Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 7 December 2023 [1]

Case C-706/22

Konzernbetriebsrat der O SE & Co. KG
in the presence of
Vorstand der O Holding SE

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – European company – Regulation (EC) No 2157/2001 – Article 12(2) – Involvement of employees – Registration of the European company conditional upon prior implementation of the negotiation procedure on the involvement of workers referred to in Directive 2001/86/EC – European company established and registered without employees having become the parent company of subsidiaries employing employees – No obligation to conduct a negotiation procedure retrospectively – Prohibition on misuse of a European company for the purpose of depriving employees of rights to employee involvement)

I. Introduction

1. The request for a preliminary ruling concerns the interpretation of Article 12(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), [2] read together with Articles 3 to 7 of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees. [3]

2. The request has been made in proceedings between the Konzernbetriebsrat der O SE & Co. KG (Works Council of O SE & Co. KG; 'the group Works Council of O KG') and the Vorstand der O Holding SE (Management Board of O Holding SE) concerning a request for the formation of a special negotiating body ('SNB') for the purpose of retrospectively commencing the negotiation procedure for the involvement of employees referred to in Articles 3 to 7 of Directive 2001/86.

3. Directive 2001/86 is the result of negotiations lasting more than 30 years, as the first proposal for the creation of a European company (SE) was issued by the European Commission in 1970. [4] For a long time, the negotiations came up against an obstacle on two points: the dualist or monist

1 Original language: French.

2 OJ 2001 L 294, p. 1.

3 OJ 2001 L 294, p. 22.

4 See recital 9 of Regulation No 2157/2001.

structure of the company and employee involvement,[5] such involvement being defined as any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.[6]

4. The draft legislation on the establishment of an SE was split into two Commission proposals submitted on 25 August 1989: one for a regulation on the Statute of an SE[7] and the other for a directive complementing the Statute for an SE with regard to the involvement of employees.[8] In the proposal for a regulation, provision was made for the possibility of forming a holding SE for certain stock companies governed by the law of at least two Member States or having a subsidiary governed for at least two years by the law of another Member State.[9]

5. Later on in the negotiations, the 'before and after' principle,[10] presented as the taking into account, within the new SE, of involvement rights existing in companies involved in the formation of an SE, enabled the bases of a compromise to emerge in 1998.[11] That key proposal resulted in the compromise which was unanimously agreed following the change in the legal basis of Directive 2001/86.

6. However, it very soon appeared that most of the SEs established in certain Member States were SEs without employees which could be registered without first having to conduct negotiations with the SNBs provided for in Article 12(2) of Regulation No 2157/2001.

7. Since a considerable number of SEs without employees were registered without prior negotiations on the involvement of employees,[12] the question arises whether such negotiations should be allowed or required to be conducted retrospectively and whether a time limit should be specified within which those negotiations may be commenced following the registration of the SE.

8. In this Opinion, I shall propose that the Court rule that Directive 2001/86 does not require negotiations to be opened retrospectively, but allows it in the case of misuse.

5 See Final Report of the Group of Experts on 'European Systems of Worker Involvement' of May 1997 (Davignon Report) (C4-0455/97), paragraph 9: 'Despite efforts to approximate the various positions (those who did not want a European Company without participation and those who were against the export of national participation models), it was inevitable that progress would be blocked.'

6 See Article 2(h) of Directive 2001/86.

7 See Proposal for a Council Regulation (EEC) on the Statute of a European Company (COM(89) 268 final – SYN 218).

8 See Proposal for a Council Directive complementing the Statute for a European Company with regard to the involvement of employees (COM(89) 268 final – SYN 219).

9 See Article 2(1) of that proposal for a regulation, now Article 2(2) of Regulation No 2157/2001.

10 See recital 18 of Directive 2001/86.

11 See Draft Minutes of the 2102nd Council session (Labour and Social Affairs), held in Luxembourg on 4 June 1998 (8717/98), available at the following internet address: https://data.consilium.europa.eu/doc/document/ST-8717-1998-INIT//pdf, p. 8.

12 In 2017, there were 450 genuine and active SEs employing more than five employees among the 2 695 SEs registered, although no data are available for some SEs (see working paper of Waddington, J. and Conchon, A., *Is Europeanised board-level employee representation specific? The case of European Companies (SEs)*, The European Trade Union Institute, Brussels, 2017, p. 7).

II. Legal framework

A. European Union law

1. Regulation No 2157/2001

9. Recitals 1 and 21 of Regulation No 2157/2001 state:

‘(1) The completion of the internal market and the improvement it brings about in the economic and social situation throughout the [European Union] mean not only that barriers to trade must be removed, but also that the structures of production must be adapted to the [EU] dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on [an EU] scale.

…

(21) Directive [2001/86] is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.’

10. Article 1(1) and (4) of that regulation provides:

‘1. A company may be set up within the territory of the [Union] in the form of an [SE] on the conditions and in the manner laid down in this Regulation.

…

4. Employee involvement in an SE shall be governed by the provisions of Directive [2001/86].’

11. Article 2(2)(a) of that regulation provides:

‘Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the [EU] may promote the formation of a holding SE provided that each of at least two of them:

(a) is governed by the law of a different Member State …’

12. Article 8(1), (14) and (16) of Regulation No 2157/2001 reads as follows:

‘1. The registered office of an SE may be transferred to another Member State … Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.

…

14. The laws of a Member State may provide that, as regards SEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not

take effect if any of that Member State's competent authorities opposes it within the two-month period …

…

16. An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer …, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer.'

13. In accordance with Article 9(1)(c) of the regulation:

'An SE shall be governed:

…

(c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

…

(ii) the provisions of Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the SE has its registered office;

…'

14. Article 12(1) and (2) of the regulation provides:

'1. Every SE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State …

2. An SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive [2001/86] has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.'

2. Directive 2001/86

15. Recitals 3, 7 et 18 of Directive 2001/86 state:

'(3) In order to promote the social objectives of the [European Union], 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 … Regulation [No 2157/2001].

…

(7) If and when participation rights exist within one or more companies establishing an SE, they should be preserved through their transfer to the SE, once established, unless the parties decide otherwise.

…

(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.'

16. Under Article 1 of that directive:

'1. This Directive governs the involvement of employees in the affairs of [SEs], 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.'

17. Article 2(b) and (g) of that directive defines participating companies as 'the companies directly participating in the establishing of an SE' and an SNB as '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'.

18. Article 3 of Directive 2001/86, entitled 'Creation of a[n] [SNB]', provides, in paragraphs 1, 2 and 6:

'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[n] [SNB] representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created …

…

6. The [SNB] may decide not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees. Such a decision shall stop the procedure to conclude the agreement referred to in Article 4. Where such a decision has been taken, none of the provisions of the Annex shall apply.

…

The [SNB] shall be reconvened on the written request of at least 10% of the employees of the SE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree to negotiations being reopened sooner. If the [SNB] decides to reopen negotiations with the management but no agreement is reached as a result of those negotiations, none of the provisions of the Annex shall apply.'

19. Article 7 of that directive entitled 'Standard rules', provides, in paragraphs 1 and 2:

'1. In order to achieve the objective described in Article 1, Member States shall … lay down standard rules on employee involvement which must satisfy the provisions set out in the Annex.

The standard rules as laid down by the legislation of the Member State in which the registered office of the SE is to be situated shall apply from the date of the registration of the SE where either:

(a) the parties so agree, or

(b) … no agreement has been concluded, and:

– the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue with its registration of the SE, and

– the [SNB] has not taken the decision provided in Article 3(6).

2. Moreover, the standard rules fixed by the national legislation of the Member State of registration in accordance with part 3 of the Annex shall apply only:

…

(c) in the case of an SE established by setting up a holding company or establishing a subsidiary:

– if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 50% of the total number of employees in all the participating companies; or

– if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 50% of the total number of employees in all the participating companies and if the [SNB] so decides.

If there was more than one form of participation within the various participating companies, the [SNB] shall decide which of those forms must be established in the SE. Member States may fix the rules which are applicable in the absence of any decision on the matter for an SE registered in their territory. The [SNB] shall inform the competent organs of the participating companies of any decisions taken pursuant to this paragraph.'

20. Under Article 11 of that directive, entitled 'Misuse of procedures':

'Member States shall take appropriate measures in conformity with [EU] law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.'

21. Article 12(2) of the directive provides:

'Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular they shall ensure that administrative or legal procedures are available to enable the obligations deriving from this Directive to be enforced.'

B. German law

22. Directive 2001/86 was transposed into German law by the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company; 'the SEBG')[13] of 22 December 2004.

23. Paragraph 18 of that law, entitled 'Resumption of negotiations', provides, in subparagraph 3:

'If structural changes to the SE are planned which could reduce employees' rights to be involved, negotiations on the SE employees' rights of involvement shall take place at the instigation of the management or Works Council of the SE. Instead of the [SNB] having to be newly established, the negotiations with the SE management may be conducted by joint agreement by the SE Works Council together with the representatives of the employees concerned by the planned structural changes who were not hitherto represented by the SE Works Council. If no agreement is reached during those negotiations, Paragraphs 22 to 33 on the Works Council of the SE and Paragraphs 34 to 38 on joint management shall apply by operation of law.'

24. Paragraph 43 of that law provides:

'An SE may not be misused for the purpose of depriving employees of involvement rights or withholding such rights. Misuse shall be deemed to exist where, without implementation of a procedure under Paragraph 18(3), changes in the structure of the SE take place within one year following its establishment which lead to employees being deprived of involvement rights, or to such rights being withheld.'

III. The facts of the main proceedings and the questions referred for a preliminary ruling

25. On 28 March 2013, the company O Holding SE, formed pursuant to Article 2(2) of Regulation No 2157/2001 by O Ltd and O GmbH, two companies with no employees and with no subsidiaries with employees and established respectively in the United Kingdom and in Germany, was registered in the Registry for England and Wales without any negotiations taking place on the involvement of employees as provided for in Articles 3 to 7 of Directive 2001/86.

26. On the following day, 29 March 2013, O Holding SE became the sole shareholder of O Holding GmbH, a company which had a registered office in Hamburg (Germany) and a supervisory board, one third of which consisted of employee representatives. On 14 June 2013, O Holding SE decided to convert that company into a limited partnership, called O KG. Its change in legal form was registered in the registry on 2 September 2013 and, from that date, the involvement of the employees on the supervisory board came to an end.

[13] BGBl. 2004 I, p. 3675.

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

28. With effect from 4 October 2017, O Holding SE moved its registered office to Hamburg.

29. The group Works Council of O KG, taking the view that the management of O Holding SE was obliged to retrospectively form an SNB, since it had subsidiaries within the meaning of Article 2(c) of Directive 2001/86, which had employees in several Member States, brought employment litigation proceedings. The Management Board of O Holding SE contested that application.

30. Following the dismissal of the application of the O KG group Works Council by the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany), which was upheld by the Landesarbeitsgericht Hamburg (Higher Labour Court, Hamburg, Germany), the case was brought before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court.

31. In order to resolve the dispute, the referring court requests an interpretation of Article 12(2) of Regulation No 2157/2001, read together with Articles 3 to 7 of Directive 2001/86. It points out that it is true that those provisions do not expressly provide that the negotiation procedure on the involvement of employees is to be conducted retrospectively if it has not been conducted previously. However, it considers that that regulation and that directive assume, as is apparent in particular from recitals 1 and 2 of that regulation, that the companies involved are economically active and thus employ employees, and that therefore, upon the formation and before the registration of the SE, it is possible to open such a negotiation procedure. Accordingly, the referring court wonders whether, in the case of registration of an SE the participating companies or subsidiaries of which do not employ employees, the objective pursued by Articles 3 to 7 of that directive might require that the negotiation procedure for the involvement of employees be conducted retrospectively if the SE becomes the controlling company of subsidiaries in several Member States.

32. In that context, the referring court considers that such an obligation might at least be required in the light of Article 11 of Directive 2001/86 if, as is the case in the main proceedings, the registration of the SE and the acquisition of subsidiaries took place within a very short period of time, since it might be assumed from that circumstance that the formation is being misused for the purpose of depriving employees of rights to employee involvement or withholding such rights.

33. If an obligation to conduct a retrospective negotiation procedure for the involvement of employees existed, the question would arise as to whether it is subject to a time limit and whether its implementation is governed by the law of the Member State in which the SE currently has its registered office or that of the Member State in which it was first registered, bearing in mind that, in this case, the latter State withdrew from the European Union after the transfer of the SE's registered office to Germany.

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

'(1) Is Article 12(2) of Regulation [No 2157/2001], in conjunction with Articles 3 to 7 of Directive [2001/86], to be interpreted as meaning that, where a [holding SE] is formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, and the holding SE was registered in the register of a Member State (a so-called "SE without employees") without a negotiation procedure for the involvement of employees in the SE having first been conducted, under that directive that negotiation procedure has to be conducted retrospectively if the SE becomes the controlling undertaking of subsidiaries in several Member States of the European Union which employ employees …?

(2) If the Court's answer to Question 1 is in the affirmative:

Is the retrospective conduct of the negotiation procedure in such a case possible and necessary for an unlimited time?

(3) If the Court's answer to Question 2 is in the affirmative:

Does Article 6 of Directive [2001/86] preclude the application of the law of the Member State where the SE now has its registered office for the purpose of retrospective conduct of the negotiation procedure if the "SE without employees" was registered in the register in another Member State without such a procedure having first been conducted and before the transfer of its registered office became the controlling company of subsidiaries in several Member States of the European Union which employ employees …?

(4) If the Court's answer to Question 3 is in the affirmative:

Is this also the case where the State where that "SE without employees" was first registered has withdrawn from the European Union after the transfer of the registered office and its law no longer contains any provisions on the conduct of a negotiation procedure for the involvement of employees in the SE?'

35. Written observations were submitted by the German Government and by the Commission.

36. At the hearing held on 28 September 2023, the group Works Council of O KG, the Management Board of O Holding SE, the German and Luxembourg Governments and the Commission presented their oral arguments and responded to the questions for oral answer put by the Court.

IV. Analysis

37. The formation of the SE is governed by a few broad principles.

38. First, it can result from only four means of formation: by merger, by formation of a holding SE, by formation of a subsidiary SE or by conversion of a limitedliability company into an SE. [14]

[14] See Article 2 of Regulation No 2157/2001.

39. Second, the SE is governed by:

– the provisions of Regulation No 2157/2001;

– the provisions of its statutes, where expressly authorised by that regulation; or,

– in the case of matters not regulated (in whole or in part) by that regulation, the provisions of national law adopted in implementation of measures of EU law relating specifically to SEs, those applicable to public limitedliability companies of the Member State of registration of the SE, and the provisions of the SE's statutes in the same way as for public limitedliability companies of the Member State of registration of the SE. [15]

40. Third, an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86 has been concluded, the SNB has decided to rely on the rules in force in the Member States where the SE has employees, or the period for negotiations pursuant to Article 5 of Directive 2001/86 has expired without an agreement having been concluded. [16]

41. The participation of employees, defined as the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company, [17] was one of the crucial points blocking the progress of the negotiations on the draft legislation on the establishment of an SE, as stated previously. [18] Allied to the principle of respecting the high level of protection of existing involvement rights, the 'before and after' principle was decisive and enabled those negotiations to be concluded. That principle was accepted both by those advocating protection of participation, since it enabled the high level of employee participation to be maintained, and by Member States not familiar with that system which saw it as a means of attracting registered offices to their countries. [19]

42. However, the 'before and after' principle relates only to participating companies and enables involvement rights existing in those companies to be protected. [20]

43. By its first question, the referring court asks, in essence, whether negotiations on the arrangements for employee involvement can be opened retrospectively, that is to say, after the registration of the holding SE formed by companies not employing employees at the time of such registration.

44. It should be recalled at the outset that, contrary to what the wording of that question suggests, whether the holding SE does or does not have subsidiaries employing workers is irrelevant to the triggering of the obligation to form an SNB and commence initial negotiations on employee involvement. Only companies participating directly in the formation of the SE are referred to in Article 2(b) and Article 3(1) of Directive 2001/86 and, consequently, only employees' rights of

15 See Article 9(1) of Regulation No 2157/2001.

16 See Article 12(2) of Regulation No 2157/2001.

17 See Article 2(k) of Directive 2001/86.

18 See point 3 of this Opinion.

19 See Sick, S., 'Worker participation in SEs – a workable, albeit imperfect compromise', in Cremers, J., Stollt, M. and Vitols, S., *A decade of experience with the European Company*, The European Trade Union Institute, Brussels, 2013, pp. 93 to 106, in particular pp. 96 and 97.

20 See recitals 3, 7 and 18 of Directive 2001/86.

involvement acquired within those companies are taken into account. On the other hand, at the time of composition of the SNB [21] and of drafting of the agreement, [22] the subsidiaries and establishments concerned are taken into account. [23]

45. Although, under Article 12(2) of Regulation No 2157/2001, registration of an SE is conditional on negotiations being conducted within the SNB, there are, in practice, cases where such registration takes place without the formation of an SNB or negotiations on arrangements for employee involvement because such arrangements are impossible.

46. This is the case with the formation of a holding SE if the companies promoting that formation do not have employees. The same applies in respect of the formation of a subsidiary SE by companies with no employees. [24] In those cases, if there are no employees in the participating companies, the SNB cannot be formed in the manner laid down in Directive 2001/86.

47. The German courts were asked to rule on the question of the possibility of registering an SE not complying with Article 12(2) of Regulation No 2157/2001. Relying on a teleological interpretation of that provision, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) [25] accepted the registration of such an SE, in spite of trade union opposition. [26]

48. SEs registered without prior negotiations on employee involvement have appeared in various Member States (particularly in Germany and the Czech Republic where there is a considerable number of them) [27].

49. That acceptance, which was contrary to the letter of Article 12(2) of Regulation No 2157/2001, was justified, according to the German Government, by a teleological interpretation of that provision in order to enable economic freedoms to be exercised on the single market which does not necessarily entail a company employing its own employees. Moreover, it was recognised not only that, in the absence of employees in the participating companies, an SNB could not be formed, but also that there were no existing employees' rights to protect and that, therefore, the 'before and after' principle could not be applied. Requiring such negotiations would have amounted to prohibiting the formation of SEs in those cases. In its observations, the Commission explained that such registration without prior negotiations could be based on the rules of Regulation No 2157/2001 stating that, in the case of matters not covered by that regulation, the national law applicable to limited-liability companies in the Member State was applicable and that, therefore, if that national law permitted the formation of limited-liability companies without employees, that also had to be allowed in the case of SEs. [28]

21 See Article 3(2) of Directive 2001/86.

22 See Article 4(2)(b) of Directive 2001/86.

23 See Working Paper No 6 of the Expert Group composed of national experts and the social affairs counsellors set up by the Commission in order to provide a forum for discussing the arrangements for the transposition of Directive 2001/86 into national legislation ('the Group of Experts "SE"') of 2 October 2002, entitled 'Definition of "participating companies" – Article 2(b)', pp. 30 and 31.

24 See Stollt, M. and Kelemen, M., 'A big hit or a flop? A decade of facts and figures on the European Company (SE)', in Cremers, J., Stollt, M. and Vitols, S., *A decade of experience with the European Company*, op. cit., pp. 25 to 47, in particular pp. 45 and 46.

25 See judgment I-3 Wx 248/08 of 30 March 2009.

26 See Köstler, R., 'SEs in Germany', in Cremers, J., Stollt, M. and Vitols, S., *A decade of experience with the European Company*, op. cit., pp. 123 to 131, in particular pp. 128 and 129.

27 See Stollt, M. and Wolters, E., *Implication des travailleurs dans la Société européenne (SE) – Guide pour les acteurs de terrain*, The European Trade Union Institute, Brussels, 2013, p. 93.

28 See Article 9(1)(c)(ii) of Regulation No 2157/2001.

50. It is common ground that the registration of SEs without employees is possible in the case submitted to the Court. [29]

51. Therefore, the question arises whether negotiations on employee involvement can be opened retrospectively.

52. The fourth subparagraph of Article 3(6) of Directive 2001/86 provides that such negotiations can take place after registration only at the written request of at least 10% of the employees of the SE, its subsidiaries and establishments, or their representatives, and at the earliest two years after the SNB's decision not to open or close prior negotiations, unless a better agreement is reached by the parties on the renegotiation date. Therefore, it is clear that retrospective negotiations can take place only if an SNB was formed at the outset and that, strictly speaking, they constitute a renegotiation. In the annex to that directive, provision is also made for negotiations four years after the representative body is established if the standard rules are applied. [30]

53. Recital 18 of Directive 2001/86 states, first, 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) and, second, that 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. That recital is not, therefore, sufficient to establish a right to retrospective employee involvement negotiations if an SNB was not formed at the outset.

54. Contrary to the contention of the German and Luxembourg Governments, the impossibility of opening retrospective negotiations is not the result of an oversight when Directive 2001/86 was drawn up, but of a genuine choice by the EU legislature resulting from the compromise on the 'before and after' principle.

55. There are several reasons for this. First, the Davignon Report, which served as a basis for the final negotiations on Regulation No 2157/2001 and Directive 2001/86, clearly advocated holding negotiations on employee involvement before registration in the interest of foreseeability for shareholders and employees as well as stability for the life of the SE. [31] Second, the European Parliament had proposed a recital 7a explicitly providing for retrospective negotiations which was rejected [32] in favour of the much vaguer wording of recital 18 of Directive 2001/86.

56. The EU legislature's choice was also apparent when the Statute for a European Cooperative Society was being drawn up and in Directive 2003/72/EC [33] on the involvement of employees in such a society, since provision is explicitly made for retrospective negotiations on employee involvement if the total number of employees exceeds 50 employees in at least two Member States. [34] In that case, negotiation between Member States enabled an obligation to conduct retrospective negotiations to be established which, although linked to the exceeding of a threshold, was not provided for in the legislation applicable to SEs.

[29] The same applies to the formation of a subsidiary SE by participating companies without employees.

[30] See Part 1(g) of the annex to Directive 2001/86.

[31] See Davignon Report, paragraphs 50 and 69, and Working Paper No 19 of the Group of Experts 'SE', of 23 June 2003, *Misuse of procedures – Article 11* ('Working Paper No 19 of the Group of Experts "SE"'), pp. 125 and 126.

[32] See Report of the European Parliament of 21 June 2001 on the Draft Council Directive supplementing the Statute for a European company with regard to the involvement of employees (A5-0231/2001), p. 7.

[33] Council Directive of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ 2003 L 207, p. 25).

[34] See Article 8(3) of Directive 2003/72.

57. Moreover, the difficulty relating to SEs without employees had been noted since 2003 by the Group of Experts 'SE',[35] but also by the independent group of experts appointed by the Commission to review Directive 2001/86, as provided for in Article 15 of that directive.[36]

58. Being, therefore, fully aware of that difficulty, the Commission prepared and drew up its report and communication on the application of Regulation No 2157/2001 and the review of Directive 2001/86. In the report, after raising the issue of the activation of shelf SEs,[37] the Commission states that 'any considerations of amendments to the SE Statute to tackle the practical problems identified by various stakeholders will have to take into account that the SE Statute is a result of a delicate compromise following lengthy negotiations. The Commission is currently reflecting on potential amendments to the SE Statute, with a view to making proposals in 2012'.[38] In the communication, after also recognising the absence of provisions in Directive 2001/86 in the case of SEs formed without employees,[39] the Commission acknowledged that it had identified some issues, but that, since the adoption of Regulation No 2157/2001 and Directive 2001/86 was the result of a delicate compromise achieved after 30 years of negotiations, it would consider the appropriateness of revising both instruments at the same time, when the regulation was reviewed in 2009.[40]

59. Furthermore, the issue was examined in greater depth, much later than the date of transposition of Directive 2001/86, in a work devoted to the 10 years of application of the SE.[41]

60. In a resolution of 2021, the Parliament called on the Commission to make the necessary improvements to the frameworks regulating SEs and European Cooperative Societies and, on the basis of a timely evaluation, to the Company Law Package, and to amend them to introduce minimum EU rules governing employee participation and representation on supervisory boards.[42]

61. Although it had been aware, since 2003 and until 2021, of the difficulties concerning the formation and existence of an SE, in particular the difficulty associated with the formation of SEs without establishing an SNB, the Commission never proposed amendments to Regulation No 2157/2001 or Directive 2001/86 in order to remedy them. Not only did the Commission never propose such amendments, but its other proposals for texts on company law having an impact on the participation or involvement of employees within the structure and role of trade unions during the formulation of the draft were not successful (proposal of 2008 for a European private company with limited liability submitted in 2008 and withdrawn in 2014, proposal on single-member private limited liability companies submitted in 2014 and withdrawn in 2018).[43]

35 See Working Paper No 19 of the Group of Experts 'SE', p. 124.

36 See Valdès Dal-Ré, F., *Studies on the implementation of Labour Law Directives in the enlarged European Union, Directive 2001/86/EC supplementing the European Company with regard to the involvement of employees, Synthesis report*, pp. 101 and 102.

37 See Report from the Commission to the European Parliament and the Council of 17 November 2010 on the application of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (COM(2010) 676 final), p. 9.

38 See report cited in footnote 37 to this Opinion, p. 11.

39 See Communication from the Commission of 30 September 2008 on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (COM(2008) 0591 final), p. 7.

40 See footnote cited in footnote 39 to this Opinion, p. 9.

41 See Cremers, J., Stollt, M. and Vitols, S., *A decade of experience with the European Company*, op. cit., in particular Chapters 1, 4 and 6 (see, respectively, footnotes 24, 19 and 26 to this Opinion).

42 See European Parliament resolution of 16 December 2021 on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive [2021/2005(INI)], paragraphs 6 and 10.

43 See fact sheet on the European Union of the European Parliament, *Company law*, available at the following internet address: https://www.europarl.europa.eu/factsheets/en/sheet/35/company-law.

62. At this stage of the discussion, it therefore seems to me to be established that the absence of a rule on retrospective negotiations on employee involvement in the case of an SE formed without an SNB is the result of a conscious choice by the EU legislature, even if that absence may be viewed as a lacuna by advocates of the system for the involvement, and in particular the participation, of employees.

63. In that context, recital 18 of Directive 2001/86 must therefore be understood as relating to cases of structural amendments in an SE formed with an SNB: this is all the more logical as its wording refers to 'that approach', that is to say, to the 'before and after' principle stated in the previous sentence, which implies the existence of rights to be protected in their previous state. That recital is, in fact, intended to clarify the principle of prioritising negotiations in the matter, illustrated by the fact that the initial agreement on employee involvement must specify the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation. [44]

64. That is how the national experts and social affairs counsellors of the Group of Experts 'SE' also understood it (having participated in the negotiations on Directive 2001/86 and been responsible for drafting a report intended to facilitate its transposition), since they state that, apart from the provisions of the directive that implicitly and partially address that concern, [45] the rules of the directive have been designed to apply only immediately before and at the time when the SE is established and that, therefore, there may be a need for the concerned parties to apply the rules of the directive, which are designed mainly to protect the systems of employee participation, in a dynamic way, and not only at the moment when the SE is established. They add that the experience of applying Directive 94/45/EC [46] shows that the resolution of such difficulties is mainly done through agreements. They conclude that, as Directive 2001/86 does not go further than that, the treatment of changes which have occurred without misuse seems to be limited merely to a detailed reference to possibilities of subsequent structural changes in the national provisions transposing Article 4(2) of that directive concerning the content of the agreement in order to make the negotiating parties aware of the possible occurrence of those changes. [47]

65. Therefore, the Group of Experts 'SE' does not consider that the Member States have any further discretion in the matter.

66. On the other hand, the experts have clearly stated that retrospective negotiations on employee involvement might be an effective sanction in cases of misuse of the SE in order to deprive employees of their participation rights and that that sanction even has the advantage of being a possible uniform response within the Member States. [48] Article 11 of Directive 2001/86 states that Member States must take appropriate measures in conformity with EU law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.

[44] See Article 4(2)(h) of Directive 2001/86.

[45] See Article 4(2)(h) and Annex, Part 1(g) of Directive 2001/86.

[46] Council Directive of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1994 L 254, p. 64).

[47] See Working Paper No 17 of the Group of Experts 'SE', of 23 June 2003, *Content of the agreement – Article 4*, pp. 113 and 114.

[48] See Working Paper No 19 of the Group of Experts 'SE', pp. 124 to 126.

67. Those experts illustrated their discussion using examples of situations of potential misuse, not only in cases where an SE is formed without participation through subsidiaries without participation, where that SE then takes control of all the subsidiaries whether or not they are subject to participation rules, but also in cases where an SE is formed by transformation in a Member State without participation rules followed by a transfer of its registered office to a Member State with such rules, or, again, in cases where an SE is formed before the thresholds triggering the application of the participation rules have been reached. [49]

68. What those examples have in common is the formation of an SE without prior negotiations on employee involvement within an SNB, since such SEs are formed from companies not subject to participation. It is therefore clear that the Group of Experts 'SE', first, had in mind cases where an SE is formed without prior negotiations and without application by default of the standard rules and, second, did not consider the possibility of retrospective legal negotiations in the case of structural changes, but only in the case of misuse.

69. The group of experts, continuing its reflections, proposed a wording for the choice in national law of an anti-misuse provision [50] based on the idea that negotiations should take place in the cases referred to in point 67 of this Opinion, once the misuse has been proved according to the general rules, for which purpose a mere presumption of misuse could be established if changes occurred shortly (say, within a year) after the SE was registered. [51] It stated that the ideal solution would be to have one provision providing for a renegotiation in those cases and, if those negotiations fail, for the application of the standard rules for participation contained in the annex to Directive 2001/86. [52] To that end, Articles 3 to 7 of that directive should be applied *mutatis mutandis* and references to the time of registration of the SE should be replaced by references to the time when negotiations fail. [53]

70. In any event, subject to the national court's assessment, the mere transfer of the registered office or the application of a provision of national law enabling employee participation in a subsidiary of an SE, which is still governed by that national law, to be brought to an end cannot alone constitute misuse without calling into question the effectiveness of Regulation No 2157/2001 and Directive 2001/86.

71. To conclude, the outcome of the negotiations on that regulation and that directive may appear to have lacunae, but the application of the 'before and after' principle at the time of registration of the SE was actually intended by the Member States and, therefore, I do not think it is possible to extend employee involvement rights through case-law, because that would call into question the balance achieved at great cost by those negotiations. If they were extended beyond cases of misuse, retrospective negotiations on employee involvement would affect the stability in the operation of the company which is also sought by the legislation, [54] since they might take place in cases of conversion into SEs before the thresholds triggering participation, in national law, are exceeded or whenever the perimeter of the employees is changed on account of the transfer or acquisition of subsidiaries.

[49] See Working Paper No 19 of the Group of Experts 'SE', p. 124.

[50] See Working Paper No 19 of the Group of Experts 'SE', pp. 126 and 127.

[51] See Working Paper No 19 of the Group of Experts 'SE', p. 125.

[52] See Part 3 of the annex to Directive 2001/86.

[53] See Working Paper No 19 of the Group of Experts 'SE', p. 127.

[54] See Davignon Report, paragraph 50, cited in Working Paper No 19 of the Group of Experts 'SE', p. 126.

72. In the light of all those reasons, I propose that the Court's answer to the first question referred for a preliminary ruling should be that Article 12(2) of Regulation No 2157/2001, read together with Articles 3 to 7 of Directive 2001/86, must be interpreted as meaning that, after the registration of a holding SE formed by participating companies not employing employees without negotiations on employee involvement having first been conducted, it does not require negotiations to be opened on the sole ground that that holding SE becomes an undertaking exercising control over subsidiaries employing employees in one or more Member States.

73. In the light of that answer, I do not consider it necessary for the Court to answer the other questions for a preliminary ruling.

V. Conclusion

74. Having regard to all the foregoing considerations, I propose that the Court's reply to the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) should be as follows:

Article 12(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), read together with Articles 3 to 7 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 after the registration of a holding European company (SE) formed by participating companies not employing employees without negotiations on employee involvement having first been conducted, it does not require negotiations to be opened on the sole ground that that holding SE becomes an undertaking exercising control over subsidiaries employing employees in one or more Member States.