that the questions referred for a preliminary ruling by the Oberster Gerichtshof bear no relation to the facts, are hypothetical or do not provide the necessary factual material.

25. On the contrary, the fact that the proceedings of which the Oberster Gerichtshof is seised are advisory in nature under no circumstances means that the request for a preliminary ruling is not related to a dispute. The Court previously had occasion to examine the admissibility of a request for a preliminary ruling made in the same type of national proceedings in another case involving the Österreichischer Gewerkschaftsbund, and the nature of the proceedings was not a sufficient reason to find that the request for a preliminary ruling was inadmissible.

26. Moreover, it is quite clear that the questions raised in the present proceedings are not hypothetical. There is actually a dispute between an undertaking and its employees and that dispute has given rise to two sets of proceedings, including the advisory proceedings in which the present request for a preliminary ruling has been made.

27. Finally, it should be added that, even if it were accepted that certain facts on the basis of which the request for a preliminary ruling is made are not accurate, that is not a sufficient reason, in this specific case, to find that the questions do not contain sufficient factual material to enable the Court to give a ruling. The exact amount of the reduction in salary suffered by the employees in the present action is not a relevant factual matter for the purposes of answering the questions referred. In these preliminary-ruling proceedings, the Court has been asked solely about the effects of a collective agreement with continuing effect and whether it falls within the scope of Directive 2001/23, a question of interpretation for the purposes of which the exact amount of the salary reduction does not affect in any way the position which the Court will take.

28. On those grounds, I propose that the Court should declare that the request for a preliminary ruling is admissible.

B – *The substance*

1. Preliminary remarks

29. As a preliminary point, I should observe at this juncture that it is not necessary to reply to both of the questions submitted by the referring court. The reply to the first question indirectly answers the second question, so that it will suffice to provide a detailed reply to the first question, while of course taking account of the concerns which prompted the second question.

⁷ — *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 27; *Della Rocca*, C-290/12, EU:C:2013:235, paragraph 29; and *Marquez Samohano*, C-190/13, EU:C:2014:146, paragraph 35.

30. In general terms, the Wirtschaftskammer claims that a collective agreement which remains effective under the conditions laid down in the national legislation (an agreement with ‘continuing effect’) is not a ‘collective agreement’ under Austrian employment law and, accordingly, nor is it a collective agreement within the meaning of Article 3(3) of Directive 2001/23. In support of its position, the Wirtschaftskammer sets out the position of some academic legal writers who believe that the continuing effect of a collective agreement does not mean that the agreement continues to exist, although it admits that this interpretation is not unanimous. In addition, the Wirtschaftskammer states that, in the present case, the continuing effect began only once the transfer of the undertaking had taken place, thereby precluding the application of Article 3(3) of Directive 2001/23, which relates only to collective agreements already in existence on the date of the transfer.

31. The Gewerkschaftsbund, the German Government, the Greek Government and the Commission have all put forward the contrary view. The German Government and the Commission submit that it is for national law to determine whether a collective agreement exists, notwithstanding that the question of the effects of the agreement in the context of the transfer of an undertaking is a matter governed by EU law. From that perspective, the continued effect of a terminated collective agreement is a device which, in accordance with the aim pursued by Article 3(3) of Directive 2001/23, must be deemed to fall within the scope of that provision. That approach means that, in so far as it extends the effects of the terminated agreement in accordance with national law, a collective agreement with continuing effect constitutes a continued agreement which the transferee must respect, at least within the minimum limits set by Article 3(3) of Directive 2001/23.

32. The Greek Government reaches the same conclusion as the Commission and the German Government, but it draws attention to the fact that the objective of the directive is to maintain certain effects over a period of time, irrespective of whether the formal source of those effects is an ordinary collective agreement or a collective agreement with continuing effect.

33. As I shall explain below, it is my view that Directive 2001/23 requires Member States, where there is a transfer of undertakings, to maintain the effects of a collective agreement even where those effects are the result of a national provision which extends them until the conclusion of a new collective agreement, or until the conclusion of bilateral agreements between the parties. Like the Commission, the German Government and the Greek Government, I believe that this outcome is the most consistent with the objective of the directive, which is to strike a balance between the undertaking’s interests and the employees’ interests during a transfer of undertakings, a situation in which employees are placed in a vulnerable position which the directive seeks to rectify.

2. The concept of ‘collective agreement’ in Article 3(3) of Directive 2001/23

34. In order to deal with the question referred to the Court by the Oberster Gerichtshof, it is necessary, first, to determine the scope of Article 3(3). Essentially, where that provision refers to a ‘collective agreement’, is this an autonomous concept of EU law or, on the other hand, is it a concept which the Member States are responsible for defining?

35. It is settled case-law that the concepts used in EU provisions are, as a general rule, autonomous. The Court has held as much in the majority of cases, with the legitimate aim of securing an interpretation of the EU provisions which is as uniform as possible.⁸ Only in cases where the EU act makes an express reference to the law of the Member States or where it is not possible to give a uniform interpretation of the term concerned will the Court refrain from delivering an autonomous interpretation.

⁸ — *Ekro*, 327/82, EU:C:1984:11, paragraph 11; *SENA*, C-245/00, EU:C:2003:68, paragraph 23; *A*, C-523/07, EU:C:2009:225, paragraph 34; and *Padawan*, C-467/08, EU:C:2010:620, paragraph 32.

36. In the case of Directive 2001/23, and its predecessor, Directive 77/187, the interpretation of autonomous concepts is of a particular nature, as both measures have effected a partial rather than a complete harmonisation of the subject-matter. The Court has held on many occasions, starting in 1985 in *Mikkelsen*, that Directive 2001/23, like its predecessor, achieved only *partial harmonisation* and is not ‘intended to establish a uniform level of protection throughout the Community on the basis of common criteria’.⁹ Accordingly, ‘the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned’.¹⁰

37. The partial nature of the harmonisation is clear, for example, in the treatment afforded to the definition of contracts of employment. In *Wendelboe*, the Court held that ‘the existence or otherwise of a contract of employment or an employment relationship on the date of the transfer within the meaning of Article 3(1) of the directive must be established on the basis of the rules of national law, subject however to observance of the mandatory provisions of the directive’.¹¹ Therefore, the directive does not define how the employment relationship is *formed*, a matter which is the responsibility of national law, and therefore national courts. However, the directive does deal with ensuring that there are common, minimum rules relating to the *effects* of that employment relationship during the transfer of an undertaking.

38. That distinction between the formation and the effects of the employment relationship makes it possible to explain the subject-matter of Directive 2001/23, in particular that of Article 3 thereof, and also the Court’s case-law on the subject. The Court’s judgments make clear first and foremost the concern to afford a minimum level of common treatment to the consequences arising from a transfer of undertakings, without unnecessarily having to create typical autonomous concepts of employment law. In short, the Court focuses on the most practical aspects of Directive 2001/23, without concentrating excessively on conceptual matters. As I stated above, support for that approach is found in the provisions of the directive.

39. The first aspect of Directive 2001/23 which warrants attention is its title. That does not refer to the categories of employment contract or collective agreement but simply to ‘employees’ rights’, while also making clear that the object of the measure is the ‘safeguarding’ of those rights. Likewise, Chapter II of Directive 2001/23 is entitled ‘Safeguarding of employees’ rights’, thus recalling that the aim of the directive is to safeguard working conditions during the transfer of an undertaking; in other words, the *effects* which that transfer has on employees’ rights.

40. Article 3 of the directive further bolsters that view by drawing attention to the importance of the ‘rights and obligations’ of employees, while leaving in the background the source of those rights and obligations. In that connection, in Article 3(1) the legislature refers to rights and obligations arising ‘from a contract of employment’ or ‘from an employment relationship’. The decisive fact is the existence of a right or an obligation, but not the formal origin of that right or obligation.

41. That approach must also be applied to collective agreements. Article 3(3) of Directive 2001/23 uses a similar scheme to that of Article 3(1), providing first that the ‘terms and conditions’ arising from a collective agreement must continue to be observed. Once again, the directive draws attention to the most significant aspect of Chapter II, namely the ‘safeguarding’ of rights. The specific origin of those rights is of secondary importance.

9 — C-105/84, EU:C:1985:331, paragraph 16.

10 — *Daddy’s Dance Hall*, C-324/86, EU:C:1988:72, paragraph 16; *Martin and Others*, C-4/01, EU:C:2003:594, paragraph 41; and *Juuri*, C-396/07, EU:C:2008:656, paragraph 23.

11 — *Wendelboe*, C-19/83, EU:C:1985:54, paragraph 16.

42. The priority afforded to the effects of employees' rights, rather than to the creation of those rights, is also clear from the objectives of Directive 2001/23. Recital 2 in the preamble to that directive refers to the frequency and importance, in economic trends, of changes in the structure of undertakings, which include transfers of businesses between undertakings.¹² As recital 3 states, the EU legislature took the view that it was necessary 'to provide for the protection of employees in the event of a change of employer', adding that this was '*in particular, to ensure that their rights are safeguarded*'.

43. Therefore, in accordance with the foregoing considerations, I believe that Directive 2001/23 does not contain an autonomous concept of 'collective agreement'. In line with the *Wendelboe* judgment, I believe, as the Commission has argued, that the existence or otherwise of a collective agreement must be established on the basis of the rules of national law. Directive 2001/23 is concerned with securing, in the event of the transfer of an undertaking, *the safeguarding of employees' rights*, in this case the rights arising from collective agreements, regardless of what the formal source of those rights is. The rights and obligations of employees are established in accordance with national law, and then Directive 2001/23 seeks to ensure that the terms and conditions of employment continue to be observed while the transfer of an undertaking takes place.¹³

44. Consequently, what the Court is required to determine is whether 'the terms and conditions agreed in any collective agreement', referred to in Article 3(3) of the directive, include the terms and conditions arising from a collective agreement with continuing effect, a question which I shall examine in the next section.

3. The terms and conditions arising from a collective agreement with continuing effect

45. It is apparent from the case-file that, as far as Austria is concerned, a collective agreement with continuing effect is a *weaker* and *temporary* extension of the effects of a pre-existing agreement. It is weaker in so far as its provisions may be waived individually by agreement between the parties. It is temporary because it ceases to apply when a new collective agreement is concluded.

46. However, the most prominent feature of a collective agreement with continuing effect is its legal framework. In Austria, as also appears to be the case of a number of Member States of the EU, a collective agreement is not converted into an agreement with continuing effect as a result of a decision of one or both parties to the employment relationship. A collective agreement becomes one with continuing effect because the legislature has expressly provided that, in exhaustively listed circumstances and with a view to maintaining legal certainty in the employment relationship, the agreement will continue to be observed on a weaker, temporary basis.¹⁴

47. Accordingly, when they conclude a contract of employment subject to a collective agreement, the parties to the employment relationship are aware that continuing effect is not a possibility arising from the terms of the collective agreement itself (or from the agreement between the parties) but rather an option specifically provided for by the national legislature and intended to ensure the stability of the employment relationship over time. As I stated above, continuing effect is intended solely to ensure that, in the interests of legal certainty, the collective agreement continues to be observed on a weaker, temporary basis. It is, therefore, a technique of maintaining in force the rights and obligations which the collective agreement attributes to the employees and the employer.

12 — 'Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers.'

13 — Rodière, P., *Droit social de l'Union Européenne*, 2nd ed., LGDJ, Paris, p. 432.

14 — Paragraph 13 of the Arbeitsverfassungsgesetz, BGBl. 22/1974.

48. Viewed from that perspective, the question of whether or not a collective agreement with continuing effect ‘*is*’, formally, a collective agreement under national law is not decisive for the purposes of Directive 2001/23. Ultimately, the directive seeks to ensure that employees’ terms and conditions of employment continue to be specifically observed for a specific period of time when there is a transfer of an undertaking. As I have already observed, it is not the source of the rights but rather their effects which explain the provisions of Article 3 of Directive 2001/23.

49. The rights and obligations of employees — regardless of what those rights and obligations are and of whether they are provided for in a contract of employment or a collective agreement — must continue to be observed under the conditions laid down in Directive 2001/23. However, where national law provides that those rights and obligations are to continue to be observed, albeit in the weaker, temporary form to which I have referred, in order to prevent a legal vacuum, I believe that, in line with Chapter II of Directive 2001/23, the continued observation of those rights and obligations must be interpreted as a natural extension of the rights and obligations previously acquired by the employee. The primary objective of continuing effect is that of a guarantee; it simply maintains the status quo in the interests of legal certainty. In such cases, the rights and obligations arising from a collective agreement with continuing effect, a mere extension of the pre-existing situation, are ‘the terms and conditions agreed’.

50. That interpretation is also consistent with the case-law of the Court. In *Werhof*, the Court rejected the continuing effect of a ‘dynamic’ contractual clause referring to future collective agreements, on the grounds that ‘Directive [2001/23] was not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements’.¹⁵ In other words, Directive 2001/23 is not intended to perpetuate a contractual situation, particularly where the situation perpetuated encompasses future rather than current rights. That is the kind of continuation of effects which upsets the balance of the contractual relationship between employer and employee, something which is prohibited by Directive 2001/23 and the case-law.

51. The existence of an express statutory provision, which is in force when the contract is concluded and stipulates that the rights and obligations established in the collective agreement are to continue to be observed in a weaker, temporary form in the interests of legal certainty, is far from being a ‘mere expectation’ or a ‘hypothetical advantage flowing from future changes to collective agreements’.¹⁶ In those circumstances, the parties to an employment relationship do not include in their assets a mere expectation but rather a real and genuine advantage: the certainty that, unless there is a new collective agreement or express agreement, the collective agreement will continue to take effect, albeit in the form indicated.

52. That finding could be countered by the literal argument to the effect that the continued observance of the terms and conditions agreed in a collective agreement is, in accordance with Article 3(3) of Directive 2001/23, limited to last ‘until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement’. To my mind, however, that provision refers to cases of termination or expiry in the strict sense, where national law does not provide for any predetermined form of agreement in the interests of legal certainty. However, in situations where national law has provided expressly, prior to the termination or expiry of a collective agreement, for the continuation of that agreement, Article 3(3) must be interpreted in such way that it secures a balance in the contractual relationship, not only with regard to the subject-matter of both parties’ obligations but also with regard to their period of validity.

¹⁵ — *Werhof*, C-499/04, EU:C:2006:168, paragraph 29.

¹⁶ — *Ibid.*

53. The need for a balance between the employer and the employee is a concern which is found in the provisions of Directive 2001/23 and in the case-law.¹⁷ It is precisely in the interests of that balance that the national provision at issue has sought to prevent the rupture of the legal framework provided for in a collective agreement governing the employment relationship. In so far as the conditions which I set out above are satisfied — in other words, predetermination by an express provision and the aforementioned continuing effect of the collective agreement — I believe that, far from upsetting the balance referred to above, it contributes to securing it.

54. In the interests of balance in the employment relationship, Directive 2001/23 has provided that Member States may limit the period during which the terms and conditions provided for in a collective agreement must continue to be observed, provided that that period is not less than one year. In those circumstances, it is reasonable for a collective agreement with continuing effect to secure the continued observance of the pre-existing terms and conditions, on the weaker, temporary terms set out above. The practice of each Member State where the concept of continuing effect exists will determine, in the light of experience in employment relationships, whether the continuing effect of a collective agreement should be limited in time. That is a matter which, naturally, falls to each Member State to decide.

55. Accordingly, I propose that the Court interpret Article 3(3) of Directive 2001/23 as meaning that the terms and conditions agreed in a collective agreement also include the terms and conditions which continue to be observed over a period of time as a result of a provision of national law preceding the termination of the collective agreement, pursuant to which the continuing effect of that collective agreement is ensured, in a weaker, temporary form, after it has been terminated.

V – Conclusion

56. In the light of the arguments set out, I propose that the Court reply in the following terms to the request for a preliminary ruling from the Oberster Gerichtshof:

Article 3(3) of Directive 2001/23 must be interpreted as meaning that the terms and conditions agreed in a collective agreement also include the terms and conditions which continue to be observed over a period of time as a result of a provision of national law preceding the termination of the collective agreement, pursuant to which the continuing effect of that collective agreement is ensured, in a weaker, temporary form, after it has been terminated.

¹⁷ — The Court has held that ‘Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other’ (*Alemo-Herron*, C-426/11, EU:C:2013:521, paragraph 25).