ECLI:EU:C:2017:969

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

14 December 2017 (*)

(Reference for a preliminary ruling — Company law — Directive 2009/101/EC — Articles 2 and 6 to 8 — Directive 2012/30/EU — Articles 19 and 36 — Charter of Fundamental Rights of the European Union — Articles 20, 21 and 51 — Recovery of claims arising under an employment contract — Right to bring, before the same court, an action against the company and its director, as a person having joint and several liability for the company's debts)

In Case C-243/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social n.º 30 de Barcelona (Social Court No 30, Barcelona, Spain), made by decision of 14 April 2016, received at the Court on 27 April 2016, in the proceedings

Antonio Miravitlles Ciurana,

Alberto Marina Lorente,

Jorge Benito García,

Juan Gregorio Benito García

v

Contimark SA,

Jordi Socías Gispert,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: Y. Bot,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2017,

after considering the observations submitted on behalf of:

– Mr Marina Lorente, by J. García Vicente, abogado,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the European Commission, by J. Rius and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 6 to 8 of Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 [EC], with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11), Articles 19 and 36 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 [TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 2012 L 315, p. 74) and of Articles 20, 21 and 51 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between (i) Mr Antonio Miravitlles Ciurana, Mr Alberto Marina Lorente, Mr Jorge Benito García and Mr Juan Gregorio Benito García and (ii) Contimark SA and its director, Mr Jordi Socías Gispert, concerning the recovery of wage arrears and other compensation which the company has been ordered to pay them.

Legal context

European Union law

Directive 2009/101

3 Directive 2009/101 was repealed by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 69, p. 46). At the time of the facts in the main proceedings, Directive 2009/101 was still applicable.

4 Recitals 1 and 2 of Directive 2009/101 stated:

‘(1) First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to

making such safeguards equivalent throughout the Community [(OJ, English Special Edition 1968(I), p. 41)] has been substantially amended several times … In the interests of clarity and rationality the said Directive should be codified.

(2) The coordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability is of special importance, particularly for the purpose of protecting the interests of third parties.'

5 Article 2 of Directive 2009/101 provided:

'Member States shall take the measures required to ensure compulsory disclosure by companies as referred to in Article 1 of at least the following documents and particulars:

(a) the instrument of constitution, and the statutes if they are contained in a separate instrument;

(b) any amendments to the instruments mentioned in point (a), including any extension of the duration of the company;

(c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;

(d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:

(i) are authorised to represent the company in dealings with third parties and in legal proceedings; it must be apparent from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly;

(ii) take part in the administration, supervision or control of the company;

(e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;

(f) the accounting documents for each financial year which are required to be published in accordance with [Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1), Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ 1986 L 372, p. 1) and Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ 1991 L 374, p. 7)];

(g) any change of the registered office of the company;

(h) the winding-up of the company;

(i) any declaration of nullity of the company by the courts;

(j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;

(k) the termination of the liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.'

6 Under Article 6 of the directive:

'Each Member State shall determine by which persons the disclosure formalities are to be carried out.'

7 Article 7 of the directive was worded as follows:

'Member States shall provide for appropriate penalties at least in the case of:

(a) failure to disclose accounting documents as required by Article 2(f);

(b) omission from commercial documents or from any company website of the compulsory particulars provided for in Article 5.'

8 Article 8 of Directive 2009/101 provided:

'If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.'

Directive 2012/30

9 Directive 2012/30 was also repealed by Directive 2017/1132. At the time of the facts in the main proceedings, Directive 2012/30 was still applicable.

10 Recital 3 of Directive 2012/30 stated:

'In order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important.'

11 Article 19 of that directive provided:

'1. In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.

2. The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.'

12 According to Article 36 of that directive:

'1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain

security for claims which have not fallen due by the date of that publication. Member States may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company.

Member States shall lay down the conditions for the exercise of the right provided for in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the reduction in the subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.

2. The laws of the Member States shall also stipulate at least that the reduction shall be void or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

3. This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.'

Spanish law

13 Article 236 of the Ley de Sociedades de Capital (Law on Capital Companies), approved by Real Decreto Legislativo 1/2010 (Royal Legislative Decree No 1/2010), of 2 July 2010 ('the Law on companies'), which is entitled 'Necessary conditions for liability and extension of personal liability', provides:

'1. The directors shall be answerable to the company, the shareholders and the company's creditors for any damage they may cause through acts or omissions contrary to the law or the statutes or carried out in contravention of the duties inherent in the holding of the office ...

2. Under no circumstances shall the fact that the harmful act or decision was adopted, authorised or ratified by the general meeting release the directors from liability.

...'

14 Under Article 237 of that law, which is entitled 'Joint and several nature of liability':

'All members of the management body which adopted the decision or carried out the harmful act shall be jointly and severally liable, with the exception of those who prove that, having taken no part either in its adoption or in its implementation, they were unaware of its existence or, if they were aware of it, had taken all reasonable steps to prevent the harm or had at least expressly objected to the decision or act.'

15 Article 238(1) of the Law on companies, which is entitled 'Company action to establish liability', is worded as follows:

'An action to establish the directors' liability shall be brought by the company following a prior resolution of the general meeting, which may be put before the meeting at the request of any shareholder …'

16 Article 241 of that law, which is entitled 'Individual action to establish liability', provides:

‘Any actions for damages which shareholders and third parties may be entitled to bring as a result of acts of the directors which directly harm their interests shall not be affected by these provisions.’

17 Article 362 of the Law on companies, which is entitled ‘Winding-up as a result of a finding that there are legal grounds or grounds in the statutes’, provides:

‘Capital companies shall be wound up if there are legal grounds or grounds in the statutes, duly established by the general meeting, or as a result of a court order.’

18 According to Article 363(1) of that law, which is entitled, ‘Grounds for winding-up’:

‘A capital company must be wound up:

(a) Where it ceases to carry out the activity or activities which comprise its objects. Such cessation shall be presumed after a period of inactivity of more than one year.

...

(e) Where the company incurs losses which reduce its net assets to an amount lower than half the share capital, unless the share capital is increased or reduced to a sufficient extent and provided that it is not appropriate to apply for the commencement of insolvency proceedings.

...’

19 Article 365(1) of the Law on companies, entitled ‘Duty to convene a general meeting’, provides:

‘The directors must convene a general meeting within two months for the purpose of adopting a winding-up resolution or, if the company is insolvent, for it to commence insolvency proceedings.

...’

20 Article 367(1) of the Law on companies, entitled ‘Joint and several liability of directors’, is worded as follows:

‘Directors shall be jointly and severally liable for obligations incurred by the company after the legal ground for winding-up has arisen if (i) they fail to convene a general meeting within the two-month period to adopt, where appropriate, a winding-up resolution or (ii) they fail to apply to the courts for a winding-up order or, as the case may be, an order commencing insolvency proceedings within a period of two months starting from the date scheduled for the general meeting where that meeting has not taken place or from the date on which that meeting took place where it took a decision not to wind up the company.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Contimark is a public limited liability company whose sole director is Mr Socías Gispert. It suffered losses in 2012 and 2013 and ceased trading in the second half of 2013.

22 The applicants in the main proceedings are former employees of Contimark, to whom that company was ordered to pay, by judgments of the Juzgado de lo Social de Barcelona (Social Court, Barcelona, Spain), wage arrears and compensation following the termination of their employment contracts in the circumstances described. Given Contimark's insolvency and the capped amount of the wage guarantee, the former employees were unable to recover their claims in full.

23 In the course of the subsequent proceedings to enforce those judgments, the applicants in the main proceedings brought, before the referring court, the Juzgado de lo Social n.º 30 de Barcelona (Social Court No 30, Barcelona), a claim, raised as an additional matter, against Mr Socías Gispert, in his capacity as the director of Contimark, seeking a declaration as to his liability for breaches of the Law on companies and as to his joint and several liability with Contimark for the outstanding sums due to them. They seek to put Mr Socías Gispert's liability in issue on the ground that, although the company had suffered heavy losses in the course of 2012 and 2013, he failed to convene a general meeting of Contimark for the purpose of adopting a winding-up resolution or requesting the commencement of insolvency proceedings.

24 The referring court explains that, in accordance with the case-law of the Tribunal Supremo (Supreme Court, Spain), it does not have jurisdiction to hear actions concerning the liability of directors of public limited liability companies. According to that case-law, creditors whose claims relate to pay have no legal basis for bringing before the Juzgado de lo Social (Social Court) an action seeking both enforcement of their claims against the company that employed them and a declaration as to the joint and several liability of a director of that company for those claims. Unlike the other creditors of that company, such creditors must first bring an action before the Juzgado de lo Social (Social Court) for recognition of their wage claims, then subsequently bring the matter before the civil or commercial court with jurisdiction over actions to establish the joint and several liability of the director of the company.

25 The referring court adds that the Law on companies provides for directors to be liable where they fail to comply with the provisions of Directives 2009/101 and 2012/30. More specifically, it states that Article 367 of that law, which concerns the joint and several liability of directors, is intended to transpose Article 19 of Directive 2012/30 into domestic law. The referring court therefore takes the view that such liability falls within the scope of those directives. It considers that the case-law of the Tribunal Supremo (Supreme Court) may contravene those directives, in the light of the principles of equal treatment and non-discrimination laid down in Articles 20 and 21 of the Charter, by requiring creditors whose claims arise under an employment contract to bring an action to establish the aforementioned liability before a different court from the court with jurisdiction to recognise their claims.

26 In those circumstances, the Juzgado de lo Social n.º 30 de Barcelona (Social Court No 30, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Under Directives 2009/101 and 2012/30 and their transposing provisions in Articles 236, 237, 238, 241 and 367, inter alia, of the [Law on companies], does a creditor of a company who pursues his employment-related claim before the competent Spanish courts — the social courts — have the right to bring simultaneously before the same court a direct action against the company for the recognition of employment-related debts and, cumulatively, an action against a natural person — the company director —, as a person with joint and several liability for the company's debts, on the ground of non-fulfilment of the company obligations laid down in those directives and transposed in the [Law on companies]?

(2) Is it possible that the case-law of the Sala de lo Social (Social Division) of the Tribunal Supremo (Supreme Court) … might infringe Articles 2, 6, 7 and 8 of Directive 2009/101 and Articles 19 and 36 of Directive 2012/30, in holding that Spanish social courts may not apply directly in relation to employment-related claims the safeguards, provided for in those directives and transposed into Spanish law in Articles 236, 237, 238, 241, 367 and others of the [Law on companies], for creditors of companies when those ultimately in charge of such companies — natural persons — fail to comply with the formal requirements regarding disclosure of basic documents of the company laid down in Directive 2009/101 and Directive 2012/30 and transposed in the Law on companies?

(3) Is it possible that the case-law of the Sala de lo Social (Social Division) of the Tribunal Supremo (Supreme Court) … might be contrary to Articles 20 and 21, in conjunction with Article 51, of the [Charter] in requiring a creditor whose claims arise under an employment contract — an employee — to bring two sets of legal proceedings, the first before the social courts for recognition of the employment-related claim against the employer and the second before the civil or commercial courts to obtain the joint and several guarantee of the company director or other natural persons, when that requirement is not laid down for any other type of creditor — regardless of the nature of his claim — in Directive 2009/101, Directive 2012/30 or any of the domestic legal provisions … transposing those Community provisions into Spanish law?'

Consideration of the questions referred

27 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2009/101, in particular Articles 2 and 6 to 8 thereof, and Directive 2012/30, in particular Articles 19 and 36 thereof, read in the light of Articles 20 and 21 of the Charter, must be interpreted as conferring on employees, who are creditors of a public limited liability company as a result of the termination of their employment contract, a right to bring, before the same social court as that having jurisdiction over their action for recognition of their wage claims, an action to establish the liability of the director of that company, on the ground that he has failed to convene a general meeting of the company despite the heavy losses sustained by it, with a view to obtaining a declaration that he is jointly and severally liable for those wage claims.

28 As a preliminary point, it should be noted that the referring court is hearing an action to establish liability on the part of the director of Contimark, for failure to comply with the obligation to convene a general meeting despite the company's heavy losses, on the basis of the provisions of the Law on companies, including Article 367 thereof, which, according to the information supplied in the order for reference, enable creditors to invoke such liability.

29 In that regard, it is apparent from recitals 1 and 2 of Directive 2009/101 that the directive is intended to coordinate national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability. As regards Directive 2012/30, recital 3 thereof states that the aim of that directive is to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies. To that end, that directive coordinates the national provisions relating to the formation of such companies, and to the maintenance, increase and reduction of their capital (see, concerning Directive 2012/30, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 86).

30 As regards the provisions of those directives to which the national court makes reference, Articles 2, 6 and 7 of Directive 2009/101 lay down the obligations of the Member States with regard to company disclosure formalities and Article 8 concerns actions carried out in the name of a

company when the company is being formed. Those provisions, as is the case, moreover, of the other provisions of the directive, do not lay down (i) an obligation to convene the general meeting of a company in the event of the latter making heavy losses, or (ii) a right for creditors to bring an action to establish the liability of the director in such a situation or (iii) any procedural provisions in that respect. They are therefore clearly unrelated to the facts of the dispute in the main proceedings. The same is true of Article 36 of Directive 2012/30, which governs only the right of creditors to obtain security in the event of a reduction in share capital.

31 Neither Article 19 nor any of the other provisions of Directive 2012/30 concern the liability of directors or impose particular requirements as to the jurisdiction of the courts in that regard. It is true that Article 19 lays down an obligation to convene a general meeting of the company in the case of a serious loss of the subscribed capital. However, that article merely sets forth the obligation but does not specify the other conditions necessary for its application, such as, for example, the organ of the company which is subject to the obligation. Above all, Article 19 does not make any provision as to the possible consequences of a failure to comply with that obligation.

32 Thus, Article 19 of Directive 2012/30 does not require there to be either (i) a right to compensation as against the director of a public limited liability company or (ii) a rule concerning the substantive and procedural conditions governing the liability of such a director, in the event of a failure to convene the general meeting despite a serious loss of the subscribed capital.

33 National law therefore governs the question whether — and if so, under what substantive and procedural conditions — the creditors of a public limited liability company may bring an action against the director to establish his liability and obtain compensation for their loss, when the general meeting has not been convened in the case of a serious loss of the subscribed capital.

34 Since Article 19 of Directive 2012/30 does not impose any specific obligation on the Member States in this regard, the situation at issue in the main proceedings cannot be assessed in the light of the provisions of the Charter (see, to that effect, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 35 and the case-law cited).

35 Having regard to all those considerations, the answer to the questions raised is that Directive 2009/101, in particular Articles 2 and 6 to 8 thereof, and Directive 2012/30, in particular Articles 19 and 36 thereof, must be interpreted as not conferring on employees, who are creditors of a public limited liability company as a result of the termination of their employment contract, a right to bring, before the same social court as that having jurisdiction over their action for recognition of their wage claims, an action to establish the liability of the director of that company, on the ground that he has failed to convene a general meeting of the company despite the heavy losses sustained by it, with a view to obtaining a declaration that he is jointly and severally liable for those wage claims.

Costs

36 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 (Fourth Chamber) hereby rules:

Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third

parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 [EC], with a view to making such safeguards equivalent, in particular Articles 2 and 6 to 8 thereof, and Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 [TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, in particular Articles 19 and 36 thereof, must be interpreted as not conferring on employees, who are creditors of a public limited liability company as a result of the termination of their employment contract, a right to bring, before the same social court as that having jurisdiction over their action for recognition of their wage claims, an action to establish the liability of the director of that company, on the ground that he has failed to convene a general meeting of the company despite the heavy losses sustained by it, with a view to obtaining a declaration that he is jointly and severally liable for those wage claims.

[Signatures]

* Language of the case: Spanish.