



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

11 September 2014*

(Reference for a preliminary ruling — Directive 2001/23/EC — Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses — Obligation on the transferee to maintain the terms and conditions agreed in a collective agreement until the entry into force of another collective agreement — Concept of collective agreement — National legislation providing that a rescinded collective agreement continues to have effect until the entry into force of another collective agreement)

In Case C-328/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 28 May 2013, received at the Court on 17 June 2013, in the proceedings

Österreichischer Gewerkschaftsbund

v

Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan, J. Malenovský, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Österreichischer Gewerkschaftsbund, by R. Gerlach, Rechtsanwalt,
- Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen, by K. Körber-Risak, Rechtsanwältin,
- the Germany Government, by T. Henze and K. Petersen, acting as Agents,
- the Greek Government, by E.-M. Mamouna and M. Tassopoulou, acting as Agents,
- the European Commission, by J. Enegren and F. Schatz, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 3 June 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(3) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).
- 2 The request was made in proceedings between the Österreichischer Gewerkschaftsbund (Austrian Confederation of Trade Unions; 'the Gewerkschaftsbund') and the Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen (Austrian Chamber of Commerce — sectoral federation of bus, air and boat transport; 'the Wirtschaftskammer') concerning the safeguarding, in the event of a transfer of business, of the effects of a rescinded collective agreement.

Law

European Union law

- 3 Article 3(3) of Directive 2001/23 provides:

'Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.'

Austrian law

- 4 Under Paragraph 8 of the Law governing employment relationships and the labour structure of undertakings (Arbeitsverfassungsgesetz, BGBl. 22/1974), as applicable to the facts at issue in the main proceedings ('the ArbVG'):

'Within the geographical, material and personal scope of a collective agreement, unless provision is made to the contrary, the following shall be parties:

1. Employers and employees who were parties to the agreement at the time of its adoption or became parties subsequently;
2. Employers to which an undertaking or part of an undertaking is transferred by one of the employers referred to in subparagraph 1.

...'

5 Paragraph 13 of the ArbVG provides:

‘The legal effects of the collective agreement shall continue after its termination in respect of employment relationships which were covered by it immediately before its termination unless a new collective agreement takes effect in respect of those employment relationships or a new individual agreement is concluded with the employees concerned.’

6 Paragraph 4(1) of the Law on the adaptation of the provisions governing contracts of employment (Arbeitsvertragsrechtsanpassungsgesetz, BGBl. 459/1993), as applicable to the facts of the main proceedings, provides:

‘Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. During the year following the transfer, the terms and conditions can neither be annulled nor restricted to the detriment of the worker in an individual employment contract.’

7 The referring court states that, in Austrian law, a collective agreement does not, in principle, become part of the employment contract, but has the same effect on that contract as a Law.

The dispute in the main proceedings and the questions referred

8 As is apparent from the order for reference, the Wirtschaftskammer is authorised to represent, for the purposes of signing collective agreements, the undertakings which are its members. In that context, the Gewerkschaftsbund and the Wirtschaftskammer concluded, for an undertaking belonging to a group of undertakings and forming part of the aviation sector (‘the parent company’), a collective agreement applicable to all airlines in that group, provided that their activity was not limited to regional transport (‘the parent company’s collective agreement’).

9 The Gewerkschaftsbund and the Wirtschaftskammer also concluded a specific collective agreement for a subsidiary of that group (‘the subsidiary’s collective agreement’).

10 On 30 April 2012, in order to make good operating losses, the parent company decided to transfer, with effect from 1 July 2012, its aviation activity to that subsidiary, by a transfer of business, so that the employees carrying out that activity would be subject to the conditions laid down in the subsidiary’s collective agreement, which were less advantageous than those of the parent company’s collective agreement. In that context, the Wirtschaftskammer rescinded that agreement with effect from 30 June 2012, the Gewerkschaftsbund then rescinding the subsidiary’s collective agreement with effect from the same date. Following those rescissions, the new employer of the employees concerned by the transfer of business, namely the subsidiary, applied internal rules adopted unilaterally, which gave rise to a consequent deterioration in the conditions of employment and a significant reduction in the remuneration of the employees concerned by the transfer of business.

11 Before the referring court, the Gewerkschaftsbund submits that, since that subsidiary was no longer subject to any collective agreement in force, the parent company’s collective agreement, which was rescinded, had to continue to apply to all the employees who were transferred, by application of the rule set out in Paragraph 13 of the ArbVG.

12 However, according to the Wirtschaftskammer, a collective agreement which has already been rescinded or has expired at the date of the transfer of business is not mandatorily imposed on the transferee. Only the collective agreement itself could continue to apply in the context of a transfer of business to the transferee.

- 13 The referring court states that the solution of the dispute before it depends on the answer to whether the rule maintaining the effects of collective agreements after their rescission, laid down in Paragraph 13 of the ArbVG, which seeks to remedy the absence of a collective agreement and to remove any interest in provoking a situation without such an agreement, constitutes a collective agreement within the meaning of Article 3(3) of Directive 2001/23. It adds that the existence, alleged by the Gewerkschaftsbund, of abusive conduct by the parent company cannot be assessed unless, in advance, the legal consequences of the transfer of business or the rescissions of the collective agreements were specified.
- 14 In those circumstances, the Oberster Gerichtshof (Supreme Court) has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Is the wording of Article 3(3) of Directive [2001/23], according to which the “terms and conditions” agreed in any collective agreement and applicable to the transferor must continue to be observed “on the same terms” until the “date of termination or expiry of the collective agreement”, to be interpreted as also covering terms and conditions laid down by a collective agreement which have continuing effect indefinitely under national law, despite the termination of the collective agreement, until another collective agreement takes effect or the employees concerned have concluded new individual agreements?
 2. Is Article 3(3) of Directive [2001/23] to be interpreted to the effect that “application of another collective agreement” of the transferee is to be understood as including the continuing effect of the likewise terminated collective agreement of the transferee in the abovementioned sense?

Consideration of the questions referred

Admissibility

- 15 The Wirtschaftskammer claims that the questions referred are inadmissible. Firstly, those questions do not raise any query concerning the interpretation or validity of EU law, but concern only national legal questions or questions of application of EU law.
- 16 Secondly, the questions referred are not relevant to the decision in the dispute because of a hypothetical factual situation, since the question referred concerning the possible existence of a transfer of business remains unclarified, and the proof of the loss of remuneration allegedly suffered by the employees concerned as a result of the transfer of business has not been adduced at the end of an adversarial procedure, during which the Wirtschaftskammer was heard by the referring court.
- 17 In that regard, it must be borne in mind that a request for a preliminary ruling made by a national court may be declared inadmissible only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or 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 (see, inter alia, judgment in *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 16 and the case-law cited).
- 18 With regard to the first argument raised by the Wirtschaftskammer, it is sufficient to note that, as emerges from their very wording, the questions referred concern the interpretation of EU law, in particular of Article 3(3) of Directive 2001/23.

- 19 As regards the second argument raised by the Wirtschaftskammer, it must be noted that the fact that the factual questions have not yet been dealt with in an evidential adversarial procedure is the result of the particular features of the procedure before the referring court. The Court has already ruled that, as such, those features do not render a question referred in that procedure inadmissible (see, to that effect, judgment in *Österreichischer Gewerkschaftsbund*, C-195/98, EU:C:2000:655, paragraph 29).
- 20 Accordingly, the questions referred for a preliminary ruling are admissible.

Substance

The first question

- 21 By its first question, the referring court asks, in essence, whether Article 3(3) of Directive 2001/23 must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before they were terminated, constitute ‘terms and conditions agreed in any collective agreement’ so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned.
- 22 In that regard, it must be borne in mind that Directive 2001/23 is intended to achieve only partial harmonisation in this area, essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria (see, inter alia, judgments in *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraph 37, and *Juuri*, C-396/07, EU:C:2008:656, paragraph 23).
- 23 In addition, Article 3(3) of Directive 2001/23 is intended to maintain not the application of a collective agreement as such but the ‘terms and conditions’ put into place by such an agreement.
- 24 Thus, as the Advocate General noted in point 41 of his Opinion, Article 3(3) of the directive requires the terms and conditions put in place by a collective agreement to continue to be observed, without the specific origin of their application being decisive.
- 25 It follows that the terms and conditions put in place by a collective agreement fall within, in principle, the scope of Article 3(3) of Directive 2001/23, irrespective of the method used to make those terms and conditions applicable to the persons concerned. In that regard, it is sufficient that such terms and conditions have been put in place by a collective agreement and effectively bind the transferor and the employees transferred.
- 26 Accordingly, terms and conditions laid down in a collective agreement cannot be regarded as being excluded from the scope of that provision on the sole ground that they apply to the persons concerned by virtue of a rule maintaining the effects of a collective agreement, such as that at issue in the main proceedings.
- 27 That interpretation is confirmed, in circumstances such as those at issue in the main proceedings, but the objective pursued by Directive 2001/23, which consists in preventing workers subject to a transfer from being placed in a less favourable position solely as a result of the transfer (see, to that effect, judgment in *Scattolon*, C-108/10, EU:C:2011:542, paragraph 75 and the case-law cited).
- 28 As the Advocate General noted in point 53 of his Opinion, the rule maintaining the effects of a collective agreement, such as that at issue in the main proceedings, is intended, in the interests of the employees, to avoid a sudden rupture of the standard framework of the agreement governing the

employment relationship. If the terms and conditions subject to that rule were excluded from the scope of Article 3(3) of Directive 2001/23, the transfer alone would have the effect which that rule seeks to avoid.

- 29 In addition, that interpretation complies with the objective of Directive 2001/23, which is to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other and from which it is clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, judgment in *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 25).
- 30 The rule maintaining the effects of a collective agreement, such as that at issue in the main proceedings, has limited effects, since it maintains only the legal effects of a collective agreement on the employment relationships directly subject to it before its rescission or a new individual agreement is concluded with the employees concerned. In those circumstances, it does not appear that such a rule hinders the transferee's ability to make the adjustments and changes necessary to carry on its operations.
- 31 Having regard to the foregoing, the answer to the first question is that Article 3(3) of Directive 2001/23 must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute 'terms and conditions agreed in any collective agreement' so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned.

The second question

- 32 By its second question, the referring court asks, in essence, whether Article 3(3) of Directive 2001/23 must be interpreted as meaning that the transferee's collective agreement, which was itself rescinded and the effects of which continue by way of a rule maintaining those effects, such as that at issue in the main proceedings, can be covered by the concept of 'application of another collective agreement' within the meaning of that provision.
- 33 Nevertheless, with regard to the terms and conditions agreed by the transferee's collective agreement, referred to by the referring court in its second question, it is not apparent from the file before the Court that those terms and conditions can apply to the transferred employees under the rule maintaining the effects of that collective agreement.
- 34 Accordingly, there is no need to answer the second question.

Costs

- 35 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:

Article 3(3) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their

effects as regards the employment relationship which was governed by them before the agreement was terminated, constitute ‘terms and conditions agreed in any collective agreement’ so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned.

[Signatures]