Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

20 June 2013 *

(Failure of a Member State to fulfil obligations — Directive 2005/56/EC — Cross-border mergers of limited liability companies — Article 16(2)(a) and (b) — Company resulting from a cross-border merger — Employees employed in the Member State where the company has its registered office or in other Member States — Participation rights — Failure to provide identical rights)

In Case C-635/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 9 December 2011,

European Commission, represented by J. Enegren and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Schillemans and C. Wissels, acting as Agents,

defendant,

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas, President of the Chamber, A. Ó Caoimh, and C. G. Fernlund (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the European Commission is asking the Court to declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to ensure that, in the case of a company resulting from a cross-border merger which has its registered office in the Netherlands, the employees

* Language of the case: Dutch.

of establishments of that company situated in other Member States enjoy identical participation rights by those enjoyed by the employees employed in the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 16(2)(b) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1; 'the Mergers Directive').

Legal context

European Union law

2 Recital 13 in the preamble to the Mergers Directive reads as follows:

'If employees have participation rights in one of the merging companies under the circumstances set out in this Directive and, if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights are to be regulated. To that end, the principles and procedures provided for in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [(OJ 2001 L 294, p. 1)] and in 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; 'the SE Directive')], are to be taken as a basis, subject, however, to modifications that are deemed necessary because the resulting company will be subject to the national laws of the Member State where it has its registered office. A prompt start to negotiations under Article 16 of this Directive, with a view to not unnecessarily delaying mergers, may be ensured by Member States in accordance with Article 3(2)(b) of [the SE Directive]'.

3 Article 16 of the Mergers Directive, entitled 'Employee participation', provides:

'1. Without prejudice to paragraph 2, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.

2. However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 6, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of the [SE] Directive, or where the national law applicable to the company resulting from the cross-border merger does not:

(a) provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation, or

(b) provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

3. In the cases referred to in paragraph 2, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, mutatis mutandis and subject to paragraphs 4 to 7 below, in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation No 2157/2001 and the following provisions of [the SE Directive]:

...

(h) part 3 of the Annex, point (b).

...

5. The extension of participation rights to employees of the company resulting from the cross-border merger employed in other Member States, referred to in paragraph 2(b), shall not entail any obligation for Member States which choose to do so to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.

…'

4 Under Article 19 of the Mergers Directive, the deadline for transposing that directive expired on 15 December 2007.

Netherlands law

5 Article 333k which amends Book 2 of the Civil Code, by which Article 16 of the Mergers Directive was transposed into national law, reads as follows:

'1. For the purposes of the present article, provisions relating to participation shall mean those provisions on participation referred to at Article 1:1(1) of the legislation concerning the role of employees in the European company.

2. Where:

(a) at least one of the companies merging employs on average more than 500 people during the six months leading up to the date of the submission of the proposed merger referred to at Article 314 and is subject to provisions relating to participation, or

(b) the provisions relating to participation are applicable to one of the merging companies and the beneficiary company does not comply with the provisions of Articles 157, 158 to 164, or 158 to 161 and 164 or 267, 268 to 274 or 268 to 271 and 274,

Articles 12(2) to (4) of Regulation No 2157/2001 and 1:4 to 1:12, 1:14(1), (2), (3)(a), and 4, 1:16, 1:17, 1:18(1)(a), (h), (i) and (j)(3) and (6), 1:20, 1:21(2)(a), on the basis that the percentage of 25 referred to in that point is replaced by 33⅓, (4) and (5), 1:26(3), and 1:31(2) of the law on the role of employees within European legal persons, and Articles 670(4) and (11), and 670a(1)(a) of Book 7 of the Civil Code shall be applicable by analogy.'

6 Under Netherlands law, companies subject to the structural system – that is to say, public and private limited companies – that meet the following criteria (see Article 2:153/263(2) of the Civil Code):

(a) according to the balance sheet and annexes thereto, the company's subscribed capital and its reserves amount to a total of at least EUR 16 million;

(b) the company or a dependent company has introduced a works council as required by law; and

(c) the company and its dependent companies employ at least 100 employees on average;

shall enjoy a statutory participation right.

7 The structural system requires the establishment of a supervisory board on which key powers are conferred. Articles 2:158(5) and 2:268(5) of the Civil Code confer upon the works council of a public or private limited company subject to the structural system a right of recommendation for the appointment of all the members of the supervisory board. It is the General Assembly that appoints the members of the supervisory board. Some companies are, under certain conditions, exempt from the application of the structural system. That is, inter alia, the case of international holding companies. The structural system may also be applied on a voluntary basis.

Pre-litigation procedure

8 Given its doubts as to the compatibility of the Netherlands legislation with Article 16(2)(b) of the Mergers Directive, the Commission sent a letter of formal notice to the Kingdom of the Netherlands on 3 November 2009. That country responded by letter of 18 March 2010, asserting that Article 16(2)(a) and (b) included an alternative and that Member States could, consequently, choose between the two possibilities left open by that legislation when they decided to apply their national law on employee participation rights. As it was not satisfied with the response received, the Commission, on 25 November 2010, sent the Kingdom of the Netherlands a reasoned opinion to which that Member State responded by letter of 27 January 2011.

The action

Arguments of the parties

9 The Commission submits that Article 16(1) of the Mergers Directive contains a general rule on employee participation in the context of cross-border mergers, pursuant to which the provisions in force in the Member State in which the company's registered office is located are applicable.

10 According to the Commission, the exceptions to that general rule, which are listed at Article 16(2) of the Mergers Directive, may be summarised as follows:

— at least one of the companies merging employs more than 500 employees and is operating under an employee participation system (first part of the introductory sentence of Article 16(2)); or

— the national law applicable to the company resulting from the cross-border merger provides for a level of employee participation lower than that which was already operating in the relevant merging companies [Article 16(2)(a)]; or

— the national law applicable to the company resulting from the merger does not provide for employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office [Article 16(2)(b)].

11 The Commission submits that the Mergers Directive does not confer upon Member States, for the purposes of the application of national legislation on employee participation, the option of choosing between the circumstances referred to at Article 16(2)(a) and (b) of the Mergers Directive. The

Commission accordingly alleges that the Kingdom of the Netherlands took into account only the provisions of Article 16(2)(a), and failed to extend the participation rights enjoyed by employees employed in the Netherlands to employees concerned by the merger employed in other Member States, in accordance with Article 16(2)(b).

12 According to the Commission, the Netherlands legislation goes against the objective, clearly mentioned at Article 16(3) of the Mergers Directive, of granting the same participation rights to all the employees of a company resulting from a merger independently of the Member State in which they are employed and has no basis in the wording of Article 16 of that directive.

13 The Commission asserts that its analysis is confirmed by recital 13 of the Mergers Directive, which mentions the circumstances in which national legislation on employee participation is not applicable to the company resulting from the merger and to which other rules, which are those referred to at Article 16(3) of the Mergers Directive ('the rules relating to the European company'), must consequently be applied. Those rules take account of Regulation No 2157/2001 and of the SE Directive.

14 The Commission asserts that Article 16(5) of the Mergers Directive does not provide Member States with the option of not extending their national legislation on participation to employees affected by the merger who are employed in other Member States.

15 The Commission notes that ideally it is the national law of the Member State in which the newly formed company is established which should apply, but only where that law provides at least the same level of participation as that which already existed before the merger within the companies concerned and where it grants the employees of the foreign establishments an identical participation system.

16 The Commission submits that it follows from the 'before and after' principle, laid down in the SE Directive, that national legislation on employee participation must always ensure all the employees affected by a merger at least the highest level of participation which those employees enjoyed before that merger. As the Kingdom of the Netherlands did not provide for that safeguard, it is alleged to have failed to fulfil its obligations.

17 The Commission concedes that the Mergers Directive could, as the Kingdom of the Netherlands submits and following the example of the SE Directive, lead to a restriction, and therefore a partial loss, of participation rights, but only where the special negotiating body provided for under Article 3 of the SE Directive did not choose to apply the provisions referred to.

18 The Commission rejects the line of argument according to which its interpretation of the Mergers Directive would make cross-border mergers more costly for small companies. It asserts that that directive has considerably simplified cross-border mergers and reduced the high costs thereof. It points out that that directive in no way provides for a less onerous employee participation system for small companies.

19 The Kingdom of the Netherlands disputes having failed to fulfil its obligations in not providing Article 16(2)(b) of the Mergers Directive in its legislation.

20 According to that Member State, it was not necessary to provide for such provisions in its national law. In providing for the application of rules relating to the European company in the situation set out in the introductory sentence of Article 16(2) of the Mergers Directive, where one of the merging companies employs more than 500 employees, and also in the circumstances mentioned at Article 16(2)(a) of that directive, the Kingdom of the Netherlands correctly applied Article 16(2) of that directive.

21 It asserts that Article 16(2)(a) and (b) of the Mergers Directive relates to two possibilities between which Member States may choose in order to offer companies employing no more than 500 employees the certain prospect of the application of national law on participation instead of the rules relating to the European company.

22 That interpretation is based on the wording of Article 16(2) of the Mergers Directive.

23 According to that provision, national law is not applicable to small companies, that is to say those employing no more than 500 employees, if it does not provide for the circumstances referred to in that provision under (a) 'or' (b). The Kingdom of the Netherlands emphasises that the term 'or', and not the term 'and', is used in that provision and in recital 13 of the Mergers Directive. The situation mentioned at Article 16(2)(a) of the Mergers Directive is always assured in the Dutch system when one Dutch company subject to the structural system is involved in a merger and that the resulting company has its headquarters in the Netherlands.

24 According to the Kingdom of the Netherlands, and in contrast to what the Commission asserts, Article 16(2)(b) of the Mergers Directive does not lead to an obligation for Member States to ensure that the rules of participation are extended to employees employed in other Member States. That interpretation is borne out by the wording of Article 16(5) of that directive, which refers to Member States 'choos[ing]' to do so.

25 That interpretation is also substantiated by the objectives and effects of the Mergers Directive. The Commission's interpretation, on the other hand, is inconsistent with the 'before and after' principle and the rationale behind the distinction between large and small companies set out at Article 16(2) of that directive.

26 Concerning the 'before and after' principle which is part of the SE Directive, the Kingdom of the Netherlands asserts, referring to recital 13 of the Mergers Directive, that it also constitutes a fundamental principle and an objective of that directive. However, that principle implies not an extension of participation rights, but only their preservation.

27 In relation to the distinction between large and small companies, the Kingdom of the Netherlands submits that, according to the introductory sentence of Article 16(2) of the Mergers Directive, large companies employing more than 500 employees are subject to the rules concerning the European company, whilst only small companies which have no more than 500 employees are, in principle, subject to national law pursuant to Article 16(2)(a) or (b) of that directive.

28 The rationale of that distinction lies in the fact that the Mergers Directive, like European Union law in general, seeks to apply a less onerous system to small companies as opposed to large companies. It follows, according to the Kingdom of the Netherlands, that the application of national law mentioned at Article 16(2) of that directive must also imply a less onerous system than that provided for by the rules concerning the European company. However, the reading that the Commission makes of point (b) leads precisely to the opposite effect, in that stricter requirements are applicable to the participation system subject to national law than those applicable under the rules relating to the European company.

29 In those circumstances, the Kingdom of the Netherlands states that it follows from Articles 7 and 3(6) of the SE Directive, in conjunction with Article 16(3) of the Mergers Directive that the application of the rules relating to the European company may in fact lead to a restriction, and therefore a loss, of participation rights. Therefore, the Commission cannot submit that, if national law is applicable, there can be no loss of participation rights, which would imply that there is *de facto* no system which is less onerous for small companies.

30 Consequently, in so far as the distinction between large and small companies referred to at Article 16(2) of the Mergers Directive permits the fact that the application of national law may also lead to a loss of employee participation rights, there is no obligation to extend the participation rights to all employees, which reinforces the interpretation according to which Article 16(2)(a) and (b) includes an alternative.

Findings of the Court

31 The Kingdom of the Netherlands does not dispute having provided, in its national law, for two of the three exceptions specified at Article 16(2) of the Mergers Directive and not having included the third exception set out at point (b) of that provision. It is thus not disputed that Netherlands law does not provide for employees of establishments of the company resulting from a cross-border merger situated in other Member States the same entitlement to exercise participation rights as is enjoyed by employees employed in the Netherlands. That Member State is of the opinion, however, that the absence of such a provision is no obstacle to the application of Netherlands law on employee participation.

32 According to the Kingdom of the Netherlands, it follows from the use of the term 'or' that, where national law on employee participation rights provides for one of those two sets of circumstances, as Netherlands law does, that law is applicable. In other words, according to that Member State, it is sufficient that national law has provided for the circumstances specified at Article 16(2)(a) of the Mergers Directive 'or' those specified at point (b) of the same provision for it to be applicable.

33 According to the Commission, the term 'or', analysed in the context of Article 16(2) of the Mergers Directive must, conversely, be interpreted as meaning that where national law does not provide for one of the two sets of circumstances in question, it must be set aside.

34 It should be noted that the Commission's interpretation is supported by the wording of Article 16(3) of the Mergers Directive. Indeed, that provision states that, '[in] the cases referred to in paragraph 2', the particular rules that it specifies, which are those relating to the European company, must be applied. As Article 16(3) relates to all the cases referred to at Article 16(2), it follows that, according to a literal reading, it applies to each of them and, accordingly, that in each of the cases referred to, the national law must be set aside in favour of the rules relating to the European company.

35 The objective of the Mergers Directive as evidenced by the preamble and the *travaux préparatoires* thereto supports that interpretation.

36 In relation to the *travaux préparatoires*, it is appropriate to refer to the opinion of the Committee on Employment and Social Affairs of 16 March 2005 incorporating certain proposals for amendment. That Committee, on the one hand, submitted in its opinion that the Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital, of 18 November 2003 [COM(2003) 703 final], did not satisfactorily deal with the circumstances where national law, to which the company resulting from the merger is subject, offers a degree or a level of participation at variance with that enjoyed by the employees of at least one of the merging companies.

37 On the other hand, the Committee has pointed out that it was appropriate also to show concern for the protection of the participation rights of employees of a company merging in one Member State who, as a result of the merger, become employees of a new company registered in another Member State, where the legislation of that other State does not provide for employee participation outside the territory where that competence is exercised. Thus, the amendments proposed by that Committee were designed to cover those two problems not alternatively but rather cumulatively. Those amendments were included in the final version of the Mergers Directive specifically by means of points (a) and (b) of Article 16(2) thereof.

38 Recital 13 in the preamble to the Mergers Directive also reflects those two problems by referring to national legislation which does not provide for the same level of participation or the same rights for all the employees concerned by the merger.

39 It follows from Article 16(3) of the Mergers Directive, read in the light of recital 13, that, in those circumstances, the specific legislation which is applicable must use as a basis the principles and rules laid down by Regulation No 2157/2001 and by the SE Directive.

40 In that regard, the Commission quite rightly cites recital 18 in the preamble to the SE Directive under which it is a fundamental principle and the stated aim of that directive to secure employees' acquired rights as regards involvement in company decisions. That recital also states that '[e]mployee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the "before and after" principle)'.

41 It is apparent from the SE Directive that the securing of acquired rights sought by the European Union legislature implies not only the preservation of employees' acquired rights in the companies participating in the merger, but also the extension of those rights to all the employees concerned.

42 Point (b) of part 3 of the Annex to the SE Directive, inter alia, illustrates that finding. That provision concerns the appointment of the members of the European company's supervisory or administrative organ. It provides that the employees of that company, its subsidiaries and establishments and/or their representative body are to have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the company equal to the highest proportion in force in the participating companies concerned before registration of the company. That provision thus provides an alignment with the system most protective of employees from among the systems existing within the companies concerned.

43 In view of the European Union legislature's intention to protect employee participation rights both in circumstances governed by the rules relating to the European company and in those governed by national law, it must be held that, in national rules also, it is important not only for employee participation in the companies concerned by the merger to be preserved, in accordance with Article 16(2)(a) of the Mergers Directive, but also for the rights enjoyed by those employees employed in the Member State in which the company resulting from the cross-border merger has its registered office, in accordance with Article 16(2)(b) of that directive, to be extended to the other employees concerned by the merger employed in other Member States.

44 It therefore follows from the wording of Article 16(2) and (3) of the Mergers Directive and from the objective of those provisions that those rules relating to employee participation which may be in force in the Member State where the registered office of the company resulting from the merger is located will not apply if the national law applicable to that company does not cumulatively provide for both situations referred to at points (a) and (b) of Article 16(2).

45 The arguments of the Kingdom of the Netherlands based on Article 16(5) of the Mergers Directive or on an alleged difference in treatment between large and small companies cannot call into question that interpretation.

46 Article 16(5) of the Mergers Directive may refer to Member States 'choos[ing]' to do so, but that term in no way refers to a discretion left open to Member States to choose between the case set out at point (a) and that at point (b) of Article 16(2). That term refers to the case where the Member State has provided for the extension of employee rights referred to at Article 16(2)(b) of that directive. In order to establish if the threshold provided for at Article 16(5) of the Mergers Directive has been crossed, only employees employed in that Member State must be taken into account. It is not necessary to count the employees employed in other Member States. As is apparent from the opinion

mentioned at paragraph 36 above, the aim of the European Union legislature was to ensure a balance between the protection of the rights of employees employed in another Member State and the requirements of national provisions relating to workforce thresholds.

47 In relation to an alleged difference between large and small companies, the Commission asserts, correctly, that the Mergers Directive, and in particular Article 16 thereof in no way provides for the application of a participation system less onerous for small companies, under which employees employed in Member States other than that in which the company resulting from the merger is registered could be deprived on a long-term basis of their participation rights within that company.

48 It follows that the submissions of the Kingdom of the Netherlands relating to a possible loss of some participation rights that is found in the context of mergers involving large companies, must *a fortiori* be conceded in the context of mergers between small companies, which means implying that there is no obligation to extend the participation rights provided for in the Netherlands to employees in other Member States, must be dismissed.

49 In those circumstances, the Court finds that the action brought by the Commission is well founded.

50 Consequently, the Court finds that, by failing to adopt all the laws, regulations and administrative provisions necessary to ensure that the employees of establishments of a company resulting from a cross-border merger which has its registered office in the Netherlands, situated in other Member States enjoy participation rights identical to those enjoyed by the employees employed in the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under point (b) of Article 16(2) of the Mergers Directive.

Costs

51 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby:

1. **Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary to ensure that the employees of establishments of a company resulting from a cross-border merger which has its registered office in the Netherlands, situated in other Member States enjoy participation rights identical to those enjoyed by the employees employed in the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under point (b) of Article 16(2) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]