Opinion of Advocate General Mengozzi delivered on 22 April 2008

Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy

Reference for a preliminary ruling: Korkein oikeus - Finland

Preliminary ruling procedure - Directive 98/59/EC - Approximation of the laws of the Member States relating to collective redundancies - Article 2 - Protection of workers - Informing and consulting with workers - Group of undertakings - Parent company – Subsidiary

Case C-44/08

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I – Introduction

1. By this reference for a preliminary ruling, made by order of 6 February 2008, the Korkein oikeus (Supreme Court) (Finland) seeks an interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. (2) The reference was made in the course of proceedings between Akavan Erityisalojen Keskusliitto AEK ry and Others ('the appellants in the main proceedings') and Fujitsu Siemens Computers Oy ('the respondent in the main proceedings') concerning the obligation to hold consultations with workers' representatives in the event of collective redundancies.

2. This case offers the Court the opportunity, for the first time, to clarify the scope of the obligation to hold consultations laid down in Directive 98/59 in relation to a group of undertakings, where the initiative to 'disengage from' or to close an undertaking is taken by the board of directors of the undertaking's parent company.

II – Legal framework

A – Community law

3. According to recital 2 in the preamble to Directive 98/59, '... it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community'.

4. Recital 11 in the preamble to Directive 98/59 states that '... it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer'.

5. Article 2(1) of Directive 98/59 provides that:

'[w]here an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.'

6. The first subparagraph of Article 2(2) of that directive provides that:

'[t]hese consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.'

7. The first subparagraph of Article 2(3) of Directive 98/59 states:

'[t]o enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.'

8. Article 2(4) of that directive provides that:

'[t]he obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.'

9. The first subparagraph of Article 3(1) of Directive 98/59 lays down the obligation for employers to notify the competent public authority in writing of any projected collective redundancies. The third subparagraph of

Article 3(1) provides that this notification is to contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives.

B – *National law*

10. Paragraph 7(1) of the law applicable at the time of the facts forming the subject-matter of the main proceedings, namely the Law on cooperation within undertakings (yhteistoiminnasta yrityksissä annettu laki (725/1978)), as amended by Laws 51/1993 and 906/1996 (the 'Law on cooperation'), provides that, before the employer decides the matter referred to in Paragraph 6 (the collective redundancies to be made), he must consult the employees and the agents or representatives of the workforce concerned on the grounds for, effects of and alternatives to the measure.

11. Paragraph 7(2) of the Law on cooperation provides that the employer must, before engaging the cooperation procedure, give the necessary information for dealing with the matter to the relevant employees and the representatives of the workforce concerned. That information – such as information on the reasons for the planned redundancies, an estimate of the number of employees in different categories who are to be made redundant, an estimate of the period within which the planned redundancies are scheduled to be made, and information on the principles on the basis of which the employees to be made redundant are determined – is to be given in writing where the employer contemplates redundancies, layoffs of over 90 days or part-time working for at least 10 employees.

12. Paragraph 7a(1) of the Law on cooperation provides that, in the case referred to in Paragraph 6(1) to (5) of that law, the consultation proposal must be made in writing at least five days before the start of consultations, if the measure to be consulted on will evidently lead to the part-time working, redundancy or laying off of one or more employees.

13. Paragraph 8 of the Law on cooperation provides that, unless another procedure has been agreed between the employer and the representatives of the workforce, the employer is regarded as having fulfilled the obligation to hold consultations where the matter has been dealt with in the manner laid down in Paragraph 7. If the measure to be consulted on will evidently lead to at least 10 employees being put on part-time working, made redundant or laid off for more than 90 days, the employer is not regarded has having fulfilled his obligation to hold consultations until at least six weeks have passed from the start of the consultations. In addition, the consideration of alternatives to the measure may start at the earliest seven days after consideration of the grounds and effects, unless agreed otherwise.

14. Pursuant to Paragraph 15a of the Law on cooperation, if a matter has intentionally or through manifest negligence been decided on without complying with the provisions of Paragraph 7(1) to (3) or Paragraph 7a or 8, and an employee has for reasons connected with that decision been placed on part-time working, laid off or made redundant, the employee is entitled to receive compensation of a maximum of 20 months' pay from the employer.

III – The main proceedings, the questions referred and the procedure before the Court of Justice

15. Following the merger into a joint undertaking of certain computer businesses of Fujitsu Ltd and Siemens AG, the Fujitsu Siemens Computers group started trading on 1 October 1999.

16. The respondent in the main proceedings became a subsidiary of Fujitsu Siemens Computers (Holding) BV (Netherlands) ('the parent company'). At that time, the group had production plants in Kilo, a district of the municipality of Espoo (Finland), and Augsbourg, Paderborn and Sömmerda (Germany).

17. The parent company's executive council, which consists of executive members of the company's board of directors, held a telephone meeting on 7 December 1999. It was decided at that meeting to make a proposal to the parent company's board for disengagement from the Kilo factory.

18. At a meeting of the parent company's board of directors on 14 December 1999, it was decided to support the executive council's proposal. However, according to the minutes of the meeting, no specific decision was taken concerning the Kilo production plant.

19. On the same day, the respondent in the main proceedings proposed cooperation consultations. Those consultations went on from 20 December 1999 to 31 January 2000, in other words for six weeks.

20. The respondent company's board, under the chairmanship of the deputy chairman of the parent company's board of directors, took a decision on 1 February 2000 to terminate the company's operations with the exception of computer sales activities in Finland. The respondent in the main proceedings began dismissing its employees on 8 February 2000. In total, some 450 of 490 employees were dismissed.

21. Some employees of the respondent in the main proceedings claimed that the latter had infringed the Law on cooperation in the course of the decisions taken at the end of 1999 and the beginning of 2000 with regard to the closure of the Kilo production plant. In accordance with Paragraph 15a of the Law on cooperation, the employees assigned their claims, plus interest, for the compensation provided for in that law in cases where the decision regarding collective redundancies was taken unlawfully to the appellants in the main proceedings, including Akavan Erityisalojen Keskusliitto AEK ry, which is one of the largest trade unions in Finland, so that the latter could effect recovery.

22. The appellants in the main proceedings sought an order from the Espoon käräjäoikeus (Espoo District Court) requiring the respondent in the main proceedings to pay them compensation in accordance with the Law on cooperation. During the proceedings at first instance, the appellants in the main proceedings claimed that the final decision to disengage the Kilo production plant from the respondent company had in reality been taken by the parent company's board by 14 December 1999 at the latest, before the cooperation consultations were held with the workforce. The respondent in the main proceedings had therefore, intentionally or through manifest negligence, infringed the Law on cooperation.

23. The Espoon käräjäoikeus held that the appellants in the main proceedings had not shown that the parent company's board had decided to terminate the operations of the Kilo production plant in such a way that the consultations between the employer and the employees within the respondent company could not take place in the manner prescribed by the Law on cooperation. The court held that the alternatives to closing the Kilo production plant were genuine and those alternatives had been examined in the course of the cooperation consultations. The Espoon käräjäoikeus, concluding that the decision to terminate the operations of the Kilo production plant had been taken at the meeting of the respondent company's board on 1 February 2000 after it had proved impossible to find other alternatives, and that the cooperation consultations had been genuine and appropriate, accordingly dismissed the action.

24. The Helsingin hovioikeus (Helsinki Court of Appeal) essentially upheld the judgment at first instance.

25. On appeal, the Korkein oikeus (Supreme Court) considers that there are differences of structure and content between the provisions of Directive 98/59 and the Law on cooperation.

26. Taking the view that an interpretation of the provisions of Directive 98/59 is necessary to enable it to give judgment, the Korkein oikeus decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 2(1) of Directive 98/59 … to be interpreted as meaning that the obligation under that provision to embark on consultations when "contemplating collective redundancies" of employees and "in good time" requires consultations to be started when it is established from strategic decisions or changes that have been made relating to the activity that a need for collective redundancies of employees follows? Or is the provision in question to be interpreted as meaning that the obligation to start consultations already arises on the basis of the employer contemplating measures or changes affecting the activity, such as a change in production capacity or a concentration of production, as a consequence of which a need for collective redundancies is to be expected?

(2) Having regard to the fact that the first subparagraph of Article 2(3) of [Directive 98/59] refers to the supply of information in good time during the course of the consultations, is Article 2(1) of the directive to be interpreted as meaning that the obligation under that provision to start consultations when "contemplating" collective redundancies and "in good time" requires consultations to be started already before the employer's intentions have reached the stage at which the employer is required to identify and supply to the employees the information specified in Article 2(3)(b)?

(3) Is Article 2(1) in conjunction with Article 2(4) of [Directive 98/59] to be interpreted as meaning that, in a situation in which the employer is controlled by another undertaking, the employer's obligation to start consultations with the representatives of the employees originates when either the employer or the parent company controlling the employer contemplates action for collective redundancies of employees in the employer's service?

(4) In the case of consultations to be carried on in a subsidiary belonging to a group, and in assessing in the light of the provisions of Article 2(4) of [Directive 98/59] the obligation under Article 2(1) to enter into consultations when "contemplating" collective redundancies and "in good time", does the obligation to start consultations already arise when the management of the group or the parent company contemplates collective redundancies but that intention has not yet taken concrete form as concerning the employees in the service of a particular subsidiary under its control, or does the obligation to embark on consultations within the subsidiary arise only at the stage when the management of the group or the parent company contemplates collective redundancies specifically in that subsidiary company?

(5) If the employer is an undertaking (a subsidiary belonging to a group) controlled within the meaning of Article 2(4) of [Directive 98/59] by another undertaking (parent company or group management), is Article 2 of the directive to be interpreted as meaning that the consultation procedure referred to there must be concluded before the decision on collective redundancies to be implemented in the subsidiary company is taken within the parent company or the group management?

(6) If [Directive 98/59] is to be interpreted in such a way that the consultation procedure to be carried on within the subsidiary company must be concluded before the decision giving rise to collective redundancies of employees is taken within the parent company or group management, is it only a decision whose direct consequence is the implementation of collective redundancies in the subsidiary company that is relevant in that connection, or must the consultation procedure be brought to a conclusion already before a commercial or strategic decision is taken within the parent company or the group management on the basis of which collective redundancies in the subsidiary company are probable but not yet finally certain?'

27. Pursuant to Article 23 of the Statute of the Court of Justice, written observations have been submitted by the appellants in the main proceedings, the respondent in the main proceedings, the Finnish Government, the United Kingdom Government and the Commission of the European Communities. Those parties also presented oral argument at the hearing on 14 January 2009, with the exception of the United Kingdom Government, which was not represented.

IV – Analysis

A – Admissibility of the first four questions

28. According to the respondent in the main proceedings, the first four questions are inadmissible since they are irrelevant for the purposes of resolving the dispute in the main proceedings. It takes the view that those questions seek to determine the moment at which the undertaking should begin cooperation consultations on redundancies, even though that legal question does not form part of the subject-matter of the main proceedings, since none of the parties has contended that the employer failed to begin consultations in good time.

29. In my view, the objection to the admissibility of the first four questions cannot be upheld.

30. It is important to point out first of all that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the

light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (3)

31. It follows that questions on the interpretation of Community law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. (4) The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of Community law bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (5)

32. In the present case, contrary to what the respondent in the main proceedings suggests, the first four questions do not seek exclusively to determine a specific starting point, but rather to establish which act or plan on the part of the parent company or the employer controlled by it may be classified in such a way as to be capable of being regarded as an act or plan by which one or the other has contemplated collective redundancies the consequence of which is to trigger the obligation to begin consultations with workers under Directive 98/59. It is apparent from the documents before the Court that that interpretation is necessary in order to determine whether the disengagement plan drawn up by the parent company in respect of the respondent in the main proceedings may be classified as a collective redundancy decision, as the appellants in the main proceedings claim, or as a decision capable of giving rise to the obligation to hold the consultations on collective redundancies provided for in the Law on cooperation transposing Directive 98/59. The question is therefore neither hypothetical nor one which bears no relation to the actual facts or purpose of the dispute in the main proceedings.

33. The first four questions referred must therefore be answered.

B – Substance

1. Preliminary remarks

34. As I pointed out when examining admissibility, one of the key questions for the purposes of resolving the dispute in the main proceedings is the legal classification of the 'decision' taken by the parent company and the definition of the consequences in terms of consulting workers' representatives provided for by Directive 98/59. Indeed, that question has given rise to some confusion in the observations of the parties which have intervened before the Court.

35. Before turning to consider the various questions referred, it would therefore be useful to examine the scope *ratione personae* of Directive 98/59, (6) and in particular the question, also raised at the hearing, whether that directive lays down obligations incumbent not only on the employer but also on the undertaking controlling that employer.

36. In my opinion, that question may be answered directly on the basis of the wording of the relevant provisions of the directive at issue.

37. It must be noted that the wording of Directive 98/59, in particular Article 2(1), (3) and (4) and Article 3(1) and (2), leaves no reasonable doubt as to the addressee of the obligations concerning information, consultation and notification.

38. Article 2(1) of that directive expressly provides that only the employer is required to begin consultations with the workers' representatives in good time. The first subparagraph of Article 2(3) of that directive identifies the employer alone as being responsible for supplying workers' representatives with all relevant information. In accordance with the second subparagraph of Article 2(3), the employer is to forward to the competent public authority a copy of the elements of the written communication which are provided for in the first subparagraph.

39. Article 2(4) of Directive 98/59 does not make any provision for an obligation incumbent on the parent company. That article states only that the obligations concerning information and consultation laid down in Directive 98/59 are to apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer. The second subparagraph of Article 2(4) makes the employer responsible for decisions taken by the parent company, even if the employer was not aware of them.

40. Although the second subparagraph of Article 2(4) does not expressly provide for an obligation incumbent on the parent company with respect to information, consultation and notification, the fact remains that, if the parent company takes the decision leading to collective redundancies, it is required to provide the necessary information to the relevant employer under its control so that the latter can duly fulfil all the obligations regarding information, consultation and notification laid down in Directive 98/59. That obligation on the part of the parent company to provide necessary information is therefore valid only in the relationship between the employer and the parent company. It does not affect the obligation to hold consultations per se.

41. Article 3 of Directive 98/59, which lays down the rules governing the notification procedure, provides that the obligation to notify is incumbent only on the employer, who is to notify the competent public authority of any projected collective redundancies (Article 3(1)) and who must forward to the workers' representatives a copy of that notification (Article 3(2)).

42. Consequently, I cannot infer anything from the provisions interpreted which would enable me to take the view that Directive 98/59 imposes on the parent company obligations to inform, consult and notify the representatives of the employer's workforce or the public authorities. (7) More specifically, with regard to the obligation to hold consultations, it must be pointed out that the fulfilment of that obligation falls exclusively on the employer even if the parent company controlling that employer takes the decision leading to collective redundancies.

43. With those remarks made, it is necessary now to examine the six questions referred.

2. The first question

44. By the first question, the referring court, behind the slightly muddled language which it uses, actually seeks clarification of the meaning of the expression 'contemplating collective redundancies' in Article 2(1) of Directive 98/59. It does so in order to define the moment at which an employer contemplates that measure, given that the obligation to hold consultations arises at that precise moment. The referring court suggests two interpretations. According to the first possible interpretation, that moment arises when it is established from strategic decisions or changes that have been made relating to the activity that a *need* for collective redundancies of employees *follows*. According to the second possible interpretation, that moment coincides with the moment when the employer considers measures or changes affecting the activity of the company *as a consequence of which a need* for collective redundancies of employees *is to be expected.* (8)

45. It must be borne in mind that Article 2(1) of Directive 98/59 lays down the obligation for the employer to begin consultations with the workers' representatives 'in good time' where he is 'contemplating collective redundancies'.

46. That provision, in establishing that the obligation to hold consultations arises as soon as the employer contemplates making collective redundancies, uses the verb 'contemplate', which does not, per se, lend itself to establishing the precise moment when the obligation to hold consultations arises. An element of interpretation is required to determine that moment.

47. First of all, that interpretation must start by considering the different language versions of Article 2(1) of Directive 98/59. It must then take into account a judgment in which the Court, in a case analogous to that forming the subject-matter of these proceedings, had occasion to interpret that provision, as well as its purpose.

48. In the language versions of Directive 98/59 other than the French, the [French] verb 'envisager' is rendered by expressions such as 'tener la intención' (Spanish version), 'beabsichtigen' (German version), 'contemplate' (English version) and 'prevedere' (Italian version).

49. It thus seems clear simply from comparing those different language versions of Article 2(1) of Directive 98/59 that the Community legislature meant the obligation provided for by that provision to arise from the existence of an intention on the part of the employer to make collective redundancies.

50. Such an interpretation of Article 2(1) of Directive 98/59 can be adopted in the light of the judgment in *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark*, (9) in which the Court ruled on the question whether Article 2(1) of Directive 75/129 is applicable where, because of his financial state, the employer ought to have contemplated collective redundancies but did not do so. The Court held that that provision applies only where the employer has *in fact* contemplated collective redundancies or has drawn up a plan for collective redundancies. (10)

51. Moreover, that interpretation is confirmed by the purpose of the obligation to hold consultations which Directive 98/59 attaches to the fact that an employer is contemplating collective redundancies.

52. After all, as the clarification contained in Article 2(2) of Directive 98/59 makes apparent, the obligation in question is not laid down solely 'with a view to reaching an agreement' with the workers' representatives on collective redundancies. It also serves to try and mitigate the consequences of those redundancies by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

53. For both purposes, consultation is essentially a function of negotiation; (11) the employer is required to begin those consultations *in good time*, that is to say at a moment when, because of its function, consultation will enable the workers' representatives to participate *effectively* in those negotiations.

54. Nevertheless, in order for such participation to be effective, it must take place at a moment when the subject-matter of the negotiations is liable to be sufficiently specific; that moment cannot be other than that at which it is apparent that the employer intends to make collective redundancies or, at least, that he already foresees the possibility of doing so as a consequence of the measures planned. It is only at that moment that the employer can be considered to be required to begin consultations. Prior to that moment, workers' representatives cannot properly participate in decision-making concerning the employment of the workforce and genuine alternatives to collective redundancies; consequently, consultations would not be useful.

55. Given that, as the wording of Article 2(1) of Directive 98/59 clearly suggests, the consequence which follows from the fact of contemplating collective redundancies is *automatic* and that that effect arises only where there is an intention or a plan on the part of the employer to make collective redundancies, the view must be taken that that fact, that is to say the contemplation of redundancies, occurs only where it is such as to give rise to consultations capable of being held in the form of negotiations with sufficiently specific subject-matter.

56. Having regard to the purpose of the obligation to hold consultations and the need to establish the existence of an intention on the part of the employer to make collective redundancies, a decision which creates a probable need to make collective redundancies in the future is not covered by the term 'contemplate', since that decision is characterised by a lack of intention on the part of the employer to make collective redundancies or a specific plan to do so.

57. Consequently, I am of the opinion that the first interpretation suggested by the referring court in its first question, concerning the situation where the employer takes measures as a result of which a *need* for collective redundancies of employees *follows* is akin to the situation where the employer should perhaps foresee collective redundancies but does not yet have the intention of proceeding with them. Taking into account the judgment in *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark* and the meaning to be attributed to the term 'contemplate' in the light of the function of the obligation to hold consultations, I take the view that Directive 98/59 is not yet applicable in such a situation. As I see it, the expression 'a need … follows' used by the national court refers to an early stage at which the employer has not yet planned or foreseen collective redundancies.

58. That being the case, it must be noted that the second interpretation suggested by the referring court in its first question, to the effect that Article 2(1) of Directive 98/59 should be understood as meaning that the obligation to hold consultations arises where the employer contemplates measures *as a consequence of which a*

need for collective redundancies of employees *is to be expected*, describes a situation which is even more remote than that contemplated in the first alternative. In such a situation, not only has the employer not yet planned or foreseen collective redundancies, but the occurrence of such an event is still within the realms of pure probability.

59. It follows, in my view, that both the first and the second alternatives proposed in the first question reflect situations in which Directive 98/59 is not applicable.

60. In the light of the foregoing, I propose that the Court's answer to the first question raised by the referring court should be that Article 2(1) of Directive 98/59 is to be interpreted as meaning that neither the situation where the employer takes measures as a result of which a need for collective redundancies of employees follows, nor that where the employer plans to adopt measures as a consequence of which a need for collective redundancies of employees is to be expected, is covered by the expression 'contemplating collective redundancies'. That expression must be understood as referring to the moment at which it is apparent that the employer intends to make collective redundancies or, at least, that he already foresees the possibility of doing so as a consequence of the measures planned.

3. The second question

61. By its second question, the referring court essentially asks whether the obligation to begin consultations in good time when contemplating collective redundancies requires consultations to be started even before the employer is in a position to supply the information specified in Article 2(3)(b) of Directive 98/59. It therefore concerns the link between the starting point of the consultations and the obligation to communicate the information provided for in Article 2(3) of Directive 98/59 to workers' representatives.

62. It should be noted that the wording of the first subparagraph of Article 2(3) of Directive 98/59 clearly states that the information must be supplied by the employer 'in good time during the course of the consultations', in order '[t]o enable workers' representatives to make constructive proposals'.

63. Taking into account the fact that, according to the first subparagraph of Article 2(3) of that directive, the information referred to in Article 2(3)(b)(i) to (vi) must be supplied *during the course of the consultations*, it can logically be considered that the obligation to supply all the information required does not necessarily have to be fulfilled at the moment when the consultations begin, but may be fulfilled during them.

64. In keeping with the logic of that provision, the employer must keep workers informed of developments and supply them with all the relevant information throughout the consultations. That flexibility is made necessary by the fact that information may become available at different times during the consultation process, which means that the employer must be able to add to the information referred to in Article 2(3)(b) of Directive 98/59 during the course of the consultations.

65. That flexibility is also necessary given that, as follows expressly from Article 2(3) of that directive, the supply of information 'in good time' is intended to 'enable workers' representatives to make constructive proposals' during the course of the consultation process. Consequently, the communication of information must be understood as being an obligation the objective of which is to enable workers to participate in the consultation process as fully and effectively as possible, and, for that to be the case, the information must be supplied up to the end of the consultations.

66. It follows that the moment at which consultations begin does not depend on the employer already being in a position to supply workers with all the information listed in Article 2(3)(b) of Directive 98/59.

67. In the light of the foregoing considerations, I propose that the Court's answer to the second question raised by the referring court should be that the incurrence of the employer's obligation to begin consultations on collective redundancies does not depend on the employer already being in a position to supply the workers' representatives with all the information required by Article 2(3)(b) of Directive 98/59.

4. The third and fourth questions

68. By the third question, the referring court asks the Court whether Article 2(1) in conjunction with Article 2(4) of Directive 98/59 should be interpreted as meaning that the obligation to consult workers' representatives arises when either the employer or the parent company controlling the employer contemplates collective redundancies. By its fourth question, the referring court asks whether the incurrence of the obligation to begin consultations requires, in the case of a group of undertakings, that the assessment of the need for the collective redundancies contemplated by the parent company has taken concrete form as concerning the employees in the service of a particular employer.

69. It should be pointed out, first of all, that, under the first subparagraph of Article 2(4) of Directive 98/59, the obligations incumbent on the employer with respect to information, consultation and notification apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

70. As regards the wording of that provision, the referring court draws attention to the different forms of words used in Article 2(1) and (4) of Directive 98/59 (paragraph 1 refers to the situation where the employer 'is contemplating' collective redundancies, while paragraph 4 refers to a 'decision' regarding collective redundancies), on the one hand, and to the different tenses used for the verbs relating to the 'decision' by some of the language versions of paragraph 4 (for example, the use of the imperfect tense in German ('getroffen wurde'), the present continuous in English ('is being taken'), the present in French ('émane') and the past perfect in Finnish ('on päättänyt')), on the other.

71. As regards the difference in the wording in Article 2(1) and (4) of Directive 98/59, it is my view that account should be taken, first, of a systematic interpretation of Directive 98/59 and, second, of the purpose of Article 2(4) thereof.

72. As regards the systematic interpretation of Directive 98/59, it should be pointed out that the main rule concerning the commencement of the obligation to consult is established by Article 2(1) of that directive; Article

2(4) has only an auxiliary function in relation to Article 2(1). The purpose of Article 2(4) is to confirm the scope of the employer's obligation to consult laid down in Article 2(1) of Directive 98/59 where the employer is a subsidiary of an undertaking. For that reason, the difference in language apparent in the auxiliary provision of Article 2(4) cannot change the meaning of the main rule. On the contrary, the auxiliary provision must be understood in the light of the main rule.

73. Consequently, the term 'decision' used in Article 2(4) of Directive 98/59 must be understood in a broad sense in the light of Article 2(1) of that directive, which, as I made clear in point 54 of this Opinion, in using the verb 'contemplate', refers to the moment at which collective redundancies are planned or foreseen, which moment precedes the adoption of the redundancy decision.

74. Consequently, it is my opinion that Article 2(4) of Directive 98/59 must not be interpreted as meaning that the obligation to consult arises when the parent company has adopted a decision on collective redundancies; on the contrary, it arises at the moment when either the employer or the undertaking controlling the employer contemplates, that is to say plans or foresees, collective redundancies.

75. That interpretation is confirmed by the objective of Directive 98/59 as expressed in Article 2(2) thereof, that is to say to avoid collective redundancies or, at least, to reduce the number of workers affected by that measure. The attainment of that objective would be compromised if the consultations took place after the decision on collective redundancies was taken by the parent company controlling the employer required to make the redundancies. (12)

76. In the light of the foregoing observations, there is no need to examine the differences between the various language versions in relation to the tenses used for the verbs relating to the term 'decision', and the use of the past tense in some language versions of Article 2(4) of Directive 98/59 must be considered to be irrelevant.

77. Consequently, Article 2(1) in conjunction with Article 2(4) of Directive 98/59 should be interpreted as meaning that, in the case of a group of undertakings, the obligation to consult workers' representatives arises when either the employer or the undertaking controlling the employer plans or foresees collective redundancies.

78. However, it should be pointed out that the fulfilment of that obligation to consult, as I made clear in points 38 and 40 of this Opinion, falls on the employer, irrespective of whether the collective redundancies are planned or foreseen by the employer or the parent company.

79. In my view, that finding should be used as the starting point for answering the fourth question raised by the referring court, by which it asks whether the incurrence of the obligation to begin consultations with workers' representatives requires, in the case of a group of undertakings, that the subsidiary company whose workers will be affected by the collective redundancies must already be specified.

80. Given that the obligation to consult workers' representatives is incumbent on the employer, it is my view that that obligation arises only when the parent company, exercising control, has identified the subsidiary in which the collective redundancies are contemplated. It is only that subsidiary, as employer, which can commence such consultations, the purpose of which is to reach an agreement with the workers' representatives.

81. That purpose of the obligation to consult, which, as I made clear in point 53 of this Opinion, seeks to ensure genuine participation by the workers' representatives in the decision-making concerning the workers' employment, would be compromised if the obligation to consult were to arise at a moment when the parent company has not yet identified the subsidiary which is to be affected by the collective redundancies contemplated. In that event, all the subsidiaries of a group of undertakings would be obliged to commence consultations at the same time in a situation where nobody yet knows what the subject-matter of those consultations might be or if they are really necessary at all. Effective participation by the workers' representatives would therefore be impossible in such a situation.

82. Consequently, I consider that the obligation to consult arises when the controlling parent company has identified the subsidiary which will be affected by the collective redundancies contemplated.

83. In the light of the foregoing considerations, I propose that the Court's answer to the third and fourth questions raised by the referring court should be that Article 2(1) of Directive 98/59, read in conjunction with Article 2(4) of that directive, is to be interpreted as meaning that, in the case of a group of undertakings, the obligation to consult the workers' representatives arises when either the employer or the undertaking controlling the employer plans or foresees collective redundancies. If redundancies are foreseen by the parent company, the obligation to consult arises only when it has identified the subsidiary which will be affected by the redundancies.

5. The fifth and sixth questions

84. By its fifth question, the referring court seeks to ascertain whether the consultation procedure laid down in Article 2(1) of Directive 98/59 must be concluded by the employer before the decision on collective redundancies is taken by the parent company. If that question is answered in the affirmative, the referring court asks, by its sixth question, what type of decision by the parent company the conclusion of the consultation procedure must precede. It proposes two options, namely, on the one hand, a decision whose direct consequence is the implementation of collective redundancies in the subsidiary, and, on the other hand, a commercial or strategic decision on the basis of which collective redundancies in the subsidiary are probable but not yet finally certain.

85. I consider that the answer to be given to the fifth question can be inferred from the judgment in *Junk*. In that judgment, the Court confirmed that a contract of employment may be terminated only after the conclusion of the consultation procedure, that is to say after the employer has fulfilled the obligations provided for in Article 2 of Directive 98/59. (13) It follows that the consultation procedure must be concluded before a decision on collective redundancies is taken.

86. As regards the situation where the decision on collective redundancies to be made within a subsidiary is taken by the parent company, I would point out that Article 2(4) of Directive 98/59 provides that the obligation to consult applies irrespective of whether the decision regarding collective redundancies is being taken by the

employer or by an undertaking controlling the employer or, as I made clear in the answer to the third question, irrespective of whether the redundancies were contemplated by the employer or by the undertaking controlling the employer.

87. Consequently, it is my view that any decision by a parent company to make collective redundancies in a subsidiary as a result of which the subsidiary, as employer, terminates the workers' contracts of employment can be taken only after the conclusion of the consultation procedure provided for in Article 2(1) of Directive 98/59.

88. That interpretation is confirmed by the objective of Directive 98/59 as expressed in Article 2(2) thereof, that is to say to avoid collective redundancies or, at least, to reduce the number of workers affected by that measure. The attainment of that objective would be compromised, as I have already made clear in point 75 of this Opinion, if the consultations took place after the decision on collective redundancies was taken by the parent company. (14)

89. As regards the sixth question, by which the referring court asks what type of decision by the parent company the conclusion of the consultation procedure must precede, it is already clear, in my view, from the answers to the first and fifth questions that it is the decision on collective redundancies referred to in the first option suggested by the referring court.

90. With regard to the second option proposed by the referring court, to the effect that the consultation procedure must be concluded before a commercial or strategic decision is taken on the basis of which collective redundancies in the subsidiary are probable but not yet finally certain, I would draw attention to the answer given to the first question.

91. Having regard to the finding reached in point 60 of this Opinion to the effect that a decision by the employer as a result of which a need for collective redundancies of employees follows is not covered by the expression 'contemplating collective redundancies', it is apparent that that decision, which cannot serve as the starting point for consultations, is even less capable of being considered to be the point of conclusion of the consultations.

92. Given that, in the case of the obligation to consult, it is irrelevant, according to Article 2(4) of Directive 98/59, whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling that employer, it should be noted that the finding reached in the preceding point of this Opinion with respect to a decision taken by the employer also applies to a decision adopted by the parent company as a result of which a need for collective redundancies of that employer's workers follows.

93. In the light of the foregoing considerations, I propose that the Court's answer to the fifth and sixth questions raised by the referring court should be that Article 2(1) of Directive 98/59, read in conjunction with Article 2(4) of that directive, is to be interpreted as meaning that, in the case of a group of undertakings, the consultation procedure must be concluded by the employer before the decision on collective redundancies is taken by the parent company. The commercial or strategic decision by the latter on the basis of which collective redundancies in the subsidiary are probable but not yet finally certain cannot be decisive for the purposes of defining the moment at which the consultations with the workers' representatives are concluded.

V – Conclusion

94. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Korkein oikeus as follows:

(1) Article 2(1) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies is to be interpreted as meaning that neither the situation where the employer takes measures as a result of which a need for collective redundancies of employees follows, nor that where the employer plans to adopt measures as a consequence of which a need for collective redundancies of employees is to be expected, is covered by the expression 'contemplating collective redundancies'. That expression must be understood as referring to the moment at which it is apparent that the employer intends to make collective redundancies or, at least, that he already foresees the possibility of doing so as a consequence of the measures planned.

(2) The incurrence of the employer's obligation to begin consultations on collective redundancies does not depend on the employer already being in a position to supply the workers' representatives with all the information required by Article 2(3)(b) of Directive 98/59.

(3) Article 2(1) of Directive 98/59, read in conjunction with Article 2(4) of that directive, is to be interpreted as meaning that, in the case of a group of undertakings, the obligation to consult the workers' representatives arises when either the employer or the undertaking controlling the employer plans or foresees collective redundancies. If redundancies are foreseen by the parent company, the obligation to consult arises only when it has identified the subsidiary which will be affected by the redundancies.

(4) Article 2(1) of Directive 98/59, read in conjunction with Article 2(4) of that directive, is to be interpreted as meaning that, in the case of a group of undertakings, the consultation procedure must be concluded by the employer before the decision on collective redundancies is taken by the parent company. The commercial or strategic decision by the latter on the basis of which collective redundancies in the subsidiary are probable but not yet finally certain cannot be decisive for the purposes of defining the moment at which the consultations with the workers' representatives are concluded.

1 – Original language: French.

2 – OJ 1998 L 255, p. 16.

3 – See, inter alia, Case C-248/07 *Trespa International* [2008] ECR I-0000, paragraph 32, and case-law cited.

4 – Ibid., paragraph 33 and case-law cited.

5 – Ibid., paragraph 33 and case-law cited.

6 – As recital 1 in its preamble states, Directive 98/59 represents the consolidation of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), as amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3). As I have already had occasion to say in points 35 and 36 of my Opinion of 21 January 2009 in Case C-12/08 *Mono Car Styling* (pending before the Court), Directive 98/59 may therefore be regarded, to all intents and purposes, as the version currently in force of Directive 75/129.

7 – Indeed, that interpretation is confirmed by the intention of the Community legislature. In this respect, it seems appropriate to refer to the *travaux préparatoires* for Directive 92/56, which, in introducing Article 2(4) into Directive 75/129, led to the adoption of the final text of Directive 75/129 as contained in Directive 98/59. Point 16 of the explanatory memorandum to the proposal for a Council directive amending Directive 75/129 (COM(91) 292 final, OJ 1991 C 310, p. 5) states that '[i]t should be emphasised that the revised text does not directly impose any obligation on controlling undertakings as such. Problems of extraterritoriality are therefore avoided. It should also be noted that the Commission is not proposing a mechanism … whereby employees would have the right to seek consultation with the undertaking's central administration or with the management of a controlling undertaking (the so-called "bypass" system)'.

8 – Emphasis added.

9 – Case 284/83 [1985] ECR 553.

10 – Ibid., paragraphs 12 to 17.

11 – To highlight the function of consultations as being to give rise to negotiations, see point 59 of the Opinion of Advocate General Tizzano in Case C-188/03 *Junk* [2005] ECR I-885, and, to that effect, paragraph 43 of the judgment in that case.

12 – See, to that effect, *Junk*, paragraph 44.

13 – See *Junk*, paragraph 45.

14 – See, to that effect, Junk, paragraph 44.