

# The new legal framework of the thresholds of dismissals, following the judgment of the Court of Justice of the European Union, fifth chamber, of 13 may 2015, Case C-392/13.

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**Abstract:** The application of the term “workplace” in Spanish labor law has been a very controversial issue over recent years in the legal field of collective redundancies. The determination of this concept acquires importance when establishing the parameters to be followed in order to establish thresholds for individual or collective dismissals. The ECJ has established a performance criterion with which member states must comply when developing their domestic legislation in order to clarify and unify criteria.

**Keywords:** workplace, collective redundancies, The European Court of Justice, Spanish labor Law.

## Introduction

The difference between individual and collective dismissal is based on determining whether or not the thresholds specified in the law have been reached.

The thresholds required by Spanish law in order to determine whether a dismissal is collective or individual have been particularly controversial in the Spanish labor courts over recent years.

Specifically, it has been questioned whether, to understand that those thresholds had been reached, it was necessary to consider the entire company as a whole or each separate work center as the reference unit.

This report considers the different positions, national and European, that have emerged in regards to this issue and explains the position of the Court of Justice of the European Union (hereinafter ECJ), Fifth Chamber, supported by its judgment ruling Case C-392 / 13.

This judgment, issued on the past May 13<sup>th</sup> 2015, can put an end to a period of doubts and contradictions regarding how to determine the thresholds considered when deciding if a dismissal was a “collective dismissal”, affecting, therefore, different ways of processing dismissals, since it is not the same to process a single dismissal as collective dismissal, as explained below.

The judgment from May 13<sup>th</sup> relates Article 51 of the Legislative Royal Decree 1/1995, 24<sup>th</sup> March, which adopted the rewritten text of the Statute of Workers Rights Law (Spanish national legislation) to the legal framework established by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, which codified Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

## Regulatory framework

As for collective dismissals, we shall consider the two relevant regulations.

On the one hand, European regulation is applicable, which establishes the regulatory framework to be adapted to the laws of each member state; and, on the other hand, there are the internal regulations of each state.

In the case of European legislation, this issue is regulated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereinafter, the Directive).

This Directive, in its Article 1.1, paragraph a), defines “collective redundancies” as follows:

«“collective redundancies” means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

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

The aim of the Directive, described in its preamble, is the approximation of the laws of the Member States on collective redundancies, on the road to progress, in order to strengthen worker protection and, in this respect, to overcome the differences existing between the provisions enforced in the Member States, given their direct impact on the functioning of the internal market.

In the case of the specific internal regulations of Spain, this issue is regulated by Legislative Royal Decree 1/1995, 24th March, which adopted the rewritten text of the Statute of Workers Rights Law (hereinafter, ET).

This legal text, in its Article 51, indicates what is meant by “collective redundancies” as follows:

*“Article 51. Collective dismissal.*

1. For the purpose of this Act, a collective dismissal shall refer to the termination of employment contracts based on economic, technical, structural or production reasons, if at least the following number of workers are affected over a ninety-day period:

- a) Ten workers in companies employing less than one hundred workers.
- b) 10% of the company’s workers if the company employs between one hundred and three hundred workers.
- c) Thirty workers in companies employing three hundred or more workers.

Collective dismissals shall also include the termination of employment contracts that affect all of the company’s staff, provided that the number of workers affected exceeds five, if the dismissal arises from the total cessation of the company’s activity also based on the aforementioned reasons.

In order to calculate the number of contractual terminations referred to in paragraph one above, any other termination that has taken place during this period at the employer’s request for other reasons not inherent to the individual worker shall also be taken into account, except for the reasons foreseen in Article 49.1.c) herein, amounting to at least five.”

It is evident that differences exist between the two norms in terms of determining when a dismissal or redundancy is considered collective.

Among these differences, it is seen that while the European regulation distinguishes between dismissals in periods of 30 and 90 days, the Spanish legislation only refers to redundancies in 90 day periods.

Also, while European legislation refers to specific amounts of workers in order to determine the thresholds of dismissal in that period of ninety days (20 workers), the Spanish regulation deter-

mines certain thresholds based on amounts and percentages that are less than the figure issued by the Directive.

There is also the additional distinction in that the Spanish norm refers to redundancies affecting the entire company's staff, providing that the number of affected workers exceeds five; thus granting increased protection to the collective redundancy figure.

Despite all of these differences, the most relevant of these is the reference unit referred to in both legal norms when establishing their determination thresholds, since, while the Directive refers to "*establishments in question*", the ET refers to "*companies*" and this is the basis of the conflict that is discussed in this study. That is, this determines whether the mentioned thresholds should be considered with respect to the overall number of workers in the company (including all company establishments) or, on the contrary, if only the number of workers within the affected center should be considered.

This issue has been discussed with regards to the reference units relating to the company or group of companies in cases where there is a group of companies for labor purposes, or even for commercial purposes. However, this issue shall not be considered in our analysis.

### Question referred to the ECJ

As for the reference units to which both norms refer both standards (the reference unit of the affected company or work center), according to these regulatory differences, there is the Reference for a preliminary ruling of Case C392/13, requesting a preliminary ruling based on Article 267 TFEU from the Labour Court N° 33 of Barcelona (Spain), according to the Court's decision from 9 July 2013.

In a preliminary ruling, the Court of Appeal (England and Wales) (Civil Division) raises two questions to the ECJ.

On the one hand, it requests clarification as to what is meant by "establishment" and, on the other hand, it asks whether the threshold required by the norm must be met in reference to the workers affected in a workplace or in the whole company.

Thus, the question was posed as follows: "*Does the concept of "establishment", as an essential Community law concept for the purposes of defining "collective redundancies" in the context of Article 1(1) of Directive 98/59, and, in view of the nature of the directive of a minimum standard as provided in Article 5 thereof, lend itself to an interpretation that allows the national provision implementing or transposing that text into the national legal order — Article 51(1) of the [ET] in the case of the Kingdom of Spain — to relate the ambit of the calculation of the numerical threshold exclusively to the "undertaking" as a whole, thereby excluding situations in which, had the "establishment" been taken as the reference unit, the numerical threshold laid down in that article would have been exceeded?"*"

1) As for **determining what is meant by "establishment"**, it should first be assessed if the workplace is the company as a whole, since in this case, the objectives of the Directive may be infringed, since this is not the sense that the rule attempts to give to this concept.

Furthermore, this interpretation would mean that a dismissed worker who was assigned to a workplace of a company other than that in which there was an unquestionable collective redundancy (e.g. dismissal of 80 workers), would have the same protection that is conferred to each worker of the unquestionably affected workplace, thus violating the meaning given by the Directive to the concept of "collective dismissal" in the traditional sense of the term.

Secondly, it should be considered that, if it is understood that the workplace does not refer to the whole company but to the entire part in which the redundant workers are assigned, the protective purpose of the Directive on the rights of information and consultation of the affected workers may also be hindered. This is the case since, as there is a risk of not attaining the minimum number of 20 affected workers, the protection mechanisms providing for the rule would not be initiated.

The ECJ considers that the term "establishment" is a concept of European Union law that should be understood as "*the entity to which the workers made redundant are assigned to carry out their duties.*"

2) As for the determination of the benchmark to interpret whether or not the threshold required by the law should be the company or the establishment, the following should be considered:

The EU law is a norm of minimums, that is, its protection is extendable in favor of the workers, so that the States are entitled to adopt more favorable provisions for workers based on their national laws.

Article 5 of the directive states: *This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.* Thus, the European legislator grants the member states the power to extend the level of protection that is established by the European standard.

Therefore, the wording of the European norm should not be interpreted so as to hinder or limit more favorable rights granted by Member States, such as the right to information and consultation or national legislation that provides for the application of mechanisms of worker protection when the dismissal affects, over a period of 90 days, less than 20 workers from a single establishment, including: rights to information, the open consultation period, severance and other contracts and collective agreements that might be applicable as recognized by the law.

Indeed, this more favorable transposition of the European norm has already materialized in the threshold required by the Spanish state to consider the dismissal to be collective, since, while the European Directive requires at least 20 workers over a period of 90 days, the Spanish regulation requires only 10 workers in companies with fewer than 100 workers; 10% for companies having between 100 and 300 workers; and 30 workers in companies with more than 300 workers; as seen previously. Thereby, the minimum required by the ET is established at 10 affected workers (10% of 100) instead of 20, and even the entire staff, when the number of affected workers is greater than five.

### **Differences between individual and collective dismissal in Spain:**

The practical difference between an individual and a collective dismissal in Spain is how it is processed and the rights and duties that each processing procedure grants the companies and workers, with the procedure to be carried out for collective redundancy being more protectionist towards the workers than the procedure to be carried out in the case of individual redundancy.

The collective dismissal must be preceded by a **period of consultation** with the legal representatives of the workers that must cover at least the possibilities of avoiding or reducing the collective redundancies and of mitigating its consequences by including **accompanying social measures**, such as outplacement, training or retraining to improve employability.

During this consultation period, very precise information is available in regards to the dismissal, the company situation, the affected employees, the reasons for the dismissal, etc. All of this facilitates the possibility of workers being better informed and being able to file claims in his defense if arguing that the dismissal was not valid.

Furthermore, the company that carries out a collective redundancy affecting more than fifty employees must provide the affected workers with an **outplacement plan** through authorized outplacement firms for a minimum period of six months, including training measures and vocational guidance, personalized attention for the affected worker and an active job search.

Another of the advantages offered to workers of collective dismissal is that they may take collective legal actions in one unique procedure.

Thereby, we conclude that the protection granted to dismissed workers as part of a collective action is greater than that offered to workers who are dismissed in an individual dismissal.

### **Relevant aspects to resolve the issue**

Considering all of the above, it is now essential to **determine two aspects** in order to resolve the matter. First, it should be determined if it is more favorable to consider the company instead of the es-

establishment as the reference unit, otherwise, there would be no reasons to have regulation differing from that of the EU. And, second, it should be determined whether, having alleged that the Spanish legislation is more favorable, the ECJ ruling in favor of interpreting the establishment as a reference unit results in the establishment being considered as the reference unit; because the ECJ considers that the rule is not more favorable, because the ECJ considers that this should not be the nature or object of the rule, or because of any other reason that the ECJ considers relevant and determinant in resolving the question.

As for the first point, we shall consider two alternate ways of thinking.

1) On the one hand, there is the stream of thought that considers that using the workplace as opposed to the entire company as the reference is more favorable to workers. This possibility is based, mainly, on the fact that, with the workplace, the application of the information and consultation procedure as required by the Directive is not hindered.

Some also justify this by alleging that, in considering the “establishment” and not the company as the reference unit, the protection of the affected workers is greater since it is easier to reach the thresholds required of collective dismissal when considering a single workplace and not the company as a whole, since the reference number of workers is lower, and, therefore, the number of affected workers is simply more expandable. Thereby, since it is easier to reach the minimum threshold required of a collective dismissal, there shall be more cases in which the dismissals are considered collective and the protective mechanisms shall be applicable in more cases.

In accordance with this viewpoint, three judgments have been issued by the Court of Justice of the European Communities (hereinafter ECJ) [Statements December 7, 1995, (Rockfon case), of September 7, 2006 (ECJ 2006 235) (Agorastoudis case) and February 15, 2007 (ECJ 2007, 33) (Chartopoiia case)], confirming that, for the purposes of the Directive, the relevant concept with regards to this calculation is the workplace, and not the company, also insisting that such criterion is of European law, namely, without the individual State having the possibility of accommodating it to its peculiarities.

2) On the other hand, there also a viewpoint that considers that using the company as the reference is more favorable to workers.

This is the interpretation advocated by the Spanish state to support the use of the company as the reference, focusing that argument around the understand that their internal rule is valid in so far as it confers more favorable rights than the European Union rule.

Specifically, Spanish case law considers that the rules found in the ET are more favorable to workers, not only in regards to the physical reference unit (company rather than establishment) for the calculation of affected workers, but also by requiring that the company justify the cause for termination and the need for prior administrative authorization in order to proceed with the collective redundancy (requirements not required by the specified Community legislation).

In this sense, numerous judgments have been issued, both by the Supreme Court and lower courts. In these judgments, the idea that it is more favorable to understand the company as a reference unit remains. This idea is based on a specific scientific doctrine that has determined that it is so. Thereby, statements such as the STS (Labor Chambers, 1st Section) of 18 March 2009, appeal of the unification of doctrine no. 1878/2008; STSJ of Galicia (Labor Chambers, 1st Section), no. 3087/2014 of 30 May, appeal of supplication no. 855/2014; STSJ of Andalusia, Seville (Labor Chambers, 1st Section), no. 173/2015 of 21 January, appeal of supplication no. 3361/2013; or the STJS of Catalonia, (Labor Chambers, 1st Section), no. 4844/2014 of 3 July, appeal of supplication no. 2049/2014; among others, indicate the following: “*establishing the company and organizational framework within which the staff must be accounted for; computing unit that best serves to guarantee, as pointed out by the whole practice of scientific doctrine.*”

There have also been numerous judgments in regards to both rules (national and international) 20 Since the Directive has a minimum standard nature that may be improved by national legislations in favor of workers; because the object of the Directive is to strengthen worker protection in the event of collective redundancy, and because Spanish legislation is more favorable to workers regulation. Thus, There are sentences such as: STS (Labor Chambers, 1st Section) of 18 March 2009, appeal for the

unification of doctrine no. 1878/2008; STS of 8 July 2012, appeal for the unification of doctrine no. 2341/2011; STSJ of Castilla y León, Burgos (Labor Chambers, 1st Section), no. 558/2010 of 7 October, appeal no. 526/2010; STSJ of Castilla-La Mancha, (Labor Chambers, 1st Section), no. 204/2013 of 14 February, appeal of supplication no. 681/2012; STSJ of Castilla-La Mancha, (Labor Chambers, 1st Section) no. 649/2012 of 6 June, appeal of supplication no. 445/2012; STSJ of Madrid, (Labor Chambers, 5th Section) no. 593/2014 of 7 July, appeal of supplication no. 271/2014; STSJ of Catalonia, (Labor Chambers, 1st Section) no. 5735/2014 of 1 September, appeal of supplication no. 1837/2014.

The judgment by the TSJ de Castilla-La Mancha, (Labor Chamber, 1st Section) no. 649/2012 of 6 June, appealing judgment no. 445/2012 also notes that *“the wording of Article 51.1 of the Statute of Workers Rights [...] does not provide any interpretative doubt as to the intention of the legislator on any alternative solution such as the workplace or even group of companies for labor purposes.”*

3) As a third viewpoint, we may consider the STSJCE of December 7, 1995 (ECJ 1995, 218) which refers to the **relative nature** of the Community concept of “establishment” recalling that this is a Community concept in which each translation to a national language incorporates distinct notions, and thereby concluding that the establishment concept **must be interpreted according to the specific circumstances** allowing flexible treatment.

### ECJ position:

In the proceedings from Case C 392/13, Spain argues that its national legislation is in conformity with Community law given that its rules are more favorable. In this respect, paragraph 37 of the ECJ judgment states the following: *“The Spanish Government submits that it made use of the right granted in Article 5 of Directive 98/59 by introducing legislative provisions intended to be more favourable to workers. Amongst other things, it specified as the reference unit not the establishment, but the undertaking. Since calculating the thresholds at the level of the undertaking may preclude the application of the information and consultation procedure provided for in that directive to the dismissals at issue in the main proceedings, the referring court raises the question whether the national legislation in question is compatible with that directive.”*

Regarding this issue, and despite the preceding paragraph, in its judgment from May 13th, the ECJ spoke out in favor of the following: to determine whether a dismissal is collective or individual the “establishment” must be used as the reference unit.

Thus, the Court itself established the following *“Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in Articles 2 to 4 of that directive [...]”*

### Conclusion

After all these interpretations, and considering the position of the ECJ, we shall now determine how this ruling has affected policy and practice in Spain. Should we start using the term “establishment” or “workplace” instead of “company”, as we have done up until now?

Clearly the judgment is not opposed to the reason of greater favoring by Spanish legislation and this is the cause for the internal regulations to continue to be interpreted as usual, since this offers more favorable results. That is, using the company as the reference unit instead of the establishment.

However, it seems logical to understand that the solution provided by the ECJ judgment from May 13<sup>th</sup> must be respected above the position held by the Spanish state since this ECJ decision was issued after, and despite, assessing the argumentation carried out in the Spanish courts. Thus, the solution to the problem appears to lie in the use of the “establishment” as the reference unit.

As such, the ECJ judgment from May 13<sup>th</sup> shall be considered a turning point in this matter in Spanish legislation and the term “company” as mentioned in Article 51 ET may have seen its end with the “*establishment*” being considered as “*the entity to which the workers made redundant are assigned to carry out their duties*”, thereby changing the parameters used to determine each type of dismissal.

Therefore, the study of this subject, its rules, case law and the ECJ’s position in this respect, leads us to conclude that it is more appropriate to consider that the thresholds of Article 51 ET must be interpreted as meaning that the “establishment” instead of the “company” as a whole should be considered the reference in the case of companies having more than one establishment; and regardless, the solution would be to interpret whether or not the ECJ judgment rejects the Spanish argument that its rule which considers the company as a benchmark, is more favorable.