Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 October 2022*

(Reference for a preliminary ruling – Social policy – European company – Directive 2001/86/EC – Involvement of employees in decision-making within the European company – Article 4(4) – European company established by means of transformation – Content of the negotiated agreement – Election of employees' representatives as members of the Supervisory Board – Election procedure providing for a separate ballot in respect of the trade union representatives)

In Case C-677/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 18 August 2020, received at the Court on 11 December 2020, in the proceedings

Industriegewerkschaft Metall (IG Metall),

ver.di – Vereinte Dienstleistungsgewerkschaft

v

SAP SE,

SE-Betriebsrat der SAP SE,

interested parties:

Konzernbetriebsrat der SAP SE,

Deutscher Bankangestellten-Verband eV,

Christliche Gewerkschaft Metall (CGM),

Verband angestellter Akademiker und leitender Angestellter der chemischen Industrie eV,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, E. Regan, P.G. Xuereb, L.S. Rossi, D. Gratsias, and M.L. Arastey Sahún, Presidents of Chambers, S. Rodin, F. Biltgen (Rapporteur), N. Piçarra, N. Wahl, I. Ziemele and J. Passer, Judges,

* Language of the case: German.

Advocate General: J. Richard de la Tour,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 7 February 2022,

after considering the observations submitted on behalf of:

– Industriegewerkschaft Metall (IG Metall) and ver.di – Vereinte Dienstleistungsgewerkschaft, by S. Birte Carlson, Rechtsanwältin,

– SAP SE, by K. Häferer-Duttiné, P. Matzke and A. Schulz, Rechtsanwälte,

– Konzernbetriebsrat der SAP SE, by H.-D. Wohlfarth, Rechtsanwalt,

– Christliche Gewerkschaft Metall (CGM), by G. Gerhardt, Prozessbevollmächtigter,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the Luxembourg Government, by A. Rodesch, avocat,

– the European Commission, by G. Braun and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(4) of 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).

2 The request has been made in proceedings between, on the one hand, Industriegewerkschaft Metall (IG Metall) and ver.di – Vereinte Dienstleistungsgewerkschaft, two trade unions, and, on the other, SAP SE, a European company (SE), and SE-Betriebsrat der SAP SE, SAP's works council, concerning the agreement on arrangements for the involvement of employees within SAP.

Legal context

European Union law

3 Recitals 3, 5, 10, 15 and 18 of Directive 2001/86 state:

‘(3) In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. This objective should be pursued through the establishment of a set of rules in this field, supplementing the provisions of [Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1)].

…

(5) The great diversity of rules and practices existing in the Member States as regards the manner in which employees’ representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE.

…

(10) The voting rules within the special body representing the employees for negotiation purposes, in particular when concluding agreements providing for a level of participation lower than the one existing within one or more of the participating companies, should be proportionate to the risk of disappearance or reduction of existing systems and practices of participation. That risk is greater in the case of an SE established by way of transformation or merger than by way of creating a holding company or a common subsidiary.

…

(15) This Directive should not affect other existing rights regarding involvement and need not affect other existing representation structures, provided for by Community and national laws and practices.

…

(18) It is a fundamental principle and stated aim of this Directive to secure employees’ acquired rights as regards involvement in company decisions. Employee 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). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.’

4 Article 1 of that directive provides:

‘1. This Directive governs the involvement of employees in the affairs of European public limited-liability companies …, as referred to in Regulation [No 2157/2001].

2. To this end, arrangements for the involvement of employees shall be established in every SE in accordance with the negotiating procedure referred to in Articles 3 to 6 or, under the circumstances specified in Article 7, in accordance with the Annex.'

5 Under Article 2 of that directive, entitled 'Definitions':

'For the purposes of this Directive:

…

(e) "employees' representatives" means the employees' representatives provided for by national law and/or practice;

(f) "representative body" means the body representative of the employees set up by the agreements referred to in Article 4 or in accordance with the provisions of the Annex, with the purpose of informing and consulting the employees of an SE and its subsidiaries and establishments situated in the Community and, where applicable, of exercising participation rights in relation to the SE;

(g) "special negotiating body" means the body established in accordance with Article 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE;

(h) "involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company;

(i) "information" means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE;

(j) "consultation" means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;

(k) "participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

– the right to elect or appoint some of the members of the company's supervisory or administrative organ, or

– the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.'

6 Article 3 of that directive, set out in Section II thereof, which is entitled 'Negotiating procedure', provides:

'1. Where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE, take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

2. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created in accordance with the following provisions:

…

(b) Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories. They shall take the necessary measures to ensure that, as far as possible, such members shall include at least one member representing each participating company which has employees in the Member State concerned. Such measures must not increase the overall number of members.

Member States may provide that such members may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment.

…

3. The special negotiating body and the competent organs of the participating companies shall determine, by written agreement, arrangements for the involvement of employees within the SE.

…'

7 Article 4 of Directive 2001/86, relating to the content of the agreement on arrangements for the involvement of employees within the SE, provides, in paragraph 2(g) and paragraphs (3) and (4) thereof:

'2. Without prejudice to the autonomy of the parties, and subject to paragraph 4, the agreement referred to in paragraph 1 between the competent organs of the participating companies and the special negotiating body shall specify:

…

(g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights;

…

3. The agreement shall not, unless provision is made otherwise therein, be subject to the standard rules referred to in the Annex.

4. Without prejudice to Article 13(3)(a), in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.'

8 Article 7(1) of that directive states:

'In order to achieve the objective described in Article 1, Member States shall, without prejudice to paragraph 3 below, lay down standard rules on employee involvement which must satisfy the provisions set out in the Annex.

…'

9 Under Article 11 of that directive:

'Member States shall take appropriate measures in conformity with Community 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.'

10 Article 13(3)(a) of that directive provides:

'This Directive shall not prejudice:

(a) the existing rights to involvement of employees provided for by national legislation and/or practice in the Member States as enjoyed by employees of the SE and its subsidiaries and establishments, other than participation in the bodies of the SE'.

11 The annex to Directive 2001/86 contains the standard rules referred to in Article 7 of that directive.

German law

The MitbestG

12 Paragraph 7 of the Gesetz über die Mitbestimmung der Arbeitnehmer (Law on Employee Participation) of 4 May 1976 (BGBl. 1976 I, p. 1153), as amended by the Law of 24 April 2015 (BGBl. 2015 I, p. 642) ('the MitbestG'), provides:

'(1) The Supervisory Board of an undertaking,

1. with normally no more than 10 000 employees shall be composed of six members representing the shareholders and six members representing the employees;

2. with normally more than 10 000 employees, but no more than 20 000, shall be composed of eight members representing the shareholders and eight members representing the employees;

3. with normally more than 20 000 employees shall be composed of 10 members representing the shareholders and 10 members representing the employees.

…

(2) The members of the Supervisory Board representing the employees must include

1. in a supervisory board with six employees' representatives, four employees of the undertaking and two trade union representatives;

2. in a supervisory board with eight employees' representatives, six employees of the undertaking and two trade union representatives;

3. in a supervisory board with 10 employees' representatives, seven employees of the undertaking and three trade union representatives.

…

(5) The trade unions referred to in subparagraph 2 must be represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertaking's Supervisory Board members in accordance with this law.'

13 As regards the election of the trade union representatives to the Supervisory Board, Paragraph 16 of that law provides:

'(1) The delegates shall elect the Supervisory Board members responsible for representing the trade unions in accordance with Paragraph 7(2) by secret ballot and in accordance with the principles of a proportional ballot …

(2) The election shall be held on the basis of nominations from the trade unions represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertaking's Supervisory Board members in accordance with this law. …'

The SEBG

14 Paragraph 2 of the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company) of 22 December 2004 (BGBl. 2004 I, p. 3675, 3686), in the version in force since 1 March 2020 ('the SEBG'), states:

'…

(8) "Involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

…

(12) "Participation" means the influence of employees on the affairs of a company by way of

1. the right to elect or appoint some of the members of the company's supervisory or administrative organ, or

2. the right to recommend or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.'

15 Paragraph 21 of that law provides:

'…

(3) In the event that the parties conclude an agreement on participation, its content must be specified. In particular, the following should be agreed:

1. the number of members of the supervisory or administrative organ of the SE whom the employees are able to elect or appoint or whose appointment they are able to recommend or oppose;

2. the procedure by which the employees are able to elect or appoint these members or to recommend or oppose their appointment; and

3. the rights of these members.

…

(6) Without prejudice to the relationship of this Law to other provisions on employee participation within the undertaking, in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE. This applies also where the organisational structure is changed from a two-tier to a one-tier board and vice versa.'

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

16 Before being transformed into an SE, SAP had the legal form of a public limited-liability company governed by German law and had, in accordance with the national legislation, a supervisory board consisting of eight members representing the shareholders and eight members representing the employees; the latter comprised six employees of the undertaking and two trade union representatives. The two trade union representatives had, pursuant to Paragraph 16(2) of the MitbestG, been nominated by the trade unions represented within the group of companies to which SAP belongs and had been elected on the basis of a ballot that was separate from that established for the election of the other six Supervisory Board members representing the employees.

17 Since 2014, when it was transformed into an SE, SAP has had a supervisory board consisting of 18 members. In accordance with the agreement on arrangements for the involvement of employees within SAP, concluded between SAP and the special negotiating body established within it ('the involvement agreement'), nine of the members of the Supervisory Board are employees' representatives. That involvement agreement lays down, inter alia, the arrangements for appointing employees' representatives and states, in that regard, that the trade unions

represented within the group to which SAP belongs have an exclusive right to nominate candidates for some of the seats for representatives of the employees employed in Germany, the election of those candidates by the employees being the subject of a ballot that is separate from that on the basis of which the other employees' representatives are elected.

18 The involvement agreement also contains rules on the establishment of a supervisory board reduced to 12 members ('the reduced Supervisory Board'), six of whom are to be employees' representatives. The employees' representatives in the first four seats allotted to the Federal Republic of Germany are to be elected by the employees employed in Germany. The trade unions represented within the group of companies to which SAP belongs may nominate candidates for a portion of the seats allotted to the Federal Republic of Germany, but no ballot that is separate from that on the basis of which the other employees' representatives are elected is envisaged for the election of those candidates.

19 The appellants in the main proceedings unsuccessfully challenged, both at first instance and on appeal, the rules of the involvement agreement relating to the appointment of employees' representatives within the reduced Supervisory Board. They subsequently lodged an appeal on a point of law with the Bundesarbeitsgericht (Federal Labour Court, Germany), claiming that those rules are contrary to Paragraph 21(6) of the SEBG and should therefore be annulled, on the ground that they do not provide for an exclusive right of nomination on the part of the trade unions, namely, a right guaranteed by separate ballot, in respect of a certain number of employees' representatives on the reduced Supervisory Board.

20 SAP submits, for its part, that the exclusive right of trade unions to nominate candidates for election as employees' representatives to the reduced Supervisory Board, provided for in Paragraph 7(2) of the MitbestG, read in conjunction with Paragraph 16(2) thereof, is not covered by Paragraph 21(6) of the SEBG.

21 The referring court considers that, on the basis of national law alone, the claim of the appellants in the main proceedings for annulment of the rules of the involvement agreement relating to the appointment of employees' representatives to the reduced Supervisory Board should be upheld. The first sentence of Paragraph 21(6) of the SEBG, in its view, requires the parties to the involvement agreement to ensure, when an SE is established by means of transformation, that the elements of a procedure for the involvement of employees, within the meaning of Paragraph 2(8) of the SEBG, that characterise the employees' influence on decision-making within a company, continue to exist to the same extent in the SE to be established. Thus, first of all, those elements must be determined in the light of the relevant national law, depending in each case on the procedures for the involvement of employees already in place in the public limited-liability company to be transformed, for the purposes of Paragraph 2(8) of the SEBG. Next, the elements that characterise the employees' influence on decision-making within a company should continue to exist to the same extent in the SE to be established. While the first sentence of Paragraph 21(6) of the SEBG does not require that the procedures and the legal situation in the company to be transformed be preserved in full, the procedural elements that decisively characterise the influence of employees' representatives on decision-making within the company to be transformed should be guaranteed qualitatively, to the same extent, in the agreement on the involvement of employees applicable to the SE. In accordance with national law, the holding of a separate ballot for the election of candidates nominated by the trade unions as employees' representatives to the reduced Supervisory Board has the aim precisely of strengthening the influence of employees' representatives on decision-making within a company,

by ensuring that those representatives include persons who are highly familiar with the circumstances and requirements of the undertaking, while at the same time having external expertise.

22 According to the referring court, in the present case, the rules of the involvement agreement relating to the appointment of employees' representatives within the reduced Supervisory Board do not comply with the requirements of Paragraph 21(6) of the SEBG since, while conferring on the trade unions represented within the group of companies to which SAP belongs the right to nominate candidates for election as members of that Supervisory Board who represent the employees, they do not provide for a separate ballot for the election of those members and therefore do not guarantee that the employees' representatives within that Supervisory Board will actually include a trade union representative.

23 Nevertheless, the referring court has doubts as to whether Article 4(4) of Directive 2001/86 provides a level of uniform protection that is different from and lower than that provided for under German law and which applies, as the case may be, to all the Member States. If so, it is required to interpret Paragraph 21(6) of the SEBG in a manner consistent with EU law.

24 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court,) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Paragraph 21(6) of the [SEBG], which determines that, in the case where an [SE] with its registered office in Germany is established by means of transformation, a separate selection procedure for persons nominated by trade unions for a certain number of Supervisory Board members representing the employees must be guaranteed, compatible with Article 4(4) of [Directive 2001/86]?'

Consideration of the question referred

The subject matter of the question referred for a preliminary ruling

25 SAP submits that it is appropriate, as a preliminary point, to examine the validity of Article 4(4) of Directive 2001/86 and to answer the question whether, by requiring the adoption, in the employee involvement agreement, of stricter rules in the case of the establishment of an SE by means of transformation than in the case of the establishment of such a company by another of the means referred to in recital 10 of that directive, that provision is compatible with primary law, in particular with the first sentence of the first paragraph of Article 49 TFEU, the first paragraph of Article 54 TFEU, and Articles 16, 17 and 20 of the Charter of Fundamental Rights of the European Union.

26 In that regard, it should be borne in mind that, according to the case-law of the Court, it is for the national courts alone, which are seised of the case and which are responsible for the judgment to be delivered, to determine, in view of the special features 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 put to the Court (see, inter alia, judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 30 and the case-law cited).

27 In the present case, the subject matter of the question referred for a preliminary ruling is the interpretation of Article 4(4) of Directive 2001/86, the referring court not having expressed any doubts as to the validity of that provision.

28 Furthermore, according to settled case-law, Article 267 TFEU does not make available a means of redress to the parties to a case pending before a national court, with the result that the Court cannot be compelled to evaluate the validity of EU law on the sole ground that that question has been put before it by one of the parties in its written observations (judgments of 5 May 2011, *MSD Sharp & Dohme*, C-316/09, EU:C:2011:275, paragraph 23 and the case-law cited, and of 17 December 2015, *APEX*, C-371/14, EU:C:2015:828, paragraph 37).

29 It follows that there is no need, in the present case, for the Court to rule on the validity of Article 4(4) of Directive 2001/86.

The interpretation of Article 4(4) of Directive 2001/86

30 By its question, the referring court asks, in essence, whether Article 4(4) of Directive 2001/86 must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable law requires such a separate ballot as regards the composition of the Supervisory Board of a company to be transformed into an SE.

31 In that regard, according to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 38 and the case-law cited).

32 As regards, in the first place, the wording of Article 4(4) of Directive 2001/86, that paragraph provides that, without prejudice to Article 13(3)(a) of that directive, in the case of an SE established by means of transformation, the agreement on arrangements for the involvement of the employees applicable to that SE is to provide 'for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.'

33 As regards the phrase 'all elements of … involvement' in that provision, it should be noted that Directive 2001/86 defines, in Article 2(h) thereof, 'involvement of employees' as covering 'any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company'. It must also be noted that the concept of 'participation' is defined in Article 2(k) of that directive as 'the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company' by way of 'the right to elect or appoint some of the members of the company's supervisory or administrative organ' or 'the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ'.

34 Thus, first, it follows from those definitions that 'participation' is, as such, a mechanism by which the employees' representatives may exercise an influence on the decisions to be taken within the company, by exercising either their right to elect or appoint some of the members of the company's supervisory or administrative organ or their right to recommend or oppose that

appointment. Having regard to the phrase 'all elements' used in Article 4(4) of Directive 2001/86, it must therefore be stated that all the elements that characterise the method of participation in question, and that are such as to enable the body representative of the employees or their representatives to exercise an influence on the affairs of the company, such as, in particular, the arrangements for exercising the abovementioned rights of election, appointment, recommendation or opposition, must be taken into account in an agreement concerning an SE established by means of transformation.

35 Second, those definitions make reference to the concept of 'employees' representatives', which, in accordance with Article 2(e) of Directive 2001/86, refers to 'the employees' representatives provided for by national law and/or practice'. It must therefore be found that the EU legislature did not define that concept but merely referred in that regard to national laws and/or practices.

36 The same finding must be made with regard to the phrase 'at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE', set out in Article 4(4) of that directive.

37 Inasmuch as it makes reference to the level of involvement in the company prior to its transformation into an SE, that phrase refers clearly to the national law and/or practice in the Member State in which that company has its registered office, that is to say, in the present case, German law. It follows that it is for the parties to the agreement on arrangements for the involvement of employees within the SE to verify that the level of employee involvement provided for therein is, for all elements of that involvement, at least the same as that laid down by that law.

38 The analysis of the wording of Article 4(4) of Directive 2001/86 thus already makes apparent that the EU legislature referred, in respect of the definition of employees' representatives and the level of involvement of employees that must be preserved, to at least the same extent, in the case of an SE being established by means of transformation, to the national law and/or practice of the Member State in which the company to be transformed into an SE has its registered office. Thus, as regards in particular the participation, it is necessary, in order to determine both the persons empowered to represent the employees and the elements that characterise the participation enabling those employees' representatives to exercise an influence on the decisions to be taken within the company, owing to the exercise of the rights referred to in Article 2(k) of that directive, to refer to the assessments made in that regard by the national legislature and to the relevant national practice. Moreover, as is apparent from recital 5 of Directive 2001/86, the EU legislature specifically took the view that the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies made it inadvisable to set up a single European model of employee involvement applicable to the SE.

39 It follows that if a procedural element established by national law, such as, in the present case, the separate ballot for the election of candidates nominated by trade unions to a defined number of seats on a company's Supervisory Board, as employees' representatives within that board, constitutes an element that characterises the national system of participation of employees' representatives, introduced with a view to strengthening employee participation in the undertaking, and if that legislation makes it, as in the present case, mandatory in nature, that procedural element must be regarded as forming part of 'all elements of employee involvement'

within the meaning of Article 4(4) of Directive 2001/86. That procedural element must thus be taken into account for the purposes of the agreement on the arrangements for involvement referred to in that provision.

40 As regards, in the second place, the context of Article 4(4) of Directive 2001/86, this bears out the literal interpretation of that provision, in the sense that the EU legislature sought to reserve special treatment to SEs established by means of transformation in order to ensure that the rights as regards involvement enjoyed by employees of the company which is to be transformed into an SE under national law and/or practice are not undermined.

41 Thus, first of all, Article 4(2) of that directive lists the various elements that the agreement on arrangements for the involvement of employees within the SE must contain, including, if applicable, the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how those members may be elected, appointed, recommended or opposed by the employees, and their rights. That provision states that it applies 'subject to paragraph 4' of that article, with the result that that latter paragraph cannot be regarded as a derogating provision that must be interpreted strictly.

42 Next, it is apparent from recital 10 of that directive that the EU legislature considered that, in the case of the establishment of an SE, in particular by means of transformation, there is an increased risk of the disappearance or reduction of existing systems and practices of participation.

43 The literal interpretation of Article 4(4) of Directive 2001/86, set out in paragraph 39 of this judgment, is, in the third place, consistent with the objective pursued by that directive. According to recital 18 of that directive, 'it is a fundamental principle and stated aim of [that directive] to secure employees' acquired rights as regards involvement in company decisions'. That recital also states that 'employee 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)'. It is thus apparent from Directive 2001/86 that the securing of acquired rights sought by the EU legislature implies not only the preservation of employees' acquired rights in the company to be transformed into an SE, but also the extension of those rights to all the employees of the SE (see, to that effect, judgment of 20 June 2013, *Commission* v *Netherlands*, C-635/11, EU:C:2013:408, paragraphs 40 and 41).

44 It must be added, as is also apparent from recitals 10 and 15 of Directive 2001/86 and from Article 11 of that directive, that the EU legislature sought to eliminate the risk that the establishment of an SE, in particular by means of transformation, might lead to a reduction, or even a disappearance, of the rights regarding involvement that the employees of the company to be transformed into an SE enjoyed under national law and/or practice.

45 Lastly, in the fourth place, the literal, contextual and teleological interpretation of Article 4(4) of Directive 2001/86 which follows from paragraphs 32 to 44 of this judgment is further borne out by the origins of that directive. First, as all the parties which submitted observations have stated and as is apparent from the final report of the Group of Experts on 'European Systems of Worker Involvement' (Davignon Report) of May 1997 (C4-0455/97), the system applicable to an SE established by means of transformation was, during the negotiations with a view to the adoption of Directive 2001/86, the main point of controversy. Concerns had been expressed in that regard, inter alia by the German Government, as to the risk that the establishment of an SE by means of transformation might result in a reduction in the level of involvement of the employees of the

company to be transformed. It was only with the introduction of a provision covering specifically the case of the establishment of an SE by means of transformation and ensuring that such establishment does not lead to a weakening of the level of employee involvement in the company to be transformed – a provision ultimately reproduced in Article 4(4) of Directive 2001/86 – that the process of adoption of that directive was able to continue.

46 In the light of the foregoing, Article 4(4) of Directive 2001/86 must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE.

47 Accordingly, in the present case, it is in the light of the German law as it applied to SAP before it was transformed into an SE, in particular Paragraph 7(2) of the MitbestG, read in conjunction with Paragraph 16(2) thereof, that it is necessary to assess whether the involvement agreement ensures at least the same level of employee involvement in decision-making within that company after its transformation into an SE.

48 It must also be pointed out that, as stated in paragraph 43 of this judgment, in so far as the securing of acquired rights sought by the EU legislature implies not only the preservation of employees' acquired rights in the company to be transformed into an SE, but also the extension of those rights to all employees of the SE, all employees of the SE established by means of transformation must enjoy the same rights as those which the employees of the company to be transformed into an SE enjoyed.

49 It follows that, in the present case, all employees of SAP must be able to avail of the electoral procedure laid down by German law, even in the absence of any indication to that effect in that law. As is apparent from the order for reference and from point 55 of the Advocate General's Opinion, in order fully to preserve the rights of those employees, promote the social objectives of the European Union as set out in recital 3 of Directive 2001/86 and guarantee the existence of information, consultation and participation procedures for employees at transnational level, the right to nominate a certain proportion of candidates for election as employees' representatives within a supervisory board of an SE established by way of transformation, such as SAP, cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries and establishments, in such a way as to ensure that those trade unions are treated equally in respect of that right.

50 In the light of all the foregoing considerations, the answer to the question referred is that Article 4(4) of Directive 2001/86 must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE, and it is necessary to ensure that, in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

Costs

51 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 (Grand Chamber) hereby rules:

Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

must be interpreted as meaning that:

the agreement on arrangements for the involvement of employees applicable to a European company (SE) established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE, and it is necessary to ensure that, in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

[Signatures]