Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 29 March 2017 [1]

Case C-126/16.

Federatie Nederlandse Vakvereniging,
Karin van den Burg-Vergeer,
Lyoba Tanja Alida Kukupessy,
Danielle Paase-Teeuwen,
Astrid Johanna Geertruda Petronelle Schenk
v
Smallsteps BV
(Request for a preliminary ruling

from the Rechtbank MiddenNederland (District Court, Central Netherlands))

(Reference for a preliminary ruling — Directive 2001/23/EC — Safeguarding employees' rights in the event of transfers of undertakings — Article 5(1) — Exception in the event of bankruptcy or insolvency proceedings — 'Pre-pack' — Continuation of the undertaking's business)

1. In the present case, the Court is called on for the first time to examine the 'pre-pack' from an EU law perspective.

2. Although it may have different meanings depending on the legal order in which it is used, the term 'pre-pack' (an abbreviation of 'pre-packaged insolvency sale') generally refers to a transfer of the assets of an undertaking in difficulties (an assignment) which is prepared before the commencement of insolvency proceedings (typically, bankruptcy or liquidation) with the assistance of an administrator (in some jurisdictions, appointed by a court), and which is usually implemented immediately after the commencement of insolvency proceedings.

3. Initially developed in the United States and the United Kingdom, pre-pack then spread to a number of other Member States. Thus, more or less varied forms of pre-pack exist for example in Germany, France [2] and the Netherlands, the latter being the Member State from which the request for a preliminary ruling in the present case originates.

1 — Original language: French.

2 — For the Federal Republic of Germany, see '*Schutzschirmverfahren*', provided for in Paragraph 270b of the Insolvenzordnung (Insolvency Regulation). In France, the '*pre-pack cession*' (pre-pack assignment) was introduced by Article L611-7 of the code du commerce (Commercial Code).

4. The success of the pre-pack is part of a growing trend in modern insolvency law of favouring approaches which, unlike the traditional approach aimed at winding up the undertaking in difficulties, seek to turn the undertaking around, or at least save its units which are still economically viable.[3] In that context, the pre-pack, which is characterised by its informal elements (a preliminary extra-judicial phase) and formal elements (a phase which takes place within the insolvency procedure), provides undertakings with a flexible tool capable of resolving certain crisis situations quickly.

5. The present reference for a preliminary ruling, made by the Rechtbank Midden-Nederland (District Court, Central Netherlands), however, asks an important question relating to the fate of the workers of an undertaking (or part of an undertaking) subject to a pre-pack. More specifically, the referring court asks the Court of Justice, in essence, whether or not, in the context of a pre-pack, as has been developed in practice in the Netherlands, the scheme for the protection of employees in the event of a transfer of undertakings, initiated by Directive 2001/23/EC,[4] is to be applied.

6. In order to answer that question, the Court must interpret, for the first time, the exception to the applicability of Directive 2001/23 laid down in Article 5(1) of that directive. In interpreting that provision in the light of the case-law which it codifies, it will be necessary to find a fair balance between, on the one hand, the requirement not to undermine the use of legal instruments such as the pre-pack which pursues the 'laudable' aim of saving units which are still economically viable and, on the other, the requirement not to circumvent, through the use of such instruments, the protection of employees guaranteed by EU law.

I. **Legal context**

A. **EU law**

7. According to recital 3, the aim of Directive 2001/23, which repealed and replaced the old Directive 77/187/EEC,[5] is to protect workers by ensuring that their rights are safeguarded in the event of a transfer of undertakings.

8. Under Article 1(1)(a), Directive 2001/23 applies to 'any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger'.

9. Directive 2001/23, in essence, makes provision for three types of protection for employees.

10. First, it ensures that the contract of employment continues in the event of a transfer of an undertaking. Thus, according to the wording of Article 3(1) of that directive, 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, to be transferred to the transferee'.

11. Secondly, under Article 4(1) of Directive 2001/23, the transfer of an undertaking 'does not in itself constitute grounds for dismissal by the transferor or the transferee'. The second sentence of that paragraph stipulates that 'this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'.

3 — That trend has been reflected recently in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015, on insolvency proceedings (OJ 2015 L 141, p. 19). See, inter alia, recital 10 of that regulation.

4 — 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).

5 — Council Directive 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) ('Directive 77/187').

12. Thirdly, Article 7 of Directive 2001/23 lays down obligations, both on the part of the transferor and of the transferee, to inform and consult workers' representatives.

13. Article 5 of Directive 2001/23, however, makes provision for an exception to the applicability of Articles 3 and 4 of that directive. Article 5(1) provides:

'Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).'

14. Article 9(2) provides that 'where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority', a Member State may provide that certain aspects of the protection scheme referred to in Articles 3 and 4 of that directive will not apply.

15. Finally, under Article 5(4) of Directive 2001/23 'Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive'.

B. **Netherlands law**

16. The provisions under national law governing employees' rights in the event of a transfer of undertakings are Articles 7:662 to 7:666 and Article 7:670(8) of the Burgerlijk Wetboek (Civil Code, 'the BW').

17. More specifically, under Article 7:663 of the BW, 'the transfer of an undertaking entails the automatic transfer to the transferee of the employer's rights and obligations existing at that time, arising from a contract of employment related to that enterprise between the employer and an employee working in that undertaking'.

18. Article 7:666(1)(a) of the BW, however, makes provision for an exception and provides that 'Articles 7:662 to 7:665 and Article 7:670(8) shall not apply to the transfer of an undertaking where the employer is declared insolvent and the undertaking belongs to the insolvent estate'.

19. The Netherlands insolvency procedure is laid down in the Faillissementswet (Insolvency Law).

20. Since 2012, a number Netherlands courts [6] have, in certain cases, preceded the insolvency with a preparatory phase aimed at concluding a transfer of the undertaking's assets (the pre-pack). That preparatory phase is always initiated on the initiative of the undertaking in question, which asks the court to appoint a prospective insolvency administrator and a prospective supervisory judge. The transfer of the assets is prepared before the declaration of insolvency with the consent of the prospective insolvency administrator and implemented by him immediately after the declaration of insolvency.

6 — It is clear from the order for reference that the pre-pack is currently recognised only in the courts of Amsterdam, Rotterdam, Overijssel, Zeeland-West-Brabant, Gelderland, Oost-Brabant, the Hague and Noord-Nederland, and that the referring court does not recognise the procedure.

21. Currently in the Netherlands, neither the preparatory phase nor the pre-pack, as such, are regulated by statute, but rather stem from practice. A preliminary legislative proposal, entitled 'Law on the continuation of undertakings' is currently being debated before the Netherlands Parliament.[7]

II. **The dispute in the main proceedings and the questions referred for a preliminary ruling**

22. Until its insolvency, Estro Groep BV was the largest childcare company in the Netherlands. It had nearly 380 establishments in the entire territory of the Netherlands and employed around 3 600 workers. At the time of the facts at issue before the referring court, the principal shareholder in Estro Groep was the investor Bayside Capital.

23. In November 2013, it became clear that, without further financing, Estro Groep would no longer be in a position to meet its obligations for the summer of 2014.

24. In its search for financing, Estro Groep first of all consulted its lenders, its principal shareholders and other lenders in order to obtain further financing. Those consultations, known as 'Plan A', were, however, unsuccessful.

25. While the negotiations for Plan A were taking place, Estro Groep drew up another plan called 'Project Butterfly'. That plan made provision for a restart of a significant part of Estro Groep following a pre-pack. That restart was to take effect on the basis of three principles, that is to say, (i) restarting 243 centres out of 380, (ii) keeping nearly 2 500 employees in work out of a total of around 3 600, and (iii) continuing the service in July 2014.

26. Whilst implementing Project Butterfly, Estro Groep only contacted H.I.G. Capital, a sister company of its principal shareholder, Bayside Capital, as a potential buyer. No other potential option was explored.

27. On 5 June 2014, Estro Groep submitted an application to the rechtbank Amsterdam (District Court, Amsterdam) for the appointment of a prospective insolvency administrator. The administrator was appointed on 10 June 2014.

28. On 20 June 2014, a limited liability company, Smallsteps BV, was created in order to take over, as a restart undertaking on behalf of H.I.G. Capital, a large part of the childcare centres of Estro Groep as part of Project Butterfly.

29. On 4 July 2014, Estro Groep submitted an application to the rechtbank Amsterdam (District Court, Amsterdam) for a suspension of payments.

30. On 5 July 2014, that application was amended to an application for a declaration of insolvency in respect of Estro Groep. The declaration of insolvency was made on the same day.

31. Still on 5 July 2014, a contract of sale (the pre-pack) was signed by the insolvency administrator and Smallsteps by which Smallsteps purchased the undertaking comprising 250 Estro Groep establishments, and undertook to offer employment to nearly 2 600 Estro Groep employees on the day the company was declared insolvent.

7 — See https://zoek.officielebekendmakingen.nl/kst-34218-1.html. It is clear from the order for reference that that preliminary legislative proposal seeks, on the one hand, to contribute to the effective resolution of the insolvency and, on the other, to encourage the rapid recovery of the undertaking's viable units after the insolvency so as to make it possible to preserve the value of the business and jobs.

32. On 7 July 2014, the insolvency administrator dismissed all the Estro Groep employees. Smallsteps offered a new contract of employment to nearly 2 600 staff employed by Estro Groep, and in the end more than a thousand were dismissed.

33. The Federatie Nederlandse Vakvereniging ('FNV'), a Netherlands trade union organisation, and four joint applicants who worked in the centres taken over by Smallsteps, but who were not offered new contracts of employment after the insolvency, brought an action before the referring court. In that action, they primarily seek a declaration that Directive 2001/23 applies to the pre-pack concluded by Estro Groep and Smallsteps and that, therefore, those four joint applicants must be regarded as henceforth working for Samallsteps, as of right, whilst retaining their conditions of employment. In the alternative, they seek a declaration that Article 7:662 et seq. of the BW still applies given that the transfer of the undertaking took place before the date of the insolvency. Smallsteps is defending the applicants' claims.

34. In those circumstances, the Rechtbank Midden-Nederland (District Court, Central Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the Netherlands insolvency procedure, in the event of an assignment of the insolvent undertaking in a situation where the insolvency is preceded by a judicially-monitored pre-pack procedure, which is expressly aimed at securing the survival of (parts of) the undertaking, compatible with the objective and purport of Directive 2001/23, and is Article 7:666(1)(a) of the BW, in that light, (still) in conformity with the directive?

(2) Is Directive 2001/23 applicable in a case where the "prospective insolvency administrator" appointed by the Rechtbank acquaints himself, prior to commencement of the insolvency procedure, with the situation of the debtor and investigates the possibilities for a restructuring of the activities of the undertaking by a third party, and also prepares for acts which must be carried out shortly after the insolvency in order to enable the restructuring to take place by means of an asset transaction through which the undertaking of the debtor, or part thereof, will be transferred at the date of the insolvency or shortly thereafter, and those activities, in their totality or in part, are continued (virtually) without interruption?

(3) Does it make any difference in this regard whether the continuation of the undertaking is the primary objective of the pre-pack, or whether the (prospective) insolvency administrator's primary objective with the pre-pack and the sale of the assets in the form of a "going concern" immediately after the insolvency is to maximise the proceeds for all of the creditors, or that, in the context of the pre-pack, consensus on the transfer of assets (continuation of the undertaking) is achieved before the insolvency and its implementation is formalised and/or effected after the insolvency? And how should the matter be viewed if it is sought to secure both the continuation of the undertaking and the maximisation of proceeds?

(4) Is the date of the transfer of the undertaking for purposes of the applicability of Directive 2001/23 and of Article 7:662 et seq. of the BW arising from it, in the context of a pre-pack preceding the insolvency of the undertaking, determined by the actual consensus on the transfer of the undertaking achieved prior to the insolvency, or is that date determined by the point in time at which responsibility as employer for carrying on the business of the unit in question shifts from the transferor to the transferee?'

III. **Procedure before the Court**

35. The order for reference was received at the Court Registry on 26 February 2016. The FNV, Smallsteps, the Netherlands Government and the European Commission submitted their observations and attended the hearing which took place on 18 January 2017.

IV. **Analysis**

A. **First, second and third questions referred for a preliminary ruling**

1. ***Preliminary observations***

36. It is appropriate to examine the first three questions together. By those questions, the referring court essentially seeks to ascertain whether Directive 2001/23 may be applied in the event of a transfer of an undertaking as part of a pre-pack, as has been developed in practice in the Netherlands (second question) and whether, in such a context, the Netherlands insolvency procedure, and specifically Article 7:666 of the BW, as applied in practice, is consistent with the objective and purpose of that directive (first question). By its third question, the referring court is seeking to ascertain, in essence, whether the reply to those questions must differ depending on whether the main objective of the pre-pack is the continuation of the undertaking and/or maximising the proceeds of the assignment.

37. Those preliminary questions raise, first, the issue of the applicability of the exception laid down in Article 5(1) of Directive 2001/23 to transfers of undertakings as part of a pre-pack.

38. The parties which submitted observations to the Court take opposing positions in that regard. On the one hand, the FNV and the Commission submit that the procedure in which a pre-pack is concluded does not come under the derogation in Article 5(1) of Directive 2001/23. It follows that, inasmuch as Netherlands insolvency law does not make provision for the application to employees of the safeguards laid down in that directive in the event of an assignment of an undertaking as part of a pre-pack, that law is not consistent with the directive.

39. On the other, Smallsteps and the Netherlands Government, by contrast, maintain that a declaration of insolvency preceded by a preliminary phase aimed at concluding a pre-pack, such as the one which took place in the case of Estro Groep, does indeed come under Article 5(1) of Directive 2001/23, so that Article 7:666(1) of the BW, as applied in practice in the Netherlands, is indeed consistent with that directive.

40. I have already stated that the present case is the first opportunity for the Court to interpret Article 5 of Directive 2001/23 and that the introduction in paragraph 1 of that article of an express exception to the applicability of that directive represents the codification of case-law developed by the Court. In those circumstances, in order to be able to appreciate fully the scope of that provision, I consider it necessary to examine the principles developed by the Court in that case-law which concerns the old Directive 77/187, subsequently repealed by Directive 2001/23.[8]

8 — Directive 77/187 made provision for the same forms of protection for employees as those laid down in Directive 2001/23, but it did not make provision for an express exception to the applicability of that directive in the event of a transfer of the undertaking in the course of insolvency proceedings.

2. ***The Court's case-law on the applicability of a scheme for the protection of employees in the event of a transfer of the undertaking as part of a procedure laid down in the event of a company crisis***

41. For the first time, the Court was faced with the issue of the applicability of Directive 77/187 in the event of an assignment of an undertaking as part of an insolvency procedure, specifically liquidation proceedings, in the case giving rise to the judgment of 7 February 1985, *Abels*.[9]

42. In that judgment, having pointed out that the purpose of Directive 77/187 was to ensure that the restructuring of undertakings within the single market does not adversely affect workers,[10] the Court highlighted the specific nature of insolvency law. It thus made clear that that law is characterised by special procedures which are intended to balance various interests, in particular those of the different categories of creditors, and which involve at least a partial derogation from other provisions of a general nature, such as the provisions of social security law.[11]

43. As a result of those specific features, the Court held that Directive 77/187 did not apply 'to transfers of undertakings … taking place in the context of insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of the competent judicial authority',[12] whilst, however, giving Member States the freedom to apply, in full or in part, the principles of that directive on the basis of their domestic law alone.[13]

44. By contrast, the Court held in the same judgment that Directive 77/187 was applicable to a procedure such as the suspension of payments, despite the fact that that procedure shares some common characteristics with a liquidation procedure. The Court considered that the reasons for not having the directive apply in the case of insolvency proceedings were not valid for a procedure which takes place before the declaration of insolvency, involving more limited supervision by the court, and which was intended primarily to preserve the assets of the undertaking and, if possible, to keep the undertaking in business in the future.[14]

45. Subsequently, in the judgment of 25 July 1991, *d'Urso and Others*,[15] the Court expressly stated that the determining factor to be taken into consideration in order to establish the applicability of Directive 77/187 to a transfer of an undertaking as part of a creditors' arrangement procedure was that of the objective pursued by the procedure in question.[16]

46. On that basis, it considered that, if the aim of the procedure at issue in that action[17] was to *liquidate* the debtors' assets in order to satisfy collectively the creditors' claims, then the transfers effected under that legal framework were excluded from the scope of Directive 77/187. On the other hand, where the decree ordering the application of that procedure also decided to *keep* the

9 — 135/83, EU:C:1985:55.

10 — Judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraphs 14 and 18). In that regard, see also judgment of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraph 23).

11 — Judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraphs 15 to 17).

12 — Judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraphs 23 and 30). See also judgment of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraph 23).

13 — Judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraph 24).

14 — Judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraphs 28 and 29).

15 — C-362/89, EU:C:1991:326.

16 — Judgment of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraph 26). In that judgment, the Court also stipulated that, bearing in mind the differences between the legal systems of the Member States, the criterion of the extent of the court's supervision of the procedure did not, on its own, make it possible to determine the scope of Directive 77/187 (paragraph 25).

17 — The dispute in the main proceedings concerned the applicability of the protection provided under Directive 77/187 in the event of a transfer of an undertaking subject to an extraordinary administrative procedure for large undertakings in difficulties, as provided under Italian legislation applicable at the time. The Court held that Italian legislation in that area had different characteristics, depending on whether or not the decree ordering the compulsory administrative liquidation decided to keep the undertaking in business. See judgment of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraph 30).

undertaking in business, under the supervision of an auditor, the aim of that procedure was, in the first place, to ensure that the undertaking continued to trade. In such a case, the social and economic objectives thus pursued could not explain nor justify the circumstance that, when the undertaking is transferred, its employees lose the rights which the directive confers on them. [18]

47. The Court upheld that approach in the subsequent judgment of 7 December 1995, *Spano and Others*. [19] Having been called on to determine whether Directive 77/187 applied to the transfer of an undertaking which had been found to be in critical difficulties in accordance with the relevant Italian legislation, the Court first confirmed that the determining factor for establishing the applicability of that directive was the objective pursued by the procedure in question. Next, it pointed out that, under Italian legislation, the purpose of a declaration that an undertaking is in a critical situation is to enable the undertaking to retrieve its economic and financial situation, but above all to preserve jobs. Thus, given that the procedure at issue was designed to promote the continuation of the undertaking's business with a view to its subsequent recovery and, unlike liquidation procedures, did not involve any judicial supervision, or any measure whereby the assets of the undertaking were put under administration, or any suspension of payments, the Court held that the social and economic objectives of that procedure did not justify the circumstance that, in the event of a transfer, the undertaking's employees lost the rights which Directive 77/187 [20] conferred on them.

48. Finally, in the judgment of 12 March 1998, *Dethier Équipement*, [21] the Court, having been called on to determine whether Directive 77/187 applied to a transfer of an undertaking which was being wound up by the court under Belgian law, then developed its approach. First, it stipulated that, apart from the criterion of the purpose of the procedure, account also had to be taken of the form of the procedure in question, in particular in so far as it means that the undertaking continues or ceases trading, and also of the objectives of Directive 77/187. [22] In that action, the Court held that, although the aim of the procedure at issue was to liquidate the assets, the situation of an undertaking being wound up by the court displayed a number of significant differences from that of an undertaking subject to insolvency proceedings, [23] including as regards the appointment and functions of the liquidator. In particular, in the Belgian winding up procedure, unlike insolvency proceedings, the liquidator, although appointed by the court, was an organ of the company who sold the assets under the supervision of the general shareholders' meeting. In those circumstances, the Court held that the reasons which led it to exclude the application of Directive 77/187 in the event of insolvency might be absent in the case of an undertaking being wound up by the court, particularly in a case, such as the one pending before the national court, in which continuity of the business was assured when the undertaking was transferred. [24]

3. *The exception contained in Article 5(1) of Directive 2001/23*

49. Following the judgments which I have just examined, the EU legislature, in 1998, [25] inserted in Directive 77/187 the provision now contained in Article 5(1) of Directive 2001/23.

18 — Judgment of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraphs 31 and 32).

19 — C-472/93, EU:C:1995:421.

20 — Judgment of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421, paragraphs 24 to 30).

21 — C-319/94, EU:C:1998:99.

22 — Judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99, paragraph 25). See also judgment of 12 November 1998, *Europièces* (C-399/96, EU:C:1998:532, paragraph 26).

23 — Those details are summarised in detail in paragraph 9 of the judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99).

24 — Judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99, paragraphs 26 to 31). See also judgment of 12 November 1998, *Europièces* (C-399/96, EU:C:1998:532, paragraphs 31 and 32). In *Europièces*, the Court applied the criteria developed in the judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99) to the voluntary liquidation procedure under Belgian law.

25 — See Article 4a of Directive 98/50, cited in footnote 5 above.

50. That provision stipulates that, save where Member States provide otherwise, the protection scheme under Articles 3 and 4 of Directive 2001/23 does not apply to transfers of undertakings where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a public authority.

51. When it refers to proceedings 'which have been instituted with a view to the liquidation of the assets of the transferor' and which 'are under the supervision of a … public authority', that provision clearly reproduces the language used by the Court in the judgments, *Abels* and *d'Urso and Others*,[26] for insolvency.[27]

52. In those circumstances, there is no doubt, as has moreover been acknowledged by all the parties which submitted observations to the Court, that the exception in Article 5(1) of Directive 2001/23 must be interpreted in the light of the principles developed by the Court in the judgments examined in points 41 to 48 above.

53. It is clear from the examination of those judgments that, in order to establish whether or not the scheme for protecting employees provided for in Directive 77/187 — and now provided for in Directive 2001/23 — was applicable to a transfer taking place as part of a procedure for situations where the undertaking is in critical difficulties, the Court considered two criteria, that is to say, the *objective* of the procedure in question and the *form* of that procedure, whilst having regard to the purpose of that directive. More specifically, it is clear from the examination of the case-law that exclusion from that protection scheme is justified only if the aim of the procedure at issue, having regard to its objectives and its form, is the liquidation of the undertaking's assets. On the other hand, if, having regard to its objectives and its form, the aim of the procedure at issue is the continuation of the undertaking's business, its economic and social objective does not justify a situation where, in the event of the undertaking being transferred, its employees lose the rights which the directive confers on them.[28]

54. That distinction between procedures aimed at liquidation and procedures aimed at the continuation of the undertaking does not stem solely from the case-law of the Court, but, as the Commission rightly pointed out, it now has a foundation in the actual text of Article 5 of Directive 2001/23. That article establishes a distinction between, on the one hand, insolvency proceedings, including bankruptcy proceedings, intended to liquidate the transferor's assets (those procedures are expressly referred to in Article 5(1) and are excluded from the scope of Directive 2001/23) and, on the other, insolvency proceedings (referred to in Article 5(2)) which, given that they were not initiated in order to liquidate the transferor's assets, imply the continuation of the undertaking.

55. Determining, *in concreto*, whether an assignment takes place as part of an insolvency procedure intended to liquidate the transferor's assets or a procedure intended to ensure the continuation of the undertaking is not a straightforward matter.

26 — See paragraph 23 of the judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55), and paragraph 23 of the judgment of 25 July 1991, *d'Urso and Others*. (C-362/89, EU:C:1991:326), and see point 43 above.

27 — Accordingly, it is not possible to accept the argument advanced by Smallsteps, both before the referring court and the Court of Justice, that the requirement laid down in Article 5(1) of Directive 2001/23 that proceedings must be 'instituted with a view to the liquidation of the assets of the transferor' and be 'under the supervision of a competent public authority', apply solely to proceedings similar to insolvency, but not insolvency as such. That interpretation clearly goes against the content of the paragraphs of the judgments of 7 February 1985, *Abels* (135/83, EU:C:1985:55), and of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326), referred to in the previous footnote.

28 — It follows that there is no basis for the interpretation, proposed by the Netherlands Government, that the decisive element for determining the applicability of Directive 2001/23 to a transfer is that it concerns the industrial or commercial activities of an insolvent undertaking. It is not the circumstances of the activities covered by the transfer which matter in the case-law, but the objective (continuation or liquidation of the undertaking) pursued by the procedure in which the transfer takes place, since the objective must be viewed in the light of the form of that procedure.

56. First, it is possible that an assignment of the viable parts of an insolvent undertaking takes place as part of a procedure which, like insolvency proceedings, is intended to liquidate the transferor's assets. Secondly, such a determination may be complicated in cases of 'atypical' procedures, such as, for example, the one developed in the Netherlands for the conclusion of a pre-pack, which takes place, at least partially, outside the scope of the law and which is hybrid in nature, in that it mixes informal elements with elements relating to a formal procedure (that is to say, insolvency proceedings as governed by the Insolvency Law).

57. In that regard, I take the view that, in general, it may be considered that a transfer takes place as part of a procedure the aim of which is the continuation of the undertaking where that procedure is designed or applied specifically in order to preserve the operational character of the undertaking (or of its viable units) in such a way as to make it possible to retain the value which stems from the uninterrupted continuation of its operations. On the other hand, procedures for the liquidation of assets are not created specifically to pursue such a goal, but are concerned solely with maximising the payment of the creditors' collective claims.

58. Of course, there may be some overlap between the objective of preserving the operational character of the assigned part of the undertaking and that of maximising the payment of the creditors' collective claims. The value of an undertaking which is still normally operational is, in general, much higher than the value of its assets taken separately and the value which that undertaking would have if its serious financial distress was declared.[29] Thus preserving the operational character of the viable part of the undertaking in distress which potentially makes it possible to obtain a higher price for its assignment may maximise the payment of the creditors' claims.[30] However, in procedures where the aim is the continuation of the undertaking, preserving that continuation is the central feature, the ultimate goal of the procedure itself, or the application of that procedure *in concreto*. On the other hand, in liquidation procedures, preservation is a purely functional aspect of the payment of the creditors' claims.

59. Therefore, in my view, that is how Article 5(1) of Directive 2001/23 is to be interpreted, in view of the case-law which it codified.

60. Before ascertaining whether that provision applies to the case of a transfer, as in the present case, as part of a procedure leading to the conclusion of a pre-pack, as it has been developed in the Netherlands, two observations should still be made.

61. First, as a derogation from the main objective of Directive 2001/23, that is to say, the protection of employees, and the application of the safeguards which that directive provides for their benefit, the exception in Article 5(1) of Directive 2001/23 must be interpreted strictly.

62. Secondly, Article 5 of Directive 2001/23, in particular paragraphs 1 and 2, gives Member States a wide discretion in defining the scope of the exceptions laid down. The first sentence of Article 5(1) expressly leaves it to the Member States, unless they 'provide otherwise', to decide whether to apply Articles 3 and 4 of Directive 2001/23 in the event of bankruptcy or any analogous proceedings. Article 5(2) of that directive allows Member States to apply Articles 3 and 4 partially to transfers of undertakings as part of an insolvency procedure initiated in relation to the transferor (whether or not that procedure was initiated in order to liquidate its assets).

29 — If it is known that the undertaking is in serious financial distress, that may have adverse consequences as regards the attitude of its customers, its suppliers and its investors towards that undertaking, which may entail significant negative consequences for its activities, and therefore its value.

30 — For a specific example of a procedure in which both those objectives overlap, see point 32 of the Opinion of Advocate General Lenz in *Dethier Équipement* (C-319/94, EU:C:1996:291).

63. Conferring on Member States such a broad discretion is not only in line with the judgment of 7 February 1985 in *Abels*,[31] but is consistent with the wide powers conferred generally on Member States when it comes to implementing and applying Directive 2001/23, which is based on the fact that that directive is intended to achieve only partial harmonisation in this area, and it is not aimed at establishing a uniform level of protection throughout the EU on the basis of common criteria.[32]

64. In the present case, however, it must be noted that the Kingdom of the Netherlands did not use the discretion expressly conferred on it by Article 5 of Directive 2001/23. At the hearing, following a specific question from the Court, the Netherlands Government explicitly confirmed that the Kingdom of the Netherlands did not adopt a specific provision which, to use the words of that directive, provides 'otherwise' than in Article 5(1). It is therefore the exception laid down in that provision which is of relevance in the present case.

4. *The applicability of the scheme for protecting employees laid down in Articles 3 and 4 of Directive 2001/23 in the event of a transfer of an undertaking as part of a pre-pack*

65. In the light of all the foregoing considerations, it is appropriate to examine whether or not a transfer as part of a pre-pack, such as the one which in the present case concerned the Estro Groep units, is covered by the exception in Article 5(1) of Directive 2001/23 and, accordingly, whether or not the protection scheme laid down in Articles 3 and 4 of that directive for the benefit of employees applies to such a transfer.

66. In that regard, it is clear from the information in the Court file that the procedure resulting in the conclusion of a pre-pack, as developed in practice in the Netherlands, takes place in two phases, that is to say, a preparatory phase, before the declaration of insolvency, and a phase simultaneous with or immediately following the declaration of insolvency.

67. That preparatory phase is always opened on the initiative of the undertaking in difficulty, which asks the court to appoint a prospective insolvency administrator and a prospective *juge-commissaire* (supervisory judge). The court may or may not make that appointment depending on whether or not it considers that it would be desirable to conduct such a procedure.

68. The idea behind that advance appointment is to enable the prospective insolvency administrator, before being formally appointed as the actual insolvency administrator, to gain information about the undertaking and to examine its financial circumstances and the possible solutions envisaged, in such a way as to be able to make a speedy request to the *juge-commissaire*, after the declaration of insolvency, to implement the pre-pack assignment.

69. To that end, the prospective insolvency administrator contacts the undertaking in question, reviews its accounts and other relevant data, and receives information on possible solutions. It may, *potentially*, also be involved in the negotiations concerning the assignment of the undertaking or its viable units.

70. In that preparatory phase, which takes place before the declaration of insolvency, the assignment of the undertaking is prepared down to the last detail. Thus, the sale contract is, in practical terms, put in place during that preparatory phase. Everything is prepared for an immediate execution of the transfer simultaneously with the declaration of insolvency, without any interruption to the undertaking's operations.

31 — See paragraphs 23 and 24 of the judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55).

32 — See judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund* (C-328/13, EU:C:2014:2197, paragraph 22 and the case-law cited).

71. Having made the declaration of insolvency, the court appoints the prospective insolvency administrator as the actual insolvency administrator,[33] and the prospective *juge-commissaire* becomes the actual *juge-commissaire*. With all aspects of the assignment having been agreed during the preparatory phase, very quickly after the opening of the insolvency proceedings (even on the same day, as happened in Estro Groep's case), the insolvency administrator asks for and receives authorisation from the *juge-commissaire* for the pre-pack assignment.[34] In order to be in a position to give its authorisation so quickly, the *juge-commissaire* clearly must have received complete and detailed information about the transaction during the preparatory phase.

72. It is clear from the order for reference and from the observations of all the parties involved in the proceedings before the Court that the aim of the structure of the procedure which I have just described, and specifically the preparatory phase for the detailed drafting of the assignment, is to avoid the disruption that would result from a sudden cessation of the undertaking's activities at the point of the declaration of insolvency, which would lead to a significant loss in the value of the undertaking or of the viable parts being assigned. It is for that very reason that the preparatory phase generally takes place in secret, so as not to publicise the difficult situation in which the undertaking in question finds itself.

73. As regards the powers of the prospective insolvency administrator and the prospective *juge-commissaire* during the preparatory phase, since that phase is not regulated by law, neither of them formally has any power. Given that, once the insolvency proceedings have been initiated, they must, respectively, ask for and give authorisation for the operation, it is clear that, during the preparatory phase, both the prospective insolvency administrator and the prospective *juge-commissaire* still have a certain degree of 'informal' power capable of influencing the transfer process. However, it is just an informal power, with no legal basis. Moreover, as both Smallsteps and the Netherlands Government submitted, the prospective insolvency administrator does not carry out any administrative activities and the *juge-commissaire* cannot give any authorisation before the formal declaration of insolvency.

74. In order to ascertain whether Directive 2001/23 applies to a transfer of an undertaking as part of such a procedure, it is appropriate to apply the criteria referred to in point 53 above.

75. In that respect, it is necessary, in the first place, to bear in mind the *objective* of the procedure at issue. There appears to be no doubt, as the referring court stated, that that procedure, taken as a whole, is aimed at transferring the undertaking (or its still viable units) in order to restart the business without any interruption, immediately after the declaration of insolvency. The purpose of that procedure is to ensure the continuation of the undertaking by preserving the added value arising from the fact that its business continues to operate. The entire preparatory phase is geared towards achieving that objective which is finally achieved on the transfer and concomitant declaration of insolvency.

76. It is apparent from the observations of the referring court that in the case of a pre-pack in the Netherlands the declaration of insolvency is in fact used as a means of restarting the undertaking. In essence, these are not real insolvency proceedings, but what may be defined as 'technical insolvency proceedings'. That is confirmed, moreover, by the fact, raised by Smallsteps at the hearing, that, in the context of a pre-pack, insolvency proceedings are not always necessary, since the preliminary phase does not always result in a declaration of insolvency.

33 — It is only in exceptional circumstances and for serious reasons that the prospective insolvency administrator is not appointed as the actual insolvency administrator.

34 — The consequence of judicial involvement in the procedure leading to the pre-pack is that the agreement to assign the undertaking acquires the value and force of a court decision rather than that of a mere contractual agreement which may be amended, or may not be executed.

77. Moreover, the referring court itself highlighted the fact that, in practice, the insolvency procedure is frequently used for the purposes of restructuring and that, in such cases, it is not aimed at liquidating the undertaking. Thus, although the procedure resulting in the conclusion of a pre-pack may take place, in part, as part of an insolvency procedure, it is quite clear that it cannot be classified as one of the traditional procedures for liquidating the undertaking. [35]

78. At this point in the analysis, I must, however, make clear that the objective pursued by the pre-pack, that is to say, the continuation of the viable parts of the undertaking by avoiding a loss in value arising out of a sudden interruption in its activities, is certainly commendable. The issue which the present action raises does not concern the admissibility under EU law of the pre-pack as such, but rather the issue of the interaction between the pre-pack and Directive 2001/23. Although it is necessary to take into account the benefits for investors, [36] creditors, the employees themselves and, more generally, society arising from the existence of procedures aimed at saving undertakings and preserving their value, the implementation *in concreto* of those procedures must, however, comply with the guarantees which EU law provides for employees.

79. In the second place, it is necessary to take into consideration the specific *form* of the procedure resulting in the conclusion of a pre-pack in the Netherlands. It is clear from the description set out in points 66 to 73 above that such a procedure is different in a number of respects from a 'traditional' insolvency procedure.

80. First of all, the procedure leading to a pre-pack is always initiated by the company in question, while an insolvency procedure may be initiated by different stakeholders, such as, for example, the creditors. [37]

81. Next, the preparatory phase, in which ultimately all the details of the transfer are decided, is entirely informal in nature. First, that phase is handled by the undertaking's management which conducts the negotiations and adopts the decisions concerning the sale of the undertaking. [38] In the present case, the conclusion of the pre-pack relating to the viable units of Estro Groep is a clear example of that. [39]

82. Secondly, I pointed out that, during that phase, the prospective insolvency administrator and the prospective *juge-commissaire* formally have no powers. Thus, the prospective insolvency administrator does not carry out any administrative activities, [40] and there is no formal procedure for establishing the liabilities. [41] In addition, I pointed out that, in order to be able to grant authorisation for the assignment so quickly, the *juge-commissaire* had to have been informed of, and essentially not raised any objection to, the transaction before the declaration of insolvency, so that the approval may simply be formalised after the declaration of insolvency. That approach may defeat almost entirely the purpose of the official supervision which should take place during formal insolvency proceedings.

35 — In that context, the argument advanced by the Netherlands Government appears odd, in that it maintained that, in view of the fact that it is part of an insolvency procedure, the procedure leading to the conclusion of a pre-pack is aimed at liquidating the transferor's assets. In that regard, I note that the actual title of the draft legislation being debated in the Netherlands Parliament and which is intended to govern pre-packs in the Netherlands is the 'Law on the continuation of undertakings' (see point 21 and footnote 7 above).

36 — That factor certainly must be taken into consideration in an economic context characterised by the existence of insolvency forum shopping practices.

37 — For the relevance of that differentiation factor in the analysis, see the Opinion of Advocate General Lenz in *Dethier Équipement* (C-319/94, EU:C:1996:291, point 46).

38 — For an example in which the Court took that factor into consideration in its analysis, see paragraph 29 of the judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99), and point 50 of the Opinion of Advocate General Lenz in *Dethier Équipement* (C-319/94, EU:C:1996:291).

39 — Thus, it is clear from the report from Estro Groep's unofficial administrator, referred to in the decision of the referring court, that Estro Groep itself chose H.I.G. Capital as a buyer, without seriously contacting other potential buyers and that the prospective insolvency administrator essentially had to accept that situation.

40 — In that regard, see judgment of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421, paragraph 29).

41 — See judgment of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99, paragraph 29), and point 47 of the Opinion of Advocate General Lenz in relation to the same case (C-319/94 EU:C:1996:291).

83. There are therefore many differences compared with insolvency proceedings. In particular, it is clear that the insolvency administrator and the court have much less influence in the case of the 'special' procedure leading to the conclusion of a pre-pack than in the case of the 'traditional' procedure for insolvency aimed at liquidating the transferors' assets.

84. In the light of the foregoing analysis, it must be concluded that, in view of the objective which it pursues and of the form in which it is applied, and although it may, in part, be conducted as part of an insolvency procedure, a procedure such as that developed in the Netherlands leading to the conclusion of a pre-pack could not be regarded as a bankruptcy procedure or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and as being under the supervision of a competent public authority, for the purposes of Article 5(1) of Directive 2001/23. Consequently, such a procedure does not come under the exception laid down in that provision. It follows that the protection scheme laid down in Articles 3 and 4 of Directive 2001/23 does indeed apply to a transfer of an undertaking, or its still viable parts, as part of such a pre-pack. What follows from the fact that the activity of the undertaking, or of its viable parts, is continued after that transfer, is that it would not be possible to explain or to justify a situation in which the employees of that undertaking, or its transferred units, are deprived of the rights conferred on them by that directive. [42]

85. In that regard, it should also be noted that such an interpretation of Directive 2001/23 cannot be called into question by an argument alleging that it might dissuade potential shareholders from acquiring the undertaking in difficulties (or its viable parts). First, the Court has already dismissed such an argument on a number of occasions. [43] Secondly, it should be recalled that, in accordance with the second sentence of Article 4(1) of that directive, it does not stand in the way of 'dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'. Those dismissals must, however, take place in compliance with all the guarantees laid down by the relevant provisions of national law.

86. Finally, as regards the provision of Directive 2001/23, mentioned by the Netherlands Government and relied on at the hearing, that is to say, Article 5(4) on the misuse of insolvency proceedings, I do not consider it to be relevant in the present case. It is clear from the above analysis that the pre-pack, as developed in the Netherlands, is not a misuse of insolvency proceedings which deprives employees of their rights under Directive 2001/23. On the contrary, the protection scheme does indeed apply in the event of a transfer taking place as part of a pre-pack.

5. *Opinion on the first three questions referred for a preliminary ruling*

87. In the light of all the foregoing, the answer, first of all, to the second question referred for a preliminary ruling is that a procedure leading to the conclusion of a pre-pack, such as that which took place in the main proceedings, although it may be conducted, in part, in the course of insolvency proceedings, does not come under the exception laid down in Article 5(1) of Directive 2001/23, so that the scheme for the protection of employees laid down in Articles 3 and 4 of that directive applies in the event of a transfer of an undertaking, or part of an undertaking, as part of a pre-pack.

42 — See, to that effect, judgments of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraph 32); of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421, paragraph 30); and of 12 March 1998, *Dethier Équipement* (C-319/94, EU:C:1998:99, paragraph 31).

43 — In that regard, see judgments of 25 July 1991, *d'Urso and Others* (C-362/89, EU:C:1991:326, paragraphs 18 and 19), and of 7 December 1995, *Spano and Others* (C-472/93, EU:C:1995:421, paragraphs 34 and 35).

88. Next, the answer to the first question referred for a preliminary ruling stems from the solution which I propose for the second question. In the event of a transfer of an undertaking as part of a pre-pack, and inasmuch as the Netherlands insolvency procedure, as applied by some courts in the Netherlands, does not provide for the application, to the employees of the transferor undertaking (or of the parts being transferred), of the protection scheme laid down for their benefit in Articles 3 and 4 of Directive 2001/23, that procedure is not consistent with that directive.

89. In that regard, however, it must be borne in mind that the principle that national law must be interpreted in conformity with EU law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it. [44]

90. It is therefore for the referring court, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, to achieve an outcome consistent with the objective pursued by Directive 2001/23 and therefore to ensure that, in the event of a transfer of an undertaking or some of its parts, as part of a pre-pack, the protection scheme laid down in Directive 2001/23 is applied for the benefit of the employees of the assigned parts of the undertaking.

91. As regards the third question referred for a preliminary ruling, it is clear from points 57, 58, and 75 to 77 above that, in view of the fact that the procedure leading to the conclusion of a pre-pack is aimed at the continuation of the undertaking's business (or of the viable parts which are being assigned), the fact that the application of that procedure may also maximise the payment of the creditors' claims does not mean that the protection scheme laid down by Directive 2001/23 for the benefit of the employees does not apply in the event of a transfer of an undertaking as part of a pre-pack. [45]

B. **The fourth question referred for a preliminary ruling**

92. By the fourth question referred for a preliminary ruling, the referring court raises the question as to exactly when the transfer of the undertaking takes place.

93. However, it must be noted that that question is raised in relation to the head of claim submitted in the alternative by the FNV and its joint applicants before the referring court. [46] As the Commission submits, such a question is relevant only where it should be held that the protection scheme laid down in Articles 3 and 4 of Directive 2001/23 do not apply in the event of a transfer of an undertaking as part of a pre-pack.

94. In those circumstances, in view of my proposed answer to the first three questions referred for a preliminary ruling, I do not consider it necessary for the Court to reply to the fourth question.

44 — Judgment of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 43), and, to that effect, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited), and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 34).

45 — In that regard, I note that in *Dethier Équipement* (judgment of 12 March 1998, C-319/94 EU:C:1998:99) the Court held that the scheme for protecting employees applied in the event of judicial liquidation, where that procedure pursued both objectives. See point 32 of the Opinion of Advocate General Lenz in *Dethier Équipement* (C-319/94, EU:C:1996:291).

46 — See point 33 above.

V. **Conclusion**

95. In light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Rechtbank Midden-Nederland (District Court, Central Netherlands) as follows:

(1) In view of the objective which it pursues and of the form in which it is applied, and although it may, in part, be conducted as part of an insolvency procedure, a procedure such as that developed in the Netherlands leading to the conclusion of a pre-pack could not be regarded as a bankruptcy procedure or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and as being under the supervision of a competent public authority, for the purposes of Article 5(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses Accordingly, such a procedure does not come under the exception laid down in that provision, so that the protection scheme laid down in Articles 3 and 4 of Directive 2001/23 applies to a transfer of an undertaking, or its still viable parts, as part of such a pre-pack.

(2) In the event of a transfer of an undertaking as part of a pre-pack, and inasmuch as the Netherlands insolvency procedure, as applied by some courts in the Netherlands, does not provide for the application, to the employees of the transferor undertaking (or of the parts being transferred), of the protection scheme laid down for their benefit in Articles 3 and 4 of Directive 2001/23, that procedure is not consistent with that directive. It is for the referring court, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, to achieve an outcome consistent with the objective pursued by Directive 2001/23 and therefore to ensure that, in the event of a transfer of an undertaking or some of its parts, as part of a pre-pack, the protection scheme laid down in Directive 2001/23 is applied for the benefit of the employees of the assigned parts of the undertaking.

(3) In view of the fact that the procedure leading to the conclusion of a pre-pack is aimed at the continuation of the undertaking's business (or of the still viable parts which are being assigned), the fact that the application of that procedure may also maximise the payment of the creditors' claims does not mean that the protection scheme laid down by Directive 2001/23 for the benefit of the employees does not apply in the event of a transfer of an undertaking as part of a pre-pack.