Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 March 2015*

(Reference for a preliminary ruling — Rules on mergers of public limited liability companies — Directive 78/855/EEC — Merger by acquisition — Article 19 — Effects — Transfer of all the assets and liabilities of the company being acquired to the acquiring company — Infringement by the company being acquired prior to its acquisition — Administrative decision confirming infringement post-acquisition — National law — Transfer of the acquired company's liability for administrative offences — Lawfulness)

In Case C-343/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal do Trabalho de Leiria (Portugal), made by decision of 14 March 2013, received at the Court on 24 June 2013, in the proceedings

**Modelo Continente Hipermercados SA**

v

**Autoridade para as Condições de Trabalho — Centro Local do Lis (ACT),**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 September 2014,

after considering the observations submitted on behalf of:

— Modelo Continente Hipermercados SA, by D. Abrunhosa e Sousa, advogado,

— the Portuguese Government, by M. Perestrelo de Oliveira, and subsequently by L. Inez Fernandes and F. Figueiroa Quelhas, acting as Agents,

— the German Government, by T. Henze and D. Kuon, acting as Agents,

— the Hungarian Government, by K. Szíjjártó, acting as Agent,

* Language of the case: Portuguese.

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by P. Guerra e Andrade and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2014,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 19(1) of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), as amended by Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 259, p. 14) ('Directive 78/855').

2 The request has been made in proceedings between Modelo Continente Hipermercados SA ('MCH') and the Autoridade para as Condições de Trabalho — Centro Local do Lis (Authority for Working Conditions — Municipality of Lis) ('the ACT'), concerning the latter's decision to fine MCH for infringements of Portuguese employment law committed by Good and Cheap — Comércio Retalhista SA ('Good and Cheap') before being acquired by MCH.

### Legal context

*EU Law*

3 The third and sixth recitals in the preamble to Directive 78/855 stated:

'… the protection of the interests of members and third parties requires that the laws of the Member States relating to mergers of public limited liability companies be coordinated and … provision for mergers should be made in the laws of all the Member States.

...

… creditors, including debenture holders, and persons having other claims on the merging companies should be protected so that the merger does not adversely affect their interests.'

4 Article 3(1) of the Directive provided:

'For the purposes of this Directive, "merger by acquisition" shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.'

5 Article 13(1) and (2) of the Directive read as follows:

'1. The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

2. To that end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. 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 merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.'

6 Article 19(1) of Directive 78/855 stated:

'A merger shall have the following consequences ipso jure and simultaneously:

(a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

(b) the shareholders of the company being acquired become shareholders of the acquiring company;

(c) the company being acquired ceases to exist.'

7 Directive 78/855 was repealed as from 1 July 2011 by Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (JO 2011 L 110, p. 1). As is apparent from the first recital in its preamble, Directive 2011/35/EU seeks in the interests of clarity and consistency to codify Directive 78/855, which had been substantially amended several times. Article 19(1) of Directive 2011/35 reproduces Article 19(1) of Directive 78/855 in identical terms.

*Portuguese Law*

8 Article 112 of the Commercial Companies Code (Código das Sociedades Comerciais) ('the CSC') states:

'Upon registration of the merger in the commercial register:

(a) the companies being acquired or, in the case of incorporation of a new company, all the merged companies, shall be wound up and their rights and obligations transferred to the acquiring company or to the new company;

(b) the members of the liquidated companies shall become members of the acquiring company or of the new company.'

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

9 On 15 February 2011, the ACT conducted an inspection of the records of hours of work performed by Good and Cheap's workers during the months December 2010 and January 2011. It found that Good and Cheap had infringed certain provisions of Portuguese employment law concerning both the number of uninterrupted hours worked by certain workers and the minimum number of hours of rest between two consecutive work periods in certain cases.

10 According to the documents before the Court, MCH and Good and Cheap registered the draft terms of their merger at the relevant office of the Commercial Registry on 22 February 2011, which were published on the Portuguese Ministry of Justice's publications website.

11 On 7 March 2011, the ACT drew up two official reports against Good and Cheap in relation to the infringements. However, the ACT did not notify Good and Cheap of those reports until 4 April 2011.

12 On 31 March 2011, the merger of Good and Cheap and MCH by way of the latter's acquisition of the former's assets and liabilities was registered and, having been absorbed by MCH, Good and Cheap was consequently wound up.

13 In a decision of 24 September 2012, the ACT confirmed the initial findings and fined MCH for each of the administrative offences committed.

14 In its appeal against the ACT's decision before the Tribunal do Trabalho de Leiria, MCH raised the issue of the compatibility of Article 112 of the CSC, as interpreted by the ACT, with Article 19 of Directive 2011/35. In that regard, the Tribunal do Trabalho de Leiria asks whether, in the case of merger by acquisition, the transfer to the acquiring company of all the assets and liabilities of the company being acquired as laid down in Article 19(1)(a) of that directive can include the transfer to the acquiring company of liability to pay fines for administrative offences committed by the acquired company prior to its acquisition.

15 In those circumstances, the Tribunal do Trabalho de Leiria decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of [EU] law and, in particular, [Article 19(1)(a) of Directive 2011/35], does the merger by acquisition of companies entail a system of transfer of liability for administrative offences to the acquiring company for acts committed by the company being acquired before registration of the merger?

(2) For the purposes of the application of Directive 2011/35, can a fine for an administrative offence be considered a liability owed to a third party, namely one owed to the State for the infringement of provisions of employment law, whereby, as a fine for the commission of an administrative offence, the liability at issue owed to the State would be transferred to the acquiring company?

(3) By constituting too broad an interpretation, contrary to the principles of EU law and, in particular, Article 19 of the Directive, is not an interpretation of Article 112 of the Commercial Companies Code according to which neither proceedings to prosecute an administrative offence committed before the merger are discontinued nor a fine imposed or to be imposed lifted contrary to the consequences of a company merger laid down in Directive 2011/35?

(4) Does that interpretation not offend against the principle that an administrative offence cannot be committed by the acquiring company without an express provision for (mitigated) strict liability or fault on the acquiring company's part?'

## Consideration of the questions referred

### *Admissibility*

16 In their written observations to the Court, the German and the Austrian Governments express doubts as to the admissibility of some of the questions posed by the national court. The German Government considers that the third and fourth questions concern an interpretation of national law. For its part, the

Austrian Government submits that the second question relates to a situation in which, contrary to the facts of the case in the main proceedings, the fine has already been imposed prior to the merger and that it is, thus, hypothetical in nature. Moreover, it submits that the issue of criminal liability raised in the fourth question is not governed by Directive 2011/35 and does not therefore present any connection with EU law as required by Article 51 of the Charter of Fundamental Rights of the European Union.

17 In that regard, the Court notes, first, that although it is clear from the facts of the main proceedings as set out by the national court that the fines were imposed as a result of a decision adopted after the acquisition of Good and Cheap by MCH, it does not, however, follow from the wording of the second question referred that that question does not relate to a case such as that at issue in the main proceedings. Consequently, the second question cannot be regarded as being hypothetical.

18 Secondly, rather than seeking an interpretation of national law, by its third question the national court manifestly seeks an interpretation of Directive 2011/35, in particular Article 19 thereof, in order to establish whether the interpretation of Article 112 of the CSC adopted, in particular, by the ACT is contrary to EU law.

19 Finally, as the Advocate General observed in point 34 of his Opinion, the fourth question appears to relate to an interpretation of principles of Portuguese law and lacks any reference to EU law. It should be noted that, according to settled case-law, the procedure laid down in Article 267 TFEU is based on a clear separation of functions between the courts and tribunals of the Member States and the Court of Justice. The Court is empowered to rule only on the interpretation or the validity of the acts of EU law referred to in Article 267 TFEU. In that context, it is not for the Court to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of them is correct (see judgment in *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 28 and the case-law cited).

20 It follows that, with the exception of the fourth question, the questions referred by the national court are admissible.

*Substance*

21 As a preliminary matter, the Court points out that Directive 2011/35, an interpretation of which is sought by the first three questions, was not in force at the time of the facts of the case in the main proceedings. In those circumstances, the questions referred must be examined solely on the basis of Directive 78/855.

22 Accordingly, by the first three questions referred, which it is appropriate to examine together, the national court seeks, in essence, to ascertain whether Article 19(1) of Directive 78/855 must be interpreted as meaning that a 'merger by acquisition' within the meaning of Article 3(1) of the directive results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for employment law offences committed by the acquired company prior to that merger.

23 In accordance with Article 19(1)(a) of Directive 78/855, merger by acquisition results ipso jure in the transfer to the acquiring company of all the assets and liabilities of the company being acquired.

24 In order to answer the questions referred by the national court, it is thus necessary to examine whether the liability of a company resulting from the commission of an administrative offence, namely the obligation to pay a fine imposed after the company's acquisition for offences committed prior to its merger by acquisition, must be considered as a liability of the company within the meaning of Article 19(1)(a) of the directive.

25 It is common ground among the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union which made submissions before the Court on this issue that a fine imposed by final decision prior to, but not paid at the time of, a merger by acquisition of two companies is a liability of the acquired company in so far as the amount of such a fine must be considered as a debt, payable by the company to the relevant Member State. However, in relation to the facts of the case in the main proceedings, which concern a fine which was imposed only after the merger of the two companies at issue in the main proceedings, only the Portuguese and Hungarian Governments and the European Commission take the view that the obligation to pay such a fine forms part of the liabilities of the company being acquired, whereas MCH and the German Government argue to the contrary.

26 In that regard, the notion of 'assets and liabilities', as referred to, in particular, in Article 19(1)(a) of Directive 78/855, is not defined by the directive itself. Nor does that article make any reference to the laws of the Member States as regards such a definition.

27 However, in accordance with settled case-law, the need for a 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, which must take into account the context of that provision and the purpose of the legislation in question (see, inter alia, judgments in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 42, and *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 14).

28 As for the context in which the notion of 'liabilities' is used, Article 19(1) of Directive 78/855 lays down that a merger by acquisition results ipso jure, and thus automatically, not only in the transfer of the assets and liabilities of the company being acquired to the acquiring company, but also, in accordance with Article 19(1)(c), in the company being acquired ceasing to exist. As a consequence, the liability for an administrative offence would be extinguished if it were not transferred to the acquiring company as part of the liabilities of the company being acquired.

29 As the Advocate General observed in point 61 of his Opinion, extinguishing such a liability would run contrary to the very notion of merger by acquisition as defined in Article 3(1) of Directive 78/855 to the extent that, in accordance with that provision, such an acquisition consists in the transfer to the acquiring company of all the acquired company's assets and liabilities as a result of the latter being wound up without going into liquidation.

30 This interpretation of the notion of liabilities is consistent with the purpose of Directive 78/855. In that regard, the third recital in the preamble to the directive states that the coordination of the laws of the Member States relating to mergers of public limited liability companies by the introduction into the Member States' laws of the legal institution of mergers aims notably at protecting the interests of members and third parties upon merger by acquisition.

31 The notion of third parties is broader than that of 'creditors, including debenture holders, and persons having other claims on the merging companies' contained in the sixth recital in the preamble to Directive 78/855, specific provisions having been put in place to protect those creditors and debenture holders, notably in Articles 13 to 15 Directive 78/855.

32 It is therefore necessary to consider as third parties, whose interests the directive is intended to protect, those entities which though not yet creditors or debenture holders at the date of the acquisition may become such post-acquisition as a result of situations antedating the acquisition. This is the case, for instance, for infringements of employment law provisions which are found to have been committed in a decision adopted after the merger by acquisition had taken place. If liability for the payment of a fine

for administrative offences committed by the company being acquired were not transferred to the acquiring company, the interest of the Member State the competent authorities of which have imposed the fine would not be protected.

33 In that context, it should be noted, as the Portuguese and Hungarian Governments and the European Commission have submitted, that if such liability were not transferred, a company could use a merger by acquisition as a means of escaping the legal consequences of offences it has committed to the detriment of the Member State concerned or other potential interested parties.

34 That conclusion is not called into question by MCH's argument that, in the case of a merger, the transfer of an acquired company's liability for an administrative offence would prejudice the interests of the creditors and shareholders of the acquiring company, since the creditors and shareholders of the acquiring company would not be able to evaluate the economic consequences of that merger, nor its effect upon the acquiring company's assets and liabilities. First of all, such creditors are, in accordance with Article 13(2) of Directive 78/855, entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and, where appropriate, are authorised to apply to the appropriate administrative or judicial authority in order to obtain such safeguards. Secondly, as the Advocate General observed in point 61 of his Opinion, the shareholders of the acquiring company can be protected notably through the inclusion of terms of disclosure and warranties in the acquisition agreement. Thirdly, in addition to the documents and information available in accordance with the relevant legislative provisions, an acquiring company is not precluded from conducting a detailed audit of the economic and legal situation of the company to be acquired before the merger by acquisition in order to obtain a more complete picture of that company's liabilities.

35 Consequently, the answer to the first three questions referred is that Article 19(1) of Directive 78/855 must be interpreted as meaning that a 'merger by acquisition' in Article 3(1) of the directive results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements of employment law committed by the acquired company prior to that merger.

## 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 (Fifth Chamber) hereby rules:

**Article 19(1) of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, as amended by Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009, must be interpreted as meaning that a 'merger by acquisition' in Article 3(1) of the directive results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements of employment law committed by the acquired company prior to that merger.**

[Signatures]