



## Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

28 January 2015\*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Transfer of undertaking — Safeguarding of employees' rights — Interpretation of Directive 2001/23/EC — Transferor who is the subject of insolvency proceedings — Guarantee that the transferee is not to be liable for certain debts of the undertaking transferred)

In Case C-688/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Spain), made by decision of 11 December 2013, received at the Court on 27 December 2013, in the proceedings brought by

**Gimnasio Deportivo San Andrés SL**, in liquidation,

intervening parties:

**Tesorería General de la Seguridad Social (TGSS)**,

**Fondo de Garantía Salarial**,

THE COURT (Sixth Chamber),

composed of S. Rodin, President of the Chamber, A. Borg Barthet and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Gimnasio Deportivo San Andrés SL, in liquidation, by G. Atarés París, insolvency administrator,
- the Tesorería General de la Seguridad Social (TGSS), by M. Mijares García-Pelayo, acting as Agent,
- the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,
- the European Commission, by J. Enegren and R. Vidal Puig, acting as Agents,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court,

\* Language of the case: Spanish.

makes the following

### Order

- 1 This request for a preliminary ruling concerns the interpretation 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 (OJ 2001 L 82, p. 16).
- 2 The request has been made in proceedings brought by Gimnasio Deportivo San Andrés SL, in liquidation ('Gimnasio'), concerning the question as to which of the latter's debts the transferee could be permitted not to bear following the transfer of Gimnasio's activities to it.

### Legal context

#### *EU law*

- 3 Article 1(1)(a) of Directive 2001/23 states:

'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'.

- 4 Article 2(1) of Directive 2001/23 provides:

'For the purposes of this Directive:

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

...

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

- 5 Article 3 of Directive 2001/23, which is included in Chapter II (entitled 'Safeguarding of employees' rights'), is worded as follows:

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

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

...

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

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

4.

(a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.

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

6 The first sentence of Article 4(1) of Directive 2001/23 provides that '[t]he 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'.

7 Article 5, also to be found in Chapter II of Directive 2001/23, reads as follows:

'1. 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).

2. 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 (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [OJ 1980 L 283, p. 23], and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph [2](b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.

...

4. 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.'

8 Article 8 of Directive 2001/23 provides:

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

#### *Spanish law*

9 Transfers of undertakings are governed by Royal Legislative Decree 1/1995 of 24 March 1995 approving the consolidated version of the Law on the Workers' Statute (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654), as amended by Law 12/2001 of 9 July 2001 (BOE No 164 of 10 July 2001, p. 24890; the 'Workers' Statute').

10 Article 44(1) of the Workers' Statute provides:

'The transfer of an undertaking, business or independent production unit of an undertaking shall not in itself terminate the employment relationship; the new employer shall take over the former employer's rights and obligations in respect of employment and social security, including commitments as regards pensions, on the conditions laid down by the specific applicable legislation, and, in general, all obligations in the sphere of additional social protection that were borne by the transferor.'

11 However, in accordance with Article 57a of the Workers' Statute, in the event of insolvency proceedings, the specific conditions laid down by Law 22/2003 of 9 July 2003 on Insolvency (Ley 22/2003 Concursal, BOE No 164 of 10 July 2003, p. 26905), as amended by Law 38/2011 of 10 October 2011 (BOE No 245 of 11 October 2011; the 'Law on Insolvency'), are to apply to the collective alteration, suspension or termination of contracts of employment and to transfers of undertakings.

12 The Law on Insolvency provides for two possible outcomes to insolvency proceedings: composition or liquidation. In the liquidation stage, Articles 148 and 149 of that law apply and they establish different legal rules depending on whether or not a liquidation plan has been produced and approved.

13 Article 148(1) of the Law on Insolvency provides that the insolvency administrator must submit a liquidation plan to the court when the liquidation stage commences and specifies, in relation to that plan, that whenever practicable, 'disposal of all, or some of, the business establishments, operations and any other units producing goods or supplying services and belonging to the insolvent party, is to be envisaged as a single transaction'.

14 Article 148(2) of the Law on Insolvency provides that the liquidation plan must be approved by the court, which may 'make amendments to that plan or decide that the liquidation is to be carried out in accordance with the supplementary rules' set out in Article 149 of that law.

15 Under Article 149 of the Law on Insolvency:

‘1. Where no liquidation plan has been approved and, should the case arise, where some matters are not covered by such a plan, the process of liquidation shall be governed by the following rules:

(a) all the business establishments, operations and other units producing goods or supplying services and belonging to the debtor shall be disposed of as a single unit unless, on receipt of a report by the insolvency administrator, the court considers that it is more expedient in the interest of the insolvency that all the component parts, or some only, be first divided or transferred individually. Disposal of the whole or, when appropriate, of each production unit, shall be performed by auction and if unsuccessful, the court may order direct disposal.

...

2. A transfer of the undertaking shall be deemed to have taken place for the purposes of employment when the effect of the disposal referred to in paragraph 1(a) is that an economic entity retains its identity, meaning an organised grouping of resources which has the objective of pursuing a central or ancillary economic activity. In such a case, the court may decide that the acquirer should not be liable by subrogation for unpaid salaries and compensation payments arising prior to the disposal which are covered by the Fondo de Garantía Salarial [Wages Guarantee Fund] in accordance with Article 33 of the Workers’ Statute. Similarly, in order to secure the future viability of the business and safeguard employment, the transferee and the employees’ representatives may enter into agreements on the alteration of the collective conditions of employment.

3. The order authorising the sale by auction or the transfer of the assets or rights whether separately, in lots or as part of an undertaking or production unit shall provide for the cancellation of all charges which predate the insolvency and were created in respect of insolvency claims that do not enjoy special privileges under Article 90.’

16 According to the referring court, final provision No 11 of the Law on Insolvency, amending the General Law on Taxation 58/2003 (*Ley 58/2003 General Tributaria*) of 17 December 2003 (BOE No 302 of 18 December 2003, p. 44987), explicitly states that transfer or extension of liability for tax purposes does not apply to the acquirers of economic operations or businesses belonging to a debtor who is the subject of insolvency proceedings when the acquisition takes place in the course of such proceedings. However, there is no equivalent provision in the social security legislation.

17 Article 127, entitled ‘Special cases of liability in respect of benefits’, of the consolidated version of the General Law on Social Security (*Ley General de la Seguridad Social*) approved by Royal Legislative Decree 1/1994 of 20 June 1994 (BOE No 154 of 29 June 1994, p. 20658; ‘LGSS’), provides at Article 127(2):

‘In the event of a transfer of ownership of the operation, industrial concern or business, the purchaser and the previous owner, or his successors in title, shall be jointly and severally liable in respect of benefits payable before that transfer. The same liability shall apply to the transferring employer and the transferee where there is a temporary assignment of staff, even where that is free of charge or on a non-profit basis.’

18 Article 15 of the LGSS (headed ‘Mandatory nature [of social security contributions]’), as subsequently amended, states at Article 15(3):

‘Natural or legal persons or entities without legal personality shall be liable for the payment of social security contributions and other social security charges where the provisions governing each scheme and charge impose a direct obligation on them in that respect. The following shall also be liable for payment of those contributions and charges: those who are jointly and severally liable, secondarily

liable or liable by reason of succession *mortis causa* on account of facts, omissions, *negotia juridica* or legal acts which give rise to that liability pursuant to any provision with the force of law which relates to, or does not expressly exclude, social security obligations, or pursuant to agreements or covenants which are not contrary to the law. That joint and several liability, secondary liability and liability by succession shall be governed and enforced by means of the recovery procedure provided for in this Law and its implementing decrees.’

- 19 Article 104 of the LGSS, which is entitled ‘Party liable [for payment of social security contributions]’, as subsequently amended, provides at Article 104(1):

‘The employer shall be liable for the payment of social security contributions and shall pay its own contributions and those of its employees in their entirety.

The persons or entities without legal personality referred to in Articles 15, 127(1) and 127(2) of this Law shall also be liable jointly and severally, secondarily or by succession.

The joint and several liability which applies in the event of a transfer of ownership of the operation, industrial concern or business, as provided for in Article 127, shall extend to all debts incurred before that transfer. Such a transfer shall be deemed to have taken place even where the continuation of the operation, industrial concern or business is carried out by a workers-owned company (“sociedad laboral”), regardless of whether or not that company consists of workers who were employed by the previous employer.

Where the employer is a company or organisation which has been dissolved and liquidated, the liability to pay its outstanding social security contributions shall be transferred to the partners or shareholders who shall be jointly and severally liable in that respect, up to a value not exceeding the liquidation proceeds distributed to them.

...’

### **The facts in the main proceedings and the questions referred for a preliminary ruling**

- 20 Gimnasio is a commercial company whose main activity consisted in the management of the Escuela Laia, a secondary school with over 150 pupils.
- 21 By order of 2 September 2013, Gimnasio was, on its own application, declared insolvent.
- 22 By order of 15 October 2013, the competent judicial authority approved the award of the Escuela Laia to the Institució Pedagògica Sant Andreu SL, a company formed by a group of teachers at the school which submitted the sole purchase offer. The Institució Pedagògica Sant Andreu undertook to maintain the activity of Gimnasio and take over its employment contracts.
- 23 According to that order, the award was made ‘subject to the following conditions:
- (1) Within 45 working days of notification of this order, the amounts that are owed in any manner to the employees shall be determined so that they may be notified to the Fondo de Garantía Salarial [Wages Guarantee Fund], in order that the latter may make payments in accordance with Article 33 of the Workers’ Statute.

...



- (5) Express authorisation is given for the transfer of the contractual relationships entered into for the operation of the production unit which the insolvent company may have with third parties, in particular powers of attorney, sales agreements, franchise agreements, urban leases, supply contracts or contracts for the provision of services. The purchaser is required to inform the court of any matters that may arise with regard to those transfers.

It is expressly directed that the transfer shall cancel charges and encumbrances that may exist in relation to any component of the assets transferred, save those linked to preferential claims as listed in the final report. Accordingly, no debt shall be transferred to the purchaser other than those mentioned in the binding bid itself as set out therein, and the purchaser or the entity designated by it shall not be liable by subrogation for the earlier tax debts of the insolvent company or for earlier obligations, that is to say, debts the insolvent company may owe to the Tesorería General de la Seguridad Social [General Social Security Treasury; 'TGSS'], and it is therefore ordered that this decision be notified to the Agencia Estatal de Administración Tributaria [State Tax Administration] and the TGSS.

...'

- 24 On 25 October 2013, the TGSS lodged an application challenging the award order of 15 October 2013, on the ground that it infringes Article 44 of the Workers' Statute in so far as it provides that the transferee is not liable by subrogation for the outstanding social security debts of Gimnasio.
- 25 On 21 November 2013, a group of former Gimnasio employees also challenged the order.
- 26 In view of the uncertainty regarding the extent of charges to be assumed by the transferee (Institució Pedagògica Sant Andreu SL, in this case), the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court 3, Barcelona), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Must the guarantee that the transferee acquiring an undertaking in insolvency, or a production unit of that undertaking, will not take on liability for debts arising out of social security debts incurred before the award of the production unit, or out of previous employment-related debts when the insolvency proceedings give rise to protection at least equivalent to that provided for in the Community directives, be considered to relate uniquely and exclusively to debts directly linked to employment contracts or employment relationships or, in the framework of overall protection of the rights of employees and the safeguarding of employment, must that guarantee be extended to employment-related or social security debts incurred before the award to a third party?
  2. In the same context of safeguarding the rights of employees, can the purchaser of the production unit obtain from the court dealing with the insolvency and authorising the award a guarantee, not only in relation to rights arising from the employment contracts but also in relation to debts incurred before the award that the insolvent company may owe to employees whose employment relationship has already been terminated or in relation to earlier social security debts?
  3. Does the person who acquires an insolvent undertaking or a production unit and undertakes to safeguard all or some of the contracts of employment, and accepts liability for them by subrogation, obtain the guarantee that there will not be claimed from him or transferred to him other obligations of the transferor connected to the contracts or relationships where he accepts liability by subrogation, particularly earlier employment risks or social security debts?

4. In brief, as regards the transfer of production units or undertakings that have been judicially or administratively declared insolvent and in liquidation, can Directive 2001/23 be interpreted not only as permitting the safeguarding of contracts of employment but also as making it certain that the purchaser will not have to be liable for debts incurred before the award of that production unit?
5. Does the wording of Article 149(2) of the Law on Insolvency, in referring to the transfer of an undertaking, constitute the provision of national law required by Article 5(2)(a) of Directive 23/2001 for the exception to operate?
6. If this is the case, must the award order issued by the court conducting the insolvency proceedings and which contains these guarantees and safeguards at all events be binding on all other courts or in administrative proceedings that may be brought against the new purchaser in respect of debts incurred before the date of purchase, with the result, therefore, that Article 44 of the Workers' Statute cannot render ineffective Article 149(2) and (3) of the Law on Insolvency?
7. If, on the other hand, it were to be considered that Articles 149(2) and (3) of the Law on Insolvency do not operate as the exception provided for in Article 5 of Directive 23/2001, the Court of Justice is asked to make it clear whether the rules laid down in Article 3(1) of the directive will affect only the employment-related rights and obligations, strictly speaking, laid down in the contracts in force, so that rights or obligations such as those arising from social security contributions or other obligations in respect of employment contracts already terminated before the insolvency proceedings were initiated are not, in any circumstances, to be regarded as being transferred to the purchaser?

### **Consideration of the questions referred for a preliminary ruling**

- 27 Under Article 99 of the Rules of Procedure of the Court of Justice, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 28 It is appropriate to apply that provision in the present case.
- 29 As a preliminary point, it should be noted that, by its questions, the referring court asks the Court whether certain provisions of the legislation of the Member State concerned comprise the measures required for transposition of Directive 2001/23 and, more generally, whether those provisions are compatible with EU law.
- 30 In that regard, it should be borne in mind that it is settled case-law that, in proceedings under Article 267 TFEU, the Court has no jurisdiction to interpret national provisions or decide whether the interpretation of those provisions by the authorities of the Member State concerned is correct (see, inter alia, judgment in *Vueling Airlines*, C-487/12, EU:C:2014:2232, paragraph 26 and the case-law cited).
- 31 Likewise, within the framework of the powers conferred on it by Article 267 TFEU, the Court has no jurisdiction to rule on the compatibility of provisions of national law with EU law (see, inter alia, judgment in *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraph 27 and the case-law cited).



- 32 However, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to determine the issue of compatibility for the purposes of the case before it (see, inter alia, judgment in *Lombardini and Mantovani*, EU:C:2001:640, paragraph 27 and the case-law cited).
- 33 In those circumstances, the seven questions submitted by the referring court, which it is appropriate to consider together, must be understood as essentially asking whether Directive 2001/23 must be interpreted as precluding a rule of national law (such as that at issue in the main proceedings) which, where there is a transfer of undertakings, businesses or parts of undertakings or businesses and the transferor is the subject of insolvency proceedings, provides or permits that the transferee be authorised not to bear the charges payable by the transferor in respect of contracts of employment or employment relationships, including charges relating to the statutory social security system, provided that those debts arose before the date of the transfer of the production unit. The referring court also asks whether the fact that the employment relationship ended before that date has any bearing in that regard.
- 34 In order to respond to these questions, it should be noted at the outset that the aim of Directive 2001/23 is to protect employees by ensuring that their rights are safeguarded in the event of a transfer of an undertaking, as is clear from recital 3 of the preamble to, and from Article 3 of, that directive (see judgment in *Kirtruna and Viganò*, C-313/07, EU:C:2008:574, paragraph 36).
- 35 Nevertheless, in view of the differences that remain between Member States as regards the extent of the protection of employees in this context, Directive 2001/23 is intended to reduce those differences by the approximation of national laws without, however, providing for complete harmonisation in this area (see recitals 4 and 6 in the preamble to Directive 2001/23 and judgment in *Amatori and Others*, C-458/12, EU:C:2014:124, paragraph 41 and the case-law cited).
- 36 As is clear from its title, Chapter II of Directive 2001/23 sets out the rules regarding safeguarding of employees' rights, in particular in Articles 3 to 5.
- 37 The first subparagraph of Article 3(1) of Directive 2001/23 lays down the principle that 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 to be transferred to the transferee.
- 38 With the same objective of safeguarding employees' rights, Article 3(3) of Directive 2001/23 provides that, following the transfer, the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the termination or expiry of the collective agreement or the entry into force of another collective agreement (judgment in *Juuri*, C-396/07, EU:C:2008:656, paragraph 32). In addition, Article 4(1) of that directive provides that the transfer of an undertaking does not in itself constitute grounds for dismissal by the transferor or the transferee.
- 39 Those protective rules must be considered to be mandatory inasmuch as Member States are not permitted to derogate from them in a manner unfavourable to employees (see, to that effect, judgment in *Commission v Italy*, C-561/07, EU:C:2009:363, paragraph 46), subject to the exceptions laid down in the directive itself.
- 40 In that regard, first, the second subparagraph of Article 3(3) of Directive 2001/23 permits Member States to limit the period for observing the terms and conditions of employment, provided that that period is not less than one year.

- 41 Secondly, Article 3(4)(a) of Directive 2001/23 provides that, unless Member States prescribe otherwise, paragraphs 1 and 3 of Article 3 do not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.
- 42 In that context, it should be noted that the Court has already held that the latter exception to the application of paragraphs 1 and 3 of Article 3 of Directive 2001/23 (which require the transferee to observe the rights and obligations of the transferor arising from a contract of employment or from an employment relationship as well as the terms and conditions agreed in any collective agreement) must be interpreted restrictively in view of the fact that the general objective of Directive 2001/23 is the safeguarding of employees' rights in the event of a transfer of an undertaking (judgment in *Commission v Italy*, EU:C:2009:363, paragraph 30 and the case-law cited).
- 43 Thus, only benefits granted outside the statutory social security schemes, which are exhaustively listed in Article 3(4)(a) of Directive 2001/23, may be excluded from the obligation to transfer employees' rights (judgment in *Commission v Italy*, EU:C:2009:363, paragraph 32).
- 44 It should also be noted that, in accordance with Article 3(4)(b) of Directive 2001/23, even where Member States apply the exception in Article 3(4)(a), the exclusion of the obligation to transfer employees' rights set out in that provision must go together with the adoption, by the Member State concerned, of the measures necessary to protect the interests of employees — including those no longer employed in the transferor's business at the time of the transfer — in respect of rights conferring on them immediate or prospective entitlement to old-age benefits and survivors' benefits under supplementary schemes referred to in Article 3(4)(a) (judgment in *Commission v Italy*, EU:C:2009:363, paragraph 31).
- 45 Thirdly, under the second subparagraph of Article 4(1) of Directive 2001/23, Member States are permitted to derogate from the first subparagraph of that article by providing that the rules on dismissal laid down in that first subparagraph do not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.
- 46 Fourthly, Article 5(1) of Directive 2001/23 provides that Articles 3 and 4 of that directive do not, as a general rule, apply to the transfer of an undertaking 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.
- 47 However, as is clear from the wording of Article 5(1) and the first part of Article 5(2), Member States are nevertheless permitted to apply Articles 3 and 4 to the transfer of an undertaking where the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority.
- 48 In accordance with Article 5(2), where a Member State exercises that option, it is nevertheless permitted, under certain conditions, not to apply certain guarantees referred to in Articles 3 and 4 of Directive 2001/23 provided that insolvency proceedings have been opened and that such proceedings are under the supervision of a competent public authority (judgment in *Commission v Italy*, EU:C:2009:363, paragraph 38).
- 49 Thus, by way of derogation from Article 3(1) of Directive 2001/23, that Member State may provide, under Article 5(2)(a) and (b) of that directive, (i) that the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings are not to be transferred to the transferee, provided that such proceedings ensure, under the law of that Member State, protection at least equivalent to that guaranteed by

Directive 80/987, and/or (ii) that, in so far as current law or practice permits, alterations to the employees' terms and conditions of employment may be agreed with a view to safeguarding employment opportunities by ensuring the survival of the undertaking.

50 Article 5(4) also provides that Member States must take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights conferred by Directive 2001/23.

51 Lastly, whilst, as stated at paragraph 39 above, the protective rules laid down by Directive 2001/23 are mandatory, subject to the exceptions expressly provided by the directive itself, it must be noted that Article 8 thereof provides that the directive does not affect the right of Member States to apply or introduce a scheme which is more favourable to employees.

52 It follows from the foregoing that, first, Directive 2001/23 establishes the principle that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking. As is apparent from the wording and structure of Article 3 of that directive, the transfer, to the transferee, of charges that are payable, at the time of the transfer of the undertaking, by the transferor on account of the fact that it is an employer, encompasses all the rights of employees provided that they are not covered by an exception expressly provided for by the directive itself (see, by analogy, judgment in *Beckmann*, C-164/00, EU:C:2002:330, paragraphs 36 and 37).

53 Therefore, just as wages and other emoluments payable to employees of the undertaking in question are an integral part of those charges, so are contributions to the statutory social security scheme payable by the transferor, since those charges arise from contracts of employment or employment relationships binding the latter. Indeed, as is also clear from Article 2(1) of Directive 2001/23, a contract of employment or employment relationship entails, in terms of that directive, a legal relationship between the employers and the employees, its purpose being to regulate the conditions of employment (judgment in *Kirtruna and Vigano*, EU:C:2008:574, paragraph 41).

54 Secondly, under Article 5(1) of Directive 2001/23, that principle does not apply where, as in the main proceedings, the transferor is the subject of insolvency proceedings and is under the supervision of a competent public authority of the Member State concerned. In such circumstances, the payment of debts arising from the relationship between the employees and the insolvent employer is guaranteed under Directive 80/987.

55 Thirdly, despite that derogation provided for in Directive 2001/23, Article 5(1) permits each Member State to apply, inter alia, Article 3 of that directive to the transfer of an undertaking where the transferor is the subject of insolvency proceedings. Article 5(2)(a) provides that, where a Member State exercises that option, it is entitled to derogate from Article 3(1) of Directive 2001/23 so that charges arising from contracts of employment or employment relationships and payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings are not transferred to the transferee, provided, however, that that Member State ensures a level of protection at least equivalent to that resulting from Directive 80/987, which requires the establishment of a mechanism that guarantees the payment of claims payable to employees under contracts of employment or employment relationships concluded with the insolvent transferor. That optional derogation does not only guarantee the payment of the wages of the employees concerned, but also safeguards employment opportunities by ensuring the survival of the undertaking in difficulty.

56 Fourthly, under Article 8 of Directive 2001/23, it is open to Member States to adopt and implement any alternative scheme in relation to transfers of undertakings, provided that it is more favourable to employees than the scheme established by that directive. That approach is consistent with the

objective pursued by Directive 2001/23, as set out in paragraph 34 above. Thus, a Member State is not deprived of the option of applying Article 3(1) of that directive, even in the case where an operator takes over an undertaking that is insolvent.

57 Fifthly, it is apparent from both the wording of Directive 2001/23 and the scheme established by that directive that, apart from the obligation imposed on Member States to protect employees no longer employed in the transferor's business on the date of the transfer as regards rights conferring on them immediate or prospective entitlement to the benefits referred to in Article 3(4)(b) of Directive 2001/23, the EU legislature has not laid down rules regarding the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date on which the transfer takes place. Nevertheless, for the same reasons as those set out in the previous paragraph, a Member State is not precluded from providing that such charges are to be transferred to the transferee.

58 It is in the light of that guidance as to the interpretation of EU law that it will be for the referring court to rule on the dispute before it, by determining whether the legislation applicable in the Member State concerned is compatible with the requirements of EU law and taking into consideration all the features of the legal and factual situation which have given rise to that dispute.

59 Having regard to all the foregoing considerations, the answer to the questions referred is that Directive 2001/23 must be interpreted as meaning that:

- in a situation where, in the context of the transfer of an undertaking, the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority and where the Member State concerned has chosen to make use of Article 5(2) of Directive 2001/23, the directive does not prevent that Member State from providing or permitting that charges payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings as a result of contracts of employment or employment relationships — including charges relating to the statutory social security system — are not to be transferred to the transferee, provided that such proceedings ensure a level of protection for employees which is at least equivalent to that resulting from Directive 80/987. Nevertheless, that Member State is not precluded from requiring such charges to be borne by the transferee, even where the transferor is insolvent;
- subject to the provisions laid down in Article 3(4)(b), Directive 2001/23 does not lay down any obligations so far as concerns the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date of transfer, but it does not preclude legislation of the Member States which permits such charges to be transferred to the transferee.

### **Costs**

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

**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 must be interpreted as meaning that:**

- **in a situation where, in the context of the transfer of an undertaking, the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority and where the Member State concerned has chosen to make use of Article 5(2) of Directive 2001/23, the directive does not prevent that Member State from providing or permitting that charges payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings as a result of contracts of employment or employment relationships — including charges relating to the statutory social security system — are not to be transferred to the transferee, provided that such proceedings ensure a level of protection for employees which is at least equivalent to that resulting from Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Nevertheless, that Member State is not precluded from requiring such charges to be borne by the transferee, even where the transferor is insolvent,**
- **subject to the provisions laid down in Article 3(4)(b), Directive 2001/23 does not lay down any obligations so far as concerns the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date of transfer, but it does not preclude legislation of the Member States which permits such charges to be transferred to the transferee.**

[Signatures]