



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 6 December 2017¹

Case C-472/16

Jorge Luís Colino Sigüenza
v
Ayuntamiento de Valladolid
IN-PULSO MUSICAL Sociedad Cooperativa
Administrador Concursal de Músicos y Escuela S.L.
Músicos y Escuela S.L.
FOGASA

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castilla y León, Spain))

(Reference for a preliminary ruling — Transfer of an undertaking — Prohibition of dismissal by reason of transfer — Dismissal for economic reasons — Directive 2001/23/EC — Expiring concession to run a music school — Loss of a service contract to a competitor — Economic entity — Economic entity which retains its identity — Collective dismissal — Right to an effective remedy — Article 47 of the Charter on Fundamental Rights of the EU)

1. This is a reference for a preliminary ruling from the Sala de lo Social del Tribunal Superior de Justicia de Castilla y León in Valladolid (Social Division of the High Court of Justice, Castilla y León, Valladolid, ‘the Tribunal Superior’) which concerns a request for re-employment by a music teacher previously employed by a company that was running a municipal music school. Shortly before the City Council selected another company to run the school, the appellant in the main proceedings was laid off.

2. After a long line of cases dealt with by the Court, this request once again raises the question under what circumstances the loss of a service contract to a competitor is to be regarded as a transfer of an economic entity within the meaning 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 (‘the Directive’), such as to require the new contractor to take over staff of the previous contractor. The specific features of the case at hand are a concession that expired before the competitor took over the activity in question, a delay of five months before the competitor resumed the activity and the fact that none of the persons employed by the appellant’s employer were taken over.

¹ Original language: English.

3. The referring court also raises a procedural question: as the first music school was laying off all of its staff, a collective dismissal procedure took place, in the course of which the collective statutory representatives unsuccessfully challenged the employer's decision. The Tribunal Superior queries whether it would infringe Article 47 of the Charter of Fundamental Rights of the European Union ('Charter'), if the individual employee was bound by a judgment given in these collective proceedings in which he was unable to be a party and defend his rights under the Directive.

I. Legal framework

A. European Union law

4. The first and second paragraphs of Article 47 of the Charter provide as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

5. Points (a) and (b) of Article 1 of the Directive state:

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

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

6. The first subparagraph of Article 3(1) of the Directive reads:

'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.'

7. The first subparagraph of Article 4(1) of the Directive provides:

'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. 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.'

B. National law

8. Article 124 of the Law regulating the Social Courts (Ley reguladora de la Jurisdicción Social, 'LJS') states in paragraphs 1 and 13:

'1. The employer's decision may be challenged by the employees' statutory representatives by means of the proceedings provided for in the following paragraphs.

...

13. When the proceedings concern an action brought by an individual before the Juzgado de lo Social (Social Court) against a dismissal, Articles 120 to 123 of this Law shall apply, subject to the following special provisions: ... (b) If, pursuant to the preceding paragraphs, the employees' representatives bring an action against the employer's decision after the commencement of proceedings brought by an individual, those proceedings shall be suspended until a decision has been taken in the action brought by the employees' representatives, which, once it is final, shall have the force of *res judicata* with regard to the individual proceedings, in accordance with Article 160(5) of this Law.'

9. Article 160(5) of the LJS provides:

'A final judgment shall have the force of *res judicata* with regard to individual actions which are pending, or which may be brought, and which concern the same subject matter or are directly related thereto, whether the actions have been brought before the social or the administrative courts. Those actions shall therefore be suspended for the duration of the collective action. An order for suspension shall be made even if judgment has been given at first instance and an appeal or an appeal in cassation is pending, the competent court being bound by the final judgment given in the collective action, even though the inconsistent or contradictory nature of that final judgment has not been invoked in appeal proceedings the purpose of which is to ensure consistency in the case-law.'

II. Facts in the main proceedings and the question referred for a preliminary ruling

10. Jorge Luis Colino Sigüenza ('the appellant') started working as a music teacher at the Municipal Music School ('the School') of Valladolid on 11 November 1996.

11. Initially, the School was run by the Ayuntamiento de Valladolid (the Municipality of Valladolid, 'the Ayuntamiento').

12. In 1997, the Ayuntamiento stopped managing the School directly and put out a call for tenders for its management. On this basis, the contract was awarded to Músicos y Escuela, S.L. ('Músicos'), a company which had been incorporated on 7 July 1997 with a share capital of ESP 500 000 (approximately EUR 3 000) and whose company object was teaching music, organising performances and selling musical instruments; ultimately, the sole purpose of the company was to take part in the tendering procedures organised by the Ayuntamiento.² Músicos took over the facilities, premises and resources for providing the services, recruited some of the staff of the Ayuntamiento, including the appellant, and carried on the music school's activity as the Municipal Music School, which continued to be considered a service provided by the Ayuntamiento to local citizens.

13. In the following years, the City Council, acting on behalf of the Ayuntamiento, called for tenders on a regular basis, namely in September 2000, September 2004, July 2008 and September 2012.³ Músicos continued to win the tenders.⁴ Its last contract covered the period until 31 August 2013, and provided for a possibility of express prolongation for a further academic year.

² See the findings of the Sala de lo Social del Tribunal Supremo (Social Division of the Supreme Court, 'Tribunal Supremo') in its judgment of 17 November 2014, CASACION 79/2014, sub 'cuarto', a copy of which has been presented to the Court by In-pulso Musical Sociedad Cooperativa ('In-pulso'). This judgment is mentioned in point 17, below, in fine and in point 102 below.

³ See the findings of the Tribunal Supremo in its judgment of 17 November 2014, sub 'cuarto'.

⁴ In September 2012, Músicos was the only applicant. See the findings of the Juzgado de Instrucción (Court of Preliminary Investigation) No 6 de Valladolid ('the Juzgado de Instrucción') in its order of 7 April 2016 rejecting an accelerated procedure in criminal proceedings 2186/2014, which was given in proceedings related to the main proceedings and has been presented to the Court by In-pulso.

14. Due to a sharp decline in the number of pupils at the beginning of the academic year 2012/13,⁵ a difference between the fees being paid by the pupils and the price of the service agreed between the Ayuntamiento and Músicos became apparent. When, in December 2012, Músicos sought compensation for that difference in an amount of more than EUR 100 000,⁶ the City Council refused to pay.

15. In those circumstances, on 19 February 2013, Músicos sought termination of the contract for non-performance by the Ayuntamiento and damages. The City Council in turn rejected these claims, pled non-performance on the part of the other party, urging it to continue to provide the service agreed upon until the end of the academic year 2012/13, and also refused to return the deposit of EUR 15 000 that Músicos had given for the use of the equipment and premises.

16. In response to the economic situation produced by the dispute with the City Council, on 4 March 2013, Músicos initiated a collective dismissal procedure. After the obligatory period of negotiation and consultation, which did not result in an agreement with the employees' representatives, Músicos, on 27 March 2013, adopted the decision to dismiss its entire staff. On 31 March 2013, Músicos ceased its activity and, on 1 April 2013, it returned possession of the premises, instruments and resources that had been made available to the School by the City Council. On 4 April 2013, the company issued a notice of dismissal to all its staff, including the appellant, with effect from 8 April 2013. Thus, Músicos dismissed 26 employees, that is, 23 teachers and 3 administrative employees.⁷

17. The workforce delegates (elected representatives of the company's staff) challenged Músico's collective dismissal decision before the Tribunal Superior, where a hearing took place on 22 May 2013. On 19 June 2013, the claim was dismissed. The Tribunal Superior held, *inter alia*, that the Ayuntamiento was under no obligation to maintain the activity of the School and that Músicos had negotiated during the consultation period in good faith and with the aim of reaching an agreement within the limits imposed by its economic situation. The judgment upheld the economic reasons for the dismissals that Músicos had invoked, taking into account the reduction in the income from pupil registration that had not been offset financially by the Ayuntamiento, which had thus created an economic imbalance justifying the closure and the cessation of activity. The workforce delegates brought an appeal in cassation against that judgment before the Tribunal Supremo, which was dismissed on 17 November 2014.

18. Meanwhile, on 30 July 2013, Músicos was declared insolvent and after winding-up proceedings, the company was dissolved by order of the Juzgado de lo Mercantil (Commercial Court) in September 2013.

19. In August 2013, the City Council, acting on behalf of the Ayuntamiento, decided to terminate the administrative contract with Músicos on the ground that Músicos had prematurely ceased to provide management of the School on 1 April 2013. The City Council also seised Músicos' deposit and claimed damages for non-performance.

20. The City Council then put out a new call for tenders for the provision of services for the management of the School. It assessed seven applicants, four of which were invited to present information about themselves and the services they could offer, by reference to a set of criteria. In the end, the contract to manage the School for the academic year 2013/14 was awarded to the company In-pulso Musical Sociedad Cooperativa ('In-pulso'), which had been incorporated on 19 July 2013, the

⁵ Músicos offered places for 600 students, but ultimately only 261 were enrolled, a number which eventually further declined to 240. According to the findings of the Juzgado de Instrucción in its order of 7 April 2016, around 250 pupils had drifted to a new music school called 'MUSICALIA' founded at the beginning of September 2012 by a former teacher of Músicos, who offered all teachers of Músicos employment by MUSICALIA, which 15 of them accepted, not all of them on an exclusive basis.

⁶ This added up to EUR 58 403,73 for the first trimester of 2013 and, on 1 April 2013, EUR 48 952,74 for the second trimester: see the findings of the Tribunal Supremo in its judgment of 17 November 2014, sub 'cuarto'.

⁷ See the findings of the Tribunal Supremo in its judgment of 17 November 2014, sub 'cuarto'.

company's sole object being provision of the service referred to in the tender.⁸ The City Council gave In-pulso use of the premises, instruments and resources for managing the School, which resumed its activities in September 2013, with an entirely different staff.⁹ In June 2014, In-pulso was also successful in the subsequent tendering procedure and was awarded a contract to continue managing the School for the academic years 2014/15 and 2015/16.

21. With regard to the dispute between the City Council and Músicos as to the termination of the contract, the Sala de lo Contencioso-Administrativo de Valladolid del Tribunal Superior de Justicia de Castilla y León (Administrative Division, Valladolid, of the High Court of Justice, Castilla y León) delivered judgments in October 2014 and April 2015, which have become final. It was held that the City Council had misinterpreted the service contract and had failed to comply with the terms agreed therein inasmuch as they established a guaranteed income irrespective of the number of pupils registered. Consequently, the Tribunal Superior decided in favour of Músicos, terminating the contract, dismissing the financial claims of the Ayuntamiento and also acknowledging that Músicos was entitled to recover its deposit. Músicos' claim for damages, however, was dismissed on the ground that Músicos had failed to fulfil its obligations, when it unilaterally ceased to provide the service without waiting for the legal proceedings.

22. After the activity of the School was resumed by In-pulso, the appellant as well as some of his former colleagues, brought individual actions against Músicos, the Ayuntamiento and In-pulso, challenging their respective dismissals. When the collective judgment mentioned above had become final the individual actions before the Juzgados de lo Social (Social Courts) were continued. They were, however, dismissed.

23. In its dismissal of 30 September 2015 of the appellant's claim, the Juzgado de lo Social No 4 de Valladolid (Social Court No 4, Valladolid) considered itself bound by the judgment of the Tribunal Superior of 19 June 2013, which had dismissed the collective action brought by the workforce delegates and had been confirmed by the Tribunal Supremo. The judgment of the Juzgado de lo Social, referring to Article 124(13)(b) of the LJS, held that, due to the *res judicata* effect, the collective dismissal was based on sufficient grounds and had also been conducted correctly, and that that permitted Músicos to carry out the subsequent individual dismissal of the appellant. The Juzgado de lo Social also held that there had not been a transfer of an undertaking because the activities were only resumed 5 months after the dismissal.

24. The appellant appealed against this judgment before the referring court.

25. The appellant contests the *res judicata* effect with regard to those later events, arguing that they could not have been taken into account by the court adjudicating on the collective action as they occurred only at a later time, that is, on the resumption of the School's activities with In-pulso in September 2013 and also on delivery of the judgments won by Músicos in October 2014 and April 2015, ordering the Ayuntamiento to pay the difference between the fees and the sum agreed upon in the service contract. The appellant also argues that the *res judicata* effect cannot affect him, because he was not a party to the collective proceedings in which the relevant judgment was given.

26. It is in that context that the Tribunal Superior refers the following questions to the Court for a preliminary ruling:

'(1) Should it be considered that there is a transfer for the purposes of Directive 2001/23/EC where the holder of a concession of a Municipal Music School, which receives all the material resources from that Municipality (premises, instruments, classrooms, furniture), has engaged its own staff and

⁸ See deed of incorporation of In-pulso of 19 July 2013 in the national file.

⁹ In-pulso did not employ any of the former employees of Músicos: see In-pulso's submissions on p. 10 of its observations.

provides its services during the academic year, ceases that activity on 1 April 2013, two months before the end of the academic year, returning all the material resources to the Council, which does not resume the activity for the remainder of the academic year 2012/13, but awards a new concession to a new contractor, which resumes the activity in September 2013, at the beginning of the new academic year 2013/14, transferring to the new contractor for that purpose the necessary material resources previously made available to the former contractor by the Municipality (premises, instruments, classrooms, furniture)?

- (2) If the answer to the previous question is in the affirmative, is it to be understood for the purposes of Article 4(1) of Directive 2001/23/EC that, in the circumstances described, – in which the failure of the main undertaking (the Municipality) to fulfil its obligations obliges the first contractor to cease its activity and to dismiss all its staff and immediately afterwards that main undertaking transfers the material resources to a second contractor, which continues with the same activity –, the dismissal of the first contractor's employees has occurred for 'economic, technical or organisational reasons entailing changes in the workforce' or has it been caused by 'the transfer of the undertaking, business or part of the undertaking or business', a cause prohibited by that article?
- (3) If the reply to the previous question is that the dismissal has been caused by the transfer and is therefore contrary to Directive 2001/23/EC, is Article 47 of the Charter of the Fundamental Rights of the European Union to be interpreted as meaning that it precludes national legislation prohibiting a court from ruling on the substance of the claims of an employee who challenges his dismissal in an individual action, as part of a collective dismissal, in order to defend the rights deriving from ... Directive 2001/23/EC ... and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, owing to the fact that final judgment has already been given on the collective dismissal in proceedings to which the worker was unable to be a party, although the unions established in the undertaking and all the collective statutory representatives of the employees were or were able to be parties?

27. Written observations have been submitted to the Court by In-pulso, the Kingdom of Spain and the European Commission. The Court asked written questions to which the appellant as well as In-pulso, the Spanish Government and the Commission gave written answers. At the hearing on 27 September 2017, oral argument was presented by the representatives of the Kingdom of Spain and the Commission.

III. Assessment

A. Overview

28. It appears that at the moment the School resumed, *Músicos* as an entity had already ceased to exist, so that there was no entity capable of having been transferred to In-pulso at the relevant moment. Even assuming that the former entity could still have been considered an existing entity, it appears, in any event, that most of the factors which indicate whether the old and the new entity are identical militate, in the present case, against a 'transfer' within the meaning of the Directive. Although I will give my interpretation of the indicators that are relevant in the present case, the ultimate weighing of the relevant factors needs to be left to the referring court.

29. The second question, concerning whether the appellant's dismissal was caused by a transfer, is to be answered on the assumption that the Court answers the first question in the affirmative or holds an affirmative answer by the national court possible. In my view, even in that event, the second question has to be answered in the negative.

30. An answer to the third question is only requested in the event of both the preceding questions being answered in the affirmative. I will nevertheless address the third question, in case the Court might not agree with my opinion as to the first two questions. Looking more closely at the details of the Spanish national rules on *res judicata* in the present context of collective dismissals, as presented by the parties, it appears that the appellant's possibility of defending his rights deriving from the Directive is not in fact restricted and his right to an effective remedy under Article 47 of the Charter does not in my view appear to be impaired.

B. First question

31. By its first question, the referring court queries whether the present situation falls within the scope of the Directive. The Spanish Government and In-pulso propose that the first question be answered in the negative and argue that in the present case no transfer has taken place, whereas the Commission is of the opposite view.

32. For my analysis of the concept of a 'transfer' within the meaning of the Directive, I will have to determine what is meant by an 'economic entity' and then assess the particular factors characterising such an entity, as established in the Court's case-law, in order to finally ascertain whether the entity has 'retained its identity' after the activity was resumed by In-pulso.

1. 'Transfer'

33. As is stated in Article 1(1)(a), the Directive 'shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger'.

34. For a transfer to fall within the scope of the Directive, three conditions must be met: (1) the transfer must result in a change of employer; (2) it must concern an undertaking, a business or part of a business; and (3) it must be the result of a contract.¹⁰

35. In the present case the first condition is clearly fulfilled: there are two employers, namely Músicos and In-pulso.

36. Nor does the third condition pose a problem: the possible change of employer is due to a contractual situation, namely to the fact that the Ayuntamiento, following a tendering procedure, entered into a new service contract with another service provider, when the contract with the previous provider came to an end. According to long-standing case-law, the underlying contract does not need to be concluded directly between the two employers themselves. The present situation in which the City Council had given the contract of its former service provider to a competitor is therefore covered by the Directive.¹¹

37. Moreover, the public law elements present in the case at hand do not preclude the application of the Directive.¹² The involvement of the Ayuntamiento and the City Council as a public body and a public authority in the transfer and also the public law nature of the administrative contracts on the basis of which the service was provided are thus no obstacle for the finding of a transfer.

¹⁰ See judgment of 24 January 2002, *Temco*, C-51/00, EU:C:2002:48, paragraph 21; see also Opinion of Advocate General Geelhoed in *Abler and Others*, C-340/01, EU:C:2003:361, point 46.

¹¹ See judgments of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 11: and of 25 January 2001, *Liikenne*, C-172/99, EU:C:2001:59, paragraph 28.

¹² See judgments of 10 December 1998, *Hidalgo*, C-173/96 and C-247/96, EU:C:1998:595, paragraph 24; of 25 January 2001, *Liikenne*, C-172/99, EU:C:2001:59, paragraph 19; and of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraph 31.

38. The only condition in respect of which there may be some doubt in the present case, is the second one, namely the requirement that there be a transfer of ‘an undertaking or business or part [thereof]’.

39. The Court has already decided on several occasions that the mere transfer of an activity does not constitute a transfer under the Directive: the loss of a service contract to a competitor cannot by itself indicate the existence of a transfer within the meaning of the Directive.¹³

40. Instead, what needs to be transferred is the business in its concrete form and substance.

41. In Article 1(1)(b), the Directive specifies that what is required is the ‘transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity’.

2. ‘Economic entity’

(a) Definition

42. The text of Article 1(1)(b) of the Directive represents a codification of earlier case-law which provided a more explicit description and according to which ‘the term entity refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective’.¹⁴

(b) Activity

43. The concept underlying that definition clearly uses as its point of reference the particular activity that the entity pursues.¹⁵ The entity consists of certain persons and assets, which are organised with a view to carrying on the relevant economic activity.

44. To determine whether or not the persons and assets assembled in *Músicos* formed an entity under the Directive that was capable of being transferred, it is thus necessary to identify the particular activity.

45. As described in its deed of incorporation, *Músicos*’ activity consisted in running the School by teaching music, organising performances and selling musical instruments; ultimately, the sole purpose of the company was to take part in the tendering procedures organised by the Ayuntamiento de Valladolid.¹⁶

(c) Organisation

46. This activity was organised by establishing a company with a particularly low share capital of approximately EUR 3 000, namely a company that could operate with 26 employees only because under the contract with the Ayuntamiento the latter bore all the economic risk.¹⁷ Thus, as it depended for its existence completely on the tenders that the City Council awarded on a regular basis for fixed periods of time, *Músicos* had to organise its activities accordingly.

13 See judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 16.

14 See judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 13.

15 For the preeminent relevance of the activity for the question of whether there is a transfer under the Directive see, inter alia, judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraphs 11 and 12, and of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 10.

16 See above point 12.

17 See the administrative service contract providing *Músicos* with a guaranteed income irrespective of the number of pupils registered.

47. Each time the contract with the Ayuntamiento came to an end, the activity of Músicos necessarily came to an end as well. This was because the tendering procedures were actually held at regular intervals (1997, 2000, 2004, 2008, 2012, 2013), which meant that it was possible that the contract would be lost to a competitor. Enshrined in its deed of incorporation, the need to win the tender was an inherent, ‘quasi-genetic’ organisational feature of Músicos, which, unlike more stable undertakings, did not look for other clients.¹⁸

48. When the organisation of an activity is what binds the material, immaterial and personal elements together to form an entity out of them, this entity will fall apart when the foreseeable and built-in risk of not winning the tender materialises. The whole structure of the undertaking was dependent on the cooperation with the City Council, which provided all material assets and also the financial means in the case of pupil numbers being lower than expected, and this cooperation lasted only for the time of the latest tender, which was mostly four years but in the relevant period only one year.

49. As Músicos’ last administrative contract expired on 31 August 2013, this was the date, when – irrespective of the economic difficulties, the insolvency and dissolution that ensued or the physical return of the premises and musical instruments that had already taken place on 31 March 2013 – an entity within the meaning of the Directive ceased to exist in any event.

(d) *Permanence*

50. The Court has already dealt with cases involving similar organisational peculiarities.

51. The leading case in which the Court held that an enterprise whose activity is limited to a particular project is not sufficient to produce the effects of a transfer once that project is finished, but that the entity needs to be designed for a more permanent period, is *Rygaard*.¹⁹ In that case the entity consisted of two apprentices and an employee as well as the materials assigned to carry out the works in question, namely the implementation of a canteen building project.²⁰ The entity was created to complete the contracted building work started by another contractor, which left the material on the building site.²¹ All elements of the entity belonged to that other contractor and were transferred for the purpose of completing the work.

52. Citing previous case-law, the Court held that to come under the Directive, the transfer had to relate to a stable economic entity whose activity was not limited to performing one specific works contract.²²

53. Yet, this was exactly the case with Músicos and In-pulso, where the entity formed by the temporary use of the premises and equipment of the School, on the one hand, and by the services of the various teachers, on the other, was limited to performing only the contract in force at a given time. Before the transfer took place, Músicos was awarded a one-year contract (September 2012 to August 2013) and after the transfer In-pulso was awarded a contract for an even shorter period (September 2013 to June 2014). Neither of the undertakings, according to their articles of incorporation, used their assets or their staff to perform other work.

54. In my view, the fact that the single contracts awarded by the municipality can be seen in the context of a whole series of follow-up contracts does not justify a different result.

¹⁸ Músicos had not looked for other business; nor had it entered into contracts with other parties or found premises on which to give music lessons in that grouping (as opposed to individual private music teachers giving lessons at home).

¹⁹ See Grau, T., and Hartmann, F., in Preis, U., and Sagan, A. (eds.), *Europäisches Arbeitsrecht*, Köln 2015, § 11, point 20, referring to *Rygaard*; and Kocher, E., *Europäisches Arbeitsrecht*, Baden-Baden 2016, § 5, point 154: ‘auf Dauer angelegt’.

²⁰ See judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 14.

²¹ See judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 13.

²² See judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 20.

55. The employer and its staff could not rely upon the continuity of contracts. Whenever one contract expired, the relevant material and immaterial assets – amongst them the concession to run the School – were no longer at the undertaking's disposal. The entity therefore showed the requisite permanence and stability only for the period that was covered by the administrative contract in force at a given time. The complete dependence on the City Council's award of a new contract prevented an overarching concept covering more than one single task. Despite the fact that, in 2012, it appears that there was no competitor to take part in the tendering procedure, Músicos could not take it for granted that it would win the tender. This is illustrated by the call for tenders in 2013 to which seven applicants responded, which shows that the tendering procedures were taken seriously and were not considered to be a mere formality.

56. Thus, whenever a contract ended, the link between the elements of the entity became too loose for it to be considered an entity as such any more. When a new contract was awarded, a new entity had to be formed, even though its components might be the old ones, such as the (then newly granted) use of the school premises and musical instruments as well as the undertaking's own staff.

57. Finally, it should be noted that, in the case-law discussing the individual elements that form an entity, the Court states that their grouping must be permanent.²³

(e) General scheme and purpose of the Directive

58. My understanding of an entity as potentially being limited by a temporal element is also in conformity with the general scheme and context as well as with the purpose of the Directive.

59. An argument based on the general scheme of the Directive is that the Directive follows the idea that developments that have come about before the transfer took place have to be respected and that the fate of an entity to be transferred or of a particular employee in that entity must not be 'rewound': Article 3(1) of the Directive leaves no doubt that only employment relationships 'existing at the date of a transfer' are to be transferred.²⁴ Accordingly, if those who left the entity before the transfer took place are not protected, nor can an entity or activity that as such is conceived to come to an end before the transfer takes place be the object of a transfer.

60. This idea that the point of reference is the situation of the entity, including as to employment, *before* the transfer is confirmed by Article 4(1) of the Directive, which states that dismissals that take place for economic, technical or organisational reasons entailing changes in the workforce are to be respected under the Directive and do not give rise to a different assessment just because a transfer ensues.²⁵

61. As far as the rationale of the Directive is concerned, one should bear in mind that despite its clear focus on the employees and their protection,²⁶ this protection is not limitless; rather, the Directive has a clearly defined objective. The Court has found that the purpose of the directive was to ensure, as far as possible, that the contract of employment continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a *less* favourable position solely as a result of the

²³ See, for example, judgments of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 21 ('in these labour-intensive sectors, where a group of workers engaged in a joint activity on a permanent basis may all by itself constitute an economic entity'); of 24 January 2002, *Temco*, C-51/00, EU:C:2002:48, paragraph 26; and of 21 October 2010, *Albron Catering*, C-242/09, EU:C:2010:625, paragraph 32; as well as the Opinion of Advocate General Geelhoed in *Abler and Others*, C-340/01, EU:C:2003:361, points 24 and 70.

²⁴ See judgments of 15 June 1988, *Bork International*, 101/87, EU:C:1988:308, paragraph 17; of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraph 49; and order of 15 September 2010, *Briot*, C-386/09, EU:C:2010:526, paragraph 27.

²⁵ See the first subparagraph of Article 4(1) of the Directive and case-law relating thereto, for example, judgment of 12 March 1998, *Dethier Equipement*, C-319/94, EU:C:1998:99, paragraphs 33 to 36.

²⁶ See recital 3. See also judgments of 17 December 1987, *Ny Mølle Kro*, 287/86, EU:C:1987:573, paragraph 25, and of 26 May 2005, *Celtec*, C-478/03, EU:C:2005:321, paragraph 26.

transfer.²⁷ *In casu*, however, to affirm that there is a transfer within the meaning of the Directive would put the employees in a *more* favourable position than the one they had been in with their own employer, whose activity, corresponding to its own business concept, came to an end on 31 August 2013.

62. Moreover, the Directive is not blind to the concerns of business. As indicated by recital 5, it is placed in the context of the completion of the internal market, which implies that the interests of business cannot be entirely ignored. Ultimately, it is in the employees' own interest for a viable business to be maintained as there is no employment without an employer with the means to take on employees.²⁸ The transferor's right, under Article 4(1) of the Directive, to dismiss employees for economic, technical or organisational reasons, is an example of considerations of this kind in the Directive. As Advocate General Lenz pointed out in his Opinion in *Dethier Équipement*, granting the employer this possibility has an indirect beneficial effect enhancing worker protection, insofar as the remaining jobs will thus be made safe.²⁹

63. Whenever the change of a service provider is considered a transfer within the meaning of the Directive, this will considerably restrict the freedom of contract of the businesses involved. The new service provider has to take over the staff of the former and, also, as not every undertaking can carry that burden, the persons seeking to enter into service contracts will have fewer competitors to choose among.³⁰

64. Where, in a case like the one at hand, a public authority, such as the Ayuntamiento, has protected itself against this restriction by awarding contracts for limited periods of one, three or four years and has also found contractors who are ready to set up their undertakings on that basis, incorporating a company only at the time of their first tender, and stating in the deed of incorporation that the company is entirely dependent on the award of a contract, it does not appear justified, in view of the Directive's balancing of the interests in play, to impose a restriction of the kind mentioned above. In such cases, the first service provider's employees cannot have any reasonable expectation that their employment will continue, given that their employer has, from the outset, chosen the concept of a company with a small share capital which is dependent on the discretion of one single contract partner who awards contracts only for limited periods of time and calls for tenders on a regular basis.³¹ In such a case it would seem excessive to restrain the freedom of contract of that partner when it exercises its right, as the Ayuntamiento did, to switch to another service provider, the first service provider having accepted this state of affairs in its deed of incorporation.

65. After all, the Directive takes the undertaking or entity as it finds it; the employees' position with their former employer is to be maintained but not enhanced. The Directive concerns transfers but does not provide for 'resurrections'.³²

²⁷ See judgments of 17 December 1987, *Ny Mølle Kro*, 287/86, EU:C:1987:573, paragraph 25, and of 26 May 2005, *Celtec*, C-478/03, EU:C:2005:321, paragraph 26.

²⁸ See opinion of Advocate General Lenz in *Dethier Équipement*, C-319/94, EU:C:1996:291, point 58, using an economic argument of this kind for the interpretation of Article 4(1) of the Directive.

²⁹ See the Opinion of Advocate General Lenz in *Dethier Équipement*, C-319/94, EU:C:1996:291, point 58, concerning the use of this possibility by a liquidator who uses this as a rationalisation measure prior to the sale of the company.

³⁰ This point is made by, for example, Bauer, J.-H., 'Christel Schmidt lässt grüßen: Neue Hürden des EuGH für Auftragsvergabe', *Neue Zeitschrift für Arbeitsrecht (NZA)*, 2004, p. 14, at p. 17.

³¹ The President of the Fifth Chamber, Mr da Cruz Vilaça, addressed that issue at the hearing using the term 'concession'.

³² This does not preclude other instruments of workers' protection, which might possibly be found in national or EU labour law and which may take into account the strong position of the Ayuntamiento and a certain responsibility towards the workers, who may think that they are protected but who are ultimately left without protection by their fragile employer companies. In the context of protection by the present Directive, Advocate General Lenz recalled in his Opinion in *Dethier Équipement*, C-319/94, EU:C:1996:291, point 56, that the existence of an employment relationship at the time of the transfer is also left to national law. In the case at hand it should further be recalled that the competitor MUSICALIA offered an employment to all teachers employed by Músicos, see footnote 5, above.

(f) *Conclusion*

66. A closer look at the case at hand shows that (independently of other occurrences such as the insolvency of *Músicos*), in any event, with the expiry of the contract to run the School on 31 August 2013, the entity had come to an end and that this end was a structural one, corresponding to *Músicos*' company object and its organisation, which tied the operation of the activity to the winning of a contract that would be valid for a certain period only and thus included a time frame. Therefore, on 1 September 2013, when a transfer could have taken place, an entity within the meaning of the Directive no longer existed.

67. This case, in which the activity was *ab initio* conceived only for determined periods, needs to be distinguished from cases in which the reassignment of a service contract concerns a service provider that pursues a myriad of contracts and projects, in which the service provider, as part of its business routine, receives requests for new contracts on a steady basis and seeks new customers.³³

68. In case the Court should take a different view on the non-existence of an entity at the relevant time, I would like to address the aspects that the parties have discussed. These concern the question whether, assuming that an entity existed at the time of the transfer, the identity of that entity was maintained beyond the transfer. That is why I will continue my analysis at this point.

3. *An entity which 'retains its identity'*

69. Where an entity exists at the moment of the transfer, but this entity has not been transferred in its entirety, that is, not all the components of the first entity have entirely been taken over, or where in the context of the transfer some change has occurred, such as an interruption of the activity, the question arises whether the transfer of the entity with only the remaining components is sufficient for a transfer to come under the Directive.

70. As the Court stated in its judgments in *Spijkers* and *Redmond Stichting*, the decisive criterion is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed.³⁴

71. The test for the maintenance of the entity's identity is a comparison of the entity before the transfer and the entity after the transfer.³⁵ The identity is determined by a myriad of factors, whose weight for the appraisal depends on their relevance for the particular activity and aim of the business.

(a) *Indicators*

72. In order to determine whether that test is met, it is necessary to consider all the facts characterising the transaction in question, including (1) the type of undertaking or business, (2) whether or not the business' tangible assets, such as buildings and movable property, are transferred, (3) the value of its intangible assets at the time of the transfer, (4) whether or not the majority of its employees are taken over by the new employer, (5) whether or not its customers are transferred, (6) the degree of similarity between the activities carried on before and after the transfer and (7) the

³³ Regarding cases like *Süzen*, C-13/95, EU:C:1997:141; *Abler and Others*, C-340/01, EU:C:2003:629; and *CLECE*, C-463/09, EU:C:2011:24, it may be assumed that this is the more common situation.

³⁴ See judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraphs 11 and 12, and of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, paragraph 23. See also judgments of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 10; of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 29; and of 13 September 2007, *Jouini and Others*, C-458/05, EU:C:2007:512, paragraph 23.

³⁵ See judgment of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 13 ('degree of similarity between the activities carried on before and after the transfer').

period, if any, for which those activities were suspended.³⁶ It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.³⁷ Ultimately this requires a factual appraisal which is therefore to be made by the national court.³⁸

73. It is, however, for the Court to specify the criteria in the light of which this appraisal is to be made.³⁹

74. Here, it seems that of the factors that have been established by the Court's case-law, some were clearly maintained when In-pulso took over running the School, namely the type of undertaking, the tangible assets as well as the clients and the activities carried out. However, the other elements, in my view, are missing.

(b) Tangible assets

75. As far as tangible assets are concerned, it is worth mentioning that Músicos did not own any relevant tangible assets, but used the Ayuntamiento's building and equipment. The scope of assets to be considered for the purposes of the Directive is, however, not confined to the employer's property. Legal title to the assets on the part of the undertaking is not necessary.⁴⁰

76. According to settled case-law, when defining the economic entity, the Court can look beyond the legal personality and property of the undertaking or business. Instead of a formal approach, looking at the legal person and the assets which that person owns, the Court has rather taken an economic approach. It has included in its assessment all assets that the employer uses to have the employees perform the activity, without even discussing whether these assets are owned or leased by the employer or whether the contracting party concerned simply permits the employer to use them.⁴¹ Nor does it make a difference whether the employer can make independent commercial use of the assets left to his disposition or whether he can use them only for the contracting partner who owns them.⁴²

77. Therefore, in the present case, the premises, musical instruments, classrooms and furniture of the School, although they were neither owned by Músicos nor directly passed on from Músicos to In-pulso, still have to be considered tangible assets of the transferor that have been transferred to the transferee.

³⁶ See judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 13; of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, paragraph 24; of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraph 14; and of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 33.

³⁷ See, for example, judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 13; of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, paragraph 24; of 7 March 1996, *Merckx and Neuhuys*, C-171/94, paragraph 17; and of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 34.

³⁸ See judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 14, and of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, paragraph 25.

³⁹ See judgments of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 14, and of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, paragraph 25.

⁴⁰ See judgments of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 41, and of 15 December 2005, *Güney-Görres and Demir*, C-232/04 and C-233/04, EU:C:2005:778, paragraph 37.

⁴¹ See judgments of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 22; of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 41; and of 15 December 2005, *Güney-Görres and Demir*, C-232/04 and C-233/04, EU:C:2005:778, paragraph 37.

⁴² See judgment of 15 December 2005, *Güney-Görres and Demir*, C-232/04 and C-233/04, EU:C:2005:778, paragraphs 39 to 41.

(c) *Intangible asset*

78. The decisive intangible asset in the present transaction is the contract with the Ayuntamiento, which, by the referring court in its first question, has also been called a ‘concession’. In fact, it can be considered a concession to run the School. This contract, however, was not taken over by In-pulso; rather, In-pulso took part in the next tendering procedure and won its own contract. Músicos did not pass on its concession and could not have done so as its own concession had run out on 31 August 2013, before In-pulso, on 1 September 2013, resumed the activity. Moreover, the City Council did not transfer Músico’s concession to In-pulso, but awarded a new one for a different period of time (2013/14 instead of 2012/13) and a different length (10 months instead of 12 months) which was not covered by Músico’s concession. As, therefore, the concession held by In-pulso was a separate concession from that held by Músicos, the two concessions might have been equivalent, but they were not identical.

(d) *Staff*

79. As to personnel, the Court does not ask whether ‘any’ of the transferor’s staff have been taken over, but whether ‘most’ of the personnel are taken over by the new employer.⁴³ Where no employees were taken over, such as in *Süzen*,⁴⁴ the Court held that there was no transfer. In most cases in which the Court has held that a transfer has taken place, a majority of the employees, sometimes all but one, or all but two,⁴⁵ had been taken over.

80. In the case at hand, Músicos had 26 employees, none of whom was taken over by In-pulso.

81. Although, according to the abovementioned⁴⁶ case-law setting out the seven indicators of identity, the staff are clearly one of the defining characteristics of the entity, their relevance for the retention of the entity’s identity varies from case to case.

82. The reason for this is that, as a characteristic or feature of the entity, the workforce can have varying degrees of impact on that entity’s particular activities. This impact is not only stronger when the qualification and education or expertise and experience of the personnel is higher, but it also depends on the relative importance and value of the material and immaterial assets, on the one hand, and the workforce, on the other. When, for example, buses for public transport⁴⁷ or a well-equipped hospital kitchen are operated,⁴⁸ the staff are not a defining feature of the work concerned and the individual persons are more interchangeable. The more individualised the relationship with the client, the less feasible it is to transfer an activity to another employer without taking over the staff or large parts of it. The test is whether exchanging one workforce for another would change the character of the service. For this, an objective assessment has to be performed, taking, in the case at hand, the perspective of the students and their parents.

43 See, inter alia, judgments of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 17; of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 13 (‘the majority of its employees’); and of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraphs 19 and 21.

44 See judgment of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141, paragraphs 3 and 4.

45 See judgment of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 3.

46 See point 72.

47 See judgment of 25 January 2001, *Liikenne*, C-172/99, EU:C:2001:59, paragraph 28.

48 See judgment of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629, paragraph 36.

83. For the 3 administrative employees that Músicos dismissed, a personal relationship between agent and customer might have been less important. The 23 music teachers, however, had to perform a task which relies to a certain degree on an established personal relationship between teacher and pupil. That being said, the undertaking is a school and not a university, where particular music styles and techniques would play a bigger role for advanced musicians. Moreover, the School in this case teaches music and thus one single subject, usually just once a week, whereas, in a regular school, the child spends much more time there and receives a general education.

84. Thus, although the impact of the individual personality of the teacher should not be over-estimated, the service of Músicos certainly entails more individual characteristics than the services that the Court had to consider in cases concerning cooks and kitchen helpers in a hospital canteen, bus drivers or cleaning and security personnel.⁴⁹ But even in those cases, the ‘staff’ factor was not left out of account in the assessment of whether the entity had retained its identity.

(e) Temporary inactivity

85. As Músicos had terminated its teaching activities on 31 March 2013 and In-pulso only began its own teaching activities on 1 September 2013, In-pulso takes the view that a five-month interruption of service of that kind excludes a transfer of the entity.⁵⁰

86. As with all factors, the significance of a factor depends on its relevance for the particular activity. Different lengths of interruption can therefore have very different effects. Especially in the case of seasonal activities, a dormant phase between the active phases will not preclude a transfer.⁵¹ In the present case, however, the period of inactivity exceeded the summer vacation, which only started around June. During the third trimester, starting in April 2013, the School did not operate. Even this irregularity, however, in my view, did not necessarily amount to an interruption of service that precludes a finding that there is a going concern.⁵²

87. For the test in these cases the clients’ perspective should be taken into account, that is, whether or not they would still expect the activity to be resumed. If the irregularities reach a degree that would destroy the clients’ confidence that the service will still be provided, such a pause would have to be considered too long. In that respect, it is relevant that the School presented itself to the students as the ‘Municipal Music School’, and not the ‘Músicos Music School’ or ‘In-pulso Music School’. Thus, the refusal of Músicos to continue the teaching would be somewhat behind the scenes. Ultimately, whether the temporary inactivity before the summer vacation would be considered too strong a rupture will have to be left to the national court, which is responsible for finding the facts. If the pupils and their parents as the relevant clientele in the Ayuntamiento perceived the interruption as a mere phase of reorganisation, this does not preclude a transfer. In fact the City Council was in frequent discussions with the Músicos during that time and then organised the tendering procedure to find another provider, so that the presence of the City Council in the background might have helped to create the impression of the School as a going concern.

49 See judgments of 11 March 1997, *Süzen*, C-13/95, EU:C:1997:141; of 25 January 2001, *Liikenne*, C-172/99, EU:C:2001:59; of 20 November 2003, *Abler and Others*, C-340/01, EU:C:2003:629; and of 15 December 2005, *Güney-Görres and Demir*, C-232/04 and C-233/04, EU:C:2005:778.

50 I would like to emphasise that this question is not identical to the other temporal question treated in this Opinion, which concerns the existence of the entity before the transaction (see above point 46 et seq.). In the present context, the existence of the entity is assumed and the question is whether – if the entity still existed with Músicos – it was identical to the one that existed later under the auspices of In-pulso.

51 See judgment of 17 December 1987, *Ny Mølle Kro*, 287/86, EU:C:1987:573, paragraphs 18 to 21, concerning the operation of a restaurant which operates on a regular basis only in summer. In regard to a temporary downtime around the festive season see also judgment of 15 June 1988, *Bork International*, 101/87, EU:C:1988:308, paragraph 16.

52 See judgment of 18 March 1986, *Spijkers*, 24/85, EU:C:1986:127, paragraph 12.

88. With this element of continuity in the background, from the client's perspective, the School had not ended with the loss of the service provider. The test can be said to be whether an entity would have survived such a phase without losing a significant number of clients, the clientele itself also being among the seven indicators of identity⁵³ established by the Court.

(f) Weighing of the whole set of factors

89. Weighing the factors, in my view, leads to a quite clear result here: Assuming, *arguendo*, that there was an entity before the transaction, this entity did not retain its identity when In-pulso took over the activity.

90. Whereas the tangible assets were transferred, none of the staff were taken over, although in the case of a music school the staff cannot be entirely disregarded. Moreover, the concession, as the central intangible asset without which the activity of the entity — the running of the School — would not be possible, has not been transferred: In-pulso holds a concession, but this concession has not been received from the transferor, either directly or indirectly with the City Council as an intermediary. The fact that the School was dormant for five months, however, does not seem to have produced a rupture that could stand in the way of a transfer.

91. As the issue is whether identity is retained, only insignificant elements can be left out when an activity is taken over by another person: there cannot be a transfer where only a part or only a certain percentage of the entity is taken over. Rather, the entity with its substance as a whole needs to be transferred. In the case at hand, neither the staff nor the concession was transferred: only the material assets, after they had been separated from the rest, were taken over. Thus, the entity before and after the award of the new contract cannot be considered to be identical.

92. I therefore find that there is no transfer in the present case.

C. Second question

93. The second question asks whether the appellant's dismissal was caused by the transfer. This question is contingent on the answer to the previous question so that I do not have to answer it. I will nonetheless give a short answer in case the Court does not share my view on the first question and holds in the affirmative.

94. As to the second question, the Spanish Government suggests that, even assuming there to be a transfer, this transfer was not the reason for the dismissal, as there were economic reasons. The Commission agrees but submits that one should also consider whether the reasons may be artificial and ultimately aimed at depriving the employees of their lawful rights.

95. Evaluating the circumstances of the case, it is striking that the City Council did not expect and was in no way prepared for the cessation of the activities by Músicos and could not provide any substitute music lessons for third trimester, although the school year had not ended and the classes were to be continued for another two months before the summer break. Instead, the City Council, when Músicos handed over the premises and instruments, tried to urge them to resume the management of the School. It was only after the sudden cessation of teaching by Músicos that the City Council started looking for another solution. The competitor who continued the School had not even been created at the time of the dismissal of Músicos' employees, its incorporation taking place only in July 2013.

⁵³ See above point 72.

96. Therefore, even assuming that a transfer took place after the dismissal, there is no causal link between that transfer and the dismissal, and the change in the management of the School which took place in September 2013 cannot call in question the legality of the dismissals made in April 2013. There is no apparent link between the City Council's non-payment of the sums requested by Músicos and the subsequent tender that was won by In-pulso. In fact, none of the parties, including the appellant, has doubts that the economic situation of Músicos, which was eventually dissolved for insolvency, was a reason for the collective dismissal.

97. As the Court pointed out in its judgment in *Dethier Équipement*,⁵⁴ a subsequent transfer does not affect dismissals that have taken place for economic, technical or organisational reasons.

D. Third question

98. By its third question, the referring court seeks to ascertain whether a rule of Spanish law infringes Article 47 of the Charter, if such a rule binds the referring court deciding on the individual dismissal by way of *res judicata* to an earlier judgment upholding the employer's decision on the collective dismissal.

99. The referring court asks this third question contingent on affirmative responses to the first two questions. As in my view, in the present situation, there is no transfer (first question) and even if there were, such a transfer would not have caused the dismissal (second question), I will answer the question only briefly as it has no relevance for the case at hand, if the Court shares my view on at least one of the previous questions.

100. As to the third question, In-pulso invokes the principle of *res judicata* and contends that it was sufficient to have the full panoply of appeals in the first proceedings, whilst the Spanish Government submits that an answer to this question is not necessary, and that, in any event, the relevant Spanish procedural law did not infringe Article 47 of the Charter. The Commission emphasises that the Spanish law is in conformity with Article 47 of the Charter.

101. As the referring court correctly states, Article 47 of the Charter, establishing a right to effective judicial protection, is directly applicable insofar as the implementation of the rights arising under the Directive is at issue.⁵⁵ The appellant invokes his right under Article 3(1) of the Directive to continue his employment relationship with the transferee In-pulso in the case of a transfer of an undertaking.

102. The parties to the proceedings, in their written and oral answers to the questions put by the Court, have, however, confirmed that, under Spanish law, the *res judicata* effect of the collective dismissal judgment given to the collective statutory representatives under Article 124(13)(b) read in conjunction with Article 160 LJS does not preclude the individual invocation of the remedies provided by the Directive. Under Spanish law, the binding force refers exclusively to the subject matter of the proceedings. Article 160(5) of the LJS provides that the force of *res judicata* in this context applies to individual actions 'which concern the same subject matter or are directly related thereto'. The question of the present individual action, namely a transfer of an entity from Músicos to In-pulso was, however, not the subject matter of the collective proceedings.

⁵⁴ See judgment of 12 March 1998, *Dethier Équipement*, C-319/94, EU:C:1998:99, paragraphs 33 to 36.

⁵⁵ This is in conformity with Article 51(1) of the Charter, which provides that the provisions of the Charter are addressed to the Member States only when they are implementing Union law.

103. The collective judgment of 19 June 2013 states that the dismissal was justified by economic reasons and that there was no transfer of the School to the Ayuntamiento. In the introductory part of its considerations,⁵⁶ the appellate judgment of the Tribunal Supremo of 17 November 2014, upholding the judgment of the Tribunal Superior of 19 June 2013 clearly defines the subject matter of the collective proceedings, stating that besides the economic reasons alleged by Músicos the question was whether the cessation of teaching by Músicos led to a transfer of the School *to the Ayuntamiento*. The present question, however, does not concern a transfer to the Ayuntamiento but *to In-Pulso*. This set of facts of the main proceedings was not dealt with in the collective proceedings. The main proceedings concerns facts that occurred at a later time and with another possible transferee. The defendant In-pulso, who is the transferee in question in the main proceedings, did not even exist at the time when the collective judgment of 19 June 2013 was given. Facts that occurred at a later date were not able to be dealt with in the collective proceedings which, according to the explanations of the referring court in its order for reference, was restricted to the facts on the day of the oral hearing of the collective proceedings. This took place on 22 May 2013, and therefore the resuming of the School in September 2013 by In-pulso was not part of the subject matter of the collective proceedings.

104. Thus, a later finding of a transfer in the individual proceedings, under Spanish law, would not be excluded by *res judicata*, as the question of a transfer to In-pulso was not addressed in the earlier collective judgment. This has not only been confirmed by the Spanish Government and the Commission but, as the Commission has correctly stated, also by the first instance court of the main proceedings (Juzgado de lo Social no. 4 de Valladolid) which did not base its findings as to a transfer to In-pulso on considerations of *res judicata* but decided this question on the merits holding that, in its view, the five months phase of inactivity was too long to find a transfer.

105. Finally, I would like to mention, that the referring court has *not* asked the Court whether the fact that it was bound in its decision on the individual dismissal by the finding of *economic reasons* in the earlier collective judgment of the Tribunal Superior of 19 June 2013 infringed Article 47 of the Charter, but has restricted its question to the matter of a *transfer*.⁵⁷

IV. Conclusions

106. In light of the foregoing, I propose that the Court answer the question referred by the Sala de lo Social del Tribunal Superior de Justicia de Castilla y León (Social Division of the High Court of Justice, Castilla y León, Spain) as follows:

- (1) It should be considered that there is no transfer for the purposes 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 where the holder of a concession of a Municipal Music School, which receives all the material resources from that Municipality (premises, instruments, classrooms, furniture), has engaged its own staff and provides its services during the academic year, ceases that activity on 1 April 2013, two months before the end of the academic year, returning all the material resources to the Municipality, which does not resume the activity for the remainder of

⁵⁶ See p. 6 sub 'Fundamentos de derecho. Primero' of the judgment of the Tribunal Supremo of 17 November 2014 presented by In-pulso as an annex to its answer to the written questions.

⁵⁷ Although the referring court mentions the fact that Músicos won the action concerning the payment under the administrative contract of the difference between the fees paid, it does not question that the economic situation at the relevant time justified the dismissal. This would be a question that might have touched on the interaction between the present Directive and Council Directive 98/59/EC concerning collective redundancies, that has been referred to *passim* by the requesting court. In *Mono Car Styling*, C-12/08, EU:C:2009:466, the Court discussed whether this latter directive infringes individual employees' right to a fair trial under Article 6 ECHR because the rights of information and consultation laid down in Council Directive 98/59/EC were left to collective representatives. The Court held that there was no infringement of the individual employee's fundamental rights as the rights under the directive are intended to benefit workers collectively and are therefore collective in nature.

the academic year 2012/13, but awards a new concession to a new contractor, which resumes the activity in September 2013, at the beginning of the new academic year 2013/14, transferring to the new contractor for that purpose the necessary material resources previously made available to the former contractor by the Municipality (premises, instruments, classrooms, furniture).

- (2) For the purposes of Article 4(1) of Directive 2001/23 it is to be understood that, in the circumstances described, – in which the failure of the main undertaking (the Municipality) to fulfil its obligations obliges the first contractor to cease its activity and to dismiss all its staff and immediately afterwards that main undertaking transfers the material resources to a second contractor, which continues with the same activity –, the dismissal of the first contractor's employees has occurred for 'economic, technical or organisational reasons entailing changes in the workforce' and has not been caused by 'the transfer of the undertaking, business or part of the undertaking or business', a cause prohibited by that article.
- (3) Article 47 of the Charter of Fundamental Rights of the European Union is to be interpreted as not precluding national legislation which prohibits a court from ruling on the substance of the claims of an employee who challenges in an individual action his dismissal, as part of a collective dismissal, in order to defend the rights deriving from Directive 2001/23 and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, where final judgment has already been given on the collective dismissal in proceedings to which the employee was unable to be a party, although the unions established in the undertaking and all the collective statutory representatives were or were able to be parties, where under the national law, the binding force of that collective judgment does not exceed the boundaries of the subject matter of the proceedings and that subject matter differs from the one at issue in the individual proceedings.