Case C-293/24

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:

23 April 2024

Referring court:

Supremo Tribunal de Justiça (Portugal)

Date of the decision to refer:

13 March 2024

Appellants:

João Filipe Ferreira da Silva e Brito and Others

Respondent:

Estado Português

Subject matter of the main proceedings

The main proceedings concern an action for a declaratory judgment in which the appellants, former employees of the airline AIA, are seeking a finding of non-contractual civil liability against the Estado Português (Portuguese State) arising from a judicial error. The appellants claim that the judgment of the Supremo Tribunal de Justiça (Supreme Court, Portugal) of 25 February 2009, given in the context of proceedings challenging their collective redundancy in 1993, is manifestly unlawful (i) because it is based on an incorrect interpretation of the concept of 'transfer of a business' within the meaning of Directive 2001/23/EC, and (ii) because the court failed to comply with the obligation to request a preliminary ruling from the Court of Justice regarding the interpretation of that concept in the light of EU law.

Subject matter and legal basis of the request

Interpretation of the concept of 'transfer of a business' in Directive 2001/23/EC – Scope of the obligation to refer under Article 267 TFEU as it relates to a national court deciding at last instance.

Provisions of European Union law relied on

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 businesses (OJ 1977 L 61, p. 26) and 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): Article 1, Article 3(1) and Article 4.

Provisions of national law relied on

Lei n.º 67/2007 – Regime da Responsabilidade Civil Extracontratual do Estado e demais Entidades Públicas (Law No 67/2007 establishing the rules on the non-contractual civil liability of the State and other public bodies) (*Diário da República*, Series 1, No 251, of 31 December 2007):

– Article 13 ('Liability in case of judicial error') provides that the State is to be civilly liable for the loss or damage arising from judicial decisions which are manifestly unconstitutional, unlawful or unjustified as a result of a manifest error in the assessment of the facts.

Decreto-Lei n.º 64-A/89, que aprova o regime jurídico da cessação do contrato individual de trabalho, incluindo as condições de celebração e caducidade do contrato de trabalho a termo (Decree-Law No 64-A/89 establishing the legal rules governing the termination of individual contracts of employment and the conclusion and expiry of fixed-term contracts of employment) (*Diário da República*, Series I, No 48, Supplement 2, of 27 February 1989) ('the LCCT')

– Article 23 ('Employees' rights'), included in Chapter V, titled 'Termination of contracts of employment due to lay-offs for objective reasons of a structural, technological or temporary nature relating to the undertaking', Section I, titled 'Collective redundancy', provides: (paragraph 1) that employees whose contract is terminated on account of collective redundancy are entitled to compensation; (paragraph 2) that, during the notice period, the employee may terminate the contract of employment without prejudice to the entitlement to compensation; and (paragraph 3) that taking that compensation equates to acceptance of the dismissal.

Decreto-Lei n.º 49408, Regime Jurídico do Contrato Individual de Trabalho (Decree-Law No 49408 on the rules governing individual contracts of employment) (*Diário do Governo*, Series I, Supplement 1, of 24 November 1969) ('the LCT'):

– Article 37 ('Transfer of a business') provides, in essence, that the position of employer is transferred to the acquirer of the business, except where, prior to the transfer, the contract of employment has ceased to be in effect or where there is an agreement between the transferor and the acquirer stipulating that the employees are to remain in the service of the transferor in another business.

Código das Sociedades Comerciais (Commercial Companies Code), as worded in the version in force at the time of the facts, approved by Decree-Law No 262/86 (*Diário da República*, Series I, No 201, of 2 September 1986)

– Article 152 ('Obligations, powers and liability of liquidators') provides that (i) by a resolution of the board, the liquidator may, in particular, be authorised to continue the former activity of the company on a temporary basis, to dispose of all of the company's assets and to transfer the company business, and (ii) that liquidator must finalise outstanding matters, satisfy the company's obligations and collect any amounts owing to the company.

Case-law of the Court of Justice of the European Union cited by the referring court

Regarding the non-contractual liability of the Member States for breaches of European Union law

– Judgment of 19 November 1991, *Francovich* (C-6/90 and C-9/90, EU:C:1991:428)

– Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79)

– Judgment of 26 March 1996, *British Telecommunications* (C-392/93, EU:C:1996:131)

– Judgment of 23 May 1996, *Hedley Lomas* (C-5/94, EU:C:1996:205)

– Judgment of 8 October 1996, *Dillenkofer and Others* (C-178/94, C-179/94 and C-188/94 to C-190/94, EU:C:1996:375)

– Judgment of 2 April 1998, *Norbrook Laboratories* (C-127/95, EU:C:1998:151)

– Judgment of 1 June 1999, *Konle* (C-302/97, EU:C:1999:271)

– Judgment of 4 July 2000, *Haim* (C-424/97, EU:C:2000:357)

– Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)

– Judgment of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391)

– Judgment of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506)

– Judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717)

– Judgment of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166)

– Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:56) (this judgment was given in response to the first request for a preliminary ruling made in the main proceedings)

– Judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602)

– Judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630)

– Judgment of 4 March 2020, *Telecom Italia* (C-34/19, EU:C:2020:148)

Regarding the concept of 'transfer of a business' in the light of the case-law of the Court of Justice as it stood at 25 February 2009, the date on which the Supreme Court gave the judgment allegedly vitiated by a judicial error

– Judgment of 14 April 1994, *Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* (C-392/92, EU:C:1994:134)

– Judgment of 11 March 1997, *Süzen v Zehnacker Gebäudereinigung Krankenhausservice* (C-13/95, EU:C:1997:141)

– Judgment of 10 December 1998, *Hidalgo and Others* (C-173/96 and C-247/96, EU:C:1998:595)

– Judgment of 25 January 2001, *Liikenne* (C-172/99, EU:C:2001:59)

– Judgment of 20 November 2003, *Abler and Others* (C-340/01, EU:C:2003:629)

– Judgment of 15 December 2005, *Güney-Görres and Demir* (C-232/04 and C-233/04, EU:C:2005:778)

Succinct presentation of the facts and procedure in the main proceedings

Proceedings challenging the collective redundancy (1993-2009)

Facts in the proceedings challenging the collective redundancy

1 The claimants were employees of Air Atlantis, SA ('AIA'), an airline established in 1985, which operated in the non-scheduled air transport sector.

2 Following a resolution passed by its general meeting on 19 February 1993, AIA was dissolved by means of public instrument on 19 April 1993.

3 The airline TAP Air Portugal ('TAP') took part in that general meeting as the majority shareholder.

4 On 26 February 1993, AIA sent a notice of collective redundancy to the employees, to take effect on 30 April 1993. All of the employees, except one, agreed to receive the compensation to which they were legally entitled.

5 At that time, the employees believed that the cause of the closure was AIA's economic, financial and operational situation and that the collective redundancy was inevitable in view of the situation in the international air transport sector, resulting from the general crisis caused by the Gulf War.

6 It was not until after their dismissal that the employees became aware that some AIA aircraft had moved to TAP and that TAP had begun to operate charter flights on routes which, until then, were served by AIA.

7 Indeed, from 1 May 1993, TAP began to operate some of the charter flights which AIA had already contracted to provide for the period between 1 May and 31 October 1993, known as 'summer IATA 93', the contracts for which had been concluded prior to the dissolution of AIA.

8 TAP used some of the assets which AIA had used in its operations, in particular, four aircraft, office equipment and the crockery used on the aircraft.

9 The transfer to TAP of office equipment and equipment of other kinds was subsequently taken into account during the winding-up of AIA, given TAP's status as principal shareholder and creditor.

10 TAP began to use the four aircraft, as their return before the expiry of the relevant leasing contracts would have involved the lessee, AIA, paying the lessor all of the rent amounts outstanding until the end of the contract.

11 Given that one of the aircraft had been subleased to AIA by TAP and that, in the case of the other three aircraft, TAP was a guarantor in respect of payment of the obligations arising from AIA's leasing contracts, TAP took over payment of the relevant amounts of rent and assumed the position of lessee in those contracts.

12 TAP did not change the colours of those assets or the logo appearing on them until sometime afterwards and, therefore, it operated flights under AIA's colours and logo.

13 The four aircraft remaining in the possession of TAP where gradually returned to their lessors between 1998 and 2000.

14 Moreover, in order to avoid the losses that would result from breaching the contracts which had already been concluded between AIA and the tour operators, which required AIA to pay large sums in compensation if it breached them, TAP operated the summer IATA 93 flights.

15 On those charter flights which AIA had previously contracted to provide, TAP mainly used the four aircraft which AIA had at its disposal and, less frequently, its own aircraft and crews.

16 In addition to operating some of the flights which AIA had already contracted to provide in the course of summer IATA 93, from 1 May 1993, TAP, which [had] almost exclusively operated scheduled air transport services, began to carry out operations in the charter market, which until that time it had not done because they were routes previously served by AIA. In the period from March to April 1994, for example, it operated fifteen charter flights.

17 In the summer of 1994, TAP itself contracted for and scheduled charter flights directly with tour operators in that market.

18 TAP started three pilot training courses prior to the dissolution and closure of AIA, which remained in operation. Moreover, TAP had started another course for the training of new pilots prior to the dissolution of AIA, which went ahead after that dissolution.

19 Two employees who had been seconded to AIA by TAP, to carry out commercial management duties in that company, were, after the dissolution of AIA, placed by TAP in its own commercial department and were assigned duties in the area of non-scheduled flights and the contracts for summer IATA 93 charter flights.

Procedure in the proceedings challenging the collective redundancy at first and second instances

20 In 1993 and 1994, the former AIA employees challenged the collective redundancy before the Tribunal do Trabalho de Lisboa (Labour Court, Lisbon, Portugal). In their claims, they sought, in particular, a declaration of unlawfulness in respect of the collective redundancy, their reinstatement within TAP, preserving their existing length of service and grade, and payment of the wages which they would have earned since the date on which the collective redundancy took effect.

21 By a judgment of 6 February, Lisbon Labour Court found that there had been a transfer of a business and ordered TAP to reinstate the employees, preserving their

existing length of service, and to pay them appropriate damages and their lost earnings.

22 The then defendants and some of the claimants lodged an appeal against that judgment with the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal).

23 On 16 January 2008, Lisbon Court of Appeal set aside the judgment under appeal as regards the reinstatement of the claimants and the payment of damages and lost earnings, thus dismissing the claimants' claims against the defendants. That judgment did not affect the sole employee who had not accepted the compensation.

24 The claimants brought an appeal against that judgment before the Supreme Court.

Arguments of the claimants before the Supreme Court in the proceedings challenging the collective redundancy

25 The claimants argued, in essence, that, although the ground cited for the collective redundancy was the permanent closure of the undertaking, the real intention of TAP was to restart the activity carried on until then by AIA in the charter flight market.

26 They therefore maintained that the facts should be regarded as a transfer of a business and not as the permanent closure of the undertaking.

27 They also cited a defect of consent with regard to the acceptance of the compensation for collective redundancy and submitted that having accepted the compensation did not prevent them from challenging their dismissal.

28 According to the claimants, the process of winding up an undertaking does not prevent the transfer of a business, since, in order for that to take place, it is sufficient for someone to continue the activity, or part of the activity, which the undertaking carried on until then.

29 With regard to the case at issue, the claimants argued specifically that the continuity of the activity had been proved, given that: (i) practically all of AIA's material resources and aircraft had been transferred to TAP; (ii) some employees who carried out commercial management duties at AIA had gone on to carry out similar duties at TAP; (iii) TAP had, for a certain period of time, used AIA's logos and colours; (iv) TAP had operated charter flights which AIA had already contracted to provide; (v) TAP had maintained the charter routes and activity and had retained the target market for that activity, which had given rise to a transfer of clientele; (vi) it was irrelevant that AIA could not transfer its licence to operate non-scheduled flights, since TAP had the necessary authorisation to operate such flights; and (vii) the fact that the business was linked to a licence and, for that reason, could not be transferred as a going concern was irrelevant, given that the transfer of a business [within the meaning of Directive 2001/23/EC], for the

purposes of employment law, is not comparable to a transfer as a going concern, which is merely a commercial transaction.

30 Those factors constituted sufficient circumstantial evidence to assert that a transfer of a business had taken place, with the inherent transfer to the acquirer, TAP, of the rights and obligations arising for both employer and employee from the contracts of employment.

31 In the opinion of the claimants, the transaction transferring AIA assets and equipment to TAP had, in reality, been a transfer of a business camouflaged as a purported 'sale of the fixed assets for their book value'.

32 There was, therefore, a direct conflict with the case-law of the Court of Justice and with Directives 77/187 and 2001/23, in particular since the judgment of Lisbon Court of Appeal of 16 January 2008 had placed no importance on the fact that the transfer of a business could have occurred in various stages, nor had it succeeded in applying the less formal and more practical approach to that concept required by legal scholarship and EU case-law.

33 The claimants also argued that it had been TAP itself who, in its capacity as the majority shareholder, had called the extraordinary general meeting of AIA, which had the resolution on the dissolution of AIA as the sole item on its agenda. It was, therefore, incumbent solely on TAP to bear the consequences of the approval of its proposal, as the potential impossibility of providing the charter flights contracted for – and the consequent deterioration in AIA's financial situation – was the result of a voluntary, conscious and legitimate decision on the part of TAP.

34 The claimants also asserted that Article 23(3) of the LCCT is incompatible with Article 4(1) of Directive 77/187 and of Directive 2001/23. Indeed, as Lisbon Labour Court had declared, the fact that the employees had accepted compensation did not prevent them challenging the collective redundancy, since such acceptance constituted a declaration that was vitiated by an error with regard to the grounds [for the redundancy].

35 So, according to the claimants, the role of the national court as a court of EU law requires it not to apply a national provision which is incompatible with a directly applicable provision of EU law, as occurs with the presumption provided for in Article 23(3) of the LCCT, in the light of Article 4 of Directive 77/187 and of Directive 2001/23.

36 Furthermore, the claimants argued that AIA was nothing more than an extension of TAP and that, in dissolving AIA and transferring AIA's business to itself, TAP had committed an abuse of legal personality in order to achieve objectives that were not sanctioned by the law, namely, the dismissals.

37 Some claimants also referred to the existence of a de facto group relationship. In their opinion, TAP, as the parent company, had become the majority shareholder

in AIA in order to take control of it and be able to dissolve it whenever it considered it appropriate – which it ultimately did by calling the general meeting which dissolved AIA.

Reasoning in the judgment of the Supreme Court of 25 February 2009

38 In its judgment of 25 February 2009, the Supreme Court held that it was not possible to deduce from the facts that AIA had transferred to TAP an organised grouping of productive factors of sufficient importance to constitute an autonomous medium for the activity of non-scheduled flights.

39 Taking into account the facts established, the Supreme Court took the view that, following the stage of liquidating AIA's assets, TAP did not take over an economic entity with the intention, directly and independently, of carrying on the charter flight activity which had previously been pursued by AIA.

40 On the one hand, no formal transfer transaction had been executed between AIA and TAP and, on the other, there was no de facto transfer of various independent elements which were subsequently reorganised within TAP, causing an autonomous business to re-emerge.

41 According to the Supreme Court, in the case brought before it, there was nothing to indicate the existence at TAP of a dedicated charter flights business unit that was independently organised for that purpose. Consequently, on the basis of the facts, it was not possible to assert that there had been a material transfer of an economic entity from AIA to TAP, within the meaning of Article 37 of the LCT and Directive 2001/23.

42 To support that conclusion as regards the different factual indications, the Supreme Court essentially emphasised the following:

– it was very important that TAP had used the four AIA aircraft on the basis of an agreement concluded in the context of the winding-up, aimed at limiting the losses of the creditors, which included TAP;

– the acts in question related to using the assets of a dissolved undertaking for the benefit of its creditors and to comply with the legal obligations of the liquidators;

– the aircraft were used, without distinction, for scheduled and non-scheduled transport and were returned to the lessors once the leasing contracts had expired, remaining in the service of TAP for a limited period of time;

– therefore, the fact that TAP began to use those aircraft when it took over payment of the rent in 1993 did not reveal an intention on its part to take over the charter aviation activity, nor was it sufficient to assert that that activity had been carried on independently;

– the 1993 flights were operated to comply with the obligations assumed in the course of the AIA winding-up process and to avoid the losses which breaching the contracts already concluded by AIA would have involved, but no independent economic entity dedicated to the activity of non-scheduled flights could be identified within TAP;

– TAP, as AIA's principal creditor, had a particular interest in avoiding those contracts being breached and the substantial payments of damages which that could result in, given that it had the option of taking over the performance of those contracts itself, having the means to do so, namely, aircraft, crews and a licence to operate charter flights;

– the claimants' argument that TAP could not, at that time, claim to have operated the flights in order to avoid substantial payments of damages, since AIA could not fulfil the scheduling for summer IATA 93 [only] as a result of the decision taken by TAP, could not be understood. TAP's actions were consistent from a financial perspective: it proposed the dissolution of AIA because it was financially unviable as an operation and, in the context of the winding-up, it took over the aircraft previously contracted for in order to avoid substantial payments of damages;

– as the case-law of the Court of Justice indicated, it was necessary to consider all of the factual circumstances which could point to a transfer of a business in order to assess their probative value;

– in the case of the 1994 flights – contracted for by TAP with the tour operators directly, for routes which it had not operated until then – TAP carried on an activity resulting from occupying the market share freed up by the closure of AIA;

– the Court of Justice, ruling on situations in which an undertaking is carrying on an activity hitherto carried on by another undertaking, has held that that mere fact does not justify the conclusion that there has been a transfer of an economic entity, since an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other 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;

– with regard to the transfer to TAP of crockery used on AIA aircraft and AIA office equipment, the transfer lacks relevance, not only because it was taken into account during the winding-up, but also because it has not been proved that that crockery and equipment had been allocated to the charter flight activity, making it impossible to assert that it formed part of an organised complex of assets and individuals specifically dedicated to the activity of non-scheduled flights;

– with regard to the retention of two female employees, which purportedly showed that the identity of the economic entity had been maintained, those

employees were bound to TAP by a contract of employment; they were, therefore, employees of TAP, not of AIA, and had been sent by TAP to carry out duties at AIA. That is a very different situation from the retention of employees. The return of those employees to TAP was a consequence of the fulfilment of their contracts of employment with their employer, given that the work of those employees within TAP cannot be regarded as [constituting] an independent economic entity dedicated to non-scheduled flights;

– in short, none of the evidence referred to led to the conclusion that there had been a transfer of the business unit, in whole or in part, given that an overall analysis of the evidence did not make it possible to identify, within TAP, a collection of material and human resources providing support for a charter flights business that was independently organised for that purpose, that is to say, an economic entity which retains its identity and independently pursues a non-scheduled commercial aviation activity within TAP.

43 In response to a request by various claimants that a preliminary ruling should be requested from the Court of Justice – some of whom suggested specific wording for the questions to be referred, in particular as regards the concept of 'transfer of a business' within the meaning of Directive 77/187 and whether Article37 of the LCT and Article 23(3) of the LCCT are consistent with that directive – the Supreme Court held as follows:

– it was one of the national courts to which the obligation to request a preliminary ruling, provided for in the then Article 234 TEC (now Article 267 TFEU), applied;

– the obligation to request a preliminary ruling only exists where the national courts consider that EU law and its interpretation are necessary in order to adjudicate on the dispute and where there are doubts regarding the interpretation of the provisions of EU law;

– even in such circumstances, that obligation is not unlimited, given that, even if the Supreme Court arrives at the conclusion that the question raised is relevant, it may not be obliged to refer the case to the Court of Justice;

– the Court of Justice itself has expressly acknowledged that the correct application of EU law may be so evident that there is no room for any reasonable doubt regarding the solution to be given to the question raised, therefore removing the obligation to request a preliminary ruling;

– the obligation to refer is never imposed by the mere fact that the parties to the proceedings express a desire for recourse to the Court of Justice, since, otherwise, requesting a preliminary ruling would turn into an avenue of appeal available to the parties to the proceedings;

– in view of the content of the directives referred to, the interpretation of those directives done by the Court of Justice and the limits of the present case, there

is no relevant doubt that makes it necessary to request a preliminary ruling, since the fact that the questions raised in this case and the situations referred to the Court of Justice are not strictly identical is unimportant;

– the Court of Justice has established a body of settled case-law with regard to transfers of businesses and Directive 2001/23 has incorporated concepts arising from that case-law;

– those concepts have already acquired such clarity, as regards their interpretation in EU and national case-law, that, in the case before it, it is not necessary to consult the Court of Justice first;

– the question of the compatibility of Article 23(3) of the LCCT with Article 4 of Directive 2001/23 could not be referred for a preliminary ruling because the subject matter of the request must respect the competences of the Court of Justice and the national court cannot request a preliminary ruling seeking the interpretation of national law, nor can it ask the Court of Justice to rule on the compatibility of a provision of national law with a provision of EU law;

– it did not fall within the competence of the Court of Justice to determine whether a particular provision of EU law was or was not applicable, even indirectly, to a particular situation before the national courts of the different Member States;

– therefore, it was not appropriate to request a preliminary ruling.

44 With regard to the lawfulness of the collective redundancy, the Supreme Court essentially held as follows:

– the series of acts carried out by AIA, TAP and the liquidator, following the dissolution of AIA and in the context of liquidating its assets, does not constitute a transfer of a business for the purposes of Article 37 of the LCT, interpreted in the light of EU legislation and case-law;

– consequently, the claimants' collective redundancy, the reason for which was the permanent closure of the undertaking, is lawful;

– the contractual position of AIA in the contracts of employment binding it to its employees, including the sole employee who did not accept the compensation, was not transferred to TAP;

– consequently, given that there was no transfer of a business, Article 4(1) of Directive 2001/23, regarding the prohibition of dismissals directly based on such a transfer, and Article 5(1) of that directive, which also requires a transfer to have taken place, did not apply;

– with regard to Article 4(1) of Directive 2001/23, there is nothing in the record of the case to show that the dismissal was based directly on an unproven act of

transfer, since the collective redundancy was based on the closure of the undertaking and was, therefore, a management decision taken for an important financial reason;

– with regard to Article 5(1) of Directive 2001/23, even if a transfer of the undertaking had taken place in the context of the winding-up, that winding-up would make it impossible to transfer the contracts of employment to TAP and it would be compatible with the dismissal of AIA's employees;

– without losing sight of the fact that the legal grounds for the collective redundancy were financial in nature and that judicial supervision must be reconciled with the freedom to conduct business and business management, the grounds relied on to support the collective redundancy should be accepted.

45 With regard to the arguments relating to the violation of fundamental legal principles protected by EU law, in particular that of *favor laboratoris*, and to the abuse of the right to resort to collective redundancy, the Supreme Court ruled as follows:

– based on the findings of fact, it was not possible to assert that AIA had abused its right to carry out the dismissal, since it was justified by the closure of the undertaking and the reason for it was the dissolution of that undertaking due to the serious financial difficulties it was experiencing;

– given that the undertaking had ceased its activity, the termination of the employees' contracts of employment was perfectly comprehensible and legitimate;

– it could not be asserted that AIA had sought, solely or principally, to cause injury to the applicants by exercising its right to resort to collective redundancy;

– nothing indicated that the defendants had exceeded the limits imposed by good faith, by accepted principles of morality or by the social or economic purpose of the right to resort to collective redundancy, much less that they had done so manifestly, such that the right may be considered to have been exercised unlawfully;

– with regard to the attitude of TAP in proposing the dissolution of AIA and, in the winding-up process, having taken over certain independent assets which it used for its [own] activity, nothing has been identified which indicates that TAP took advantage of being a distinct legal person from AIA in order to achieve objectives that were not sanctioned by the law;

– TAP's proposal to dissolve AIA was justified and TAP had not made any employment-related commitments to the employees contracted by AIA, so it could not be asserted that it intended to evade such non-existent commitments.

As regards the Boeing 737 courses in particular, the facts did not show that they had started after the dissolution of AIA:

– it was not proved that the dissolution of AIA and the collective redundancy were set in motion by TAP, in connivance with AIA, in order to operate non-scheduled air transport in the same conditions as existed at the time when AIA was established, thereby reducing its cost;

– there was nothing in the facts which made it possible to conclude that TAP had infringed the rules of good faith and, therefore, there was no basis to assert that it had taken advantage of the separate [legal] personalities in order to carry out dismissals which, otherwise, the law would not have allowed;

– it is only possible to commit an abuse of a company's legal personality where that legal personality is used unlawfully or abusively in order to cause injury to third parties; that is, in those cases in which the exercise of the subjective right leads to a result which is manifestly divergent from the purpose for which it was conferred by the law. The facts established in relation to the action in question did not indicate the existence of any of those factors;

– given that the collective redundancy was lawful, the questions relating to the relevance of the acceptance, or otherwise, of the compensation paid to the applicants, the constitutionality of the provision linking taking the compensation to acceptance of the dismissal, whether the applicants could rely on the voidability of the declaration of acceptance and whether there was any error in relation to the reasons for or the purpose of the transaction which had led the employees to decide to accept the relevant compensation were not ultimately examined, and nor were the questions relating to the quantification of the wages which would have been due, if the dismissal had been unlawful;

– accordingly, it was not necessary to rule on the other questions raised in the appeals brought.

46 In view of the above, in its judgment of 25 February 2009, the Supreme Court dismissed the claimants' appeals and dismissed their claims against the defendants.

Main proceedings (2013-2024)

47 The claimants brought an action for a declaratory judgment against the Portuguese State, under the ordinary procedure, before the Varas Cíveis de Lisboa (Court of First Instance, Lisbon, Portugal), claiming, in essence, that the judgment given by the Supreme Court on 25 February 2009, in the context of the proceedings challenging their collective redundancy, was manifestly unlawful because it was based on an incorrect interpretation of the concept of 'transfer of a business' within the meaning of Directive 2001/23 and because that court had failed to

comply with its obligation to request a preliminary ruling from the Court of Justice.

48 In that action, they asked the court to order the Portuguese State to pay them: (i) compensation for the monetary loss caused to them amounting to all of the remuneration not received from the date of their collective redundancy until the date of delivery of the judgment of the Supreme Court, on 25 February 2009, the remuneration that would be due to them until the anticipated date of their respective retirements and compensation for the loss relating to the reduction in the amount of their retirement pensions; (ii) compensation for pain and suffering; (iii) compensation for the loss relating to the remuneration which ceased to be paid until the date of their reinstatement; and (iv) in the alternative, compensation for the damage resulting from loss of opportunity.

49 On 31 December 2013, the Court of First Instance requested a preliminary ruling from the Court of Justice, essentially seeking clarification as to whether, in the light of Directive 2001/23, a transfer of a business had occurred and whether Article 267 TFEU had to be interpreted as meaning that the Supreme Court was obliged to request a preliminary ruling.

50 On 9 September 2015, the Court of Justice gave judgment in the case *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565), in which it ruled, in particular, that: (i) Article 1(1) of Directive 2001/23 must be interpreted as meaning that the concept of a 'transfer of a business' encompasses a situation such as that examined in the present case; and (ii) in circumstances which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.

51 The Court of First Instance found in favour of the defendant [now the respondent].

52 Some of the claimants brought an appeal before Lisbon Court of Appeal which, by a judgment of 16 March 2023, dismissed the appeal in its entirety and upheld the judgment of the Court of First Instance ('the judgment under appeal').

53 Some of the claimants [now the appellants] brought a further appeal before the Supreme court, where the case is currently pending.

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

54 The essential question raised in the present case concerns the assessment of the non-contractual civil liability of the Portuguese State for acts infringing EU law,

carried out in the exercise of judicial authority, in particular, by means of the judgment of the Supreme Court of 25 February 2009, as regards two essential aspects:

(a) due to the incorrect interpretation of the concept of 'transfer of a business' in the light of Directive 2001/23 and in view of the factual evidence available to the Supreme Court;

(b) due to the fact that that court is obliged to request a preliminary ruling from the Court of Justice, as requested by some of the then claimants, since courts had given conflicting decisions on the same question and because the Supreme Court is the national court of last instance.

55 Unlike the rules laid down in Article 340 TFEU, which provides for the non-contractual liability of the institutions, bodies and agencies of the European Union, the liability of the Member States for breaching EU law is not expressly provided for in the Treaties.

56 Nevertheless, the existence of such liability has been asserted repeatedly by the Court of Justice since the judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

57 In that judgment, the Court of Justice established the principle that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible and, at the same time, it defined the conditions for such liability.

58 That case-law of the Court of Justice has been confirmed in other subsequent judgments and the Court has also affirmed that that principle is valid regardless of which body or entity of the Member State it is whose action or omission results in the breach.

59 In the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), the Court of Justice expressly extended the liability of the Member States to include breaches of EU law resulting from acts of the judiciary where it is deciding at last instance, as occurs in the present case. That case-law has been confirmed repeatedly by the Court of Justice.

60 In the context of the main proceedings, it was held, both at first instance and at second instance, that it was not appropriate to refer new questions for a preliminary ruling, given that the formulation of the questions suggested by the appellants would imply the Court of Justice adjudicating on the present dispute, a task which falls to the courts of each Member State.

61 However, in the case that gave rise to the judgment in *Köbler*, it had to be determined whether it was for the Court of Justice to establish whether, in the main proceedings in that case, there was liability on the part of the Member State

for breaching EU law, as a result of a decision of a national court, or whether such an assessment was exclusively a matter for the national courts.

62 In response to that question, the Court of Justice began by observing that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for that purpose.

63 However, immediately afterwards, the Court stated that it had available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State to be incurred are fulfilled. Moreover, it declared that it was for it to establish whether such a breach of EU law had the requisite manifest character for liability under EU law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

64 More recently, that opinion was expressed again in the judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602), in which the questions referred for a preliminary ruling consisted in determining whether the conduct of a court of that State, as it had been described by the applicant, constituted a sufficiently serious breach of EU law.

65 In response to that question, the Court of Justice examined the specific facts at issue in that situation, reaching the conclusion that, although the court had available to it all the legal and factual elements necessary to assess of its own motion whether a contractual term was unfair in the light of the directive in question, there had not been a sufficiently serious breach of EU law.

66 The Court of Justice has not confined itself to stating the criteria for establishing a sufficiently serious breach of EU law, but rather it has also assessed whether those criteria were met in each particular case and has assessed the conduct of the national courts, although, in the two cases referred to above, it concluded that there had not been a sufficiently serious breach of EU law.

67 It does not follow from the foregoing that the Court of Justice has replaced the national court as the body adjudicating on the disputes in question. The Court has emphasised the principles of equivalence and effectiveness, in particular in the judgment in *Tomášová*, and has concluded that the rules regarding reparation for damage caused by a breach of EU law, such as those concerning the assessment of such damage or the relationship between a claim for that reparation and other remedies which could be available, are determined by the national law of each Member State, in conformity with the principles of equivalence and effectiveness.

68 Starting from the above premises, given that the liability of the Member States for acts or omissions of its bodies which breach EU law, including courts deciding at last instance, is based on the EU law which defines the conditions necessary for that liability to arise – albeit in relation to national law and respecting the principles of equivalence and effectiveness as set out above – it is appropriate that it should be the Court of Justice which, for the whole of the European Union,

unifies the case-law relating to the assessment of those same conditions necessary for liability on the part of the Member States to arise.

69 The case-law of the Court of Justice indicates that the Court attributes that 'reserved competence' to itself; it does not confine itself to stating the criteria for a finding of a 'sufficiently serious breach' of EU law, but rather it also applies them to specific cases pending before the referring national courts.

70 The judgment under appeal, however, notes that, in the judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565), given in response to the questions referred for a preliminary ruling in that case, the Court of Justice assessed the concept of 'transfer of a business' in the light of the case-law of the Court in 2015, even though the Supreme Court had ruled on that question in 2009. The judgment under appeal also asserts that the judgment of the Court of Justice contains some 'obvious, not insignificant errors'.

71 According to the judgment under appeal, those errors relate to how the factual circumstances of the dispute were presented, in that it stated that 'TAP took on a number of former AIA employees', when, according to the judgment under appeal, 'TAP did not take on any AIA employees. What occurred, as has been stated, was that (only) two female employees who were seconded to AIA (in which TAP was the principal shareholder) returned to TAP, although they were TAP employees who held a position in that company following the dissolution of AIA.'

72 The judgment under appeal also notes that, in the judgment of the Court of Justice, it states that the Supreme Court had considered that 'the business owned by AIA was one linked to a specific asset, namely a licence, which was not transferable, so that the transfer of the business was impossible, since only individual assets could be disposed of, not the business itself', when that 'is not the case, given that the reasoning presented had been used previously in the judgment of the Court of Appeal, to which the Supreme Court referred and that part of which it did not endorse. Indeed, it noted the inconsistency in the "emphasis placed on the fact that the business owned by AIA was one linked to a non-transferable licence […], in so far as, given that TAP was authorised to operate both in the area of 'scheduled' flights and in that of 'non-scheduled' flights […], the link of the non-scheduled air transport business to a licence did not prevent TAP from operating that business"'.

73 According to the judgment under appeal, in addition to those errors, 'it is apparent that the series of facts examined is far from containing/providing all of the relevant factual context, something which is evident, inter alia, from the context in which the secondment of the two female employees mentioned ended, from TAP's situation as a creditor of AIA, from the fact that the transfer of the 'small items of equipment' mentioned had occurred as a result of acts carried out in the course of the winding-up (bearing in mind TAP's position as a creditor), from the motivation underlying the fact that TAP took over the leasing contracts for the aircraft and from the fact that those aircraft were handed back to the lessor on the

expiry of the leasing contracts, and from the motivation, similarly underlying, to take over the operation of the charter flights already contracted for with tour operators for the summer of 1993, in view of the financial penalties which would naturally result from breaching those contracts, which effectively worsened TAP's position as a creditor of AIA.'

74 The Court of Appeal concludes that 'in view of the errors [we have] mentioned in the judgment of the Court of Justice, as well as the factual omissions [we have] presented, to which we cannot cease to attach importance, that decision must clearly be assessed and examined in a critical spirit when it comes to weighing up the deficiencies detected'.

75 If there are errors in the grounds of the judgment of the Court of Justice – due to a flawed assessment of the facts appearing in the record of the case or to the fact that not all of the relevant factual evidence was provided – in accordance with the provisions of EU law, what is required is to refer new questions to the Court for a preliminary ruling and not, as the judgment under appeal concludes, carrying out a critical assessment of the judgment given by the Court.

76 Referring new questions to the Court of Justice for a preliminary ruling remains obligatory when, in the proceedings [in question], the need to make a reference for a preliminary ruling subsists, given that making successive requests for a preliminary ruling in the context of the same national proceedings is provided for and is not in any way an unprecedented initiative.

77 Moreover, although the response of the Court of Justice refers to a time that is irrelevant to the solution to the particular case at issue, the solution cannot consist simply in not applying that binding judgment, but rather [it must consist] in returning to the Court of Justice, specifying that, in order to achieve the correct solution to the dispute, it is necessary to know whether the response given in the judgment given in that case is also applicable to the time when the judicial decision which allegedly breached EU law was given.

78 Accordingly, it should be borne in mind that, in the request for a preliminary ruling already made in relation to the same case, the Court of Justice ruled on whether the factual situation of the present case could be subsumed into the concept of 'transfer of a business' within the meaning of Directive 2001/23. However, the Court examined that question without reference to the time when the judgment of the Supreme Court at issue in these proceedings was given, that is, 25 February 2009, which would make it necessary to take into account the case-law of the Court as it existed at that date.

79 The Court of Justice also declared that the Supreme Court had infringed Article 267 TFEU by refusing, in its judgment of 2009, to request a preliminary ruling regarding the interpretation of [Directive 2001/23], so that it could be determined whether the proven facts in the action could be subsumed into the concept of 'transfer of a business' provided for in that directive.

80 However, the Court of Justice did not rule – because it had not been asked to do so – on whether that infringement was sufficiently serious to provide a basis for finding the Portuguese State liable.

81 In view of the doubts raised, the Supreme Court considers it appropriate to make a new request for a preliminary ruling, given the primacy of EU law and the need to ensure uniformity in the interpretation and application of the Treaties.

82 On the one hand, with regard to the primacy of EU law over national law when it comes to the liability of the State for breaches of EU law, the purpose of that liability is to ensure the full effectiveness of EU law and, in particular, effective legal protection of the rights of workers, which both Directive 77/187 and Directive 2001/23 were intended to guarantee.

83 On the other hand, with regard to the need to ensure uniformity in the interpretation and application of the Treaties when it comes to the liability of the Member States for breaches of EU law – in particular, on the part of national courts deciding at last instance – we are not aware of any decision of the Court of Justice, other than that given in the present case, which has tackled that question in the context of an action concerning the concept of 'transfer of a business' within the meaning of Directive 2001/23.

84 In the context of this reference for a preliminary ruling, it is, moreover, appropriate to ask the Court of Justice for a preliminary ruling on whether, in the present case, there was a sufficiently serious breach of EU law in the judgment of the Supreme Court of 25 February 2009, either on account of having incorrectly interpreted the concept of 'transfer of a business' in the light of EU law, or on account of having failed to comply with the obligation to request a preliminary ruling from the Court.

85 As the settled case-law of the Court of Justice indicates, there are three conditions which must be satisfied to trigger liability on the part of the Member States for loss and damage caused to individuals by breaches of EU law for which they can be held responsible, namely, that (i) the purpose of the provision of EU law infringed is to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal relationship between the breach and the damage suffered by the victims.

86 In the present case, given that there can be no doubt that Directives 77/187 and 2001/23 confer a right on the employees, which they can rely on directly, namely that the concept of EU law 'transfer of a business' should apply, if the Court of Justice concludes that there has been a sufficiently serious breach on the part of the Supreme Court as set out above, the possibility of the right to redress will depend solely on whether a causal link between that breach and the damage caused is found to exist.

87 In the judgment under appeal the Court of Appeal did not find such a causal link, holding that there had not been a material judicial error as defined in the case-law

of the Court of Justice. It thus concluded that the Supreme Court had acted in accordance with the law in giving its judgment of 25 February 2009.

88 Should the Court of Justice consider that, on the date on which the Supreme Court gave the judgment at issue in this case, that is 25 February 2009, it should have been concluded that the proven facts constituted a transfer of a business in the light of the directives mentioned and that, with its conduct, the Supreme Court had committed a sufficiently serious breach of EU law, it would be reasonable to conclude that the collective redundancy of the appellants should have been declared unlawful. It would follow from that the appellants are entitled to be compensated for the damage suffered.

89 However, at the time when the facts occurred, Article 23(2) of the LCCT was in force in the Portuguese legal system, providing that if an employee took compensation it implied acceptance of his or her dismissal.

90 In the case which gave rise to the judgment of the Supreme Court of 25 February 2009, it was proved that the employees who brought the action had accepted the compensation which had been awarded to them as a result of the collective redundancy and that they did so because they were convinced that the dissolution of AIA was inevitable.

91 It was also proved that, at that time, the then claimants were unaware that, following the termination of their contracts of employment, TAP would carry on at least part of the charter flight activity which, until then, had been carried on by AIA, nor were they aware that some of AIA's equipment, including the aircraft, would be transferred to TAP.

92 In the above-mentioned judgment of 25 February 2009, the Supreme Court did not apply Article 23(2) of the LCCT, as it considered the collective redundancy to be valid and, therefore, dismissed the part of the appeal that dealt with that question.

93 However, in those same proceedings, that is, in the proceedings challenging the collective dismissal, Lisbon Court of Appeal held that that article was entirely valid, since the fact that all of the then claimants, except one, had taken the compensation demonstrated their willingness to accept their dismissal and made it impossible to challenge the collective redundancy.

94 In the present action, in order to establish a causal link between the alleged breach of EU law and the damage suffered by the employees, it is necessary to assess the interpretation and application of the rule laid down in Article 23(3) of the LCCT and to examine its compatibility with the EU law in force at that time, that is, Directive 77/187.

95 Should it be found that, in the situation examined by the judgment of the Supreme Court of 25 February 2009, a transfer of a business did indeed take place, the application of Article 23(3) of the LCCT would prevent the transfer to TAP of the rights and obligations arising for AIA from the contracts of employment in

existence at the time of the transfer, given that the employees accepted the compensation for the termination of their contracts of employment in the context of the collective redundancy carried out by AIA.

96 Accordingly, the Supreme Court considers that, in order to examine that causal link, it is also appropriate to refer a question for a preliminary ruling on that point.

Questions referred for a preliminary ruling

‘1. In view of the proven facts set out above and the case-law of the Court of Justice as it stood at 25 February 2009, should 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 businesses] and 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) of Council Directive 2001/23/EC, which clarified the concept of “transfer”, have been interpreted on that date as meaning that the concept of “transfer of a business” encompassed a situation in which an undertaking active in the charter flights market was wound up by a decision of its majority shareholder, which was itself an undertaking active in the aviation sector and which, in the context of the winding-up, carried out the acts which are described in greater detail in the proven facts set out above?

2. If the answer is in the affirmative and likewise in view of the proven facts set out above and the case-law of the Court of Justice as it stood at 25 February 2009, does the decision contained in the judgment given on that same date by the Supremo Tribunal de Justiça (Supreme Court, Portugal), which, deciding at last instance and in the light of the facts of which it was aware, held that the above-mentioned directives, in particular Article 1(1) of Council Directive 2001/23/EC of 12 March 2001, should be interpreted as meaning that the concept of “transfer of a business” did not encompass the situation described in the previous question, constitute a sufficiently serious breach of EU law?

3. In view of the proven facts set out above and the case-law of the Court of Justice as it stood at 25 February 2009, does the decision contained in the judgment given on that same date by the Supremo Tribunal de Justiça (Supreme Court), which, deciding at last instance and in the light of the facts of which it was aware, held that Article 234 TEC (now Article 267 TFEU) should be interpreted as meaning that, in view of the facts described in the first question referred and the fact that the lower national courts that had heard the case had given conflicting decisions, the Supremo Tribunal de Justiça (Supreme Court) was not obliged to request a preliminary ruling from the Court of Justice regarding the correct interpretation of the concept of “transfer of a business” for the purposes of

Article 1(1) of Directive 2001/23/EC, constitute a sufficiently serious breach of EU law?

4. If the answer to the first question is in the affirmative and if the answer to either or both of the previous two questions is in the affirmative, the conclusion having been reached that there is a sufficiently serious breach of EU law – in a case such as the present one, in which it has been proved that the employees agreed to receive compensation for the collective redundancy, as they were convinced that the dissolution of Air Atlantis, their employer, was inevitable and were unaware that, after the termination of their contracts of employment, TAP would carry on at least part of the charter flight activity which, until then, had been carried on by Air Atlantis and that some of Air Atlantis's equipment, including the aircraft, would be transferred to TAP – must Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 be interpreted as meaning that it precludes a national provision, such as Article 23(3) of Decree-Law No 64-A/89 of 27 February, which has since been repealed but was applicable at the time of the facts in the main proceedings, in accordance with which "where the employee takes the compensation referred to in this article, it equates to acceptance of the dismissal"?'