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Provisional text

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 14 September 2017(1)

Case C-103/16

Jessica Porras Guisado

v

Bankia SA

Sección Sindical de Bankia de CCOO

Sección Sindical de Bankia de UGT

Sección Sindical de Bankia de ACCAM

Sección Sindical de Bankia de SATE

Sección Sindical de Bankia de CSICA

Fondo de Garantía Salarial (Fogasa)

joined party:

Ministerio Fiscal

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain)

(Social policy — Directive 92/85/EEC — Safety and health of pregnant workers and workers who have recently given birth or are breastfeeding — Article 10(1) and (3) — Prohibition of dismissal — Exceptional cases not connected with the pregnant worker's condition — Article 10(2) — Notice of dismissal — Directive 98/59/EC — Approximation of the laws of the

Member States relating to collective redundancies — Article 1(1)(a) — Dismissal for reasons not related to the individual workers concerned)

Introduction

1. The selection of which workers will be 'let go' in the context of a collective redundancy is always a sensitive issue. Before such a collective redundancy is put into effect, there will be, in accordance with the requirements of the Collective Redundancies Directive, (2) consultations between the employer and the workers' representatives. It may be felt that certain specific categories of workers should be given protection during the collective redundancy (in the sense of priority for retention during the selection process). However, the workforce may also comprise other categories of workers who enjoy protection against dismissal by virtue of some other legal instrument (for example, workers covered by the Maternity Directive). (3)

2. In this request for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain: 'the referring court') the Court is asked to interpret the prohibition on the dismissal of pregnant workers in Article 10 of the Maternity Directive. More particularly, the Court's guidance is sought as to how to interpret that prohibition in conjunction with the Collective Redundancies Directive in the event of a collective redundancy procedure.

Legal framework

European Union Law

The Maternity Directive

3. The recitals to the Maternity Directive, which is the tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC, (4) explain that it was adopted in order to introduce minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of, inter alia, pregnant workers, identified as such a specific group at risk. (5) Protection of the safety and health of pregnant workers should not mean that women on the labour market are treated unfavourably nor work to the detriment of directives concerning equal treatment for men and women. (6) The risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers and provision should be made for such dismissal to be prohibited. (7)

4. The term 'pregnant worker' is defined in Article 2(a) as a 'pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

5. The Commission, in conjunction with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, was instructed to draw up guidelines on the assessment of risks to workers covered by the Maternity Directive. (8) An assessment must be made of the work place and the job of the pregnant worker. (9) Employers must adjust the working conditions or working hours of the pregnant worker in order to avoid any identified risk. If

that is not possible, she must be moved to another job; and if that is not possible, she must be granted leave. (10)

6. Article 10 is entitled 'Prohibition of dismissal'. It states:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

7. Article 12 provides that Member States must introduce into their legal systems such measures as are necessary to enable workers who fall within the scope of the Maternity Directive to pursue their claims in cases where they are wronged by a failure to comply with the obligations laid down.

The Collective Redundancies Directive

8. The Collective Redundancies Directive aims to ensure that greater protection is afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the European Union. (11) Its recitals explain that completion of the internal market should lead to an improvement in the living conditions for workers and that the differences between the provisions in force in Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers can have a direct effect on the functioning of the internal market. (12)

9. Within Section I ('Definitions and scope'), Article 1(1)(a) defines 'collective redundancies' as 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

– at least 10 in establishments normally employing more than 20 and less than 100 workers,

– at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

– at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

...

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.' (13)

10. Section II contains the information and consultation requirements. Thus, an employer contemplating collective redundancies must begin consultations with the workers' representatives in good time with a view to reaching an agreement. To enable workers' representatives to make constructive proposals, employers must in good time during the course of the consultations supply them with all relevant information and notify them of the following elements: (i) the reasons for the projected redundancies; (ii) the number and categories of worker to be made redundant; (iii) the number and categories of worker normally employed; (iv) the period over which the projected redundancies are to be effected; and (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer. A copy of those elements of the written communication is to be sent to the competent public authority. (14)

11. The procedure for collective redundancy is laid down in Section III. That procedure starts with the notification in writing of any projected collective redundancies to the competent public authority. (15) A copy of the notification must also be sent to the workers' representatives. (16) Projected collective redundancies take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal. (17) Member States may provide that the timescales laid down shall not apply to collective redundancies arising from termination of an establishment's activities where this is the result of a judicial decision. (18)

Spanish legislation

Legislation transposing the Maternity Directive

12. The referring court states that the Maternity Directive is transposed in Spain by Ley 39/99 de 5 de noviembre de Conciliación de la vida personal, laboral y familiar (Law 39/1999 of 5 November 1999 reconciling family life and working life of workers). Two forms of protection are provided for pregnant workers. The first applies throughout the employment relationship and is based on the mere fact of pregnancy. If a pregnant worker is dismissed (regardless of whether the employer knows about her condition) all she has to do is give proof of her pregnancy and it is the employer that must then prove reasonable objective cause for the dismissal. Where such evidence is produced, it may entail a declaration of legality, otherwise the dismissal will be void by operation of law. (19)

13. The second form of protection is based upon Articles 53(4), first subparagraph, and 55(5), first subparagraph, of the Workers' Statute as well as Article 8 of Ley Orgánica 3/2007 de 22 de marzo, para la igualdad efectiva de hombres y mujeres (Organic Law 3/2007 of 22 March 2007 on effective equal treatment for women and men, 'the Organic Law of 2007'). Those provisions stipulate in essence that where a worker alleges discrimination because she has been dismissed on grounds of pregnancy, she must produce sufficient information to indicate that the dismissal is based on her pregnancy. The employer then bears the burden of proof in establishing that there was no discrimination. The referring court expresses the view that the main proceedings do not concern the second form of protection. (20)

Legislation transposing the Collective Redundancies Directive

14. The term collective redundancies is defined in Article 51(1) of the Workers' Statute as the termination of contracts of employment for economic, technical or organisational reasons or reasons related to production where certain thresholds are met. Under Article 51(5) of the Workers' Statute, when employees are being selected for compulsory redundancy, the workers' legal representatives enjoy priority status in relation to being retained by the undertaking concerned. Such status may be afforded to other groups, such as workers with family responsibilities, employees of a particular age or persons suffering disability. (21)

15. Article 13 of the Real Decreto 1483/2012 de 29 de octubre, por el que se aprueba el Reglamento de los procedimientos de despido colectivo y de suspensión de contratos y reducción de jornada (Royal Decree 1483/2012 of 29 October 2012 approving the regulations for collective redundancy procedures and for suspension of contracts and reduction of daily working time) reflects the provisions concerning the selection criteria for employees in cases of collective redundancy. Article 13(3) states that the final collective redundancy decision must set out the reasons for affording certain employees priority as regards retaining their position within the undertaking concerned.

Facts, procedure and the questions referred

16. On 18 April 2006 Ms Porras Guisado was engaged by Bankia S.A. ('Bankia'). On 9 January 2013, Bankia opened a period of consultation with the workers' representatives with a view to effecting a collective redundancy. On 8 February 2013, the negotiating committee reached an agreement ('the negotiating committee agreement') setting out the criteria to be applied in selecting those workers to be dismissed and those who were to be retained in employment with Bankia. Two categories of workers were accorded priority status. These were married couples or de facto couples and disabled employees whose disability was assessed as being greater than 33%.

17. On 13 November 2013, Bankia sent Ms Porras Guisado a letter ('the dismissal letter') giving her notice of the termination of her contract of employment pursuant to the negotiating committee agreement. The dismissal letter stated as follows:

'… In the specific case of the Province of Barcelona where you work, following completion of the procedure for acceptance of the programme of dismissals attracting compensation, disregarding persons affected by geographic mobility procedures and changes of work post, a more extensive adjustment to the workforce has become necessary, requiring the termination of the employment contracts of persons designated directly by the undertaking, in accordance with the provisions of paragraph II-B of [the negotiating committee agreement] …

In that regard, as a result of the assessment process carried out in the undertaking during the consultation period, this being a relevant factor in the adoption of [the negotiating committee agreement] ..., your score is 6 points, placing you among the lower scores of the Province of Barcelona, where you work.

Therefore, in application of the assessment criteria set out and for the reasons stated, I inform you that it has been decided to terminate your contract of employment with effect from 10 December 2013.' (22)

18. On the same day, the sum of EUR 11 782.05 was transferred to Ms Porras Guisado's bank account by way of compensation. Pursuant to the negotiating committee agreement, her dismissal took effect from 10 December 2013.

19. Ms Porras Guisado was pregnant when she was dismissed.

20. Ms Porras Guisado requested a conciliation procedure on 9 January 2014. That procedure took place, without success, on 1 April 2014. In the meantime, on 3 February 2014, Ms Porras Guisado lodged an application challenging her dismissal before the Juzgado Social No 1 de Mataró (Social Court No 1 of Mataró) which found in favour of Bankia on 25 February 2015.

21. Ms Porras Guisado brought an appeal against that judgment before the referring court which seeks a preliminary ruling on the following questions:

'(1) Should the expression "… exceptional cases not connected with their condition which are permitted under national legislation and/or practice …" in Article 10(1) of [the Maternity Directive], which constitutes an exception to the prohibition against dismissing [pregnant workers], be interpreted as not corresponding to the expression "… one or more reasons not related to the individual workers concerned …" referred to in Article 1(1)(a) of [the Collective Redundancies Directive], but rather as being more restricted than the latter?

(2) In the event of collective redundancy, in order to decide whether there are exceptional cases which justify the dismissal of [pregnant workers] pursuant to Article 10(1) of [the Maternity Directive], is there a requirement that the worker concerned cannot be reassigned to another work post or is it sufficient for her dismissal to be based on proof of economic or technical reasons or reasons relating to production that affect her work post?

(3) Is national legislation, such as that in force in Spain, which, in order to transpose the prohibition laid down in Article 10(1) of [the Maternity Directive] on dismissing [pregnant workers], does not prohibit such a dismissal (preventive protection), but provides that the dismissal is to be declared void (reparative protection), where the undertaking concerned fails to provide reasons which justify the worker's dismissal, compatible with Article 10(1) of that directive?

(4) Is national legislation, such as that in force in Spain, which makes no provision in cases of collective redundancy for [pregnant] workers to be afforded priority for retention in the undertaking concerned compatible with Article 10(1) of [the Maternity Directive]?

(5) Is national legislation compatible with Article 10(2) of [the Maternity Directive] if it treats as sufficient a letter such as that in the main proceedings dismissing a [pregnant worker] in the context of a collective redundancy procedure without making reference to the existence of any exceptional grounds for her dismissal, concerned over and above those on which the collective redundancy is based?'

22. Written observations were submitted by Bankia, the Spanish Government and the European Commission. At the hearing on 26 January 2017 those parties presented oral argument.

Assessment

Admissibility

23. Bankia submits that the present request for a preliminary ruling is inadmissible since Ms Poras Guisado did not invoke the Maternity Directive when she first brought her claim before the Juzgado Social No 1 de Mataró (Social Court No 1 of Mataró), and national procedural rules preclude her from doing so at a later stage. It also submits that Ms Porras Guisado does not have standing, according to Spanish case-law, to bring an action challenging the criteria for selecting employees to be retained in the undertaking agreed between Bankia and the workers' representatives.

24. Regarding those two arguments, I observe that the jurisdiction of the Court is confined to considering provisions of EU law only. In view of 'the distribution of functions between the [Court of Justice] and the national court, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure'. (23)

25. The request for a preliminary ruling is therefore admissible.

Applicability of the Maternity Directive

26. Bankia submits that the Maternity Directive is not applicable to Ms Porras Guisado, since she did not inform her employer of her pregnancy. Article 2(a) of that directive expressly states that only a worker 'who informs her employer of her condition, in accordance with national legislation and/or national practice' falls within its scope.

27. It is not clear from the facts set out in the order for reference precisely when Ms Porras Guisado informed her employer of her pregnancy. At the hearing Bankia claimed that it was unaware of that fact at the moment of the dismissal. (24)

28. In the division of jurisdiction between the Courts of the European Union and the national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a rule of EU law are satisfied in the case pending before it, while the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation. (25)

29. In the present case, it is thus for the national court to determine when Ms Porras Guisado informed her employer of her pregnancy. It is, however, for this Court to provide guidance as to the meaning of the provisions of the Maternity Directive and in particular as to whether a pregnant woman who has not informed her employer of her condition before she is dismissed may benefit from the protection of Article 10 of that directive.

30. That article prohibits dismissal of pregnant workers 'within the meaning of Article 2' of the Maternity Directive.

31. That definition is composed of two elements. First, the worker must be pregnant (26) and, second, she must have informed her employer of her condition in accordance with national legislation and/or national practice. Both elements must be present for a worker to be considered as a 'pregnant worker' within the meaning of the Maternity Directive.

32. According to the Court's case-law, the EU legislature intended to give the concept of 'pregnant worker' its own independent meaning in EU law, even though one element of that definition − namely that relating to the details of the procedure for informing the employer of her condition − refers back to national legislation and/or national practice. (27)

33. In the context of the prohibition of dismissal, this Court has construed the information requirement liberally. Thus, in *Danosa* it held that procedural requirements cannot divest the special protection for women provided by Article 10 of the Maternity Directive of its substance. 'If, without having been formally informed by the worker in person, the employer learns of her pregnancy, it would be contrary to the spirit and purpose of [the Maternity Directive] to interpret the provisions of Article 2(a) of that [d]irective restrictively and to deny the worker concerned the protection against dismissal provided for under Article 10'. (28)

34. Here, I draw attention to a tension in the drafting of the Maternity Directive. Whereas other provisions of the Directive (notably, Articles 5, 6 and 7) provide protection on a continuing basis whilst the worker is at work, Article 10 stands out inasmuch as it contains an unequivocal prohibition on dismissal of 'workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1)'. The only derogation from that prohibition is that relating to 'exceptional cases not connected to their condition', which I shall discuss later. Now, at the very beginning of a pregnancy, the worker herself will not know that she is pregnant. Once she does find out, there will necessarily be some lapse of time before she informs her employer of the fact, thus fulfilling both the conditions to fall within the definition of a 'pregnant worker' laid down in Article 2(a). And yet the prohibition in Article 10(1) is expressly stated to apply 'from the beginning of [the] pregnancy' – that is, from a point at which she cannot possibly comply with the requirement to inform her employer of her condition.

35. How is this tension to be resolved? There appears to me to be two possible options.

36. The first is to say that, unless and until a pregnant woman informs her employer of her pregnancy, the prohibition on dismissal does not apply. That reading (canvassed by Bankia) is one that strikes the balance in favour of the employer. Unless he has been informed, or otherwise knows, (29) of the pregnancy, he is free to dismiss the worker in question. Priority is given to the words 'workers, within the meaning of Article 2', at the expense of affording more extensive protection to pregnant workers. Such a reading protects a pregnant worker who has had the foresight (or good fortune) to inform her employer of her condition before he dismisses her (or makes her redundant as part of a collective redundancy). If she does not yet know that she is pregnant, or has not yet told her employer of the fact, when the dismissal takes effect, she is not protected. The protected period is thus necessarily shorter than that specified by the plain text of Article 10(1).

37. The alternative is to give priority to protecting female workers 'during the period from the beginning of their pregnancy to the end of the maternity leave', even though they may not yet have informed their employer of their condition. That reading (as I understand it, the interpretation that the Commission assumes to be correct) strikes the balance in favour of the pregnant worker. It seems to me to be the better reading.

38. The Court has repeatedly stated that, 'It is precisely because of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, including the particularly serious risk that they may be prompted voluntarily to terminate their pregnancy, that, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave'. (30) It has gone on to state (equally categorically) that, '[d]uring that period, Article 10 of the Maternity Directive does not provide for any exception to, or derogation from, the prohibition on dismissing pregnant workers, save in exceptional cases not connected with their condition, provided that the employer gives substantiated grounds for the dismissal in writing'. (31) Those repeated statements indicate that the Court has, for decades, recognised that pregnant women are indeed a vulnerable

group and that the legislation protecting them in the workplace should be read bearing that fully in mind.

39. However, the case-law of the Court thus far does not address the tension that I have identified. Thus, in *Webb* and in *Tele Danmark*, the employers were clearly aware that their respective employees were pregnant when they dismissed them. (32) The judgment in *Webb* examines whether Article 2(1) of Directive 76/207/EEC (the early directive on equal treatment between men and women in employment) (33) read in conjunction with Article 5(1) thereof, protected a woman employee from dismissal where that employee, hired to replace another employee absent on maternity leave, herself fell pregnant. The judgment in *Tele Danmark* focuses on whether the protection against dismissal afforded by Article 10 of the Maternity Directive still applies when an employee hired on a short-term contract is pregnant at the moment when she is hired but conceals the fact. In both cases, the Court answered the question in the affirmative. (34) In *Danosa* the Court noted that there was 'some controversy' as to whether, inter alia, the defendant company had been informed of Ms Danosa's pregnancy: it proceeded on the basis that those matters of fact were for the national court to determine. (35)

40. Mention should also be made of the decision in *Pontin*. (36) There, the employer (T-Comalux) dismissed Ms Pontin with immediate effect by registered letter dated 25 January 2007. Ms Pontin informed T-Comalux that she was pregnant by registered letter dated 26 January 2007 (*that is, the following day*) and claimed that, as a result, the dismissal of which she had been notified by T-Comalux was null and void. (37) In replying to the referring court, the Court dealt at length with complex questions involving the equivalence and effectiveness of the national remedies available to Ms Pontin in respect of her dismissal. The Court must, I think, necessarily have done so on the basis that Ms Pontin *was* covered by the protection against dismissal afforded by Article 10 of the Maternity Directive as transposed into national law, even though she had not informed her employer of her condition before her dismissal took effect. However, that point is not addressed in the judgment.

41. If the requirement to notify the employer can be satisfied *ex post*, it follows that once the employer is so notified, the dismissal in question becomes an unlawful dismissal within the meaning of Article 10(1) of the Maternity Directive (unless the 'exceptional cases' exception applies). The worker concerned, having notified the employer, is unquestionably a 'pregnant worker' within the definition in Article 2(a). Since, on this hypothesis, she has already been dismissed, Article 10(3) then operates to provide a remedy by requiring Member States to 'take the necessary measures to protect workers, within the meaning of Article 2, from the consequences of dismissal which is unlawful by virtue of point 1'.

42. It is true that on this reading an employer may unwittingly dismiss a worker whom he ought not to have dismissed. However, if he is made aware of his error soon after the dismissal, (38) he has the opportunity to undo the damage that he has inadvertently caused her by dismissing her. Such a result is entirely in accordance with the aims of Article 10 of the Maternity Directive.

43. It may be wondered whether there is a limit to how long after the dismissal the worker may notify her former employer of her condition and seek to avail herself of the protection afforded by Article 10 of the Maternity Directive. Given the tension that I have already identified, it is unsurprising that Article 10 provides no explicit answer to that question. It seems to me that, in fairness to the employer, the dismissed employee is under a duty not to delay unreasonably in notifying her employer and making her claim; and that her possibility of doing the former as a prelude to the latter should be deemed to lapse at the end of the period of protection laid down by Article 10(1) – that is, at 'the end of the maternity leave referred to in Article 8(1)'. Precisely when

that is will depend on how the Member State in question has chosen to transpose the Maternity Directive. For a pregnant woman who has been dismissed, the date may be hypothetical in the sense that, having been dismissed, she may not have enjoyed some, all or possibly any of her maternity leave. (39) However, the national court will be able to ascertain the date on which her maternity leave *would* have ended and will thus be able to determine whether she has notified her employer of her condition before that date.

44. In dwelling on this issue, I am conscious both that it is for the national court to find the necessary facts and that Spanish national law (specifically, Law 39/1999) appears to offer a form of protection irrespective of whether the employer was aware of the employee's pregnancy. (40) Precisely how that provision of national law operates is likewise a matter for the national court. It is nevertheless possible that, in order to decide the case before it, the referring court may need specifically to know whether the protection against dismissal afforded by Article 10 of the Maternity Directive covers an employee who had not, at the time of her dismissal as part of a collective redundancy, informed her employer of her condition. For that reason and in the interests of legal certainty, I would urge the Court to clarify this point in the sense that I have indicated.

45. Against that background, I turn to the questions asked by the referring court.

Question 1

46. By Question 1 the referring court asks whether the phrase 'exceptional cases not connected with their condition which are permitted under national legislation and/or practice' permitting the dismissal of pregnant workers (Article 10(1) of the Maternity Directive) should be interpreted as corresponding exactly to the expression '… one or more reasons not related to the individual workers concerned …' referred to in Article 1(1)(a) of the Collective Redundancies Directive, or whether the former is more restrictive.

47. Bankia, Spain and the Commission respond in the affirmative.

48. I do not share that view.

The relationship between the Maternity Directive and the Collective Redundancies Directive

49. Question 1 concerns the interaction between the provisions prohibiting dismissals in the Maternity Directive and the provisions regulating dismissals in the Collective Redundancies Directive. It is therefore important first to clarify the relationship between the two instruments.

50. The issues covered by those two directives were addressed in parallel and in the same document by the Commission as early as 1973. (41) The Council resolution that followed in 1974 adopted the same approach. (42) It was in that context that the first directive on collective redundancies was adopted in 1975. (43) In contrast, before the adoption of the Maternity Directive, cases concerning pregnant workers were resolved by reference either to Article 119 of the EEC Treaty and Directive 75/117/EEC on equal pay, (44) or to Directive 76/207/EEC on equal treatment regarding access to employment, training, promotion and working conditions. (45)

51. Both the Maternity Directive and the Collective Redundancies Directive are underpinned by the Community Charter of the fundamental social rights of workers. (46) The latter refers specifically both to the measures that should be developed to enable men and women to reconcile their occupational and family obligations and to the need to develop information, consultation and participation for workers in cases of collective redundancies. (47)

52. That said, it is nevertheless obvious that the scope of the two directives is different. The Maternity Directive protects workers who are pregnant, have recently given birth or are breastfeeding and whose safety and health are considered to be at risk. (48) The Collective Redundancies Directive protects workers who may be subject to collective redundancy and therefore must be afforded greater protection. (49)

53. A worker caught up in a collective redundancy procedure while she is pregnant belongs to two different protected groups, for different reasons, and should benefit from the protection of both directives. If a pregnant woman is dismissed in the context of a collective redundancy procedure, the guarantees of both Article 10 of the Maternity Directive and those set out in Articles 2 to 4 of the Collective Redundancies Directive are therefore applicable. I agree with the oral submission of all the parties that the two legal instruments are in that respect complementary.

The prohibition on dismissing pregnant workers in the Maternity Directive

54. The objective of the Maternity Directive, which was adopted on the basis of Article 118a of the EEC Treaty (the precursor of Article 153 TFEU), is to encourage improvements in the safety and health at work of pregnant workers. (50) In that context, the purpose of the prohibition of dismissal laid down in Article 10 is to protect pregnant workers because of the harmful effects that the risk of dismissal for reasons associated with their condition may have on their physical and mental state. (51)

55. It appears from the wording of Article 10 that the protection from dismissal is objective. It is related to the fact of being pregnant and not to the reasons of the dismissal. Those reasons become relevant only when it comes to applying the derogation from the principle of prohibition of dismissal provided for by Article 10(1) in fine. The aim of that article is thus ‘to emphasise the exceptional nature of the dismissal’ of pregnant women. (52)

56. According to settled case-law, exceptions to a principle must be interpreted strictly. (53) That is a fortioriso where the principle is of a protective nature (as here) and serves to protect the safety and health of a vulnerable group of workers.

57. The derogation from the prohibition of dismissal in Article 10(1) is subject to three cumulative conditions. First, dismissal of pregnant workers may only occur in exceptional cases not connected to the pregnancy. Second, those cases must be permitted under national legislation and/or practice. (54) Third, and where applicable, the competent authority must give its consent. It is the first of those conditions that is in issue in the present case. It is obvious from its wording that two elements must be present. The cases where the dismissal of a pregnant worker is not prohibited must be both (i) exceptional and (ii) not connected to the pregnancy.

58. The term ‘exceptional cases’ must not only be interpreted narrowly: it must also be interpreted in accordance with the normal sense of the terms at issue. (55) The normal sense of ‘exceptional’ is ‘unusual’ or ‘extraordinary’. That is how I shall construe this term.

59. The term ‘not connected with [the pregnancy]’ means that the dismissal must be based on objective grounds that are not related to the pregnant worker’s condition.

The prohibition of dismissal of pregnant workers and the Collective Redundancies Directive

60. By harmonising the rules applicable to collective redundancies the EU legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for EU undertakings. (56)

61. Collective redundancies are defined by Article 1(1)(a) of the Collective Redundancies Directive as 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned'. In the context of that directive, the concept of 'redundancy' has been interpreted by this Court as 'including any termination of contract of employment not sought by the worker and therefore without his consent. It is not necessary that the underlying reasons should reflect the will of the employer'. (57) It is thus apparent that the Court has given a wide interpretation to that definition. (58)

62. Does that definition and more precisely the expression 'one or more reasons not related to the individual workers concerned' correspond exactly to the grounds permitting the dismissal of pregnant workers, namely 'exceptional cases not connected with their condition'?

63. In my view, the answer is 'no'.

64. It is true that there is a correspondence between the expression 'reasons not related to the individual workers concerned' in the Collective Redundancies Directive, and the *second* element of the exception permitting the dismissal of pregnant workers in Article 10(1) of the Maternity Directive, that is cases 'not connected with [the pregnancy]'. However, dismissals in the context of collective redundancies do not, in my view, necessarily always satisfy the *first* element of the exception in Article 10(1) of the Maternity Directive, namely that the cases must be 'exceptional', for the following reasons.

65. First, in the definition of collective redundancies set out in Article 1(1)(a) of the Collective Redundancies Directive there is no equivalent term to 'exceptional'. That provision is indeed a *definition* and not an *exemption*. It follows that, whereas the former may legitimately be construed broadly, the latter must be construed narrowly.

66. Second, the structure and the wording of the definition of collective redundancies do not correspond to cases that are 'exceptional'. Rather, they encompass situations that may, unfortunately, be deemed to occur with a certain degree of regularity. For that reason, such redundancies have been identified using a wide definition and three different redundancy thresholds for redundancies taking place over a period of 30 days, depending on the number of workers employed by the establishment concerned, together with a separate threshold for redundancies that take place over a period of 90 days. This careful delineation itself suggests that collective redundancies happen often enough for it to be appropriate to categorise them by time-periods, size of the establishment and number of redundancies over the period concerned.

67. Third, the genesis and the historic evolution of the Collective Redundancies Directive likewise suggest that collective redundancies are not 'exceptional'. The Commission's proposal for a directive was submitted to the Council as early as in 1972. (59) The Commission there emphasised that differing legislation on collective redundancies between Member States had a direct effect on the functioning of the Common Market. Those divergences in legislation were creating disparities in the conditions of competition which influenced decisions taken by undertakings, especially multinationals, on the distribution of posts to be filled. Thus, they were prejudicial to balanced overall and regional development and impeded the improvement of workers' living and working conditions. (60) Directive 75/129, the predecessor to the Collective Redundancies Directive, was duly promulgated in early 1975. In its careful delineation of when

collective redundancies covered by its provisions occur, that directive bears a striking resemblance to the legislation currently in force. (61)

68. It is thus clear that the Collective Redundancies Directive was intended to address situations that occur sufficiently frequently to have an impact on the functioning of the Common Market and that have obvious consequences for the living and working conditions of workers.

69. Of course, situations may arise in which a particular collective redundancy may properly be described as an 'exceptional case' within the meaning of Article 10(1) of the Maternity Directive: for example, when the establishment's activities are terminated or a whole sector of its activities ceases. Indeed, the Collective Redundancies Directive itself makes special provision for redundancies resulting from the termination of the establishment's activities as a result of a judicial decision, in which case the waiting periods laid down in Article 4 do not apply. (62) That provision shows that within the context of that directive there are situations that are, indeed, deemed to be exceptional. That does not mean, in my view, that *every* collective redundancy is an 'exceptional case' for the purposes of the derogation from the prohibition of dismissal in Article 10(1) of the Maternity Directive. (63)

70. I therefore conclude that the conditions under which Article 10(1) of the Maternity Directive permits a pregnant worker to be dismissed, namely 'exceptional cases not connected with [her] condition which are permitted under national legislation and/or practice', should not be interpreted as corresponding exactly to the expression 'one or more reasons not related to the individual workers concerned' in Article 1(1)(a) of the Collective Redundancies Directive. A particular situation giving rise to a collective redundancy may, where the circumstances so warrant, qualify as an 'exceptional case' within the meaning of the former provision. It is for the national court to verify the existence of such circumstances.

Question 2

71. By its second question the referring court seeks guidance on whether Article 10(1) of the Maternity Directive requires that, in the event of a collective redundancy, in order to invoke the 'exceptional cases' exception permitting the dismissal of a pregnant worker, there must be no possibility of reassigning that worker to another post. This question is linked to the first one inasmuch as it concerns the scope of the notion of 'exceptional cases' under Article 10(1) of the Maternity Directive.

72. In that respect, it follows from the analysis I have already set out of the term 'exceptional cases' in the context of Article 10(1) of the Maternity Directive and the definition of collective redundancies (64) that for it to be lawful to dismiss a pregnant worker, it is not sufficient to invoke reasons that affect her post in the event of a collective redundancy (or indeed outside that context). There must be no plausible possibility of reassigning the pregnant worker to another suitable post. If, for instance, all secretarial posts save one are to become redundant in an undertaking and that one post is filled, the employer might reasonably be expected to reassign the pregnant worker as an administrative assistant, but not as a driver or a welder. Or a complete sector of that undertaking's activities may have ceased, with the result that her set of skills are no longer required. (65)

73. I therefore conclude that Article 10(1) of the Maternity Directive should be interpreted as meaning that, where a pregnant worker can plausibly be reassigned to another suitable work post in the context of a collective redundancy, the derogation from the prohibition of dismissal contained in that provision will not apply. Whether that is the case is for the national court to verify.

Questions 3, 4 and 5

74. Questions 3, 4 and 5 as framed by the referring court appear to ask the Court to rule on whether various provisions of national law are compatible with EU law.

75. According to settled case-law, it is not for the Court, in the context of a request for a preliminary ruling under Article 267 TFEU, to give a ruling on the compatibility of provisions of national law with EU law. (66) On the other hand, 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 rule on the compatibility of those rules of national law with EU law. (67) To that end, the Court may have to reformulate the questions referred to it. (68) I shall therefore do so.

Question 3

76. By its third question the referring court essentially asks whether Article 10 of the Maternity Directive requires Member States to provide pregnant workers with both protection against unlawful dismissal itself (preventive protection) and protection against the consequences of unlawful dismissal (reparative protection).

77. According to the referring court, Spanish legislation only gives pregnant workers reparative protection. It considers, however, that Article 10(1) is concerned with preventive protection whilst Article 10(3) covers reparative protection.

78. Bankia, Spain and the Commission submit that the Spanish legislation is in line with the Maternity Directive.

79. The Court has already explained that 'in the context of the application of Article 10 of [the Maternity Directive], the Member States cannot amend the scope of the concept of "dismissal" thereby negating the extent of the protection which that provision offers and compromising its effectiveness'. (69) It follows that Member States must duly transpose into national law the protection against dismissal laid down by the Maternity Directive.

80. Are the requirements of both Article 10(1) and Article 10(3) of the Maternity Directive satisfied by national legislation which offers protection against the consequences of unlawful dismissal (reparative protection) but does not make specific separate provision for protection against unlawful dismissal itself (preventative protection)?

81. In my view, both the purpose and the wording of the Maternity Directive indicate that the answer is 'no'.

82. The aim of that directive is to protect the safety and health of pregnant workers. Dismissal from employment may have harmful effects on their physical and mental state. (70) It is also clear from the wording of the fifteenth recital, the title of Article 10 ('Prohibition of dismissal') and the wording of Article 10(1), which unequivocally requires Member States to 'take the necessary measures to prohibit the dismissal of [pregnant workers]', that the primary purpose of the EU legislature in drafting that article was to protect pregnant workers from being dismissed. If, despite that prohibition, a situation arises in which a pregnant worker has in fact (unlawfully) been dismissed, Article 10(3) then requires the Member State to ensure that the worker is 'protected from consequences of dismissal which is unlawful by virtue of [Article 10(1)]'.

83. It is true that the recital speaks (rather curiously) merely of the 'risk of dismissal for reasons associated with their condition' having such adverse effects. However, it is the risk of dismissal itself that may produce such results. Dismissal, interruption of career and unemployment put the pregnant worker in a situation of disappointment, stress and insecurity. These may plausibly have harmful effects on her physical and mental state, including what the Court has described as 'the particularly serious risk' that she may be prompted voluntarily to terminate her pregnancy. (71)

84. Possible *ex post* remedies obtained after a period of litigation, such as an order reinstating a pregnant worker in her post, payment of arrears of salary due and/or an award of damages, will certainly assist in mitigating the consequences of a wrongful dismissal. It is intrinsically unlikely, however, that they will entirely undo the adverse mental and physical effects caused by the initial wrongful act.

85. Here, I recall that the Court has already interpreted the actual prohibition on dismissal widely. Thus, in *Paquay* the Court held that, 'having regard to the objectives pursued by [the Maternity Directive] and, more specifically, to those pursued by its Article 10, it is necessary to point out that the prohibition on the dismissal of pregnant women and women who have recently given birth or are breastfeeding during the period of protection is not limited to the notification of that decision to dismiss. The protection granted by that provision to those workers excludes both the taking of a decision to dismiss as well as the steps of preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child'. (72) It is clear from that judgment that a *broad prohibition on dismissal itself* must be in place in order to satisfy the requirements of Article 10(1).

86. Thus, as I see it, Article 10 contains two separate requirements, one preventive (Article 10(1)) and the other restorative (Article 10(3)). National provisions that address only the restorative element, however effectively they perform that task, cannot discharge the obligation to have in place, as the first line of protection, a prohibition on dismissing pregnant workers save in the 'exceptional cases' covered by the derogation in Article 10(1).

87. I add only that the applicable Spanish legislation appears to provide that an unlawful dismissal is 'void by operation of law'. (73) The precise consequences that will follow are a matter for national law and for the national court. It seems, however, from the referring court's description of how national law operates and the way in which it has framed its third question that that remedy provides reparative protection rather than preventative protection. If that is right, whilst it might satisfy the requirements of Article 10(3) of the Maternity Directive, it would not appear to address the requirements of Article 10(1).

88. I therefore conclude that Article 10 of the Maternity Directive requires Member States to provide pregnant workers both with protection against dismissal itself (in order to comply with their obligations under Article 10(1)) and protection against the consequences of a dismissal prohibited by Article 10(1) that has nevertheless taken place (in order to comply with their obligations under Article 10(3)).

Question 4

89. By its fourth question, the referring court essentially asks whether Article 10(1) of the Maternity Directive requires Member States to legislate to ensure that pregnant workers enjoy priority for retention in the undertaking where they are employed in the event of a collective redundancy.

90. Bankia, Spain and the Commission reply in the negative.

91. This question concerns the possibility of 'retention in the undertaking', whereas the second question referred enquired about 'reassignment to another work post'. The two concepts are not synonyms. If the post that the pregnant worker is currently occupying disappears, she can be reassigned to another post only if such a post is vacant (or if a vacancy can be created by transferring another worker to yet another post and then reassigning her to the post thus vacated). 'Retention in the undertaking' means that, no matter what, that pregnant worker will continue in employment. It may be possible to achieve that result by reassigning her to another vacant post; but it may also mean reassigning her to another post and making the current incumbent of that post redundant instead; or keeping her in the same post, abolishing another post and thus making the worker occupying that post redundant instead. An obligation of 'retention in the undertaking' would therefore afford greater protection to the pregnant worker than an obligation on the employer merely to attempt 'reassignment to another post'. The referring court asks whether the Maternity Directive requires Member States to legislate in order to afford a pregnant worker 'priority' over other categories of workers in the event of a collective redundancy. It does not ask whether there is an absolute obligation of retention; and I say at once that, given the presence of the derogation for 'exceptional cases' in Article 10(1), it is clear that the Maternity Directive does not impose any such absolute obligation.

92. I take as my starting point for answering this question the protective purpose of the Maternity Directive, the prohibition of dismissal in Article 10(1) thereof and the limited derogation it contains permitting the dismissal of pregnant workers only in 'exceptional cases'. Assuming that those elements have been transposed correctly into national law, the resulting national legislation should normally ensure that a pregnant worker is indeed retained in employment in the event of a collective redundancy.

93. In that regard, where national legislation or practice *does* make express provision – in the arrangements governing collective redundancies – for priority for retention in the undertaking to be given to other identified groups of workers (such as workers with family responsibilities or disabilities), there may be a consequent risk that both the employer and the workers' representatives will inadvertently overlook the requirements of 'ordinary' national law protecting pregnant workers from dismissal save in exceptional cases. If they do so and if a pregnant worker is dismissed as a result merely of applying the general criteria agreed for all workers of the enterprise where the collective redundancy is to take place, that worker's dismissal will be unlawful.

94. That said, there is no separate requirement in the Maternity Directive such as to found an *obligation* on the part of a Member State to enact separate specific legislation that confers on pregnant workers 'priority to be retained in the undertaking' in the event of a collective redundancy. Nor, (unsurprisingly), is such an obligation to be found in the Collective Redundancies Directive.

95. Here, I recall that the Court had to deal with an analogous question in *Jiménez Melgar*, which concerned the non-renewal of the fixed-term contract of a pregnant worker. (74) There, one of the issues at stake was whether, 'in allowing derogations from the prohibition of dismissal of pregnant workers … in cases "not connected with their condition which are permitted under national legislation and/or practice", Article 10(1) of [the Maternity Directive] requires the Member States to specify the reasons for the dismissal of such workers'. The Court held that Article 10(1) did not require the Member States to specify the particular grounds on which such workers may be dismissed; but that since the Maternity Directive laid down minimum provisions, it did not in any way prevent the Member States from providing for higher protection for those workers in that way if they wished to do so. (75)

96. Applying the same line of reasoning here, I conclude that Article 10(1) of the Maternity Directive does not require Member States to make specific provision for pregnant workers to be afforded priority for retention in an undertaking in the event of a collective redundancy. Member States remain free to make such provision by way of additional protection or in the interests of legal certainty if they so desire.

Question 5

97. By Question 5, the referring court asks whether a letter of dismissal such as that in the main proceedings, where a pregnant worker is dismissed in the context of a collective redundancy procedure, satisfies Article 10(2) of the Maternity Directive even though it makes no reference to the existence of any exceptional grounds for her dismissal over and above those on which the collective redundancy is based.

98. Spain and the Commission replied in the affirmative. Bankia submitted at the hearing that it is enough to inform the worker of the reasons for her dismissal in writing.

99. Article 4(1) of the Collective Redundancies Directive provides that projected collective redundancies notified to the competent public authority take effect not earlier than 30 days after their notification to that authority, and that without prejudice to any provisions governing individual rights with regard to the notice of dismissal.

100. Article 10(2) of the Maternity Directive introduces precisely such an individual right for pregnant workers. To be valid, a notice of dismissal to such a worker must (i) be in writing and (ii) state duly substantiated grounds for the dismissal. The fifth preliminary question concerns the second element.

101. In my view, the expression ‘duly substantiated grounds’ means that, first, the notice of dismissal must give the reasons for the dismissal and, second, that those reasons must be in accordance with the requirements set out in the Maternity Directive.

102. The relevant requirements of the Maternity Directive are to be found in the derogation from the prohibition of dismissal in Article 10(1). The notice of dismissal must therefore set out the facts and reasoning on which the employer relies to bring the pregnant worker he intends to dismiss within the rubric of ‘exceptional cases not connected with [the pregnancy]’ permitting the dismissal of a pregnant worker.

103. In the context of a collective redundancy, a notice of dismissal which limits itself to providing the general reasons for the redundancies and selection criteria, but does not explain why the dismissal of a pregnant worker is permissible because the specific circumstances of the collective redundancy in question make it an ‘exceptional case’, will not satisfy that test.

104. What if the employer becomes aware that the worker in question is a pregnant worker only after he has notified her that she is to be dismissed? It seems to me that, once he becomes aware of that fact, the employer has then to re-examine the dismissal in the light of the prohibition in Article 10(1) of the Maternity Directive, as transposed into national law. Only if he concludes that the collective redundancy in question falls within the category of ‘exceptional cases’ in Article 10(1) can the employer maintain the dismissal. In such circumstances, he will require to serve a new notice of dismissal which respects the conditions laid down by Article 10(2) of the Maternity Directive.

105. I therefore conclude that, for a notice of dismissal to fulfil the requirements of Article 10(2) of the Maternity Directive, it must both be in writing and state duly substantiated grounds regarding the exceptional cases not connected with the pregnancy that permit the dismissal. Whether that is the case is for the national court to verify.

Conclusion

106. In the light of all the foregoing considerations, I suggest that the Court should answer the questions posed by the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain) as follows:

– The conditions under which Article 10(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, permits a pregnant worker to be dismissed do not correspond exactly to the expression 'one or more reasons not related to the individual workers concerned' in Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. A particular situation giving rise to a collective redundancy may, where the circumstances so warrant, qualify as an 'exceptional case' within the meaning of the former provision. It is for the national court to verify the existence of such circumstances.

– Article 10(1) of Directive 92/85 should be interpreted as meaning that, where a pregnant worker can plausibly be reassigned to another suitable work post in the context of a collective redundancy, the derogation from the prohibition of dismissal contained in that provision will not apply. Whether that is the case is for the national court to verify.

– Article 10 of Directive 92/85 requires Member States to provide pregnant workers both with protection against dismissal itself (in order to comply with their obligations under Article 10(1)) and protection against the consequences of a dismissal prohibited by Article 10(1) that has nevertheless taken place (in order to comply with their obligations under Article 10(3)).

– Article 10(1) of Directive 92/85 does not require Member States to make specific provision for pregnant workers to be afforded priority for retention in an undertaking in the event of a collective redundancy. Member States remain free to make such provision by way of additional protection or in the interests of legal certainty if they so desire.

– For a notice of dismissal to fulfil the requirements of Article 10(2) of Directive 92/85, it must both be in writing and state duly substantiated grounds regarding the exceptional cases not connected with the pregnancy that permit the dismissal. Whether that is the case is for the national court to verify.

1 – Original language: English.

2 – Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16) ('the Collective Redundancies Directive').

3 – Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), ('the Maternity Directive'). At the material time it was the version of that directive as amended by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21) which applied.

4 – Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1). That directive established the general framework for legislation protecting the health and safety of workers. Other individual directives cover subjects such as minimum safety and health requirements for the workplace, use of work equipment, use of personal protective equipment, manual handling of loads or minimum health and safety requirements regarding the exposure of workers to carcinogens or mutagens, asbestos, ionising radiation, noise or vibration. Another protected group is young workers (Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ 1994 L 216, p. 12).

5 – See the first, seventh and eighth recitals and Article 1(1) of the Maternity Directive.

6 – The ninth recital.

7 – The fifteenth recital.

8 – Article 3(1). As required by that Article, the Commission has adopted the Communication from the Commission on the Guidelines on the assessment of chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2000) 466 final/2).

9 – Article 4.

10 – Article 5.

11 – Recital 2.

12 – Recitals 3, 4 and 6.

13 – It is common ground that Ms Porras Guisado falls within the scope of the Collective Redundancies Directive, as she does not come within any of the exceptions listed in Article 1(2) thereof.

14 – Article 2(1) and (3).

15 – Article 3(1).

16 – Article 3(2).

17 – Article 4(1).

18 – Article 4(4).

19 – The referring court states in the questions referred for preliminary ruling (see point 21 below) that the effect of the dismissal being declared void by operation of law is described in Spanish law as 'tutela reparativa' ('reparative protection'), which it contrasts with 'tutela preventiva' ('preventive protection'). That Court equates Article 10(1) of the Maternity Directive with 'tutela preventiva' and Article 10(3) thereof with 'tutela reparativa'.

20 – See further point 27 and footnote 24.

21 – Although the referring court suggests that, as a matter of national law, 'those with family responsibilities' might be construed as including pregnant workers, the negotiating committee agreement described in point 16 below and applied in the present case did *not* accord the latter priority status.

22 – The negotiating committee agreement had established that as the date on which the collective redundancies were to take effect.

23 – Judgment of 14 January 1982, *Reina*, 65/81, EU:C:1982:6, paragraph 7. See also judgment of 13 June 2013, *Promociones y Construcciones BJ 200*, C-125/12, EU:C:2013:392, paragraph 14 and the case-law cited. The Court must therefore abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law: see judgment of 1 December 2005, *Burtscher*, C-213/04, EU:C:2005:731, paragraph 32 and the case-law cited.

24 – If, as Bankia claims, it did not know of Ms Porras Guisado's condition at the material time (and could not therefore have dismissed her *because* she was pregnant), it would seem that the provisions of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23) and the national legislation described at point 13 above indeed do not bear upon the case before the national court.

25 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 34.

26 – It might be thought that a definition which begins 'pregnant worker shall mean a pregnant worker' borders on the tautological. A more charitable explanation is that the draftsman was focusing on the requirement that she should inform her employer of her condition 'in accordance with national legislation and/or national practice'.

27 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 53.

28 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 55.

29 – See judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 53.

30 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 60. See also judgments of 11 October 2007, *Paquay*, C-460/06, EU:C:2007:601, paragraph 30; of 8 September 2005, *McKenna*, C-191/03, EU:C:2005:513, paragraph 48; of 4 October 2001, *Tele Danmark*, C-109/00, EU:C:2001:513, paragraph 26; of 30 June 1998, *Brown*, C-394/96, EU:C:1998:331, paragraph 18; and of 14 July 1994, *Webb*, C-32/93, EU:C:1994:300, paragraph 21.

31 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 61. See also judgments of 11 October 2007, *Paquay*, C-460/06, EU:C:2007:601, paragraph 31; of 4 October 2001, *Tele Danmark*, C-109/00, EU:C:2001:513, paragraph 27; of 30 June 1998, *Brown*, C-394/96, EU:C:1998:331, paragraph 18; and of 14 July 1994, *Webb*, C-32/93, EU:C:1994:300, paragraph 22.

32 – See judgment of 14 July 1994, *Webb*, C-32/93, EU:C:1994:300, paragraph 4, and of 4 October 2001, *Tele Danmark*, C-109/00, EU:C:2001:513, paragraph 12.

33 – Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

34 – See judgment of 4 October 2001, *Tele Danmark*, C-109/00, EU:C:2001:513, paragraph 34.

35 – Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraphs 31 to 37.

36 – Judgment of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666.

37 – Judgment of 29 October 2009, *Pontin*, C-63/08, EU:C:2009:666, paragraphs 21 and 22.

38 – In *Pontin* (judgment of 29 October 2009, C-63/08, EU:C:2009:666), the employee informed her employer of her condition the day after receiving notice of dismissal (see point 40 above).

39 – To the extent that she is absent on *maternity* leave when she is dismissed, I find it hard to see how her employer could credibly argue that he was unaware of her condition.

40 – See point 12 above.

41 – Social action programme, COM(73) 1600, 24 October 1973. See, in particular, pp. 15, 19, 20 and 23.

42 – Council Resolution of 21 January 1974 concerning a social action program (OJ 1974 C 13, p. 1).

43 – Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29).

44 – Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

45 – Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40). Both Directive 75/117 and Directive 76/207 were repealed by Directive 2006/54. For an outline of the relevant case-law at that point, see Opinion of Advocate General Ruiz-Jarabo Colomer in *Boyle and Others*, C-411/96, EU:C:1998:74, point 26.

46 – Community Charter of the fundamental social rights of workers, adopted at the Strasbourg European Council on 9 December 1989 by the Heads of State or Government of 11 Member States. See the fifth recital of the Maternity Directive and recital 6 of the Collective Redundancies Directive.

47 – See paragraphs 16, 17 and 18 of the Community Charter of the fundamental social rights of workers.

48 – See the eighth recital and Article 1 of the Maternity Directive.

49 – See recital 2 of the Collective Redundancies Directive.

50 – See Article 1 and the first, seventh, eighth and ninth recitals of the Maternity Directive.

51 – See the fifteenth recital of the Maternity Directive, point 38 above and the case-law cited.

52 – Opinion of Advocate General Tizzano in *Jiménez Melgar*, C-438/99, EU:C:2001:316, point 38.

53 – Judgments of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 59 and the case-law cited, and of 29 March 2012, *Commission* v *Poland*, C-185/10, EU:C:2012:181, paragraph 31 and the case-law cited.

54 – In respect of the second condition, this Court has held that in allowing derogations from the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding in cases 'not connected with their condition which are permitted under national legislation and/or practice', Article 10(1) of the Maternity Directive does not require the Member States to specify the particular grounds on which such workers may be dismissed. See judgment of 4 October 2001, *Jiménez Melgar*, C-438/99, EU:C:2001:509, paragraph 38.

55 – Judgment of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 60 and the case-law cited.

56 – Judgment of 12 October 2004, *Commission* v *Portugal*, C-55/02, EU:C:2004:605, paragraph 48 and the case-law cited.

57 – Judgment of 12 October 2004, *Commission* v *Portugal*, C-55/02, EU:C:2004:605, paragraph 50. I underline here the use of the expression '*any* termination of contract of employment not sought by the worker' (emphasis added). As I read the judgment, the Court used that phrase in order to give the concept of 'redundancy' a broad meaning, thus enhancing the protection afforded by the Collective Redundancies Directive.

58 – Judgment of 10 December 2009, *Rodríguez Mayor and Others*, C-323/08, EU:C:2009:770, paragraph 34.

59 – Proposal for a Council Directive on the harmonisation of the legislation of the Member States relating to redundancies (submitted by the Commission to the Council), COM(72) 1400.

60 – See the second recital of the proposal for a Council Directive on the harmonisation of the legislation of the Member States relating to redundancies (submitted by the Commission to the Council), COM(72) 1400.

61 – Article 1(1)(a) of the Collective Redundancies Directive.

62 – Article 4(4) of the Collective Redundancies Directive.

63 – Here, unusually, I do not find myself in agreement with the view expressed *obiter* by my esteemed late colleague Advocate General Ruiz-Jarabo Colomer in his Opinion in *Tele Danmark*, C-109/00, EU:C:2001:267 (a case that did not involve a collective redundancy). Advocate General Ruiz-Jarabo Colomer there suggested (at point 44) that 'a collective dismissal for financial, technical, organisational or production reasons affecting an undertaking' would fulfil the requirement of 'exceptional cases unconnected [with the pregnancy]'.

64 – See points 58 and 64 to 68 above.

65 – See point 69 above.

66 – See, inter alia, judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, paragraph 22 and the case-law cited.

67 – Judgment of 10 December 2009, *Rodríguez Mayor and Others*, C-323/08, EU:C:2009:770, paragraph 30.

68 – Judgment of 20 October 2016, *Danqua*, C-429/15, EU:C:2016:789, paragraph 36.

69 – Judgment of 11 October 2007, *Paquay*, C-460/06, EU:C:2007:601, paragraph 32.

70 – Article 1 and fifteenth recital of the Maternity Directive.

71 – See judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 60 and the case-law cited. The Court there makes it abundantly clear that these consequences may flow from the risk of dismissal itself.

72 – Judgment of 11 October 2007, C-460/06, EU:C:2007:601, paragraph 33.

73 – See point 12 above.

74 – Judgment of 4 October 2001, *Jiménez Melgar,* C-438/99, EU:C:2001:509. In that case, the Court found (at paragraph 47) that 'whilst the prohibition of dismissal laid down in Article 10 of [the Maternity Directive] applies to both employment contracts for an indefinite period and fixed-term contracts, non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and 3(1) of Directive 76/207'.

75 – Judgment of 4 October 2001, *Jiménez Melgar,* C-438/99, EU:C:2001:509, paragraphs 37 and 38.