THE EU DIRECTIVE FOR COLLECTIVE REDUNDANCIES AND ITS IMPLEMENTATION IN GREECE AND GERMANY

1. Introduction

The legal framework regulating collective redundancies taking place on European territory is primarily given by European law. As a result of the economic difficulties following the oil crisis of 1973, which led to many closures and restructuring of enterprises, collective dismissals have been regulated on European level for over 30 years. Given this common legal basis, the relatively common level of economic development such as the fact that many European countries share a similar legal tradition with respect to labor law, it is therefore to some extend possible to assert the existence of certain uniformity in the regulation of collective redundancies on European territory.

On the other hand, however, it should not be ignored that EU law is - mostly and also in this particular case - contained in directives setting core principles and objectives, which then have to be implemented nationally. Due to this fact, consequent differences with regards to specific approaches and particular measures are always to be expected. Apart from that, certain economical, political and cultural differences across Europe naturally still exist and have an influence on the concrete measures taken and procedures followed in each country. Therefore it appears more appropriate to claim that the regulation of collective redundancies in Europe is based on a common ground, with local differences in the particular application, however, still remaining significant.

2. The Council Directive 98/59/EC of 20 July 1998 "on the approximation of the laws of the Member States relating to collective redundancies"

2.1 General outlines - Summary

The Council Directive 98/59/EC of 20 July 1998 "on the approximation of the laws of the Member States relating to collective redundancies", which consolidates the Directives 75/129/EEC and 92/56/EEC, is the core European legal text regulating collective dismissals. It is intended to harmonize Member States' law on the procedures to be followed when collective redundancies are planned on European territory, in order to afford greater protection to workers affected.

This law requires employers to **consult** the appropriate workers' representatives in the case of collective redundancies. It specifies the points which this consultation must cover and all necessary **information** which the employers shall supply the workers' representatives with during the course of the consultation. **Main purpose of the consultation is to cover measures to avoid or at least mitigate dismissals and their consequences.**

In addition, the Directive calls for **notification of the projected redundancies to the competent public authority** of the respective Member state and establishes the

procedure and practical arrangements to be made in that case, so that the competent authority will be offered enough time to reflect on a solution and to prepare an eventual policy response.

2.2 Provisions of the directive in particular

2.2.1 Definitions and scope (Article 1)

With reference to the cases where the Directive applies to, article 1 gives a wide definition of the notion of "collective redundancies", including **all dismissals effected by an employer for any reason *"not related to the individual workers concerned"*.** In addition to that, it also introduces **a quantitative criterion** which requires for the application of the Directive a number of redundancies within a certain period of time, depending on the size of the establishment.

Specifically the number of redundancies has to be:
(a) either, over a period of 30 days:
- at least 10 in establishments normally employing more than 20 and less than 100 workers,
- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more,

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

Article 1 stipulates moreover that, for the purpose of calculating the required number of redundancies, any termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

According to Article 1 Paragraph 2 the Directive does not apply to:
(a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts,
(b) workers employed by public administrative bodies or by establishments governed by public law and
(c) the crews of seagoing vessels.

2.2.2 Information and consultation with the workers' representatives (Article 2)

According to Article 2 **any employer contemplating collective redundancies must hold consultations with the workers' representatives in good time with a view to reaching an agreement (Paragraph 1), in order to avoid or reduce the number of workers affected and to mitigate the negative consequences** (Paragraph 2). During the course of the consultations the employer has **to provide the workers' representatives with all relevant information** and in the same time to notify to them in writing at least

the following: the reasons, the number and category of workers employed as well as of the ones to be made redundant, the period over which redundancies are to be effected, the criteria used for the selection of the workers affected and the method used for calculating compensations other than the ones arising out of national legislation and /or practice. A copy of this information shall be also transmitted to the competent public authority (Paragraph 3).

Finally Article 2 stipulates that employers are subject to aforementioned obligations even if the decision regarding collective redundancies has not been taken by them, but by an undertaking controlling the employer and accordingly that it can not be accepted as an excuse that the employer was not provided with the necessary information by the undertaking which took the decision (Paragraph 4).

2.2.3 Notification of the competent public authority (Articles 3 and 4)

The employer must notify the competent public authority in writing of any projected collective redundancies and supply it with all relevant information, including particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected (Article 3 Paragraph 1). A copy of this notification shall be forwarded to the workers' representatives, who may send any comments they have to the competent public authority (Article 3 Paragraph 2).

The projected collective redundancies cannot take effect earlier than 30 days after the aforementioned notification (Article 4 Paragraph 1). Within this period the competent authority shall make efforts to find solutions (Article 4 Paragraph 2). Member States may grant the competent public authority the power to reduce this period (Article 4 Paragraph 1) or also to extend it in cases where the problems are not likely to be solved within the initial period. The employer must be then informed of any extension and the grounds for it before expiry of the initial period (Article 4 Paragraph 3).

Especially for the cases that collective redundancies follow the termination of an establishment's activities resulting from a judicial decision, the Directive grants two exemptions: Firstly the observance of the aforementioned time periods is not compulsory; Member States are allowed not to apply the respective provision to such cases (Article 4 Paragraph 4). Secondly the Directive makes an exemption even from the obligation of notification of the competent public authority, stipulating that in cases of cessation of activity resulting from a judicial decision Member States may provide that the employer shall be obliged to notify the competent public authority in writing only if the latter so requests (Article 3 Paragraph 1).

2.3.4 Final provisions (Articles 5 to 10)

Among the final provisions, which in general have technical character, worth mentioning here is Article 5 which gives the Member States the **right to apply or introduce provisions which are more favorable to workers** than the ones of the Directive and

Article 6 which imposes on the Member States the obligation to ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive will be available to the workers' representatives and/or workers.

3. Implementation of the Directive in the national legislations

3.1 General observations

Since the Directive establishes core principles and minimal requirements for the procedures to be followed in cases of collective redundancies on European territory, national provisions of the Member States vary widely with reference to the complexity and length of the consultation procedures as well as to the exact notice requirements foreseen. In many cases national legislation is more inclusive and e.g. requires a consultation process to be adopted in relation to a smaller number of dismissals or takes into account a longer time period over which collective redundancies can be effected. Differences among the Member States are also observed specifically with reference to the powers which competent public authorities exercise during the course of consultations, the quantity of information which the employer has to supply to workers' representatives, the exact form in which workers are being represented, the selection criteria for the workers to be made redundant etc.

3.2 Implementation in particular Member States

3.2.1 Greece

In Greece, collective redundancies are regulated nowadays by **Law No. 1387/1983** (that adopted the then in force Directive No. 75/129/EC) as modified with Laws No. 2736/1999 and 2874/2000.

The frame for the application of the Law is similar to that of the Directive[33], but **the quantitative criterion for its application (in accordance with Article 5 of the Directive) is more favorable to workers** and the set numbers are lower than the ones provided in the Directive.

Thus, the said Law applies to "establishments" with more than twenty (20) employees. More specifically, in establishments with 20 – 200 employees four (4) redundancies within one (1) month are required; while in establishments with more than 200 employees a percentage of 2 – 3% and up to thirty (30) employees within the same month is necessary[34]. Though from its phrasing it seems that the number or thirty (30) employees is the maximum limit for enforcement of the Law in the second case, it has been accepted that the actual meaning of this standard is that the collective redundancies

[33] a) Collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts, (b) workers employed by public administrative bodies or by establishments governed by public law and (c) the crews of seagoing vessels.
[34] This percentage is further defined each semester by a Decree of the Minister for Labor.

procedures apply even in cases of a percentage less than 2% if the actual number of the redundant employees is more than thirty (e.g. in an establishment with 2000 employees, where 2% is 40 employees, the respective procedures should be followed even in case of termination of the contracts of 30 employees even though the 2% limit is not exceeded).

Meanwhile, the meaning of the word "establishment" was recently re-defined by the European Court of Justice (ECJ) in Case C-270/05 ("Athinaiki Chartopoiia vs Panagiotidis and others"), which concerned a preliminary ruling by the Greek Supreme Court that tried to solve this long-lasting in Greek theory and jurisprudence pending issue. According to the ECJ's decision:

"...for the purposes of the application of Directive 98/59, an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks... the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment' It is, moreover, in this spirit that the Court has held that it is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently effect collective redundancies (Rockfon, paragraph 34, and point 2 of the operative part). Nor must there be a geographical separation from the other units and facilities of the undertaking".

As far as the qualitative criterion is concerned, the Law, being also similar with the provisions of the Directive, refers to **redundancies that are non related with the employees**, which means that redundancies that are attributed to the behavior or the skills or even the personal situation (e.g. illness, pension etc.) of an employee are not counted in the collective ones. More over, due to a conflict whether the cases of "agreed redundancies", where the employee has consented to the termination of his contract, most likely because of additional benefits such as an increased severance allowance, should be also counted in and subject to the related procedures (the jurisprudence tended to deny this[35]), a new par. 3 was added to Article 1 of the Law[36] providing (in correspondence to the similar provision of the Directive) that **any form of termination of employment contracts with the initiative of the employer that are not attributed to the employee are considered as redundancies and consequently counted in, under the condition that the redundancies are at least five (5).**

With relation to the obligations of the employer in cases of an intention for collective redundancies, Articles 2 and 3 of the Law, corresponding also to the respective articles of the Directive, set firstly **the obligation of notification** of such redundancies to the

[35] Supreme Court 803/2003.
[36] With article 21 of Law No. 3488/2006.

workers' representatives and the competent public authorities[37] and of **an obligation of the employer for consultation** with the workers' representatives on these actions.

The content of the information to be notified to the workers' association and the competent authorities is identical with that of the Directive, while the Law provides that the workers' representatives are the representatives of the establishment's workers' union, under the condition that its' (the union's) members are i) 70% of the total workforce and ii) the majority of the employees to be fired. If there are in the specific establishment more workers' unions none of which covers the 70% requirement and/or the majority of the redundant employees, the representatives of the employees are appointed by the boards of directors of these unions, within three days from the respective notification of the employer, while if there are no workers' union in the establishment, that fulfills these criteria, the employees are represented by a three or five member commission, elected by the assembly of the employees in accordance with the provisions of par. 3 of Article 4 of the said Law.

The parties have twenty (20) days to consult (starting from the notification of the employer to the workers' representatives) and the result of the consultation is put down in writing and filled to the competent public authorities; **if there is an agreement between the parties, the redundancies take effect ten (10) days after such a submission.**

The most significant deviation of the Law, however, in comparison with the provisions of the Directive is related with the intervention of the public authorities in the procedure in case of disagreement between the parties. Though no similar guidelines exist in the Directive, Article 5 of the Law provides that, if the involved parties do not agree on the proposed scheme, the Prefect or the Minister of Labor respectively, after taking into consideration the provided information, the situation of the establishment and of the labor market in general as well as the general interest of the national economy, may decide within ten (10) days from submission of the results of consultation, either to **extend the consultation** for another twenty (20) days, if any party requires it, or even to **reject the total or part of the scheduled redundancies**. On the other hand, if the ten-days limit pass without any such action by the public authorities the proposed by the employer scheme for redundancies is considered accepted.

It is self-evident that this is a major intervention of the national public authorities to the procedure of any collective redundancies, since **it may lead to a prevention or a holdback of the scheduled redundancies**, especially if we take into consideration that **any redundancies made in violation of the law are invalid** and, thus, the employment contracts of the redundant are not actually terminated and the contractual obligations of the parties continue to be in force.

This radical intervention, attributed mostly to the pre-existed legislation regarding collective redundancies, have been heavily criticized by both the Greek legal theory and

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[37] The Prefect or the Minister of Employment (if the establishment has branches in several prefectures) respectively and the Head of the local Labor Office.

European authorities[38] and has led to **a severe downgrading** of the respective procedures since the workers' unions, having in mind that the final word will be that of the public authorities and the projected plan may be rejected tend to negotiate quite strictly and uncompromisingly, while the employers on the other hand, knowing that the planned redundancies may be prevented by the public authorities, seek firstly any kind of measures or solution that would help them escape from this difficult situation.

Finally, it should be mentioned that all redundancies taking place in accordance with the provisions of the said law, should be done **in accordance with the laws regulating the termination of employment contracts and the payment of the respective severance allowances**, which lead to the conclusion that agreements between the parties in contrary with the provisions of these statutes are not allowed.

3.2.2 Germany

3.2.2.1 The Redundancy Protection Law

The conformity of German national legislation with European law on collective redundancies is generally satisfactory. The national implementation of Directive 98/59/EC took place through Sections 17 to 22 of the Redundancy Protection Law (*"Kündigungsschutzgesetz"*, shortened: *"KSchG"*), which adopt and specify the principles set by the directive. Apart from the more or less similar provisions included, which don't need to be repeated here, **this law also makes use of the power given by Article 5 of the Directive which enables Member States to apply or introduce provisions which are more favorable to workers**. As a result of that as well as of the mainly general character of the directive, there are several aspects in this law, which are particular and therefore worth mentioning:

- With reference to its' scope of application and in order to define "collective redundancies" depending on the number of persons being made redundant within a certain time period, *KSchG* refers only to a 30 days period, not making use of the possibility offered by Article 1 Paragraph 1 (a) (ii) of the Directive to apply it also with respect to a period of 90 days. Additionally, *KSchG* requires a lower minimum number of workers to be made redundant by the calculation of the collective redundancy thresholds[39].

- *KSchG* explicitly excludes from its scope of application all cases of persons who act as legal representatives - or are members of bodies which act as legal representatives - of legal entities or of other groups of persons, including managers and directors of companies, provided that they have the power to hire or fire employees (Section 17

[38] In the aforementioned Decision (C-270/05) the ECJ has noted that *"... in the context of the proceedings before the Court, the issue of the compatibility of the intervention by the national public authorities, namely the prefect or the Minister for Labour, ...has been raised with some insistence"*.

[39] Redundancy Protection Law applies specifically to redundancies effected by an employer within a period of 30 days and include a) more than 5 employees in enterprises with more than 20 and less than 60 employees, b) 10 % or more than 25 employees in enterprises with at least 60 and less than 500 employees and c) at least 30 employees in enterprises with at least 500 employees (Section 17 Subsection 1).

Subsection 5). **The conformity of this specific provision of *KSchG* with Directive 98/59/EC is, however, doubtful**, since there is no similar provision to be found in the latter.

- According to *KSchG* **the employer must first inform the workers' representatives in the works council** (*"Betriebsrat"*) of its intentions in good time and consult with them about possible solutions. As a second step he then has to **issue a notice to the local Employment Office** (*"Agentur für Arbeit"*), to which a statement of the works council shall be attached. In case the works council gives no statement, the respective notice to the Employment Office can be issued at least two weeks after the works council was first informed (Section 17 Subsections 2 and 3 *KSchG*). Because *KSchG* does not stipulate which are the legal consequences in the case that the employer does not meet the above obligations and given the fact that the German case law has given no clear answer to this question yet, there is a great deal of discussion in German legal theory, whether such breaches should lead to an invalidity of relevant dismissals or just draw some not so severe consequences instead, the majority being though apparently in favor for the first solution.

- With respect to the exact information which has to be included in the notifications supplied to the works council and to the local Employment Office *KSchG* repeats the text of the Directive (reasons, number and categories of workers, selection criteria[40], time period etc.). In addition to that, Section 17 Subsection 3 *KSchG* stipulates some extra information to be included in the notice to be given to the Employment Office, i.e. gender, age, occupation and nationality of the employees to be made redundant.

- **If a dismissal is not effected within 90 days after the point of time, to which it is permitted by law, the whole procedure must start all over from the beginning** (Section 18 Subsection 4).

3.2.2.2 The Works Constitution Law

Apart from the provisions of the Redundancy Protection Law, it is common practice in Germany that in cases of collective redundancies also the Works Constitution Law (*"Betriebsverfassungsgesetz"*, shortened: *"BetrVG"*) is being applied[41]. This law contains the rights given to works councils and regulates among others the negotiation process between employers and works councils in cases of any alterations to the establishment. Since collective redundancies are normally related to such alterations, the respective provisions of *BetrVG* usually also apply in such cases. Indeed in the German practice the obligations of the employer to inform and consult with the works councils,

[40] In German law there are certain rules on social selection (*"Sozialauswahl"*), which apply to each dismissal based on business requirements and taking place in establishments of more than 10 employees (or more than 5 employees for employees hired before the amendment to *KSchG* on 1.1.2004), therefore also to collective redundancies. According to Section 1 Subsection 3 *KSchG* the employer must use 4 social criteria when selecting the employees to be dismissed, that is length of service, age, disability and dependants who are financially supported by the employee.

[41] *BetrVG* applies only to collective redundancies in establishments with more than 20 employees (Section 111).

which are foreseen in Section 17 Subsection 2 *KSchG*, are usually being fulfilled by following the procedures stipulated in Sections 111 to 113 *BetrVG*[42].

According to these provisions the employer and the works council shall try to reach an agreement in writing in order to reconcile their interests in connection with the proposed alterations ("Reconciliation of interests" - *"Interessenausgleich"*). Moreover they must enter into an agreement in writing on the financial compensation for the employees affected by the proposed alterations ("Social compensation plan" – *"Sozialplan"*). If no reconciliation of interests is achieved or no agreement is reached on the social compensation plan, then each of the parties has the option to apply to the local Employment Office for mediation. Otherwise or if this attempt fails, each party may submit the case to the conciliation committee. If no agreement can be reached there on the social compensation plan, the conciliation committee shall be the one to make a decision on the drawing up of this plan[43]. For this case the law gives in Section 112 Subsection 5 a list of all factors which the conciliation committee should take into account when making its decision.

3.2.2.3 The case "Junk vs. Kühnel"

Apart from the slight particularities of the German legislation as regards the implementation of the Directive 98/59/EC, which don't really raise any big matters, the main issue worth mentioning in connection with this subject is the great impact of the judgment of the European Court of Justice (ECJ) of 27th January 2005 in the case "Junk vs. Kühnel" (Case C-188/03), which practically changed the way the Directive was being interpreted and adapted in German law and practice.

Up to that point the interpretation of the term "redundancy" in the case law of the Federal Labor Court (*"Bundesarbeitsgericht"*, shortened: *"BAG"*) as well as in the administrative practice of the Employment Office was that it referred to the point in time of the actual termination of employment. It was thus according to this interpretation that it was being examined how many "redundancies" took place within 30 days, so as to decide, if the statutory threshold had been reached in order to judge if one had to deal with "collective redundancies", and it was according to this interpretation that it was being examined whether the statutory obligation of an employer to carry out a "redundancy" not before a month after he had notified the Employment Office was being obeyed.

[42] Section 1 Subsection 5 Sentence 4 *KSchG* stipulates explicitly that a process of Reconciliation of interests according to *BetrVG* can replace the statement of works council which shall be attached to the notice of the employer supplied to the Employment Office according to Section 17 Subsection 3 Sentence 2 *KSchG*.

[43] For the case that the planned alteration to the establishment consists only in a reduction of stuff, the Works Constitution Law stipulates some stricter conditions, under which such a decision of the conciliation committee can be made, i.e. only in cases of dismissal of minimum 20 % of the employees in establishments with less than 250 employees and of 15 % in establishments with more than 250 employees, also no application to new companies (Section 112a *BetrVG*).

The ECJ, in reference for a preliminary ruling from the Labor Court (*"Arbeitsgericht"*) of Berlin, decided on the contrary that **the event constituting redundancy consists already in the declaration by an employer of his intention to terminate the contract of employment.** In accordance with that, the Court also ruled that **this declaration can only take place after the conclusion of the consultation** provided for in Article 2 of Directive 98/59/EC and after the employer has notified the competent public authority according to Articles 3 and 4 of the Directive. The ECJ justified its interpretation of the term "redundancy" by saying that **the purpose of the consultation and notification obligation was to make an effort to avoid or reduce the number of redundancies planned.** This purpose could no longer be practically achieved if the decision had already been made by the employer and the respective notice had already been given.

Consequently the *BAG* with its decision of 23.3.2006 changed its jurisdiction and decided for an interpretation of *KSchG* which would be conforming to ECJ's interpretation of the Directive 98/59/EC. After this decision the situation in Germany is relatively clear. **Redundancy as referred to in *KSchG* is being uniformly interpreted as the declaration of the dismissal and not as the actual point of termination of employment.** Accordingly the announcement of a dismissal can now be made by an employer only after the consultation with the works councils has concluded and the notice to the Employment Office has been given.

The "conclusion of the consultation process" is being understood in Germany not in the way that this process has to come to an actual result; it's enough when the works council has been properly informed and have had the opportunity to state its positions towards the employer. **Practically, two weeks after the works council has been informed, the process is being considered to be ended even if the works council has not come to a statement and the employer can thus move on to the second step,** which is to issue the notice to the Employment Office, being that way in accordance with Section 17 Subsection 3 Sentence 3 *KSchG*, which simply requires that the notice to the Employment Office shall be issued at least two weeks after the works council was informed.

As regards the other procedures of consultation foreseen in the Works Constitution Law, that is the negotiations with respect to a reconciliation of interests and a social compensation plan, the majority of German jurisdiction and theory considers these negotiation forms not to be affected from the decision of the ECJ, so that they can practically carry on even after the employer has announced the intended dismissals to the employers concerned[44]. Also because of this different approach **it is these forms of consultation that are being actually followed in the practice in cases of collective redundancies in Germany,** while the ones foreseen in the *KSchG* are mostly of formal character, since they cannot really lead to any practical results.

Yiannis Sourlas

Lazaros Sidiropoulos

[44] A practical and recent example of this can be found in the decision of the *BAG* of 21.5.2008.