Vastuvõtmise kuupäev : 20/12/2022

Case C-706/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

17 November 2022

Referring court:

Bundesarbeitsgericht (Federal Labour Court) (Germany)

Date of the decision to refer:

17 May 2022

Applicant, appellant and appellant on a point of law:

Konzernbetriebsrat der O SE & Co. KG

Intervener:

Vorstand der O Holding SE (Holding SE)

Subject matter of the main proceedings

Employee involvement in a Societas Europaea (SE) – Negotiation procedure – Possibility of retrospective conduct thereof

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 12(2) of Regulation (EC) No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86/EC, to be interpreted as meaning that, where a holding SE is formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, and the holding SE was registered in the register of a Member State (a so-called 'SE without employees') without a negotiation procedure for the involvement of employees in the SE having first been conducted, under that

directive that negotiation procedure has to be conducted retrospectively if the SE becomes the controlling undertaking of subsidiaries in several Member States of the European Union which employ employees?

2. If the Court's answer to Question 1 is in the affirmative:

   Is the retrospective conduct of the negotiation procedure in such a case possible and necessary for an unlimited time?

3. If the Court's answer to Question 2 is in the affirmative:

   Does Article 6 of Directive 2001/86/EC preclude the application of the law of the Member State where the SE now has its registered office for the purpose of retrospective conduct of the negotiation procedure if the 'SE without employees' was registered in the register in another Member State without such a procedure having first been conducted and before the transfer of its registered office became the controlling company of subsidiaries in several Member States of the European Union which employ employees?

4. If the Court's answer to Question 3 is in the affirmative:

   Is this also the case where the State where that 'SE without employees' was first registered has withdrawn from the European Union after the transfer of the registered office and its law no longer contains any provisions on the conduct of a negotiation procedure for the involvement of employees in the SE?

Provisions of European Union law relied on

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) in the version in force from 1 July 2013: Articles 1(8), 8(1), (10) and (16), and 12(1) and (2)

Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22): Articles 2, 3(1), 4 to 7, and 11

Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 2009 L 122, p. 28) in the version in force from 9 October 2015: Articles 3(2) and 17

Provisions of national law relied on

Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company) (Law on

involvement in SEs; ‘the SEBG’) of 22 December 2004 (BGBl. I p. 3675, 3686) in the version currently in force: Paragraphs 3, 4, 16, 18, 22, and 43

Succinct presentation of the facts and procedure in the main proceedings

1 The parties disagree as to whether a negotiation procedure for the involvement of employees in the Societas Europaea (SE) is to be commenced and whether the associated information is to be provided.

2 The applicant is the group works council formed at O SE & Co. Kommanditgesellschaft (O KG). The intervener at 2 is the management board of O Holding SE (Holding SE).

3 Holding SE was formed at the beginning of 2013 pursuant to Article 2(2) of Regulation No 2157/2001 by O Limited (Ltd.) and O Gesellschaft mit beschränkter Haftung (GmbH) and was registered in the register for England and Wales on 28 March 2013. The companies involved in the formation employed no employees and had no subsidiaries within the meaning of Article 2(c) of Directive 2001/86/EC at which employees were employed. Therefore, no negotiations on employee involvement were held pursuant to Article 3 to 7 of the above directive prior to the registration of Holding SE in the register.

4 As of 29 March 2013, Holding SE was the sole shareholder of O Holding GmbH. O Holding GmbH had its registered office in Hamburg and had a supervisory board, one third of which consisted of employee representatives. On 14 June 2013, Holding SE decided to convert O Holding GmbH (a public limited company) into a limited partnership – O KG. As a result of the change in legal form, which was registered in the register on 2 September 2013, the involvement of the employees on the supervisory board came to an end.

5 Furthermore, Holding SE was and is a limited partner of O KG within the meaning of Paragraph 161(1) of the Handelsgesetzbuch (Commercial Code) (‘the HGB’). O KG has around 816 employees. It has subsidiaries in several Member States of the European Union which employ a total of around 2 200 employees. A limited partner of O KG within the meaning of Paragraph 161(1) of the HGB was and is O Management SE (Management SE), whose sole shareholder in turn is Holding SE. Management SE, which has its registered office in Hamburg, has a board of directors (unitary system). However, Management SE, like Holding SE, employs no employees of its own.

6 With effect from 4 October 2017, Holding SE moved its registered office to Hamburg.

7 In the decision-making procedure initiated by the applicant group works council of O KG, it took the view that the management of Holding SE is obliged to commence a procedure for the formation of a special negotiating body. Since Holding SE had subsidiaries within the meaning of Article 2(c) of Directive

2001/86 in several Member States which employ employees, the negotiations on the involvement of employees – which in principle are to be conducted prior to the registration of an SE – had to be conducted retrospectively.

8 In the view of the management board of Holding SE, there is no obligation to conduct such negotiations retrospectively.

9 The lower courts dismissed the applications.

Need for a decision of the Court of Justice

10 The decision in the decision-making procedure turns on whether Article 12(2) of Regulation (EC) No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, is to be interpreted as meaning that under that directive, where a holding SE is formed by participating companies which like their subsidiaries employ no employees (a so-called 'SE without employees') and was registered in the register of a Member State without a negotiation procedure for the involvement of employees in the SE having first been conducted, requires that that negotiation procedure be conducted retrospectively if the SE becomes a controlling undertaking of subsidiaries in several Member States of the European Union which employ employees.

11 By its applications, the group works council is seeking to have a negotiation procedure pursuant to Article 3(1) of Directive 2001/86 commenced retrospectively. It claims that the management should request that the employee representatives or – where no employee representatives exist in a particular case – the employees of its subsidiaries in the Member States of the European Union form a special negotiating body. It should also provide the information necessary to conduct the negotiation procedure.

12 In the view of the chamber concerned, that request is to be examined on the basis of the SEBG, that is to say the law of the Member State in which the SE holding company currently has its registered office should be taken as a basis.

13 Under the first sentence of Paragraph 3(1) of the SEBG, the scope thereof is open. The provisions of that law apply both to an SE which is formed with its registered office in Germany and an SE which initially had its registered office in another (former) Member State of the European Union which subsequently transfers its registered office to Germany – as in the main proceedings. Following its formation, Holding SE had its registered office initially in Britain. However, the registered office was transferred to Hamburg. Pursuant to Article 8(10) of Regulation No 2157/2001, the transfer of the registered office took effect on the date on which it was registered, in accordance with Article 12, in the register for its new registered office. The registration in the commercial register was effected on 4 October 2017. Since that date, the SEBG has been applicable to Holding SE.

14 In the view of the referring court, nothing to the contrary follows from Article 6 of Directive 2001/86. Under that provision, except where otherwise provided in the directive, the legislation applicable to the negotiation procedure provided for in Articles 3 to 5 thereof is to be the legislation of the Member State in which 'the registered office of the SE is to be situated'. However, in the view of the chamber concerned, that provision is based on the idea that the negotiation procedure for the involvement of employees in the SE must always be conducted as part of its formation and prior to its registration. This is demonstrated by Article 3(1) and (2) of Directive 2001/86. Under that article, the management or administrative organs of the participating companies drawing up a plan for the establishment of an SE must, inter alia, take the necessary steps to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE as soon as possible after publishing the draft terms of creating a holding company. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments is to be created. Subparagraph (b) of the second paragraph of Article 7(1) of Directive 2001/86 also makes this clear. Under that provision, the application of the standard rules as laid down by the legislation of the Member State in which the registered office of the SE is to be situated turns, inter alia, on whether the competent organ of each of the participating companies decides to accept that 'and so to continue with its registration of the SE'. This interpretation of Article 6 of Directive 2001/86 is confirmed by the provisions of Regulation No 2157/2001. It is clear from recital 19 and Article 1(4) of the regulation that Directive 2001/86 forms an indissociable complement to the regulation. Under Article 16(1) of Regulation No 2157/2001, an SE is not to acquire legal personality until it is registered in the register. However, under Article 12(2) of Regulation No 2157/2001 registration may not be effected unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, the special negotiating body has taken a decision pursuant to Article 3(6) of the directive, or the period for negotiations pursuant to Article 5 of the directive has expired without an agreement having been concluded.

15 Nor is anything different to be concluded from Article 8(16) of Regulation No 2157/2001, which provides for a fiction of the registered office being in the exit State. That rule does not cover the conduct of a negotiation procedure for the involvement of employees in the SE. Under Article 1(4) of Regulation No 2157/2001, the negotiation procedure is to be governed by the provisions of Directive 2001/86.

16 The provisions of the SEBG do not contain an explicit legal basis for the group works council's request for commencement of a negotiation procedure for the involvement of employees following the formation and registration of Holding SE.

17 Paragraph 4 of the SEBG does not cover the case of the retrospective conduct of such a procedure. Paragraphs 4 to 17 and Paragraphs 19 and 20 of the SEBG

govern only the formation, composition and selection of the special negotiating body and the negotiation procedure for the planned formation of an SE.

18 Nor is Paragraph 18 of the SEBG directly applicable in the present case.

19 Under Paragraph 18(1) and (2) of the SEBG, after the formation of an SE and under certain conditions, the employees or their representatives may decide to re-establish a special negotiating body and resume negotiations with the management of the SE. That provision requires that a special negotiating body must have had already been established at the time of the formation of the SE which, under Paragraph 16(1) of the SEBG, decided not to open or to terminate negotiations. Those requirements are not met in this case since no negotiations were commenced at the time Holding SE was formed.

20 Paragraph 18(3) of the SEBG is likewise not applicable. Under that provision, negotiations on employees' rights to be involved take place at the instigation of the management of the SE or the SE works council if structural changes to the SE are planned which could reduce employees' rights to be involved. That requirement is not fulfilled in the main proceedings. In the case of Holding SE no structural changes were planned – since the application of German law as of 4 October 2017 – which could have reduced employees' rights to be involved. Furthermore, that provision also governs only the 'resumption' of negotiations. It requires that negotiations on employee involvement must have already taken place when the SE was founded.

21 However, the chamber concerned considers that the rules on the formation, composition and selection of the special negotiating body and the negotiation procedure laid down in Paragraphs 4 to 17 and Paragraphs 19 and 20 of the SEBG could be applied by analogy to Holding SE. The crucial factor here is that it was registered in the register as a holding SE 'without employees' without a negotiated procedure for the involvement of employees in the SE having first been conducted and subsequently became the controlling company of subsidiaries in several Member States of the European Union which employ employees.

22 Holding SE was 'without employees' when it was registered in the register of England and Wales on 28 March 2013. Neither did the two companies involved in the formation – O Ltd. and O GmbH – employ employees, nor did they have subsidiaries which employed employees. Thus, at that time there were no employees or employee representatives who could have formed a special negotiating body.

23 For this reason, Holding SE was registered in the register even though the registration requirements under Article 12(2) of Regulation No 2157/2001 had not been met. The requirements therein are intended to safeguard the negotiated procedure for employee involvement provided for in Directive 2001/86. Since that procedure cannot be conducted where an SE 'without employees' is formed, the objective of the registration requirements cannot be attained in such a case.

Therefore, according to case-law and academic writings Article 12(2) of Regulation No 2157/2001 must be interpreted strictly in that regard and even though the requirements set out therein are not satisfied, registration must be effected. The registration of such an SE 'without employees' is customary throughout the European Union.

24 Holding SE still does not employ employees itself. However, since 29 March 2013 it has had subsidiaries which do employ employees.

25 By acquiring all the shares in O Holding GmbH, Holding SE gained controlling influence over that company and its subsidiaries, established in Member States of the European Union, within the meaning of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (Regulations 2009 No 2401), which were applicable before its registered office was transferred to Germany. As sole shareholder, Holding SE was able to appoint the management of O Holding and thus its board of directors. In addition, Holding SE thus indirectly had controlling influence over its subsidiaries established in Member States of the European Union.

26 The change in the legal form of O Holding GmbH to a limited partnership and the transfer of the registered office of Holding SE to Germany changed nothing in this regard. O KG was and is represented by its limited partner – Management SE established in Germany – and not by Holding SE. However, as the sole shareholder of Management SE, Holding SE could and can appoint its board of directors. The board of directors appoints the managing directors. As a result, Holding SE also has controlling influence over O KG and its subsidiaries established in Member States of the European Union.

27 In such circumstances, it would be possible under national law to apply Paragraph 4 et seq. of the SEBG on the formation, composition and selection of the special negotiating body and the negotiation procedure by analogy to Holding SE.

28 In German law, a provision can be applied by analogy if the act concerned contains an unintended gap in the law, the unintended nature of which can be established positively on the basis of specific circumstances. The gap must result from the fact that the legislature unintentionally deviates from the purpose underlying the act. In addition, in accordance with the principle of equality and to avoid contradictory assessments a case not governed by law must demand the same legal consequence as the cases covered directly by the wording of the law.

29 Whether or not those requirements are fulfilled turns on the interpretation of EU law.

Explanation of the questions submitted for a preliminary ruling

30 Firstly, in the view of the chamber concerned, the SEBG would contain an unintended gap in the law if Article 12(2) of Regulation No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, were to be interpreted as meaning that the negotiation procedure for the involvement of employees in an SE which has not been carried out beforehand had to be conducted retrospectively in the case of the formation and registration in the register of a holding SE 'without employees' if the SE subsequently became the controlling undertaking of subsidiaries in several Member States of the European Union which employ employees.

31 The SEBG does not lay down an obligation to conduct the procedure retrospectively. Nor are the standard rules laid down in Paragraph 22 et seq. of the SEBG applicable. Under Paragraph 22(1) of the SEBG – the content of which corresponds to Article 7(1) of Directive 2001/86 – the involvement of employees governed by that provision requires that the parties so agree or that no agreement has been concluded by the deadline laid down in Paragraph 20 and that the special negotiating body has not taken the decision provided for in Paragraph 16. The standard rules laid down in Paragraph 22 et seq. of the SEBG therefore only apply if – as provided for in Paragraph 4 et seq. of the SEBG – a special negotiating body has been established. This reflects the concept underlying Directive 2001/86 whereby employee participation is primarily to be agreed by negotiation.

32 However, in the view of the chamber concerned, that gap in the law would only be unintentional if EU law were to require an obligation to conduct negotiations retrospectively in a case such as that in the main proceedings. By the SEBG, the German legislature merely sought to implement the requirements of Directive 2001/86. If an obligation to conduct the negotiations retrospectively were to arise from EU law, the legislature would have unintentionally deviated from that underlying purpose. National law could then be developed in conformity with EU law.

33 Articles 3 to 7 of Directive 2001/86 do not expressly stipulate that the negotiation procedure on the involvement of employees in a holding SE is to be conducted retrospectively after its formation where an SE 'without employees' at the time it is registered subsequently becomes the controlling undertaking of companies in several Member States of the European Union which employ employees. However, in the view of the referring court, this merely reflects that fact both the directive and Regulation No 2157/2001, in accordance with the concept underlying them, assume that the commencement of a negotiation procedure on the involvement of employees in the SE is possible when the SE has been founded and before it has been registered. In this regard, the chamber concerned considers that the EU legislature assumed that the companies involved in the formation within the meaning of Article 2(b) of the directive, or at least the subsidiaries concerned within the meaning of Article 2(c) thereof, are economically active and thus employ employees. This is demonstrated by recitals 1 and 2 of Regulation

No 2157/2001. According to those recitals, that regulation seeks to enable the reorganisation of companies whose 'business' is not limited to satisfying purely local needs. It seeks to give 'existing companies … the option of combining their potential'. Recital 10 of Regulation No 2157/2001 also refers to companies 'carrying on economic activities'. Accordingly, Article 12(2) of Regulation No 2157/2001 expressly provides that an SE may not be registered and thus legally formed unless an agreement on arrangements for employee involvement has been concluded, the special negotiating body has taken a decision not to open negotiations or to terminate negotiations already opened, or the period for negotiations beginning with the formation of the special negotiating body has expired without an agreement having been concluded. If, contrary to those requirements, a holding SE 'without employees' is registered, the purpose of Articles 3 to 7 of Directive 2001/86 might require that the negotiations on employee involvement be conducted retrospectively if the holding SE becomes the controlling company of subsidiaries in several Member States of the European Union which employ employees.

34 In the case of the main proceedings, such an obligation to conduct negotiations retrospectively could at least be required in the light of Article 11 of Directive 2001/86. It requires that, where registration of the holding SE and acquisition of the subsidiaries take place at such a close point in time, it be assumed that the formation is being misused for the purpose of depriving employees of rights to employee involvement or withholding such rights.

35 If the Court's answer the first question were in the affirmative, the second question would arise as to whether the retrospective conduct of the negotiation procedure in such a case is possible and necessary for an unlimited time. In the view of the chamber concerned, such an obligation on the SE would not, depending on the case, be subject to a time limit. It would not cease to exist merely with the passage of time. The fact that the number of employees employed in a holding SE and its subsidiaries may change over time should not mean that a (possible) obligation to conduct a negotiated procedure retrospectively does not apply.

36 Thirdly, if the Court answered the second question in the affirmative, it would be necessary to clarify whether – as assumed by the chamber concerned – the retrospective conduct of the negotiation procedure is to be determined by the law of the Member State in which the holding SE now has its registered office if – as in the case in the main proceedings – it was registered in the register of another Member State without such a procedure having been conducted first and, before the transfer of its registered office, became the controlling company of subsidiaries in several Member States of the European Union which employ employees. Therefore, the interpretation to be given to Article 6 of Directive 2001/86/EC is decisive.

37 Fourthly, if the Court concludes that the retrospective conduct of the negotiation procedure in a case such as that in the main proceedings is not determined by the

law of the Member State in which the SE currently has its registered office, but by the law of the State in which that SE 'without employees' was first registered, the question arises as to whether this is also the case where that State withdrew from the European Union after the transfer of the SE's registered office and its law contains no provisions on the conduct of a negotiation procedure on the involvement of employees in the SE. Directive 2001/86 was implemented in Britain by the Regulations 2009 No 2401. However, with the expiry of 31 December 2020, all SEs registered in the United Kingdom were converted into 'UK Societas' and the rules on the negotiation procedure for involvement of employees in the SE were repealed.