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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

13 June 2019 (*)

(Reference for a preliminary ruling — Social policy — Directive 2001/23/EC — Scope — Transfer of part of an undertaking — Safeguarding of employees' rights — Concept of 'transfer' — Concept of 'economic entity' — Transfer of part of the economic activity of a parent company to a newly created subsidiary — Identity — Autonomy — Pursuit of an economic activity — Criterion requiring stability of the pursuit of an economic activity — Recourse to factors of production of third parties — Intention to liquidate the entity transferred)

In Case C-664/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Areios Pagos (Court of Cassation, Greece), made by decision of 8 November 2017, received at the Court on 27 November 2017, in the proceedings

Ellinika Nafpigeia AE

v

Panagiotis Anagnostopoulos and Others,

interveners:

Syllogos Ergazomenon Nafpigeion Skaramagka, I TRIAINA,

Panellinia Omospondia Ergatoÿpallilon Metallou (POEM),

Geniki Synomospondia Ergaton Ellados (GSEE),

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, J. Malenovský (Rapporteur), C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 November 2018,

after considering the observations submitted on behalf of:

- Ellinika Nafpigeia AE, by S. Andriopoulos and D. Zerdelis, dikigoroi,
- P. Anagnostopoulos and 89 other employees, Syllogos Ergazomenon Nafpigeion Skaramagka, I TRIAINA and Panellinia Omospondia Ergatoypallilon Metallou (POEM), by V. Pittas, dikigoras,
- D. Karampinis, by M. Michalopoulos, dikigoras,
- K. Priovolos and K. Kostopoulos, by A. Tzellis, dikigoras,
- Geniki Synomospondia Ergaton Ellados (GSEE), by S. Kazakou, dikigoras,
- the Greek Government, by S. Charitaki, S. Papaioannou and E.-M. Mamouna, acting as Agents,
- the European Commission, by M. Konstantinidis and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(a) and (b) 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 between (i) Ellinika Nafpigeia AE and (ii) Panagiotis Anagnostopoulos and 89 other employees ('the employees concerned') concerning performance of the contracts of employment initially entered into by those parties.

Legal context

EU law

3 Directive 2001/23 codified, with effect from 11 April 2001, Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of

29 June 1998 (OJ 1998 L 201, p. 88). As all the relevant events relating to the transfer at issue in the main proceedings took place after 11 April 2001, Directive 2001/23 is applicable *ratione temporis* to the dispute in the main proceedings.

4 Recitals 3 and 8 of Directive 2001/23 state:

‘(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

...

(8) Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187/EEC as interpreted by the Court of Justice.’

5 Article 1(1)(a) and (b) of Directive 2001/23 provides:

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

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

6 Article 2(1)(a) and (b) of Directive 2001/23 is worded as follows:

‘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’.

7 As set out in the first subparagraph of Article 3(1) of Directive 2001/23:

‘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.’

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

‘1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

...

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

9 Article 5(1) of Directive 2001/23 provides:

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

Greek law

10 By virtue of Article 2(1)(a) and (c) of Proedriko Diatagma 178/2002: Metra schetika me tin prostasia ton dikaionaton ton ergazomenon se periptosi metavivasis epicheiriseon, enkatastaseon i tmimaton enkatastaseon i epicheiriseon, se symmorfosi pros tin Odigia 98/50/EK tou Symvouliou (Presidential Decree 178/2002: Measures relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, in compliance with Directive 98/50/EC) (FEK A' 162/12.7.2002; 'Presidential Decree 178/2002'), the provisions of that decree apply to all contractual or statutory transfers or mergers of undertakings, businesses or parts of businesses, which involve a change of employer and may concern public or private bodies carrying out economic activities, whether with a view to profit or not.

11 Article 2(1)(b) of Presidential Decree 178/2002 defines 'transfer' as the transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

12 Article 3(1)(a) and (b) of Presidential Decree 178/2002 defines the terms 'transferor' and 'transferee' as meaning, in the former case, any natural or legal person who, by reason of a transfer within the abovementioned meaning, ceases to be the employer in respect of the undertaking, business or part of the undertaking or business, and, in the latter case, any natural or legal person who, by reason of such a transfer, becomes the employer in respect of the undertaking, business or part of the undertaking or business.

13 Under the first subparagraph of Article 4(1) of Presidential Decree 178/2002, all the existing rights and obligations of the transferor under a contract of employment or employment relationship are transferred to the transferee as from the date of transfer.

14 The second subparagraph of Article 4(1) of Presidential Decree 178/2002 provides that the transferor is to continue, after the transfer, to be jointly, severally and fully liable with the transferee in respect of obligations arising under a contract of employment or employment relationship up to the date on which the transferee takes over.

15 It follows from Article 4(2) of Presidential Decree 178/2002 that the transferee is to continue, after the transfer, to maintain the working conditions already established by a collective agreement, an arbitral award, regulations or an individual contract of employment.

16 The first subparagraph of Article 5(1) of Presidential Decree 178/2002 provides that the transfer of an undertaking, business or part of an undertaking is not, in itself, to constitute grounds for dismissing employees. However, in accordance with the second subparagraph of Article 5(1), provided that the provisions relating to redundancy are complied with, any dismissals that prove necessary for economic, technical or organisational reasons entailing changes in the workforce are permitted. Nevertheless, Article 5(2) of the decree provides that, if the contract of employment or employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employees, the employer is to be regarded as having been responsible for the termination of the contract of employment or employment relationship.

17 Under Article 6(1) of Presidential Decree 178/2002, the consequences of a transfer, provided for in Articles 4 and 5 of that decree, are not applicable where the transferor is the subject of bankruptcy proceedings or any similar proceedings.

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

18 The employees concerned were taken on by Ellinika Nafpigeia about 30 years ago under contracts of employment of indefinite duration, to work at that company's facilities in Skaramangas (Greece).

19 Ellinika Nafpigeia had been a public sector undertaking since 1985, but it was privatised in 2002 and made subject to a prohibition on reducing its working workforce before 30 September 2008.

20 When Ellinika Nafpigeia was privatised, it had four lines of business, namely military and commercial shipbuilding, ship repairs, submarine shipbuilding and repairs, and railway vehicle production and repairs. Those lines of business were allocated to four 'directorates', respectively the surface vessels directorate, the repairs directorate, the submarine directorate and the rolling stock directorate. Ellinika Nafpigeia's structural organisation included, in addition to those directorates, four production 'divisions', namely a rolling mill workshop, a pipe workshop, a carpentry workshop and a machining workshop. The involvement of those production 'divisions' was essential for the carrying out of the works undertaken in each of the abovementioned lines of business, organised by directorate.

21 Shortly after it was privatised, Ellinika Nafpigeia created a subsidiary in the rolling stock sector, namely Etaireia Trochaiou Ylikou Ellados AE ('ETYE'), in order to transfer to it the programme agreements underway relating to the construction and supply of various types of rolling stock. According to the order for reference, on 28 September 2006 Ellinika Nafpigeia and ETYE concluded a number of contracts in order to enable Ellinika Nafpigeia's 'rolling stock directorate' to operate, from 1 October 2006, within the framework of an autonomous company, under ETYE's name.

22 Those contracts concerned, in particular, the leasing for business purposes of a plot of land owned by Ellinika Nafpigeia, the sale and delivery by Ellinika Nafpigeia to ETYE of movable property, the provision by Ellinika Nafpigeia to ETYE of administrative services and the assignment by Ellinika Nafpigeia to ETYE of outstanding works to be carried out under three programme agreements.

23 In 2007 Ellinika Nafpigeia and ETYE concluded some further contracts, concerning, in particular, the secondment of ETYE staff to Ellinika Nafpigeia, the assignment by Ellinika

Nafpigeia to ETYE of outstanding works to be carried out under a programme agreement and the provision of services by ETYE to Ellinika Nafpigeia.

24 On 28 September 2007 Ellinika Nafpigeia and ETYE concluded a framework agreement providing for ETYE's liquidation on 30 September 2008. In addition, it was agreed that Ellinika Nafpigeia would bear the liquidation costs equivalent to the estimated cost of making the 160 ETYE employees redundant. The date envisaged for that liquidation was, however, put back by an amendment made to the framework agreement on 10 September 2008.

25 On 1 October 2007 INTEI Industriebeteiligungsgesellschaft mbH (INTEI) and Industriegesellschaft Waggonbau Ammendorf mbH (IGWA), a group of German limited liability companies, became the owners of all the shares in ETYE.

26 By announcement of 8 October 2007, the employees concerned were informed that ETYE had been transferred to that group of companies. A company-level collective agreement concerning the pay and working conditions of all ETYE employees was concluded on 13 May 2008.

27 In 2010 the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece) declared ETYE insolvent.

28 On 1 June 2009 the employees concerned brought an action before the Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens, Greece) for a declaration that they continued to be bound to Ellinika Nafpigeia by contracts of employment of indefinite duration, that Ellinika Nafpigeia was required to pay them the lawful wages in particular throughout the period that their contracts of employment continued and that, in the event of termination of the contracts of employment, Ellinika Nafpigeia would be required to make the statutory redundancy payments to each of the employees.

29 After that court upheld the action, Ellinika Nafpigeia brought an appeal before the Efeteio Athinon (Court of Appeal, Athens, Greece), which confirmed the judgment delivered at first instance, holding, in particular, that ETYE had never been an autonomous organisational entity. It found, first, that ETYE was not an autonomous production unit, on the ground that the contribution of Ellinika Nafpigeia's four production divisions was necessary for the manufacture and repair of the rolling stock and that, if Ellinika Nafpigeia ceased all activities, it would be impossible for ETYE to manufacture and repair rolling stock. Second, ETYE did not have its own administrative support as this was provided by Ellinika Nafpigeia and, third, it did not have financial autonomy, its financial management having to be carried out by Ellinika Nafpigeia. The Efeteio Athinon (Court of Appeal, Athens) inferred from this that there was no transfer of an undertaking, business or parts of a business and that, therefore, Ellinika Nafpigeia continued to be the employer of the employees concerned.

30 Ellinika Nafpigeia appealed on a point of law against that decision of 29 August 2013 to the Areios Pagos (Court of Cassation, Greece). Within the chamber of that court hearing the case there was a divergence of views concerning the scope of the words 'economic entity' in Article 1 of Directive 2001/23.

31 According to three members of the chamber, ETYE was unable to pursue the activity entrusted to it, since it did not have the necessary technical or material infrastructure before the transfer at issue and the rolling stock directorate which appears to have been transferred to it was unable to operate without the support of Ellinika Nafpigeia's production divisions and of its administrative and financial services. In their view, that assessment is corroborated by the low

volume of work undertaken by ETYE, which led to its insolvency. The foregoing is stated to be supported, furthermore, by the position of the employees concerned that the purpose of the transfer at issue was to put an end to the rolling stock manufacture and repair activity of Ellinika Nafpigeia and to lose the related posts without Ellinika Nafpigeia having to take on adverse financial consequences.

32 On the other hand, two members of the chamber hearing the case are of the opinion that the unit transferred had sufficient autonomy, both before and after the transfer at issue, in order to engage in its economic activity. In the case of transfer of a less important unit, the elements inherent in the concept of 'economic entity' may be interpreted less strictly than in the case of a transfer of the whole of an undertaking or of a main activity. The fact that the transferee may, as a subsidiary, have been supported by the transferor in carrying out the activity acquired does not preclude the existence of a transfer, since, for the purpose of interpreting the concept of 'transfer', it is necessary to take into account modern forms that 'entrepreneurship' may take, in particular by having recourse to goods and services of third parties. Finally, the intention of the transferor and the transferee to liquidate the undertaking is not evidence that precludes a transfer, but a factor supporting, as the case may be, the conclusion under national law that the terms of the contract have been amended unilaterally and the contract has been terminated by the employer making the transfer.

33 Consequently, the Areios Pagos (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) On the true meaning of Article 1 of Directive [2001/23] and in order to establish whether or not there is a transfer of an undertaking, business or part of an undertaking or business, is “economic entity” to be understood as a completely self-sufficient production unit which is capable of operating to attain its economic object without in any way seeking (purchasing, borrowing, leasing and so forth) factors of production (raw materials, manpower, machinery, components of the finished product, support services, financial resources and so forth) from third parties? Or, on the contrary, does it suffice, in order to qualify as an “economic entity”, that the subject matter of the activity is distinct, that that subject matter is in fact able to constitute the object of an economic endeavour and that it is feasible to effectively organise the factors of production (raw materials, machinery and other equipment, manpower and support services) to attain the object in question, irrespective of whether or not the new operator of the activity also seeks outside factors of production, or fails to attain the object in a particular instance?’

(2) On the true meaning of Article 1 of Directive [2001/23], is the existence of a transfer precluded where the transferor or transferee or both of them have in view not only the successful continuance of the activity under the new operator, but also its future cessation for the purpose of winding up the undertaking in question?’

Consideration of the questions referred

34 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2001/23, in particular Article 1(1)(a) and (b) thereof, must be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous.

35 It should be noted, first of all, that it is clear from Article 1(1)(a) of Directive 2001/23 that the directive is to 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.

36 Where those conditions are met, the transfer must also satisfy the conditions laid down in Article 1(1)(b) of Directive 2001/23, that is to say, it must relate to an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

37 In order to provide the referring court with a useful answer, it is appropriate, as a first step, to answer the question whether Directive 2001/23, in particular Article 1(1)(b), is capable of applying in a situation where the transferor, the transferee, or both those persons jointly, envisage not only pursuit by the transferee of the activity of the entity transferred but also the future liquidation of the transferee itself. It is only if the answer is in the affirmative that it will be necessary, as a second step, to answer the question whether a transferred entity such as that at issue in the main proceedings is capable of falling within Article 1(1)(a) and (b) of Directive 2001/23.

38 First of all, whilst Article 1(1)(b) of Directive 2001/23 provides that the transfer must be carried out with ‘the objective of pursuing an economic activity’, it is not, however, apparent from that wording that such pursuit of activity must be unlimited in time or that the transferor, the transferee or both those persons jointly might not also have the intention of causing the transferee itself to cease to exist subsequently, after they have pursued the activity at issue.

39 It therefore does not follow from any provision of Directive 2001/23 that the EU legislature intended to make the directive’s applicability conditional upon the transferee continuing to exist beyond a particular time.

40 It should be pointed out, next, that an interpretation that resulted in a transfer such as that at issue in the main proceedings being excluded from the scope of Directive 2001/23 would run counter to the primary objective pursued by the directive.

41 Directive 2001/23 is intended to ensure the continuity of employment relationships existing within an economic entity, irrespective of any change of ownership (judgment of 6 March 2014, *Amatori and Others*, C-458/12, EU:C:2014:124, paragraph 51 and the case-law cited).

42 The transfer at issue in the main proceedings seems to have been carried out in particular with a view to the new operator continuing the economic activity, so that the continuance of the employment relationships which is guaranteed by Directive 2001/23 must be ensured in this instance.

43 Finally, that interpretation is borne out by Article 5(1) of Directive 2001/23, which forms part of the context of Article 1(1)(b) of the directive.

44 By virtue of Article 5(1) of Directive 2001/23, Articles 3 and 4 thereof are, in principle, not to apply 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.

45 It follows that the protection which employees are granted by Articles 3 and 4 of Directive 2001/23 may cease only in a situation where it is the transferor who is the subject of such proceedings on the date of the transfer.

46 However, in the main proceedings, it is undisputed that, first, the transferor is not the subject of such proceedings and, second, cessation of the economic activity transferred is envisaged only for the future, in the context of the transferee's liquidation.

47 As a result, in circumstances such as those in the main proceedings, the employees concerned by the transfer cannot be deprived of the protection that they are granted by Articles 3 and 4 of Directive 2001/23.

48 It follows from the foregoing that Directive 2001/23, in particular Article 1(1)(b), is, in principle, capable of applying in a situation where the transferor, the transferee, or both those persons jointly, envisage not only pursuit by the transferee of the activity of the entity transferred but also the future liquidation of the transferee itself.

49 As is apparent from paragraph 31 of the present judgment, the referring court seems nevertheless to have doubts as to whether, in the case before it, the transfer involves abuse by the transferor, the transferee or both those persons jointly, in order to conceal their true intention of facilitating the liquidation of the entity transferred without having to assume the financial consequences.

50 In this connection, attention should be drawn to the general principle of EU law that the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 to 97 and the case-law cited).

51 It follows therefrom that grant of the benefit of the provisions of EU law must be refused where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally (see, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 98).

52 It is for the Court to provide the referring court with useful guidance enabling it to establish whether or not the transferor and the transferee have observed the principle recalled in paragraph 50 of the present judgment.

53 In that regard, whilst Article 1(1)(b) of Directive 2001/23 makes the directive's applicability subject to the condition that the economic activity of the entity transferred must be pursued after the transfer, the mere pursuit of that activity cannot in itself lead to the finding that that condition is met.

54 The Court has held that, in order to fall within Directive 2001/23, the transfer must enable the transferee to pursue the activities or certain activities of the transferor in a stable way (see, to that effect, judgment of 2 December 1999, *Allen and Others*, C-234/98, EU:C:1999:594, paragraph 37 and the case-law cited).

55 The requirement of stability set by the Court must be understood as referring to a coherent grouping of different factors of production, in particular tangible or intangible assets as well as the necessary staff, enabling the entity transferred to pursue an economic activity (see, to that effect, judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraph 21).

56 A grouping of factors of production which tends, from the time of the transfer, to give rise to an imbalance between production inputs and outputs, and which thus may well lead to production being stifled and, gradually but inevitably, to the activity transferred ceasing to exist, not only cannot be regarded as complying with the requirement of stability but could in particular betray an abusive intent of the economic operators at issue in order to escape the adverse financial consequences connected with the future liquidation of the entity transferred which would normally have fallen on the transferor and which the transferee is not in position to assume.

57 That could also be the case if the activity of the entity transferred were limited to the completion of certain specific contracts or programmes, without an organised grouping of assets such as those referred to in paragraph 55 of the present judgment being put in place within the transferee's undertaking (see, to that effect, judgment of 19 September 1995, *Rygaard*, C-48/94, EU:C:1995:290, paragraphs 20 to 22).

58 It is for the referring court to establish, in the light of the foregoing criteria, whether, in a situation such as that at issue in the main proceedings, the transferor and the transferee at issue observe the general principle of EU law set out in paragraph 50 of the present judgment and may, consequently, benefit from the advantages for which Directive 2001/23 provides when an undertaking is transferred.

59 As a second step, it is necessary, as stated in paragraph 37 of the present judgment, to examine whether Article 1(1)(a) and (b) of Directive 2001/23 is capable of applying to the transfer of an entity such as the entity at issue in the main proceedings.

60 In order to fall within the scope of Directive 2001/23, the transfer must relate to a part of the undertaking making the transfer that constitutes an economic entity, understood as an organised grouping of persons and assets enabling the exercise of an economic activity which pursues a specific objective and which is sufficiently structured and autonomous (see, to that effect, judgment of 13 September 2007, *Jouini and Others*, C-458/05, EU:C:2007:512, paragraph 31 and the case-law cited).

61 The entity at issue must also retain its identity following the transfer in order to fall within the scope of Directive 2001/23 (see, to that effect, judgment of 12 February 2009, *Klarenberg*, C-466/07, EU:C:2009:85, paragraph 39).

62 Since the identity of an economic entity is constituted by several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (judgment of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraph 43 and the case-law cited), that identity necessarily entails, amongst other matters, functional autonomy.

63 Thus, as the functional autonomy of such an entity is inherent in its identity, it must, as Article 1(1)(b) of Directive 2001/23 requires, be retained after the transfer.

64 Furthermore, that autonomy does not have to be total. Indeed, it follows expressly from the wording of Article 1(1)(a) of Directive 2001/23 that the directive is applicable not only to the transfer of an undertaking but also where part of an undertaking is transferred.

65 Consequently, a production unit of an undertaking, such as that at issue in the main proceedings, whose activity was carried out, before the transfer, within that undertaking and whose

autonomy within it was accordingly limited cannot automatically be excluded from the scope of Directive 2001/23.

66 In the present instance, it is apparent from the order for reference that the production unit might not be capable of operating in order to attain its economic object without having recourse to the factors of production of a third party.

67 Indeed, whilst parts of a single undertaking enjoy the latter's overall autonomy, the autonomy that those parts need in their own relations with third parties may well be lacking.

68 In a similar context, the Court has held in particular that an interpretation of Article 1(1)(b) of Directive 2001/23 which excludes from the scope of that directive a situation in which the tangible assets essential for the performance of the activity transferred have been owned at all times by the transferor would deprive that directive of part of its effectiveness (see judgment of 7 August 2018, *Colino Sigüenza*, C-472/16, EU:C:2018:646, paragraph 39 and the case-law cited).

69 However, given that, as is clear from paragraph 21 of the present judgment, a production unit such as that at issue in the main proceedings, consisting of Ellinika Nafpigeia's 'rolling stock directorate', was transferred to ETYE, a subsidiary of Ellinika Nafpigeia, that unit can no longer be regarded as having the autonomy of the parent company. In order for a hived-off unit, such as that at issue in the main proceedings, to retain autonomy, it must therefore have, after the transfer, sufficient safeguards ensuring it access to the factors of production of the third party at issue so as not to be dependent upon the economic choices unilaterally made by the latter.

70 Those safeguards may take the form, in particular, of agreements or contracts between the unit transferred and the third party concerned that lay down the specific and mandatory conditions under which access to the third party's factors of production will be ensured.

71 Ultimately it will be for the referring court to establish, in the light of the factors set out in paragraphs 69 and 70 of the present judgment and taking account of all the facts characterising the transaction at issue, that the production unit transferred has sufficient safeguards ensuring it access to the factors of production of third parties.

72 Accordingly, the answer to the questions referred is that Directive 2001/23, in particular Article 1(1)(a) and (b) thereof, must be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous, provided that — matters which are for the referring court to establish — first, the general principle of EU law requiring the transferor and transferee not to seek to obtain fraudulently or wrongfully the advantages that they might derive from Directive 2001/23 is observed and, second, the production unit concerned has sufficient safeguards ensuring it access to the factors of production of a third party so as not to be dependent upon the economic choices unilaterally made by the latter.

Costs

73 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 (Third 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, in particular Article 1(1)(a) and (b) thereof, must be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous, provided that — matters which are for the referring court to establish — first, the general principle of EU law requiring the transferor and transferee not to seek to obtain fraudulently or wrongfully the advantages that they might derive from Directive 2001/23 is observed and, second, the production unit concerned has sufficient safeguards ensuring it access to the factors of production of a third party so as not to be dependent upon the economic choices unilaterally made by the latter.

[Signatures]

^{*} Language of the case: Greek.