SUMMARY

ECJ 20 June 2013, case C-635/11 (European Commission - v - Kingdom of the Netherlands), Information and consultation

Facts

Article 16(1) of Mergers Directive 2005/56 provides that a company resulting from a cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office. Thus, if for example a Dutch company and a German company merge and the merged company has its registered office in the Netherlands, the Dutch rules on employee participation will apply to the entire workforce, both in the Netherlands and Germany. The employees in Germany will lose their German-law rights and obtain Dutch-law rights.

Article 16(1) contains the principal rule and Article 16(2) provides exceptions. One exception, that is not relevant to this case, is where at least one of the merging companies has over 500 employees and operates under an employee participation system, as provided in the SE Directive 2001/86 (“the 500+ exception”).

The other exception is that the national law applicable to the merged company does not:

a. provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ (this situation is referred to below as “clause a”); or

b. provide for employees of establishments of the company resulting from the cross-border merger in other Member States the same entitlement to exercise participation rights as is enjoyed by the employees in the Member State where the merged company has its registered

office (this situation: “clause b”).

So, for example, if a Dutch and a German company merge, the merged company has its registered office in the Netherlands and Dutch law does not provide at least the same level of employee representation on the Supervisory Board (part a) or at least the same level of employee participation through works councils (part b), then the exception provided in Article 16(2) of the Mergers Directive applies. In that case, neither the Dutch nor the German employee participation rights but, instead, the employee participation principles of SE Directive 2157/2001 apply.

Dutch law provides that the principles of SE Directive 2157/2001 apply in the situation referred to in the 500+ exception and in “clause a” situations. Dutch law makes no reference to “clause b” situations.

Pre-litigation procedure

The Commission took the position that the Dutch legislation at issue is at odds with the Mergers Directive. It submitted that it follows from the “before and after” principle, laid down in the SE Directive, that national legislation on employee participation must always ensure all employees affected by a merger are provided with (at least) the highest level of participation that the employees enjoyed before the merger. The Dutch government disputed having failed to fulfil its obligations in not providing Article 16(2)(b) of the Mergers Directive in its legislation.

ECJ’s findings

1. According to the Dutch government, it follows from the use of the term ‘or’ between clauses a and b that, where national law on employee participation rights provides for one of those two sets of circumstances, as Netherlands law does, that law is applicable. In other words, according to the Netherlands, it is sufficient that its law has provided for the circumstances specified in “clause a” or those specified in “clause b” of the same provision for it to be applicable.

According to the Commission, the term ‘or’, analysed in the context of Article 16(2) of the Mergers Directive must, conversely, be interpreted as meaning that where national law fails to provide for one of the two sets of circumstances, it must be set aside (§ 33).

2. The Commission’s interpretation prevails (§ 34-42).

3. In view of the EU legislature’s intention to protect employee participation rights both in

circumstances governed by the rules relating to the European company and in those governed by national law, it must be the case that, in national rules, it is important not only for employee participation in the companies concerned by the merger to be preserved, in accordance with Article 16(2)(a) of the Mergers Directive, but also for the rights enjoyed by employees employed in the Member State in which the company resulting from the cross-border merger has its registered office, in accordance with Article 16(2)(b) of that directive, to be extended to the other employees concerned by the merger employed in other Member States.

It therefore follows from the wording of Article 16(2) and (3) of the Mergers Directive and from the objective of those provisions, that rules relating to employee participation that may be in force in the Member State where the registered office of the company resulting from the merger is located will not apply if the national law applicable to that company does not cumulatively provide for both situations referred to at points (a) and (b) of Article 16(2) (§ 43-44).

Ruling

The Kingdom of the Netherlands has failed to fulfil its obligations under point (b) of Article 16(2) of Directive 2005/56 by failing to adopt all the laws, regulations and administrative provisions necessary to ensure that the employees of a company resulting from a cross-border merger with its registered office in the Netherlands, who are situated in other Member States, enjoy participation rights identical to those enjoyed by the employees employed in the Netherlands..

Creator: European Court of Justice (ECJ)
Verdict at: 2013-06-20
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