

SUMMARY

## **ECJ 19 May 2011, cases C-256/10 and C-261/10 (Fernández), Health and safety**

***&lt;p&gt;The Directive 2003/10 must be interpreted as meaning that an employer in a company in which the workers&rsquo; daily noise exposure level exceeds 85dB, measured without taking account of the effect of individual hearing protectors, fails to fulfil its obligations by simply providing the workers with such protectors.&lt;/p&gt;***

***&lt;p&gt;The Directive does not require an employer to make an extra payment to workers who are exposed to a noise level above 85dB, measured without taking account of the effect of individual hearing protectors. However, national law must provide appropriate mechanisms to ensure that such workers can require the employer to take preventive measures.&lt;/p&gt;***

### **Facts**

Fernández and Macedo Lozano operated a stone-cutting machine in a company that produced stone materials from natural stone. The noise level at their place of work exceeded a daily average of 85dB, which is in excess of the level allowed by Directive 2003/10 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (the “Directive”). Their employer provided them with individual hearing protection equipment, thanks to which their noise exposure level dropped to below 80dB. That is the level below which an employer need take no noise prevention measures.

The employment contracts of Fernández and Macedo Lozano were governed by a collective

agreement. It provided that “Persons who work in conditions that are particularly arduous, toxic or dangerous are entitled to receive an extra payment corresponding to 20% of their basic salary”.

### **National proceedings**

Fernández and Macedo Lozano claimed the 20% extra payment on the basis that they were exposed to a noise level exceeding a daily average of 85dB. Their employer argued that they were not exposed to noise above 80dB. The court of first instance accepted this defence and dismissed the claim. On appeal, the Court of Appeal referred three questions to the ECJ.

The referring court stated that the dismissal of the claim by the court of first instance was consistent with recent case-law of the Spanish Supreme Court, according to which the noise-attenuating effect of individual hearing protection equipment must be taken into account when determining whether a worker is exposed to arduous conditions at his work station. That case-law, interpreting the concept of “arduousness” in the light of the Directive and of the Spanish law transposing it, infers from that legislation that it is intended to protect workers against health risks connected with actual exposure to noise. It follows that, in the Supreme Court’s view, there is no arduousness where individual hearing protection equipment allows reduction of the noise reaching the ear to a level of under 80dB.

The referring court was unsure whether the Supreme Court’s view is in line with the Directive, which stresses the importance of reducing noise levels at source and provides for hearing protection equipment only as a last resort. The court reasoned that it would undermine the Directive’s effectiveness if an employer could escape from the obligation to make the 20% extra payment under the collective agreement simply by making hearing protection equipment available, even in situations where reduction of noise at source is possible.

### **ECJ’s ruling**

1. The ECJ begins by setting out the employer’s obligations under the Directive and, in particular, the hierarchy between those obligations (§ 22-32).
2. It follows from that hierarchy that an employer cannot fulfil its obligations under the Directive by simply providing its workers with individual hearing protectors in order to reduce their noise level exposure (§ 33).
3. The Spanish Supreme Court’s restrictive interpretation of the Directive would undermine the Directive’s effectiveness (§ 36-37).

4. Although the Directive does not deal with payments and therefore does not require that failure by an employer to comply with its preventive obligations should be penalised by the obligation to make extra payments, such an obligation does fall within the Directive's objective of protecting workers' health. The Member States' freedom to choose the ways and means of ensuring that directives are implemented does not affect their obligation to ensure that the Directive is fully effective and that individuals can rely on the Directive before the national courts. It follows that national law must be interpreted so as to enable workers to effectively require their employers to comply with the preventive obligations under the Directive (§ 38-42).

### **Ruling**

The Directive must be interpreted as meaning that an employer in a company in which the workers' daily noise exposure level exceeds 85dB, measured without taking account of the effect of individual hearing protectors, fails to fulfil its obligations by simply providing the workers with such protectors.

The Directive does not require an employer to make an extra payment to workers who are exposed to a noise level above 85dB, measured without taking account of the effect of individual hearing protectors. However, national law must provide appropriate mechanisms to ensure that such workers can require the employer to take preventive measures.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2011-05-19

**Case number:** C-256/10 and C-261/10