

Case C-404/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

16 June 2022

Referring court:

Dioikitiko Protodikeio Athinon (Greece)

Date of the decision to refer:

3 May 2022

Applicant:

Ethnikos Organismos Pistopoiisis Prosonton & Epaggelmatikou Prosanatolismou (E.O.P.P.E.P.)

Defendant:

Elliniko Dimosio

Subject matter of the main proceedings

Application by the Ethnikos Organismos Pistopoiisis Prosonton & Epaggelmatikou Prosanatolismou (E.O.P.P.E.P.) (National Organisation for the Certification of Qualifications and Vocational Guidance, ‘the EOPPEP’) contesting the notice issued on 12 July 2018 by the Head of the Tmima Epitheorisis Ergasiakon Scheseon Neas Ionias (Nea Ionia Labour Relations Inspectorate, ‘the TEES’) imposing a fine on it for infringement of the information and consultation requirements under national legislation transposing Article 4(2), (3) and (4) of Directive 2002/14/EC into the national legal system.

Subject matter and legal basis of the request

The request for a preliminary ruling has been made pursuant to Article 267 TFEU, taking account in particular of the fact that the provisions of Article 2(a) and Article 4(2)(b) of Directive 2002/14, which give rise to reasonable doubt as to the meaning of the terms ‘economic activity’, ‘situation’, ‘structure’ and ‘probable

development of employment’, have not been interpreted by the courts of the European Union.

Questions referred for a preliminary ruling

1) (a) What does the term ‘undertaking carrying out an “economic activity”’ mean for the purposes of Article 2(a) of Directive 2002/14/EC?

(b) Does it include private-law legal entities such as the EOPPEP which, in the exercise of its powers of certification of vocational training bodies, acts as a public-law legal entity and exercises public powers, inasmuch as (i) for certain of its activities, such as the provision of all manner and form of vocational guidance services to the competent ministerial bodies, centres and vocational education and training bodies, undertakings, and employers’ and workers’ associations (Article 14(2)(ib) of Law 4115/2013, Government Gazette I/24), it follows from Article 14(2)(ie) of that law laying down the requirements for the provision of advisory and vocational guidance services by private individuals and legal entities in Greece that there may be a market in which commercial undertakings are carrying out an activity in competition with the applicant, and (ii) according to Article 23(1)(d) of that law, the applicant’s resources include revenue from the performance of work and the provision of services either allocated to it by the Minister or performed on behalf of third parties, including government departments, national and international organisations, public- or private-law legal entities and private individuals, whereas (iii) for its other activities, Article 20 of Law 4115/2013 provides for the payment of fees?

(c) Does the answer to the above question depend on whether, in relation to most of the activities (Article 14(2) of Law 4115/2013) of the private-law legal entity, a few appear to be carried out only in a market environment and, if the answer to that is in the negative, whether it suffices that the legislature provided (Article 14(2)(ib) and Article 23(1)(d) of Law 4115/2013) for that legal entity to act, in part at least, as a market operator or whether it is necessary to prove that it does indeed carry out a particular activity in a market environment?

2) (a) What do the terms ‘situation’, ‘structure’ and ‘probable development of employment’ in the undertaking, on which workers must be informed and consulted, mean for the purposes of Article 4(2)(b) of Directive 2002/14/EC?

(b) Do the above terms include the removal of employees from positions of responsibility in which they were placed temporarily after the private-law legal entities EKEPIS and EKEP had merged with the EOPPEP and operating regulations had been adopted for that legal entity which did not abolish those positions, and must the workers therefore be informed and consulted prior to their removal?

(c) Does the answer to the above question depend on (i) whether the smooth functioning of the legal entity and its operational needs were cited as the reason

for the removal of a worker from a position of responsibility, so that it can achieve the objectives which it was established to pursue, or whether poor performance of the worker's duties as acting head was the reason for the worker's removal; (ii) the fact that the employees removed from positions of responsibility were retained as members of the legal entity's staff; or (iii) the fact that other persons were temporarily placed in positions of responsibility by the decision of the competent body removing employees from positions of responsibility?

Provisions of European Union law relied on

Article 151 TFEU

1989 Community Charter of the Fundamental Social Rights of Workers, Article 18

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29), recitals 7 and 8, Article 2, Article 3(1), Article 4(2), (3) and (4) and Article 8(2)

Judgments of the Court of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 44; of 11 November 2021, *Manpower Lit*, C-948/19, EU:C:2021:906, paragraphs 39, 43 and 45; of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 44; of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 21; of 17 March 2011, *Peñarroja Fa*, C-372/09 and C-373/09, EU:C:2011:156, paragraph 37; of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 26; and of 2 February 1988, *Blaizot and Others*, 24/86, EU:C:1988:43, paragraph 17.

Opinion of Advocate General V. Trstenjak of 7 July 2011, *KHS AG*, C-214/10, EU:C:2011:465, point 60.

Provisions of national law relied on

Presidential Decree 240/2006 establishing a general framework for informing and consulting employees in accordance with Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 (OJ 2002 L 80) (Government Gazette I/252) ('Presidential Decree 240/2006'), Article 2 and Article 4(2), (3) and (4)

Law 4115/2013 on the organisation and operation of a youth and lifelong learning foundation and a national organisation for the certification of qualifications and vocational guidance and other provisions (Government Gazette I/24) ('Law 4115/2013'), Articles 13, 14, 20 and 23

Succinct presentation of the facts and procedure in the main proceedings

- 1 By a joint ministerial decision adopted in 2011, the private-law legal entity registered as Ethniko Kentro Pistopoiisis Domon Dia Biou Mathisis (National Centre for the Certification of Lifelong Learning Structures, ‘the EKEPIS’) and the private-law legal entity registered as Ethniko Kentro Epaggelmatikou Prosanatolismou (National Centre for Vocational Guidance, ‘the EKEP’) were merged with the private-law legal entity registered as Ethnikos Organismos Pistopoiisis Prosonton (National Organisation for the Certification of Qualifications, ‘the EOPP’) and ceased to be independent legal entities. By that same joint ministerial decision, the EOPP was renamed Ethnikos Organismos Pistopoiisis Prosonton & Epaggelmatikou Prosanatolismou (E.O.P.P.E.P.).
- 2 Two EKEPIS employees, P.M. and D.M., were among those transferred to the EOPPEP following its establishment.
- 3 The organisation chart of the EOPPEP was approved by decision of its board of directors adopted on 9 December 2011. By decision adopted by that board on 16 February 2012, P.M. was assigned to the position of acting head of the Qualifications Certification Department and D.M. was assigned to the position of acting deputy director of the Directorate of Administration & Economic Services and acting head of the Finance Department. Lastly, that decision was amended by decision adopted by the board of directors on 17 June 2013, further to which D.M. temporarily took over the Directorate of Administrative & Economic Services alone.
- 4 Following the publication on 19 December 2017 of the applicant’s operating regulations, under which the directorates and departments referred to above were maintained, the applicant’s board of directors adopted two decisions: by the first decision, adopted on 18 January 2018, the board decided that D.M. should continue to hold the position of acting head of the Directorate of Administrative & Economic Affairs pending the selection and appointment of a head of that directorate and, by the second decision, adopted by the board on 14 February 2018, D.M. was released from her duties as acting head of the directorate but remained in the Administration Department. According to the contents of the decision adopted on 14 February 2018, D.M. was removed because, as head of the Directorate of Administrative & Economic Affairs, she had failed, first, to apply the correct value for staff salaries in accordance with the legislation in force and the ‘final finding’ of the Geniko Logistirio tou Kratous (General Accounting Office of State) and, second, to issue a salary classification verification notice for the applicant’s employees.
- 5 By the decision adopted by the applicant’s board of directors on 21 February 2018, P.M. was released from her duties as acting head of the Qualifications Certification Department, but continued to work as an employee of that department. The preamble to the decision states that it was adopted by the board of directors with due regard for the need to serve the applicant’s requirements and

safeguard its smooth functioning and operational needs, so that it can achieve the objectives which it was established to pursue. By the same decision of the board of directors, K.G. was also released from his position as head of the Structure Licensing Department, but continued to work as an employee of the applicant's Knowledge Management and e-Governance Department, and A.A. was assigned to the position of acting head of the Finance Department.

- 6 Following the adoption of the above decisions, P.M. and D.M. filed complaints against them with the Nea Ionia TEES on 26 February 2018 and 15 March 2018, respectively, by which they requested that industrial dispute proceedings be initiated. The Nea Ionia TEES found from its on-site investigation that the applicant, which employs 80 workers, had failed to inform or consult its works council, as required by Presidential Decree 240/2006, before removing the above employees from their positions of responsibility.
- 7 Based on the findings of that investigation, the Head of the Nea Ionia TEES issued a notice dated 12 July 2018 imposing a fine of EUR 2 250 on the applicant for infringement of Article 4(2), (3) and (4) of Presidential Decree 240/2006. Specifically, the fine was imposed for the infringement consisting in the applicant's failure to submit, first, written information to the works council and, second, the minutes of the consultation 'before removing two employees as heads of operational units'.
- 8 The applicant lodged an application for annulment of the notice imposing the fine.

The essential arguments of the parties in the main proceedings

- 9 The EOPPEP submits, *inter alia*, that (a) it is not an undertaking carrying on an economic activity, in that, when it exercises its powers of certification of vocational training bodies, it is exercising public powers; (b) when the EOPPEP was established, P.M. and D.M. were assigned to the positions of acting head of department and acting head of directorate, respectively, and were aware of the fact that their appointments were temporary; and (c) the infringement at issue concerns two isolated staff cases to which the information and consultation procedure does not apply and in which, conversely, the applicant is, in the present case, exercising its own managerial rights.
- 10 The defendant requests that the application for annulment be dismissed as unfounded in law.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 11 According to the case-law of the *Symvoulío tis Epikrateias* (Council of State, Greece), the applicant, which is a private-law legal entity, is acting as a public-law legal entity exercising public powers when it exercises its powers of certification of vocational training bodies. Moreover, when it exercises those powers, it does

not qualify as an undertaking carrying out an ‘economic activity’ within the meaning of Article 2(a) of Directive 2002/14.

- 12 However, for certain of its other activities, such as the provision of all manner and form of vocational guidance services to the competent ministerial bodies, centres and vocational education and training bodies, undertakings, and employers’ and workers’ associations (Article 14(2)(ib) of Law 4115/2013), it follows from the provisions of Article 14(2)(ie) of that law laying down the requirements for the provision of advisory and vocational guidance services by private individuals and legal entities in Greece that there may be markets in which commercial undertakings are carrying out an activity in competition with the applicant. It must also be borne in mind that, under Article 23(1)(d) of Law 4115/2013, the applicant’s resources include revenue from the performance of work and the provision of services either allocated to it by the Minister or performed on behalf of third parties, including government departments, national and international organisations, public- or private-law legal entities and private individuals, whereas for its other activities, Article 20 of Law 4115/2013 provides for the payment of fees. It follows from this, first, that the legislature provided for the applicant to act as a market operator in part at least, as the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question which is normally agreed upon between the provider and the recipient of the service (see judgment of 11 November 2021, *Manpower Lit*, C-948/19, EU:C:2021:906, paragraphs 43 and 45).
- 13 Furthermore, Article 4(2)(b) of Directive 2002/14 establishes a requirement to inform and consult workers on matters relating to the ‘situation’, ‘structure’ and ‘probable development of employment’ within the undertaking and ‘any anticipatory measures envisaged, in particular where there is a threat to employment’.
- 14 According to Article 18 of the 1989 Community Charter of the Fundamental Social Rights of Workers, that requirement applies, for example, where restructuring operations in undertakings or mergers have an impact on employment. That is true, as a general rule, of the case under consideration, as the applicant is the product of a merger with other legal entities, the EKEPIS and the EKEP, and P.M. and D.M. were removed from their positions of responsibility in February 2018, following the adoption of the applicant’s first operating regulation in December 2017.
- 15 Although those employees had been placed in those positions of responsibility temporarily, P.M. was relieved of her duties as acting head of the Qualifications Certification Department in order to serve the applicant’s requirements, so that it could achieve the objectives which it was established to pursue, not due to shortcomings in the performance of her duties, as was the case with D.M., and the position of head of the Qualifications Certification Department continued to exist even after the applicant’s operating regulations had been adopted.

- 16 That fact, assuming that the case at issue comes within the scope of Directive 2002/14, gives rise to doubts as to the interpretation of the terms ‘situation’, ‘structure’ and ‘probable development of employment’ within the meaning of Article 4(2)(b) of the directive.
- 17 Moreover, by its decision of 21 February 2018, the board of directors allocated and removed other workers to and from positions of responsibility, again in order to serve the applicant’s requirements and safeguard its smooth functioning and operational needs, so that it can achieve the objectives which it was established to pursue.
- 18 The applicant’s claim that there was no requirement in the case under consideration to inform and consult its workers, as the contested removal from positions of responsibility concerns two isolated cases, has been asserted to no avail, as the labour dispute under consideration arose in the wake of the application submitted by those two workers alone, even though other workers were also removed from positions of responsibility further to the same decision by the applicant’s board of directors.

WORKING DOCUMENT