Provisional text

JUDGMENT OF THE COURT (Second Chamber)

13 July 2023 (*)

(Reference for a preliminary ruling – Social policy – Collective redundancies – Directive 98/59/EC – Information and consultation – Second subparagraph of Article 2(3) – Obligation of employer contemplating a collective redundancy to forward to the competent public authority a copy of the information communicated to the workers' representatives – Objective – Consequences of a failure to comply with that obligation)

In Case C-134/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 27 January 2022, received at the Court on 1 March 2022, in the proceedings

MO

v

SM as liquidator of G GmbH,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún, F. Biltgen (Rapporteur), N. Wahl and J. Passer, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– MO, by C. Schomaker, Rechtsanwalt,

– SM as liquidator of G GmbH, by M. Stahn, Rechtsanwalt,

– the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 2(3) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

2 The request has been made in proceedings between MO and SM as court-appointed liquidator of G GmbH concerning the validity of MO's dismissal in the context of a collective redundancy.

Legal context

European Union law

3 Article 2 of Directive 98/59, which is in Section II thereof, entitled 'Information and consultation', provides, in paragraphs 1 to 3:

'1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

…

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).'

4 Article 3 of that directive, which is in Section III thereof, entitled 'Procedure for collective redundancies', provides, in paragraph 1:

'Employers shall notify the competent public authority in writing of any projected collective redundancies.

…

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.'

5 Article 4 of that directive, which is also in Section III, states, in paragraphs 1 to 3:

'1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.

Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.

2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.

3. Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.

Member States may grant the competent public authority wider powers of extension.

The employer must be informed of the extension and the grounds for it before expiry of the initial period provided for in paragraph 1.'

German law

6 Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB') provides:

'Any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law.'

7 Paragraph 17 of the Kündigungsschutzgesetz (Law on protection against unfair dismissal), in the version applicable to the facts in the main proceedings, provides, in subparagraphs 1 to 3:

‘(1) The employer is under an obligation to notify the public employment agency before it makes redundant:

…

2. in establishments normally employing at least 60 and fewer than 500 workers, 10% of the workers normally employed or more than 25 workers;

…

over a period of 30 calendar days. Any other termination of an employment relationship brought about by the employer shall be assimilated to redundancy.

(2) If the employer contemplates making redundancies that are subject to the obligation to issue a notification under subparagraph 1, it shall promptly provide the works council with the appropriate information and notify it in writing, in particular, of:

1. the reasons for the projected redundancies;

2. the number and professional categories of workers to be made redundant;

3. the number and professional categories of workers normally employed;

4. the period over which the projected redundancies are expected to take place;

5. the proposed criteria for selecting the workers to be made redundant;

6. the proposed criteria for calculating any redundancy payments.

…

(3) The employer must simultaneously forward to the public employment agency a copy of the notice given to the works council; this must contain at least the details required under points 1 to 5 of subparagraph 2. The notice referred to in subparagraph 1 shall be given in writing and shall enclose the observations of the works council on the redundancies. If the works council has not made any observations, the notice shall be valid if the employer can demonstrate that the works council was notified at least two weeks prior to the notice given in accordance with the first sentence of subparagraph 2 and the stage reached in consultations. The notice must include information on the name of the employer, the registered office and type of establishment, as well as the reasons for the projected redundancies, the number and professional categories of workers to be made redundant, the number of workers normally employed, the period over which it is planned to carry out the redundancies and the criteria for selecting the workers to be made redundant. The notice shall also include, for the purposes of job placement and in agreement with the works council, information on the sex, age, profession and nationality of the workers to be made redundant. The employer shall send the works council a copy of the notice. The works council may send additional observations to the employment agency. It must send the employer a copy of the observations.’

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

8 The applicant in the main proceedings had been employed by G GmbH since 1981.

9 On 1 October 2019, the competent insolvency court initiated insolvency proceedings in respect of G GmbH at the latter's request, and appointed the defendant in the main proceedings as insolvency administrator for the purposes of those proceedings. Under national legislation, for the duration of the proceedings, the defendant in the main proceedings performed the function of employer in relation to the workers of G GmbH.

10 On 17 January 2020, it was decided that G GmbH would cease all business operations by no later than 30 April 2020 and that more than 10% of the 195 workers it employed would be made redundant in the period from 28 to 31 January 2020.

11 The procedure for consultation of the works council, acting as the workers' representative, was initiated on the same date, 17 January 2020. In the context of that consultation, the information referred to in point (b) of the first subparagraph of Article 2(3) of Directive 98/59 was communicated to the works council in writing. It is common ground, however, that no copy of that written communication was forwarded to the competent public authority, in this instance, the Agentur für Arbeit Osnabrück (Osnabrück Employment Agency, Germany).

12 On 22 January 2020, the works council stated, in its final observations, that it did not see any way in which the projected redundancies might be avoided.

13 On 23 January 2020, in accordance with the Law on protection against unfair dismissal and Article 3 of Directive 98/59, the projected collective redundancy was notified to the Osnabrück Employment Agency, which acknowledged receipt of it on 27 January 2020 and then scheduled advisory appointments for 153 workers affected by the projected redundancy for 28 and 29 January 2020.

14 By letter received on 28 January 2020, the applicant in the main proceedings was informed that his contract of employment with G GmbH would be terminated with effect from 30 April 2020.

15 The applicant in the main proceedings brought an action before the competent labour court for a finding of non-termination of his employment relationship. In support of his action, he argued that a copy of the communication sent to the works council on 17 January 2020 had not been forwarded to the competent public employment agency, although the forwarding of that communication, as required both by the second subparagraph of Article 2(3) of Directive 98/59 and by Paragraph 17(3) of the Law on protection against unfair dismissal, was a condition for the validity of the dismissal.

16 The defendant in the main proceedings maintained that the dismissal in question was valid since Paragraph 17(3) of the Law on protection against unfair dismissal, unlike other provisions of that paragraph, was not intended to protect the workers affected by a collective redundancy or to avoid redundancies. According to the defendant in the main proceedings, the purpose of forwarding to the public employment agency concerned the copy of the communication to the works council, as required by that provision, was merely to inform that agency of the projected redundancies. The forwarding of that communication could not protect the workers concerned against a collective redundancy since the public employment agency could not infer from it ways in which, in the opinion of the works council, the projected redundancies might be avoided, and the forwarding of

the copy of that communication would not have any effect on the consultations between the employer and the works council.

17 The action brought by the applicant in the main proceedings having been dismissed at first instance and on appeal, the applicant brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court.

18 That court considers that the fact that the public employment agency did not receive a copy of the communication sent to the works council in connection with the consultation of the works council constitutes an infringement of Paragraph 17(3) of the Law on protection against unfair dismissal, which transposes the second subparagraph of Article 2(3) of Directive 98/59 into national law. However, neither that directive nor national law provides for an express penalty for such an infringement. The referring court considers that, in such cases, it must ensure, in accordance with the principles of equivalence and effectiveness, that infringements of EU law are punished in accordance with substantive and procedural rules similar to those which apply to infringements of national law of a similar nature and gravity, and that the penalty is effective, proportionate and dissuasive. In accordance with those principles, the referring court had previously repeatedly held that breaches of an employer's obligations in connection with collective redundancies, other than that provided for in Paragraph 17(3) of the Law on protection against unfair dismissal, rendered the dismissal null and void under Paragraph 134 of the BGB on the grounds of the protection of the workers which they are intended to ensure.

19 In the case of an infringement of Paragraph 17(3) of the Law on protection against unfair dismissal, the referring court has doubts, however, as to whether that infringement can also render a dismissal null and void. In order for such a provision to be considered a statutory prohibition within the meaning of Paragraph 134 of the BGB, it would be necessary to determine whether Paragraph 17(3) is intended to confer individual protection on the workers affected by a collective redundancy procedure, which would, in turn, require interpretation of the second subparagraph of Article 2(3) of Directive 98/59.

20 In that regard, the referring court considers that the latter provision may, in the light of the protection of workers in the event of collective redundancies that is the objective of Directive 98/59, be intended to encourage the employer, the authority responsible for giving notice of the collective redundancy and workers' representatives to act jointly. That objective would require the competent authority to be informed of the projected dismissal of a large number of workers as promptly as possible. From that point of view, the second subparagraph of Article 2(3) of Directive 98/59 could be interpreted as granting individual protection to the workers concerned.

21 According to the referring court, there are, however, also arguments in favour of the opposite view. It notes in that regard that the consultation procedure precedes notification of the collective redundancy so that the sending of the communication to the works council at the beginning of the consultation process cannot yet have any real effect on the placement efforts of the employment administration. Under Directive 98/59, the involvement of the competent authority is triggered only by the notification by the employer of the projected collective redundancy in accordance with Article 3(1) thereof. By contrast, at the time when the communication that precedes that notification has to be forwarded as provided for by the second subparagraph of Article 2(3) of Directive 98/59, namely before the end of consultations with the workers, it will not yet have been definitively established whether workers will be joining the labour market and, if so, how many and when or which workers will be affected. From that point of view, that provision is only procedural and its infringement as transposed into German law, even when the principles of equivalence and

effectiveness are taken into account, would not therefore render null and void the dismissal of an individual worker affected by the collective redundancy.

22 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:

‘What is the purpose of the second subparagraph of Article 2(3) of [Directive 98/59], according to which the employer is to forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v)?’

Consideration of the question referred

23 As is apparent from the information set out in paragraphs 16 to 21 of the present judgment, the referring court asks the Court of Justice about the purpose of the second subparagraph of Article 2(3) of Directive 98/59, which places the employer under an obligation to forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v) of that article. In so doing, the referring court seeks to determine the likely legal consequences, in national law and in the light of the principles of effectiveness and of equivalence, of a breach of that obligation, in the absence of details in that respect in that directive.

24 By its question, the referring court asks, therefore, in essence, whether the second subparagraph of Article 2(3) of Directive 98/59 must be interpreted as meaning that the employer’s obligation to forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph of Article 2(3), point (b), subpoints (i) to (v) of that directive is intended to confer individual protection on the workers affected by collective redundancies.

25 For the purpose of answering that question, it must first of all be recalled that, in accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. The origins of a provision of EU law may also provide information relevant to its interpretation (judgment of 2 September 2021, *CRCAM*, C-337/20, EU:C:2021:671, paragraph 31 and the case-law cited).

26 With regard, in the first place, to the wording of the second subparagraph of Article 2(3) of Directive 98/59, according to which the ‘employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v)’, it must be noted that this does not include anything that might clarify the purpose of the forwarding obligation laid down by that provision.

27 It is necessary therefore, in the second place, to examine the context in which the second subparagraph of Article 2(3) of Directive 98/59 occurs.

28 In that regard, first, it must be noted that that provision appears not in Section III of that directive, entitled ‘Procedure for collective redundancies’, but in Section II, entitled ‘Information and consultation’, which, as is apparent from Article 2(1) of the directive, governs the procedure for the consultation of workers’ representatives where an employer is contemplating a collective redundancy. Accordingly, the forwarding of the information provided for in the second subparagraph of Article 2(3) of Directive 98/59 must occur at a stage at which collective

redundancies are merely ‘contemplated’ and the procedure for consultation of workers’ representatives has only started and is not yet complete.

29 In accordance with Article 2(2) of Directive 98/59, the objective of consultations with the workers’ representatives is to avoid termination of employment contracts or to reduce the number of workers affected, and to mitigate the consequences. Furthermore, the raison d’être and effectiveness of those consultations presuppose that the relevant factors to be taken into account in the course of those consultations have been determined (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 46).

30 The Court has, moreover, stated that the information referred to in point (b) of the first subparagraph of Article 2(3) of Directive 98/59 can be provided during the consultations and not necessarily at the time when the procedure organising them starts, a certain flexibility being essential in view of the fact, in particular, that the purpose of the employer being under that obligation is to enable the workers’ representatives to participate in the consultation process as fully and effectively as possible and that, to achieve that, any new relevant information must be supplied up to the end of that process (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraphs 52 and 53).

31 Accordingly the information which the employer is obliged to supply to the workers’ representatives may evolve and change over time so as to enable them to make constructive proposals (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 51).

32 It follows from the above that the forwarding of information referred to in the second subparagraph of Article 2(3) of Directive 98/59 merely serves to give the competent public authority an idea of the reasons for the projected redundancies, the number and categories of workers to be made redundant, the number and categories of workers normally employed, the period over which the projected redundancies are to be effected, and the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or national practice confers the power therefor upon the employer.

33 That authority cannot therefore rely entirely on that information in order to prepare the measures falling within its sphere of competence in the event of a collective redundancy.

34 Secondly, it should be noted that the competent public authority is not given any active role during the consultation procedure involving workers’ representatives. The second subparagraph of Article 2(3) of Directive 98/59 merely designates it as the recipient of a copy of the elements of written communication which are provided for in the first subparagraph of Article 2(3), point (b), subpoints (i) to (v), whereas Articles 3 and 4 of that directive, in Section III thereof, entitled ‘Procedure for collective redundancies’, do give it an active role.

35 Thus, Articles 3 and 4 of Directive 98/59 provide that the competent public authority must be notified of projected collective redundancies and that such redundancies cannot take effect until the end of a period which that authority must use to seek solutions to the problems raised by them (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 40). As the Advocate General stated in point 34 of his Opinion, that obligation to notify must allow the competent public authority to explore, on the basis of all the information forwarded to it by the employer, the possibilities of limiting the negative consequences of those redundancies by means of measures tailored to the data characterising the labour market and economic activity to which those collective redundancies relate. By contrast, the forwarding to that authority of the copy of

information referred to in the second subparagraph of Article 2(3) of that directive does not trigger a time limit that must be observed by the employer or create an obligation on the part of the competent public authority.

36 Consequently, the forwarding of information to the competent public authority, as referred to in the second subparagraph of Article 2(3) of Directive 98/59, occurs only for information and preparatory purposes so that the competent public authority can, if necessary, exercise the powers provided for in Article 4 of that directive effectively. Thus, the obligation to forward information to the competent public authority is intended to enable that authority to anticipate as far as possible the negative consequences of projected collective redundancies in order to be able to seek solutions effectively to the problems raised by those redundancies when it is notified of them.

37 In the light of the purpose of forwarding information and of the fact that it occurs at a stage where the collective redundancies are merely contemplated by the employer, the action of the competent public authority is, as the Advocate General noted in point 51 of his Opinion, intended not to deal with each worker's individual situation but to gain an overall understanding of the projected collective redundancies. The Court has, moreover, previously held that the right to information and consultation provided for in Article 2 of Directive 98/59 is intended to benefit workers as a collective group and is collective in nature (judgment of 6 July 2009, *Mono Car Styling*, C-12/08, EU:C:2009:466, paragraph 42). It follows that the second subparagraph of Article 2(3) of that directive gives workers collective, not individual, protection.

38 With regard, in the third place, to the main objective of Directive 98/59, this supports the finding in the preceding paragraph. It is apparent from the case-law of the Court that that objective is to make collective redundancies subject to prior consultation with the workers' representatives and prior notification to the competent public authority (judgment of 17 March 2021, *Consulmarketing*, C-652/19, EU:C:2021:208, paragraph 40 and the case-law cited). As it is, at the stage of consultation of the workers' representatives, which, as Article 2(2) of that directive states, covers ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences, that notification of the competent public authority is ensured by Article 2(3) of that directive.

39 As regards, in the fourth place, the origins of the second subparagraph of Article 2(3) of Directive 98/59, it should be borne in mind, as the Advocate General noted in point 37 of his Opinion, that Directive 98/59 recast Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29). It is apparent from the *travaux préparatoires* of the latter directive that the obligation to forward to the competent public authority the information provided to the workers' representatives, set out in the second subparagraph of Article 2(3) thereof, was proposed because such an obligation was considered useful to enable the competent authorities immediately to become aware of a situation liable to have a crucial impact on the labour market and to prepare itself for any necessary measures (Council document 754/74).

40 It follows that the origins of the second subparagraph of Article 2(3) of Directive 98/59 also support the finding that the obligation to forward information that is referred to in that provision is laid down for the information and preparatory purposes noted in paragraph 36 of the present judgment.

41 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that the second subparagraph of Article 2(3) of Directive 98/59 must be interpreted as meaning that the employer's obligation to forward to the competent public authority a

copy of, at least, the elements of the written communication which are provided for in the first subparagraph of Article 2(3), point (b), subpoints (i) to (v) of that directive is not intended to confer individual protection on the workers affected by collective redundancies.

Costs

42 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 (Second Chamber) hereby rules:

The second subparagraph of Article 2(3) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

must be interpreted as meaning that the employer's obligation to forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph of Article 2(3), point (b), subpoints (i) to (v) of that directive is not intended to confer individual protection on the workers affected by collective redundancies.

[Signatures]

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* Language of the case: German.