ECLI:EU:C:2018:653

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

7 August 2018 (*)

(Reference for a preliminary ruling — Social policy — Collective redundancies — Directive 98/59/EC — First subparagraph of Article 2(4) — Definition of 'undertaking controlling the employer' — Procedures for consultation of workers — Burden of proof)

In Joined Cases C-61/17, C-62/17 and C-72/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany), by decisions of 24 November 2016, received at the Court on 6 February 2017 (C-61/17 and C-62/17) and on 9 February 2017 (C-72/17), in the proceedings

Miriam Bichat(C-61/17),

Daniela Chlubna(C-62/17),

Isabelle Walkner(C-72/17)

v

Aviation Passage Service Berlin GmbH & Co. KG,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits (Rapporteur), A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 12 April 2018,

after considering the observations submitted on behalf of:

– M. Bichat, by F. Koch, Rechtsanwalt,

– D. Chlubna, by H. Kuster and U. Meißner, Rechtsanwälte,

– I. Walkner, by H. Kuster and U. Meißner, Rechtsanwälte,

– Aviation Passage Service Berlin GmbH & Co. KG, by U. Rupp and U. Schweibert, Rechtsanwältinnen,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the European Commission, by C. Valero, F. Erlbacher and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 2(4) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

2 The requests have been made in three sets of proceedings between (i) Ms Miriam Bichat, (ii) Ms Daniela Chlubna, and (iii) Ms Isabelle Walkner and their former employer, Aviation Passage Service Berlin GmbH & Co. KG (‘APSB’), concerning the legality of their dismissals in the light of the consultation procedures provided for in Article 2 of Directive 98/59.

Legal context

EU law

3 On 17 February 1975, the Council of the European Communities adopted Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies (OJ 1992 L 48, p. 29).

4 Council Directive 92/56/EEC of 24 June 1992 amended Directive 75/129 and added a paragraph 4 to Article 2 of that directive, worded as follows:

‘The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.’

5 In the interests of clarity and rationality, Directive 75/129, as amended by Directive 92/56, was subsequently repealed and replaced by Directive 98/59, which codified the original directive.

6 Recital 2 of Directive 98/59 states:

‘Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community’.

7 Article 2 of that directive is worded as follows:

‘1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

...

3. To enable workers’ representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

...

4. The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the

ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.'

8 Article 5 of that 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.'

9 Article 6 of that directive reads as follows:

'Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.'

German law

10 Article 17 of the Kündigungsschutzgesetz (Law on protection against unfair dismissal BGB1.I, p. 1317; 'the KSchG') transposes Article 2 of Directive 98/59 and provides:

'(2) Where an employer is contemplating collective redundancies he shall in good time provide the workers' representatives with the relevant information and shall, in particular, notify them in writing of:

1. the reasons for the projected redundancies;

2. the number and categories of workers to be made redundant;

3. the number and categories of workers normally employed;

4. the period over which the projected redundancies are to be effected;

5. the criteria proposed for the selection of the workers to be made redundant;

6. the method for calculating any redundancy payments.

The consultations between the employer and the representatives of the workers shall, at least, cover ways and means of avoiding collective redundancies or of reducing the number of workers affected, and of mitigating the consequences.

(3a) The obligations as to information, consultation and notification laid down in paragraphs 1 to 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer. The employer may not rely on the ground that the necessary information has not been provided to it by the undertaking which took the decision leading to collective redundancies.'

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

11 Ms Bichat had been employed since 1 May 1988 by APSBand by its predecessor in law, providing assistance to passengers in Tagel Airport in Berlin (Germany). Ms Chlubna and Ms Walkner had occupied a similar post since 1 May 1992.

12 APSB worked exclusively for the company GlobeGround Berlin GmbH & Co. KG ('GGB'), which is active in various airport industries. During 2008 that company was bought by the group WISAG, which carried out some restructuring. The respondent in the main proceedings retained its sphere of activity.

13 As it was making losses, GGB terminated the contracts concluded with APSB in stages from 30 June 2014, and informed the latter that the services provided were now to be provided by undertakings outside the group. Those undertakings took on none of APSB's staff.

14 On 22 September 2014, during a general meeting of APSB (the respondent in the main proceedings), GGB, as the only member with voting rights, adopted a decision to cease APSB's activities as from 31 March 2015 and to dissolve the organisation set up for the purpose of exercising those activities.

15 In January 2015, APSB informed the works council of the planned collective redundancy and heard from it on the matter, without subsequently taking account of its opposition to the dismissals on the ground that the alleged losses were fictitious with regard to both APSB and GGB.

16 On 29 January 2015, Ms Bichat, Ms Chlubna and Ms Walkner were informed that their employment relationships would terminate with effect from 31 August 2015.

17 A number of challenges were successfully brought against those collective redundancies. On 10 June 2015, APSB informed the works council that it planned to carry out another collective redundancy. That collective redundancy took place on 27 June, taking effect, this time, on 31 January 2016. In that respect, GGB stated that the reasons were the same as those which had been communicated to APSB's works council during the previous collective redundancy which should have taken effect on 31 August 2015.

18 By judgments of 12 January 2016 (Case C-61/17), of 23 February 2016 (Case C-62/17) and of 1 March 2016 (Case C-72/17), the Arbeitsgericht Berlin-Brandenburg (Labour Court, Berlin-Brandenburg, Germany) dismissed the actions of the appellants in the main proceedings, who brought appeals against those decisions before the referring court.

19 The Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany) takes the view that the outcome of the disputes pending before it depends, in particular, on the interpretation of Article 2(4) of Directive 98/59. In that regard, the referring court notes that Article 17 of the KSchG, which transposes Article 2 of that directive almost word-for-word, gives rise, on a national level, to differences in interpretation, particularly of the concept of 'undertaking controlling the employer'. Accordingly, a broad interpretation of that concept that also includes undertakings not linked in terms of legislation on groups of companies but subject only to a *de jure* or de facto control could render the redundancies at issue in the main proceedings void, whereas that would not be the case if a restrictive interpretation was applied to that term.

20 In those circumstances, the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg) decided to stay the proceedings and to refer the following questions, worded identically in each case, to the Court for a preliminary ruling:

'(1) Must the notion of a controlling undertaking specified in the first subparagraph of Article 2(4) of [Directive 98/59] ... be understood to mean only an undertaking whose influence is ensured through shareholdings and voting rights or does a contractual or de facto influence (for example, as a result of the power of natural persons to give instructions) suffice?

(2) If the answer to Question 1 is to the effect that an influence ensured through shareholdings and voting rights is not required:

Does it constitute a "decision regarding collective redundancies" within the meaning of the first paragraph of Article 2(4) of Directive 98/59 if the controlling undertaking imposes requirements on the employer such that it is economically necessary for the employer to effect collective redundancies?

(3) If Question 2 is answered in the affirmative:

Does the second subparagraph of Article 2(4) in conjunction with Article 2(3)(a), Article 2(3)(b)(i) and Article 2(1) of Directive 98/59 require the workers' representatives also to be informed of the economic or other grounds on which the controlling undertaking has taken its decisions that have led the employer to contemplate collective redundancies?

(4) Is it compatible with Article 2(4) in conjunction with Article 2(3)(a), Article 2(3)(b)(i) and Article 2(1) of Directive 98/59 to place on workers pursuing a judicial process to assert the invalidity of their dismissal effected in the context of collective dismissals, on the basis that the employer effecting the dismissal did not properly consult the workers' representatives, a burden of presenting the facts and adducing evidence that goes beyond presenting the indicia for a controlling influence?

(5) If Question 4 is answered in the affirmative:

What further obligations to present facts and adduce evidence may be placed on the workers in the present case pursuant to the abovementioned provisions?'

21 By order of the President of the Court of 9 March 2017, Cases C-61/17, C-62/17 and C-72/17 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The first question

Admissibility

22 It must be noted, as a preliminary point, that the German Government contends that this question is inadmissible inasmuch as it concerns a hypothetical problem and that the Court is unable, in the light of the matters of fact and of law put forward by the referring court, to give a useful reply.

23 In that respect, it should be recalled that, according to settled case-law, it is solely for the national courts, before which disputes are brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 42 and the case-law cited).

24 A reference for a preliminary ruling from a national court may be refused by the Court only if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 43 and the case-law cited).

25 In the present case, it must be held, first, that following a request for information, sent by the Court to the referring court on 25 October 2017, the referring court reiterated both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions referred to the Court.

26 Second, as the Advocate General noted in point 32 of her Opinion, the information provided by the referring court does not render the first question hypothetical.

27 It follows from the foregoing that the first question referred for a preliminary ruling is admissible.

Substance

28 By its first question, the referring court asks, in essence, whether the first subparagraph of Article 2(4) of Directive 98/59 must be interpreted as meaning that the term 'undertaking controlling the employer' covers only an undertaking linked to that employer by shareholdings or voting rights, or whether it also covers an undertaking with a decisive contractual or factual influence over that employer.

29 In that regard, it must be noted, first, that the first subparagraph of Article 2(4) of Directive 98/59 does not define 'undertaking controlling the employer', nor does it refer to the law of the Member States on that issue. According to the Court's settled case-law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (see, inter alia, judgments of 27 January 2005, *Junk*, C-188/03, EU:C:2005:59, paragraphs 29 and 30, and of 13 May 2015, *Lyttle and Others*, C-182/13, EU:C:2015:317, paragraph 26 and the case-law cited).

30 In those circumstances, and like the term 'establishment' referred to in Article 1(1)(a)(ii) of Directive 98/59, the term 'undertaking controlling the employer' referred to in the first subparagraph of Article 2(4) of that directive must be interpreted in an autonomous and uniform manner in the EU legal order (see, to that effect, judgment of 13 May 2015, *Lyttle and Others*, C-182/13, EU:C:2015:317, paragraph 26 and the case-law cited).

31 As a preliminary point, it must be clarified that the concept of 'control' for the purposes of Directive 98/59 refers, as the Advocate General noted in point 50 of her Opinion, to a situation in which an undertaking may adopt a strategic or commercial decision compelling the employer to contemplate or to plan for collective redundancies (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 48).

32 That having been clarified, it is not possible to determine from the wording of the first subparagraph of Article 2(4) of Directive 98/59 alone, what the links are between the undertaking and the employer that determine when the former 'controls' the latter. In that context, account must

be taken of the origins of that provision as well as the objective pursued by the legislation at issue in the main proceedings.

33 As regards, first, the origins of the first subparagraph of Article 2(4) of Directive 98/59, it must be noted that the approximation of the laws of the Member States relating to collective redundancies was, initially, the subject of Directive 75/129, referred to in paragraph 3 of this judgment, which was amended by Directive 92/56.

34 Recital 6 in the preamble to Directive 92/56 states that it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of the fact that the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer. To that end, Directive 92/56 inserted a paragraph 4 into Article 2 of Directive 75/129, which corresponds to Article 2(4) of Directive 98/59.

35 Both Directive 98/59 and, before that, Directive 75/129 which it replaced, provide for a partial harmonisation of the rules for the protection of workers in the event of collective redundancies, that is to say, harmonisation of the procedure to be followed when such redundancies are to be effected (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 29 and the case-law cited).

36 In that regard, the Court has clarified in the context of that partial harmonisation that the legislature intended, with its adoption of Directive 92/56 and then Directive 98/59, to fill a gap in its earlier legislation and to add clarification concerning the obligations of employers who are part of a group of undertakings. Thus, against an economic background marked by the increasing presence of groups of undertakings, Article 2(4) of Directive 98/59 serves to ensure, where one undertaking is controlled by another, that the purpose of that directive, which, as is stated in recital 2 of its preamble, is to promote greater protection for workers in the event of collective redundancies, is actually achieved (judgment of 10 September 2009, *AkavanErityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 44 and the case-law cited).

37 Consequently, the Court has interpreted Article 2(1) and the first subparagraph of Article 2(4) of Directive 98/59 to the effect that, under those provisions, irrespective of whether collective redundancies are contemplated or projected as a result of a decision of the undertaking which employs the workers concerned or a decision of its parent company, it is always the former of those two companies which is obliged, as the employer, to start consultations with the representatives of its workers (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 62).

38 With regard to the objective of Directive 98/59, second, it is clear from recital 2 that that is to afford greater protection to workers in the case of collective redundancies. In that regard, the Court has clarified that, under Article 2(2) of the directive, the consultations with workers' representatives before the collective redundancy are to cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraphs 27 and 28).

39 To that end, the protection of workers in the event of collective redundancies is as great as the criteria applied for defining the term 'undertaking controlling the employer' referred to in the first subparagraph of Article 2(4) of Directive 98/59 are wide, those criteria nonetheless having to respect EU law and its principles, such as the principle of legal certainty.

40 In those circumstances, it follows from an interpretation of the origins and the objective of the first subparagraph of Article 2(4) of Directive 98/59, first, that the term ‘undertaking controlling the employer’ covers all undertakings which, by virtue of belonging to the same group or having a shareholding that gives it the majority of votes in the general meeting and/or the decision-making bodies within the employer, are able to require the latter to adopt a decision contemplating or planning for collective redundancies.

41 Moreover, situations in which an undertaking, while not having the majority of votes referred to in the preceding paragraph, is able to exercise decisive influence within the meaning of paragraph 31 of this judgment, which is expressed in the results of votes in company bodies owing, inter alia, to the employer having dispersed capital, a relatively low level of participation by the members at general meetings or the existence of pacts between members within that employer, must also be regarded as falling within that notion.

42 Second, in order to ensure protection of the principle of legal certainty, purely factual criteria such as the existence of a common patrimonial interest between the employer and the other undertaking or the ‘undertaking’s own best interests to satisfy its information, consultation and notification obligations provided for by Directive 98/59’, put forward by the Commission in its written and oral submissions, cannot establish the existence of a situation in which an undertaking controls the employer within the meaning of the first subparagraph of Article 2(4) of Directive 98/59.

43 Furthermore, the possible use of such criteria could require a competent national court to carry out difficult investigations, such as the assessment of the nature and intensity of the various interests common to the undertakings concerned, leading to an uncertain result, which could undermine the principle of legal certainty.

44 In addition, it is not disputed that a simple contractual relationship, in so far as such a relationship does not allow an undertaking to exercise a decisive influence on dismissal decisions taken by the employer, cannot be considered sufficient to establish a situation of control within the meaning of the first subparagraph of Article 2(4) of Directive 98/59.

45 In the light of all the foregoing, the answer to the first question is that the first subparagraph of Article 2(4) of Directive 98/59 must be interpreted as meaning that the term ‘undertaking controlling the employer’ covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer’s decision-making bodies and compel it to contemplate or to plan for collective redundancies.

Questions 2 to 5

46 Having regard to the answer given to Question 1, there is no need to answer Questions 2 to 5.

Costs

47 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 (Fifth Chamber) hereby rules:

The first subparagraph of Article 2(4) 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 meaning that the term 'undertaking controlling the employer' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies.

[Signatures]

* Language of the case: German.