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JUDGMENT OF THE COURT (Sixth Chamber)

29 March 2001 (1)

(Reference for a preliminary ruling - Article 11(1) and (2) of Directive 94/45/EC - Information to be made available by undertakings on request - Information intended to establish the existence of a controlling undertaking within a Community-scale group of undertakings)

In Case C-62/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesarbeitsgericht Düsseldorf (Germany) for a preliminary ruling in the proceedings pending before that court between

Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG

and

Bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG,

on the interpretation of Article 11(1) and (2) of Council Directive 94/45/EC 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),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: A. Saggio,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG, by T. Schmidt, Rechtsanwalt,
- bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG, by E. Huber, Rechtsanwalt,
- the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as agents,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Commission of the European Communities, by D. Gouloussis and J.C. Schieferer, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2000,

gives the following

Judgment

1. By order of 21 January 1999, received at the Court on 22 February 1999, the Landesarbeitsgericht Düsseldorf (Düsseldorf Higher Labour Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234EC) three questions on the interpretation of Article 11(1) and (2) of Council Directive 94/45/EC 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, 'the Directive').

2. Those questions were raised in proceedings between the Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG ('the Works Council') and bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG ('the employer'), concerning the latter's refusal to give the former information relating to the number of employees and the structure of the undertakings within the bofrost* group to which it belongs.

The legal background

The Community legislation

3. Article 1(1) and (2) of the Directive provides:

'(1) The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

(2) To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees under the terms, in the manner and with the effects laid down in this Directive.'

4. Article 2(1)(a) to (c) and (e) provides as follows:

'(1) For the purposes of this Directive:

(a) ”Community-scale undertaking” means any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States;

(b) ”group of undertakings” means a controlling undertaking and its controlled undertakings;

(c) ”Community-scale group of undertakings” means a group of undertakings with the following characteristics:

- at least 1 000 employees within the Member States,

- at least two group undertakings in different Member States, and

- at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

...

(e) ”central management” means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking.'

5. Article 3(1) and (2) of the Directive defines 'controlling undertaking' as follows:

'(1) For the purposes of this Directive, ”controlling undertaking” means an undertaking which can exercise a dominant influence over another undertaking (”the controlled undertaking”) by virtue, for example, of ownership, financial participation or the rules which govern it.

(2) The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when [an undertaking], in relation to another undertaking directly or indirectly:

(a) holds a majority of that undertaking's subscribed capital; or

(b) controls a majority of the votes attached to that undertaking's issued share capital; or

(c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.'

6.

According to Article 4(1) of the Directive, '[t]he central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings`.

7. Finally, Article 11(1) and (2) provides:

'(1) Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.

(2) Member States shall ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.`

The national legislation

8. The Federal Republic of Germany transposed the Directive into national law by means of the Gesetz über Europäische Betriebsräte of 28 October 1996 (Law on European Works Councils, BGBl. I, p. 1548, 'the EBRG`).

9. By virtue of Paragraph 2(1) of the EBRG, that law applies to undertakings situated in the Community and having their seat in German territory and to groups of undertakings established in the Community where the controlling undertaking has its seat in German territory.

10. Paragraph 5 of the EBRG, adopted in order to transpose Article 11 of the Directive, provides:

'(1) The central management must give to the employees' representatives, upon request, information on the average number of employees and the distribution of these within the Member States, on the undertakings and establishments and on the structure of the company or group of companies.

(2) A works council or a central works council may exercise the right granted in subparagraph 1 against the local management of the establishment or undertaking; the latter shall be required to obtain from the central management the information and documents necessary to provide the particulars requested.`

11. Paragraph 6 of the EBRG attributes to 'controlling undertaking` a definition similar to that under Article 3 of the Directive.

The dispute in the main proceedings

12. The bofrost* group, to which the employer belongs, consists of several companies, some established in Germany and some in other Member States.

13. The Works Council is the works council of one of the companies belonging to the bofrost* group.

14. In April 1997 the undertakings in the bofrost* group established in European territory concluded a 'Gleichordnungskonzernvertrag`, that is to say, a special agreement intended to establish parity between the various undertakings belonging to the group,in order that none should be dominant and that there should be no hierarchical relations between them.

15. Under that international agreement, they entrusted the management of the group in Europe to a 'Lenkungsausschuß` (steering committee). They also set up a shareholders' advisory council, presided over by Josef H. Boquoi, whose agreement is necessary for the adoption of certain business-related decisions

and of those which do not form part of the normal pattern of commercial activity.

16. The undertakings in the bofrost* group established in Germany had concluded such an agreement as long ago as April 1993.

17. In response to several requests made by the Works Council to the employer, seeking information on the number of employees and the structure of the undertakings in the bofrost* group in order to prepare for the setting-up of a European Works Council, as provided for by the Directive, the employer by letter of 9 January 1997 definitively refused to supply that information.

18. On 3 March 1998 the Works Council applied to the Arbeitsgericht Wesel (Wesel Labour Court) for an order that that information should be supplied. It claimed that the conditions laid down in Paragraphs 2(1) and 5(1) of the EBRG had been satisfied, since Mr Boquoi held a majority shareholding such as to give rise to the presumption under Paragraph 6(1) and (2) of the EBRG, at least in the bofrost* group companies having their seat in Germany.

19. The Works Council maintained that the employer could not rebut that presumption by relying on the international agreement concluded within the group. In its view, Mr Boquoi, in his capacity as president of the shareholders' advisory council, exercised a dominant influence over the European group steering committee and, in practice, over all the companies in the group established in Europe.

20. The employer contended that the Works Council's application should be rejected, arguing that the EBRG was not applicable and that the Works Council could not, therefore, avail itself of the right to information in issue.

21. According to the employer, Paragraph 5 of the EBRG presupposes that the conditions laid down in Paragraph 2(1) of that Law are satisfied, namely, that there is a European-scale group of undertakings and that the controlling undertaking has its seat in Germany, which is not the case in this instance. In its view, neither Mr Boquoi nor any undertaking is able to exercise legal or actual control within the group. Mr Boquoi does not hold shares in any of the companies in the bofrost* group with the power to manage the limited partnerships, but only in the undertakings which are the limited partners. In addition, even in his capacity as a member of the shareholders' advisory committee, he is in no position to control the German and European undertakings in the group.

22. By judgment of 5 August 1998 the Arbeitsgericht granted the Works Council's request for information.

23. On 23 November 1998 the employer brought an appeal against that judgment before the Landesarbeitsgericht Düsseldorf. That court considered that, on a proper construction of Paragraph 5(1) of the EBRG, the Works Council is entitled to call on the employer to provide information on the average overall number of employees and their distribution between Member States, and on the structure [of the group], including the shareholding connections of Mr Boquoi in his entrepreneurial capacity, even where it has not been established that there exists a controlling undertaking within the meaning of Paragraphs 2(1) and 6 of the EBRG.

24. None the less, considering that that interpretation of the provisions of domestic law could not be adopted if it proved to be contrary to Article 11(2) of the Directive, the national court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 11(1) and (2) of Council Directive 94/45/EC of 22 September 1994 to be interpreted as meaning that the right to information laid down therein exists even where it is not (yet) established whether or not there is a controlling undertaking within the meaning of Article 3 of Directive 94/45/EC in a group of undertakings as defined in Article 2(1)(b) of Directive 94/45/EC?

(2) If question (1) is answered in the affirmative:

Does the right to information in Article 11(1) and (2) of Directive 94/45/EC also include the right of a works council to request from the undertaking concerned information which gives rise to the presumption referred to in Article 3(2) of Directive 94/45/EC?

(3) Does Article 11(1) and (2) of Directive 94/45/EC also include the right of a works council to request documents from an undertaking to clarify and explain such information?'

The first question

25. By its first question, the national court is, in essence, seeking to ascertain whether, on a proper construction of Article 11(1) and (2) of the Directive, an undertaking which is part of a group of undertakings is required to supply information to the internal workers' representative bodies, even where it has not yet been established that there is a controlling undertaking within a group of undertakings.

26. The employer contends that it is clear from the wording of Article 11(2) of the Directive that an undertaking is obliged to supply information only if it has alreadybeen established that it is a controlling undertaking within a group of undertakings. According to the employer, any other interpretation would make it impossible to know which undertakings are obliged to supply information or how and in what way the undertaking responsible for supplying the information is to obtain the information required concerning other undertakings with which it has no links as part of a group of undertakings within the meaning of the Directive.

27. The Works Council, the Austrian and German Governments and the Commission all submit that, in order to attain the chief objective of the Directive - namely informing and consulting employees - the workers concerned must of necessity be assured access to information enabling them to judge whether they are entitled to require negotiations to be opened relating to the setting-up of a European Works Council or of a transnational information and consultation procedure and, if appropriate, to formulate their request properly. That right also includes information as to whether or not there exists a controlling relationship between the various undertakings concerned for the purposes of Article 3 of the Directive.

28. It must first of all be noted, in this connection, that, as stated in the 11th recital in the preamble to the Directive, it is the purpose of that directive to ensure that the employees of Community-scale undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.

29. As is clear from its general scheme, transnational informing and consulting of employees are essentially to be ensured by means of a system of negotiations between the central management, within the meaning of Article 2(1)(e) of the Directive, and the workers' representatives.

30. Next, Article 11(1) of the Directive provides that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings are to abide by the obligations laid down by the Directive.

31. The wording of that same provision makes it clear that the scope of those obligations is not to be confined, on the employers' side, exclusively to central management within the meaning of Article 2(1)(e) of the Directive.

32. Finally, as the Works Council, the Austrian and German Governments and the Commission have correctly pointed out, if the Directive is to serve a useful purpose, it is essential that the workers concerned be guaranteed access to information enabling them to determine whether they have the right to demand the opening of negotiations with central management, once its existence is established, and the workers' representatives.

33. Such a right to information constitutes a necessary prerequisite for determining whether a Community-

scale undertaking or group of undertakings exists, which is itself acondition precedent for the setting-up of a European works council or of a transnational procedure for informing and consulting workers.

34. As regards employees of an undertaking forming part of a group of undertakings, as defined in Article 2(1)(b) of the Directive, their right to be informed therefore exists even before it is ascertained whether or not there exists within the group a controlling undertaking within the meaning of Article 3 of the Directive.

35. That interpretation is corroborated by the wording of Article 11(2) of the Directive, which refers generally to 'parties concerned by the application of this Directive', without confining itself to central management, within the meaning of Article 2(1)(e) of the Directive, or workers' representatives.

36. In light of the foregoing, the answer to be given to the first question must be that, on a proper construction of Article 11(1) and (2) of the Directive, an undertaking which is part of a group of undertakings is required to supply information to the internal workers' representative bodies, even where it has not yet been established that the management to which the workers' request is addressed is the management of a controlling undertaking within a group of undertakings.

The second and third questions

37. With regard to the second and third questions, which deal with the scope of the obligation to supply information imposed by Article 11(1) and (2) of the Directive, information concerning the number of employees in a group of undertakings, within the meaning of Article 2(1)(b) of the Directive, in each Member State, information requested pursuant to Article 11(2) of the Directive, cannot be dissociated from information concerning the existence of a controlling relationship between the various undertakings concerned within the meaning of Article 3 of the Directive.

38. As pointed out in paragraph 32 above, it is implicit in the Directive's purpose that the obligations which it lays down are to be fulfilled in such a way as to enable the workers concerned, or their representatives, to have access to the information which is necessary if they are to be able to determine whether or not they are entitled to request the opening of negotiations and, where relevant, to make that request in due form.

39. It follows that, where information relating to the structure or organisation of a group of undertakings forms part of the information which is essential to the opening of negotiations for the setting-up of a European Works Council or for the transnational information and consultation of employees, an undertaking within the group is required to supply the information which it possesses or is able to obtain to the internal workers' representative bodies requesting it.

40. It also follows that, to the extent that it is necessary in order to make it possible for the employees concerned or their representatives to gain access to the information which is essential if they are to be able to determine whether or not they are entitled to request the opening of negotiations, communication of documents clarifying and explaining the information which is indispensable for that purpose may also be required, in so far as that communication is necessary.

41. The answer to be given to the second and third questions must therefore be that where information relating to the structure or organisation of a group of undertakings forms part of the information which is essential to the opening of negotiations for the setting-up of a European Works Council or for the transnational information and consultation of employees, an undertaking within the group is required to supply the information which it possesses or is able to obtain to the internal workers' representative bodies requesting it. Communication of documents clarifying and explaining the information which is indispensable for that purpose may also be required, in so far as that communication is necessary in order that the employees concerned or their representatives may gain access to information enabling them to determine whether or not they are entitled to request the opening of negotiations.

Costs

42.

The costs incurred by the German and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Landesarbeitsgericht Düsseldorf by of 21 January 1999, hereby rules:

1. On a proper construction of Article 11(1) and (2) of Council Directive 94/45/EC 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, an undertaking which is part of a group of undertakings is required to supply information to the internal workers' representative bodies, even where it has not yet been established that the management to which the workers' request is addressed is the management of a controlling undertaking within a group of undertakings.

2. Where information relating to the structure or organisation of a group of undertakings forms part of the information which is essential to the opening of negotiations for the setting-up of a European Works Council or for the transnational information and consultation of employees, an undertaking within the group is required to supply the information which it possesses or is able to obtain to the internal workers' representative bodies requesting it. Communication of documents clarifying and explaining the information which is indispensable for that purpose may also be required, in so far as that communication is necessary in order that the employees concerned or their representatives may gain access to information enabling them to determine whether or not they are entitled to request the opening of negotiations.

Gulmann

Skouris

Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 29 March 2001.

R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber

1: Language of the case: German.