ECLI:EU:C:2022:356

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Social policy – Directive 2008/94/EC – Protection of employees in the event of their employer's insolvency – Article 2(2) – Concept of 'employee' – Article 12(a) and (c) – Limitations on the responsibility of the guarantee institutions – Person exercising, on the basis of a contract of employment entered into with a trading company, the functions of a management board member and chief executive officer of that company – Concurrent exercise of functions – National case-law refusing that person the benefit of the guarantees laid down by that directive)

In Case C-101/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 11 February 2021, received at the Court on 18 February 2021, in the proceedings

HJ

v

Ministerstvo práce a sociálních věcí,

THE COURT (Seventh Chamber),

composed of J. Passer, President of the Chamber, F. Biltgen (Rapporteur) and N. Wahl, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,

– the European Commission, by J. Hradil and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2) and Article 12(a) and (c) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36), as amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 (OJ 2015 L 263, p. 1) ('Directive 2008/94').

2 The request has been made in proceedings between HJ, the applicant in the main proceedings, and the Ministerstvo práce a sociálních věcí (Ministry of Labour and Social Affairs, Czech Republic) concerning a request for payment of remuneration not paid by a company in a state of insolvency.

Legal context

European Union law

3 In accordance with recital 7 of Directive 2008/94, Member States may set limitations on the responsibility of the guarantee institutions. Those limitations must be compatible with the social objective of the directive and may take into account the different levels of claims.

4 Article 1 of that directive states:

'1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive.

3. Where such provision already applies in their national legislation, Member States may continue to exclude domestic servants employed by a natural person from the scope of this Directive.'

5 Article 2(2) of Directive 2008/94 provides:

'This Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".

However, the Member States may not exclude from the scope of this Directive:

(a) part-time employees within the meaning of [Council] Directive 97/81/EC [of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9)];

(b) employees with a fixed-term [employment] contract within the meaning of [Council] Directive 1999/70/EC [of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43)];

(c) employees with a temporary employment relationship within the meaning of Article 1(2) of [Council] Directive 91/383/EEC [of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19)].'

6 The first paragraph of Article 3 of Directive 2008/94 states:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.'

7 Article 12 of Directive 2008/94 is worded as follows:

'This Directive shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

…

(c) to refuse or reduce the liability referred to in the first paragraph of Article 3 or the guarantee obligation referred to in Article 7 in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.'

Czech law

Law No 118/2000

8 Zákon č. 118/2000 Sb., o ochraně zaměstnanců při platební neschopnosti zaměstnavatele a o změně některých zákonů (Law No 118/2000 on the protection of employees in the event of the employer's insolvency and amending certain laws) transposes Directive 2008/94 into Czech law.

9 In accordance with Paragraph 2(3) of Law No 118/2000, the latter does not apply to an employee who was, during the period concerned, an employee of an insolvent employer and who was, at the same time, the statutory body or a member thereof during the period concerned and who held at least a 50% ownership interest in that employer.

10 Under Paragraph 3(a) of Law No 118/2000, the term 'employee' means, for the purposes of that law, 'an individual with whom an employer has agreed on an employment relationship, an agreement for the performance of work … or an agreement on a work activity, on the basis of which he was entitled to claim payment of a salary for the period concerned and which was not paid to him by the employer'.

The Labour Code

11 Under Paragraph 2 of the zákon č. 262/2006 Sb., zákoník práce (Law No 262/2006 establishing the Labour Code) ('the Labour Code'):

'(1) Dependent work is work carried out in the context of a relationship of superiority of the employer and subordination of the employee, on behalf of the employer and in accordance with the employer's instructions, and performed by the employee in person.

(2) Dependent work must be performed in return for a salary, payment or remuneration for the work carried out, at the employer's expense and under the responsibility of the employer, during a defined time frame and at a workplace of the employer or possibly at another agreed place.'

12 Paragraph 4 of that code is worded as follows:

'The employment relationship is governed by the present law; where this law cannot be applied, the employment relationship shall be governed by the Civil Code, always in accordance with the fundamental principles governing employment relationships.'

13 Paragraph 6 of that code states:

'An employee is an individual who has undertaken to perform dependent work within a basic employment relationship.'

The Law on trading companies and cooperatives

14 Paragraph 59(1) and (2) of zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (Law No 90/2012 on trading companies and cooperatives) provides:

'(1) The rights and obligations between a commercial company and the member of its elected body shall be governed, *mutatis mutandis*, by the provisions of the Civil Code relating to the mandate, unless otherwise provided by law or by a contract concerning the performance of duties, where it has been entered into. The provisions of the Civil Code relating to the management of property of others shall not apply.

(2) In a capital company, the service contract shall be concluded in writing and must be approved, including amendments thereto, by the supreme body of the company; in the absence of such approval, the contract shall not produce effects. …'

15 Paragraph 60 of that law states:

'In a capital company a contract for the performance of the duties must also contain the following information:

(a) the definition of all components of remuneration which accrues or may accrue to a member of an elected body, including any benefit in kind, the payment of contributions to the pension scheme or other benefits;

…'

16 Paragraph 435(3) of that law provides:

‘The management board of a public limited company shall be governed by the principles and guidelines approved by the general meeting, provided that they comply with the rules and statutes. However, no one shall be authorised to issue directions to the management board concerning business management.’

The facts in the main proceedings and the question referred for a preliminary ruling

17 While working for AA, a trading company, since 2010 as an architect on the basis of a contract of employment, the applicant in the main proceedings was elected, in September 2017, as chairman of the management board of that company and for that purpose entered into a contract with that company in which it was stated that he was not entitled to remuneration for the performance of that function.

18 Subsequently, an addendum to his original contract of employment was concluded, stating that, as an employee, he was entitled to a salary. That addendum stated that he had, since October 2017, occupied the position of CEO of AA.

19 Following AA’s insolvency in 2018, the applicant in the main proceedings submitted to the Úřad práce České republiky – krajská pobočka pro hl. m. Prahu (Labour Office – Regional Branch for the Capital City of Prague, Czech Republic) an application on the basis of Law No 118/2000 for payment of his remuneration for the months of July to September 2018 (‘the period in question’).

20 That application was denied on the ground that the applicant in the main proceedings could not be regarded as an employee as defined by Paragraph 3(a) of Law No 118/2000.

21 The complaint lodged by the applicant in the main proceedings was rejected by the Ministry of Labour and Social Affairs. The latter held that, during the period in question, the applicant in the main proceedings had performed, in the course of his duties as chairman of the management board and CEO of AA, one single and identical form of work, namely the business management of that company, and that he could not therefore be regarded as being linked by an employment relationship with that company.

22 The action brought before the Městský soud v Praze (Prague City Court, Czech Republic) was also dismissed by judgment of 11 June 2020. That court held, in accordance with the national case-law relating to the ‘concurrent exercise of functions’, that, in so far as, during the period in question, the applicant in the main proceedings had performed concurrently the duties of CEO and chairman of that company’s management board, there was no superior relationship or any relationship of subordination with that company, and he could therefore not be regarded as an employee within the meaning of Law No 118/2000.

23 In addition, that court rejected the arguments of the applicant in the main proceedings alleging that, during the period in question, he did not carry out solely the business management of AA, but that he also worked as a construction manager and project manager. It found that the applicant in the main proceedings had been elected chairman of the management board in order to avert a financial situation adverse to the company, such as insolvency. However, it pointed out, the purpose of Law No 118/2000 is not to remedy harm that members of an insolvent employer’s statutory body sustain due to their own unsuccessful business management.

24 The applicant in the main proceedings lodged an appeal before the referring court on a point of law against that judgment.

25 The referring court observes that, according to the national case-law relating to the concurrent exercise of functions, which is the subject of debate between the Czech courts, in particular between the Nejvyšší soud (Supreme Court, Czech Republic) and the Ústavní soud (Constitutional Court, Czech Republic), a contract of employment entered into between a trading company and a person, which provides that that person is to perform concurrently the functions of a member of a statutory body and CEO of that company, is valid under the Labour Code. However, a person in such a position cannot be regarded as an employee within the meaning of Law No 118/2000. Even if there is a contract of employment, a member of a statutory body who manages the trading company's activities cannot perform his or her duties in the context of a relationship of subordination, with the result that there is no employment relationship between that member and that company.

26 The referring court is unsure whether Article 2(2) and Article 12(a) and (c) of Directive 2008/94 preclude such national case-law.

27 It points out in this respect that, as the Court of Justice has consistently held, Directive 2008/94 pursues a social objective which seeks to guarantee a minimum level of protection for all employees in the event of the employer's insolvency (see, to that effect, judgments of 10 February 2011, *Andersson*, C-30/10, EU:C:2011:66, paragraph 25, and of 5 November 2014, *Tümer*, C-311/13, EU:C:2014:2337, paragraph 37), and that Member States can therefore exclude certain persons from this protection only in specific cases determined by that directive (see, to that effect, judgments of 16 December 1993, *Wagner Miret*, C-334/92, EU:C:1993:945, paragraph 14; of 17 November 2011, *van Ardennen*, C-435/10, EU:C:2011:751, paragraph 39; and of 5 November 2014, *Tümer*, C-311/13, EU:C:2014:2337, paragraph 37). Furthermore, any exclusion of a right must be objectively justified and must constitute a measure necessary to avoid abuse (judgment of 21 February 2008, *Robledillo Núñez*, C-498/06, EU:C:2008:109, paragraph 44).

28 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 2 of Directive [2008/94], in conjunction with Article 12(a) and (c) thereof, preclude national case-law according to which a CEO of a trading company is not deemed to be an "employee" for the purpose of the satisfaction of pay claims pursuant to Directive [2008/94], for the sole reason that the CEO as an employee is, at the same time, a member of the statutory body of the same trading company?'

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Article 2(2) and Article 12(a) and (c) of Directive 2008/94 must be interpreted as precluding national case-law according to which a person who, on the basis of a contract of employment, performs concurrently the duties of CEO and member of a statutory body of a company cannot be regarded as an employee and, consequently, cannot benefit from the guarantees provided for by that directive.

30 As a preliminary point, it should be noted that, according to Article 1(1) of Directive 2008/94, that directive is to apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1) of that directive. In addition, Article 3 of that directive establishes an obligation to pay employees' outstanding claims. It follows that employees, within the meaning of that directive, come within the scope of Directive 2008/94.

31 It should be added that the situations which the national case-law at issue in the main proceedings excludes from the benefit of Law No 118/2000 are not covered by the exceptions laid down in Article 1(2) and (3) of that directive. First, although Article 1(2) of Directive 2008/94 authorises Member States, by way of exception, to exclude claims by certain categories of employee from the scope of that directive, this is subject to the condition that there are other forms of guarantee which offer the persons concerned a degree of protection equivalent to that resulting from that directive. In the present case, however, it is apparent from the order for reference that the national case-law at issue in the main proceedings does not grant such equivalent protection to persons who are members of a statutory body of a company and who also, on the basis of a contract of employment, perform the duties of CEO of that company. Secondly, Article 1(3) of Directive 2008/94 concerns domestic servants employed by a natural person, which is not the case with the persons referred to in the national case-law at issue in the main proceedings.

32 In order to provide the referring court with a useful answer, it is necessary, in the first place, to examine whether national case-law such as that at issue in the main proceedings is compatible with Article 2(2) of Directive 2008/94.

33 In this respect, it should be noted that Directive 2008/94 does not itself define the concept of 'employee' and provides, in the first subparagraph of Article 2(2), that it is without prejudice to national law as regards the definition of that term, provided that certain categories of employee, set out in the second subparagraph of Article 2(2) thereof, which are not relevant for the purposes of the present case, are not excluded.

34 However, it is clear from the Court's case-law that the discretion enjoyed by the Member States in defining that concept is not unlimited. Thus, it follows from that case-law that the first subparagraph of Article 2(2) of Directive 2008/94 must be interpreted in the light of the social objective of that directive, which is to guarantee all employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period. Member States therefore cannot define at will the term 'employee' in such a way as to undermine the social objective of that directive (see, by analogy, judgment of 5 November 2014, *Tümer*, C-311/13, EU:C:2014:2337, paragraph 42).

35 Furthermore, the Court has already held that, in view of that social objective of Directive 2008/94 and the terms of Article 1(1) thereof, the definition of the term 'employee' necessarily refers to an employment relationship that gives rise to a right, held vis-à-vis the employer, to receive payment for work done (see, by analogy, judgment of 5 November 2014, *Tümer*, C-311/13, EU:C:2014:2337, paragraph 44). It is thus contrary to that social objective to deny the protection provided for under that directive in the event of the employer's insolvency to individuals to whom national legislation generally attributes the status of employees and who, by virtue of that legislation, have wage claims vis-à-vis their employer arising from contracts of employment or employment relationships, as referred to in Article 1(1) and the first paragraph of Article 3 of that directive (see, by analogy, judgment of 5 November 2014, *Tümer*, C-311/13, EU:C:2014:2337, paragraph 45).

36 It follows that the fact that a person performing the duties of CEO of a trading company is also a member of the statutory body of that company does not, in itself, allow for the presumption or exclusion of the existence of an employment relationship or the classification of that person as an employee within the meaning of Directive 2008/94.

37 Accordingly, the first subparagraph of Article 2(2) of Directive 2008/94 must be interpreted as precluding national case-law, such as that at issue in the main proceedings, according to which a person who, on the basis of a contract of employment, performs concurrently the duties of CEO and of a member of a statutory body of a trading company cannot be regarded as an employee within the meaning of that directive.

38 In the present case, it is apparent from the order for reference that the applicant in the main proceedings performed concurrently the duties of CEO and chairman of AA's management board on the basis of a contract of employment entered into with that company and that, on that basis, he received remuneration. Since, according to the referring court, such a contract of employment is valid under the Labour Code, it cannot be ruled out that the applicant in the main proceedings may be regarded as being an employee within the meaning of the first subparagraph of Article 2(2) of Directive 2008/94, this, however, being a matter to be ascertained by the referring court.

39 In the second place, with regard to the compatibility of national case-law, such as that at issue in the main proceedings, with Article 12(a) of Directive 2008/94, it should be remembered that that provision enables Member States to take the measures necessary to avoid abuses.

40 In so far as it establishes an exception to a general rule, that provision must be interpreted restrictively. In addition, it must be interpreted in a manner compatible with the social objective of Directive 2008/94 (see, by analogy, judgment of 11 September 2003, *Walcher*, C-201/01, EU:C:2003:450, paragraph 38 and the case-law cited).

41 It must also be borne in mind that the abuses referred to in Article 12(a) of Directive 2008/94 are abusive practices that adversely affect the guarantee institutions by artificially giving rise to a claim for salary, thereby illegally triggering a payment obligation on the part of those institutions. The measures that the Member States are authorised to take under that provision are, accordingly, those that are necessary to prevent such practices (see, by analogy, judgment of 11 September 2003, *Walcher*, C-201/01, EU:C:2003:450, paragraphs 39 and 40).

42 In the present case, it is apparent from the order for reference that the national case-law at issue in the main proceedings seeks to prevent a situation in which persons who perform concurrently the duties of CEO and of management board member of a trading company are able to obtain payment of outstanding claims on account of the insolvency of that company, since they may be partly responsible for that insolvency. Therefore, it follows the logic behind Article 12(a) of Directive 2008/94.

43 However, that case-law establishes a non-rebuttable presumption according to which such a person does not exercise his or her functions in the context of a relationship of subordination but, in actual fact, leads the trading company concerned and that, consequently granting him or her the benefit of the guarantees provided for in Directive 2008/94 would constitute an abuse within the meaning of Article 12(a) thereof. However, a general presumption of the existence of abuse, which cannot be rebutted in the light of all the characteristic elements of each particular case, cannot be permitted (see, by analogy, judgments of 4 March 2004, *Commission* v *France*, C-334/02, EU:C:2004:129, paragraph 27, and of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 64, as well as the Opinion of Advocate General Kokott in *Grenville Hampshire*, C-17/17, EU:C:2018:287, point 65).

44 Therefore, national case-law such as that at issue in the main proceedings cannot be justified on the basis of Article 12(a) of Directive 2008/94.

45 As regards, in the third place, the compatibility of national case-law, such as that at issue in the main proceedings, with Article 12(c) of Directive 2008/94, that provision authorises Member States to refuse or reduce the liability referred to in the first paragraph of Article 3 of that directive or the guarantee obligation referred to in Article 7 thereof in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities, both conditions being cumulative.

46 That provision is based, among other things, on an implicit assumption that an employee who, simultaneously, owned an essential shareholding in the undertaking concerned and had a considerable influence on its activities could, thereby, be partly responsible for its insolvency (judgment of 10 February 2011, *Andersson*, C-30/10, EU:C:2011:66, paragraph 24).

47 In the present case, although the national case-law at issue in the main proceedings might, depending on the circumstances, be justified by the fact that a person who exercises concurrently the functions of CEO and of management board member of a trading company is likely to exercise considerable influence over the activities of that company, the fact remains that that case-law contains no reference to the first condition laid down in Article 12(c) of Directive 2008/94, namely that the employee had to own, on his or her own or together with his or her close relatives, an essential part of that company.

48 It follows that Article 12(a) and (c) of Directive 2008/94 precludes national case-law, such as that at issue in the main proceedings, which establishes a non-rebuttable presumption according to which a person who, even on the basis of a valid contract of employment under national law, performs concurrently the duties of CEO and of a member of a statutory body of a trading company cannot be regarded as an employee within the meaning of that directive and, therefore, cannot benefit from the guarantees provided for by that directive.

49 Consequently, the answer to the question referred for a preliminary ruling is that Article 2(2) and Article 12(a) and (c) of Directive 2008/94 must be interpreted as precluding national case-law according to which a person who, on the basis of a valid contract of employment under national law, performs concurrently the duties of chief executive officer and of a member of a statutory body of a trading company cannot be regarded as an employee within the meaning of that directive and, therefore, cannot benefit from the guarantees provided for by that directive.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 2(2) and Article 12(a) and (c) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, as amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015, must be interpreted as precluding national case-law according to which a person who, on the basis of a valid contract of employment under national law, performs concurrently the duties of chief executive officer and of a member of a statutory body of a trading company cannot be regarded as an employee within the meaning

of that directive and, therefore, cannot benefit from the guarantees provided for by that directive.

[Signatures]

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* Language of the case: Czech.