



Reports of Cases

Case C-706/22

Konzernbetriebsrat der O SE & Co. KG

v

Vorstand der O Holding SE

(Request for a preliminary ruling from the Bundesarbeitsgericht)

Judgment of the Court (Second Chamber) of 16 May 2024

(Reference for a preliminary ruling – European company – Regulation (EC) No 2157/2001 – Article 12(2) – Involvement of employees – Registration of the European company – Conditions – Prior implementation of the negotiation procedure on the involvement of employees referred to in Directive 2001/86/EC – European company which was established and registered without employees but which became the parent company of subsidiaries employing employees – No obligation to conduct a negotiation procedure retrospectively – Article 11 – Misuse of a European company – Deprivation of the rights of employees to employee involvement – Prohibition)

Social policy – European company – Involvement of employees – European company which was established and registered without employees but which became, after its registration, the parent company of subsidiaries employing employees – Negotiation procedure on the involvement of employees – No such negotiations before the registration of the company – No obligation to conduct a negotiation procedure retrospectively

(Council Regulation No 2157/2001, Art. 12(2); Council Directive 2001/86, Arts 3 to 7 and 11)

(see paragraphs 40, 46-51, 54-58, operative part)

Résumé

Ruling on a request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany) in the context of a dispute relating to negotiations on the involvement of employees in a European company ('an SE'), the Court of Justice holds that there is no obligation arising from the provisions of Regulation No 2157/2001¹ and of Directive 2001/86² for a holding SE, none of whose participating companies or their subsidiaries employ employees and which was registered without such negotiations having first been conducted, to open those negotiations at a later stage on the ground that it subsequently acquired control of subsidiaries in one or more Member States which employ employees.

¹ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

² 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).

On 28 March 2013, O Holding SE, formed³ by two companies established in the United Kingdom and Germany, which have no employees or subsidiaries⁴ employing employees, was registered in the companies register for England and Wales without any negotiations on the involvement of employees⁵ having taken place prior to that registration.

On 29 March 2013, O Holding SE became the sole shareholder of O Holding GmbH, which had its registered office in Hamburg (Germany) and a supervisory board, one third of which consisted of employee representatives. In June 2013, O Holding SE decided to convert O Holding GmbH into a limited partnership, called O KG. That change in legal form was registered in the companies register in September 2013 and, from that date, the involvement of the employees on the supervisory board came to an end. In addition, as from October 2017, O Holding SE moved its registered office to Hamburg.

Although O KG has around 816 employees and has subsidiaries in several Member States which employ a total of around 2 200 employees, its partners (O Holding SE, a limited partner, and O Management SE, a company with personal liability, with a registered office in Hamburg, whose sole shareholder is O Holding SE) do not have any employees.

Taking the view that the management of O Holding SE was obliged retrospectively to form a special negotiating body, since the latter had subsidiaries which had employees in several Member States, the group Works Council of O KG brought employment litigation proceedings. The referring court, before which the dispute was brought following the dismissal of that application, requests an interpretation by the Court of Article 12(2) of Regulation No 2157/2001,⁶ read in conjunction with Articles 3 to 7 of Directive 2001/86.⁷ It wonders whether there is an obligation arising from the provisions of Regulation No 2157/2001 and of Directive 2001/86 for an SE, none of whose participating companies or their subsidiaries employ employees and which was registered without negotiations on the involvement of employees having first been conducted, retrospectively to conduct such a negotiation procedure on the ground that that SE has acquired control of subsidiaries in several Member States which employ employees.

Findings of the Court

In the first place, the Court notes that it is apparent from a combined reading of Article 12(2) of Regulation No 2157/2001 and Article 3(1) to (3) of Directive 2001/86 that the negotiation procedure between the parties on arrangements for the involvement of employees in the SE with a view to concluding an agreement on those arrangements is, as a general rule, to be conducted during the formation of the SE and prior to its registration. In that context, the Court states that those provisions are not applicable to an SE already established, where the participating companies that established it did not, at the time of its establishment, employ employees and negotiations on the involvement of employees in the SE could not, therefore, be opened prior to its registration. In that regard, although Directive 2001/86 nevertheless provides for three situations

³ In accordance with Article 2(2) of Regulation No 2157/2001.

⁴ Within the meaning of Article 2(c) of Directive 2001/86.

⁵ As provided for in Articles 3 to 7 of Directive 2001/86.

⁶ Under Article 12(2) of Regulation No 2157/2001, 'an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.'

⁷ Articles 3 to 7 of Directive 2001/86 lay down the rules governing the negotiation procedure on the involvement of employees in an SE.

in which the negotiation procedure on the involvement of employees may be opened at a later stage, the wording of that directive does not require the subsequent implementation of that procedure within an SE already established.

In the second place, the Court observes, first of all, that it follows from Directive 2001/86⁸ that both the securing of acquired rights as regards employee involvement and the negotiations between the parties on the concrete procedures for that involvement relate to ‘the creation’ and to ‘the establishment’ of an SE. According to the Court, that conclusion does not support the view that the negotiation procedure on the involvement of employees is to be opened subsequently within an SE already established. Next, the Court notes that there is nothing in Regulation No 2157/2001⁹ to indicate that the provisions of Directive 2001/86 relating to the negotiation procedure on employee involvement are to be applied *mutatis mutandis* to an SE already established where the participating companies that established it have begun to carry on an economic activity and thus to employ employees after its establishment. Lastly, the Court also notes that Directive 2001/86 does not contain any provision which would give rise to an obligation to open negotiations on the involvement of employees or which would extend the guarantee of employees’ existing participation rights to situations in which structural changes are made to a holding SE already established by participating companies which do not employ employees, and do not have subsidiaries employing employees.

In the third and last place, ruling on the question whether an obligation to open a subsequent negotiation procedure within an SE already established might be required, pursuant to Article 11 of Directive 2001/86,¹⁰ in the case of misuse of an SE for the purpose of depriving employees of their rights to employee involvement, the Court states that that article leaves a margin of discretion to the Member States as regards the choice of appropriate measures to be taken in that respect, subject to compliance with EU law, and does not lay down, where an SE is in a situation such as that at issue in the main proceedings, an obligation subsequently to open that negotiation procedure.

⁸ And, in particular, from recitals 3 and 6 to 8 of Directive 2001/86.

⁹ And, in particular, in recitals 1 and 2 thereof.

¹⁰ Article 11 of Directive 2001/86, entitled ‘Misuse of procedures’, provides that Member States must take appropriate measures in conformity with EU law ‘with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights’.