ADS ANKER

OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 27 February 2003 [1]

1. By an order of 24 July 2001 the Arbeitsgericht (Labour Court) Bielefeld (Germany) submitted to the Court pursuant to Article 234 EC two questions for a preliminary ruling on the interpretation 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 [2] (hereinafter 'the Directive'). In particular, the Arbeitsgericht Bielefeld asks whether an undertaking established in a Member State of the Community which is regarded as the central management of a Community-scale group of undertakings within the meaning of the Directive is obliged to provide information to other group undertakings established in other Member States when such undertakings have received from the employees' internal representation bodies a request for information which they do not possess and, if that is the case, to specify the scope of such an obligation.

I — Legal background

A — *The relevant provisions of the Directive*

2. Article 1 of the Directive provides that:

'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

1 — Original language: Italian.

2 — OJ 1994 L 254, p. 64. As the Directive was based on Article 2 (2) of the Agreement on social policy annexed to Protocol 14 to the EC Treaty, it did not initially apply to the United Kingdom. Its application was subsequently extended to that Member State by Council Directive 97/74/EC (OJ 1998 L 10, p. 22).

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. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

...'

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

'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;

...'.

4. Article 3(1) provides that:

'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.'

5. Pursuant to Article 4 of the Directive:

'1. The 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.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.'

6. Article 5(1) of the Directive provides that:

'In order to achieve the objective in Article 1 (1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.'

7. Under Article 6(1) of the Directive:

'The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1 (1).'

8. Article 11 of the Directive provides that:

'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.

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

...'

9. Finally, according to Article 14(1) of the Directive:

'Member States shall bring into force the laws, regulations and administrative provi-

sions necessary to comply with this Directive no later than 22 September 1996 or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.'

B — *The German legislation*

10. 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, hereinafter the 'EBRG').[3]

11. Under Paragraph 2(1) of the EBRG that law applies to Community-scale undertakings having their seat in German territory and to Community-scale groups of undertakings where the controlling undertaking has its seat in German territory. However, even if the central management is not situated in Germany, under Article 2(2) of the law it also applies as regards, *inter alia*, the provisions for calculating the number of employees in Germany (Article 4 of the EBRG), exercise of the right to information (Article 5(2) of the EBRG), determination of the controlling undertaking (Article 6 of the EBRG) and the report on the bodies representing employees in the Federal Republic of Germany (Article 35(2) of the EBRG).

12. Article 5 of the EBRG provides that:

'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.'[4]

3 — BGBl. 1996 I, p. 1548.

4 — Unofficial translation.

II — Facts, procedure before the national court and questions submitted for a preliminary ruling

13. The dispute pending before the Arbeitsgericht Bielefeld is between the German company ADS Anker GmbH (hereinafter 'ADS Anker') and the works council of that company (hereinafter 'the works council').

14. It transpires from the order for reference that ADS Anker is part of a Community-scale group of undertakings, the parent company of which is situated in Switzerland. The order also states that ADS Anker is controlled by the company Anker BV, established in the Kingdom of the Netherlands, which holds shares of other undertakings belonging to the Anker group established in various Member States. The Anker group undertaking with the largest number of employees in a Member State is the British undertaking RIVA.

15. Neither a European Works Council nor a procedure for informing and consulting employees within the meaning of Article 1(2) of the Directive has been established within the group in question. In order to remedy that situation, the works council asked ADS Anker, pursuant to Article 5(2) of the EBRG, to give it the information laid down in Article 5(1) of the EBRG and the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council. In the light of the refusal of ADS Anker, the works council brought an action before the national court in pursuit of its claim.

16. In its defence, ADS Anker maintains that it is unable to comply with the requirement to obtain the information requested in accordance with Article 5(2) of the EBRG because both the parent company in Switzerland and the Netherlands company Anker BV refuse to provide the information in question. ADS Anker also states that under German law it cannot obtain information held by undertakings situated outside Germany.

17. The national court, however, held that ADS Anker's argument would be unfounded if it were concluded that, because of a requirement that can be deduced from the Directive — in particular from Articles 4(1) and 5(1) thereof — and from the national provisions transposing the Directive, the central management with its seat in another Member State is required to provide ADS Anker with the information specified in Article 5(1) of the EBRG.

18. The national court concludes that, if that interpretation is correct and if such a requirement is found to exist, it is then

necessary to examine whether in accordance with the same provisions the central management is required to provide ADS Anker not only with the information specified in Article 5(1) of the EBRG but also information on the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council.

19. In order to resolve these issues, the Arbeitsgericht Bielefeld stayed the proceedings and asked the Court for a preliminary ruling on the following questions:

'1. Is it a requirement of Council Directive 94/45/EC 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, in particular Articles 4 and 11 thereof, that an undertaking established in the United Kingdom, which is regarded as the central management under the second paragraph of Article 4(2) and Article 4 (3) of the Directive, or an undertaking established in the Kingdom of the Netherlands, which constitutes the central management of the controlling undertaking under Article 2(1)(e) and Article 3(1) of the Directive, is obliged to provide another undertaking resident in the Federal Republic of Germany belonging to the same group of undertakings with information on undertakings and establishments belonging to the group of undertakings and on their legal form and representation arrangements and the average total number of employees and their distribution across the Member States and the undertakings?

2. If the Court of Justice answers the first question in the affirmative: Does the obligation to provide information also encompass the names of the employees' representation bodies and their representatives who are to participate, on behalf of the employees of the undertaking or the undertakings controlled by it, in the establishment of a European Works Council?'

III — Procedure before the Court

20. In the course of the written procedure the works council, ADS Anker, the Federal Republic of Germany and the Commission of the European Communities submitted observations to the Court. The works council, ADS Anker and the Commission also attended the hearing held on 5 December 2002.

IV — Legal analysis

A — *The first question submitted for a preliminary ruling*

21. In its first question, the national court asks in essence whether, on the basis of Articles 4 and 11 of the Directive, the Member States must require an undertaking established in their territory which is to be regarded as the central management of a Community-scale group of undertakings within the meaning of the Directive to provide the group undertakings established in other Member States with the information requested of the latter by their internal employees' representation bodies if such information is not available to such undertakings and is necessary in order to be able to request the opening of negotiations on the establishment of a European Works Council or a procedure for informing and consulting employees.

22. Before replying to this question, I think it is appropriate to emphasise that neither the national court nor any of the parties involved in this case doubt the duty of the Member States to require the central management within the meaning of Article 4(1) of the Directive to provide information to employees who intend to initiate negotiations for the establishment of a European Works Council. Moreover, I have expressed my views in this regard at length in my Opinion in Case C-440/00 *Kühne & Nagel.* [5]

23. Nor is there any doubt, especially after the *Bofrost** judgment, as to the obligation for each undertaking in a group to provide its employees, in accordance with Article 11(2) of the Directive, with 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'. [6] In that judgment the Court clarified once and for all that the scope of the obligations deriving from the Directive 'is not to be confined, on the employers' side, exclusively to central management'. [7]

24. What is in doubt in the present case, however, is whether the triangle of central management-undertakings-employees, in which the flow of information on the central management-employees and undertakings-employees sides is not contested, should also be closed on the central management-undertakings side. In other words, we are being

5 — Opinion of 11 July 2002, Judgment of 13 January 2004, ECR I-787.

6 — Judgment in Case C-62/99 *Bofrost** [2001] ECR I-2579, paragraph 38.

7 — See the *Bofrost** judgment, paragraph 31.

asked whether the requirement to provide information operates not only vertically but also horizontally and hence whether, pursuant to the Directive, it is also incumbent on the central management *vis-à-vis* the other group undertakings, in particular when the internal employees' representation bodies have asked the undertakings for the information necessary for opening negotiations on the establishment of a European Works Council and they do not have it.

25. According to ADS Anker, the reply to this question should be in the negative. In its opinion, it is not apparent from the text of the Directive that the central management is required to provide information to the other group undertakings. Hence the central management is required to provide the information necessary for the opening of negotiations on the establishment of a European Works Council only when it is requested directly by the employees. That conclusion is justified, ADS Anker continues, by the consideration that as it is the employees who request the information it is they who must obtain it from the central management. To require the undertaking to obtain the information requested by its employees by taking legal proceedings against the central management could have adverse repercussions on relations within the group. Furthermore, according to ADS Anker, if the legal proceedings failed the employees would have no further means of obtaining the information they had requested.

26. The works council, the German Government and the Commission, by contrast, propose a reply in the affirmative, for reasons which I shall explain below.

27. As for myself, I must immediately observe that the arguments adopted by ADS Anker in support of its stance do not convince. They are based more on reasons of convenience than on an interpretation of the provisions of the Directive. By contrast, I find more convincing the logical, systematic and textual arguments adopted in support of the opposite claim, which I shall now attempt to illustrate.

28. I must begin by recalling that, as I stated in my Opinion in the *Kühne & Nagel* case, 'the system described in the directive hinges upon the role of the central management of the Community-scale undertaking or group of undertakings, upon which Article 4(1) of the directive places primary responsibility for achieving the purpose laid down in the directive, since it is the effective decision-

making centre of the undertaking or the group'.[8] That responsibility includes 'the obligation, using all available resources, to meet any need that may arise in the setting up of a European Works Council or a procedure for the purpose of informing and consulting employees under the directive, limited only in that the activity requested of the central management should be truly *necessary* for the purpose'.[9] It follows from this that the central management is 'required to create all the physical and logistical conditions and means for negotiations with the workers' representatives to be able to proceed duly'.[10]

29. A corollary to that requirement is certainly also the requirement to communicate to the employees all the information necessary for exercising the right granted to them by Article 5(1) of the Directive to request the opening of negotiations for the establishment of a European Works Council. To claim that that requirement applies only when the employees have requested the information directly from the central management and not also when the request comes from other group undertakings would impose an unjustifiable and illogical limitation on the broad scope of Article 4(1) of the Directive and diminish a responsibility that, as I have said, the Directive clearly describes as primary and general.

30. As the Commission rightly observes, since that provision places the responsibility for creating the conditions necessary to permit the establishment of a European Works Council on the central management — and, I would add, gives it that responsibility by reason of the fact that it represents the entire group — that responsibility translates not only into an obligation to provide the information requested for that purpose to the employees' representation bodies direct but also an obligation to provide the same information to other group undertakings that have received a request of this kind from their own employees.

31. In other words, when the internal bodies representing the employees of an undertaking ask the undertaking for information in order to exercise their rights under the Directive and the undertaking does not have such information, the conditions for the application of Article 4(1) of the Directive are met, specifically the conditions in which group undertakings are entitled to request information from the central management and the latter is obliged to provide it in order to create, as that provision stipulates, the conditions for the setting up of the works council.

32. I repeat, anything else would severely restrict the scope of the obligation which that provision places on the central manage-

8 — See point 29 of my Opinion in Case Case C-440/00 *Kühne & Nagel*.

9 — Ibid.

10 — See point 30 of my Opinion in Case C-440/00 *Kühne & Nagel*.

ment and, as the German Government and the works council note, would infringe the principle of effectiveness of the Directive, which imposes requirements designed to facilitate, and not obstruct, the setting up of European Works Councils.

33. To accept the line of argument criticised here would obstruct the employees in the exercise of the rights recognised by the Directive instead of encouraging them therein, by obliging them to take onerous and wearisome measures for that purpose without any objective justification, thus frustrating the achievement of the objective that the Directive explicitly sets out to foster, in contrast to the said principle of effectiveness. As the works council has rightly observed, one need only consider the difficulties that the employees would encounter in obtaining from the central management the information necessary to request the opening of negotiations if that management were in a different Member State.

34. So much for the question of the central management and its obligations. A further argument to the same effect can also be deduced, however, if we look at the question of the individual group undertakings. As the German Government has rightly observed, since the *Bofrost** judgment recognised that each such undertaking has an obligation under the Directive to provide its own internal employees' representation bodies with 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,' [11] it must also of necessity be recognised that such undertakings are entitled to obtain this information from the central management.

35. That having been said, I am not unaware that difficulties could arise in achieving effective compliance with the obligation in question where the central management and the individual undertakings operate in different Member States (but even where they are in the same State). I must, however, remind the Court in this regard that, under Article 14(1) of the Directive, the Member States are required not only to bring into force 'the laws, regulations and administrative provisions necessary to comply with this Directive', but also 'to take all necessary steps enabling them at all times to guarantee *the results* imposed by this Directive'. [12] Furthermore, under Article 11(3) they must ensure that 'adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced'.

11 — See the *Bofrost** judgment, paragraph 39.

12 — My italics.

36. These provisions require the Member States to achieve particularly explicit and detailed results, which in some ways go beyond the general transposition obligations normally laid down in Community directives. It follows that the Member States are required to establish all the means necessary to guarantee full compliance with the obligations under Article 4(1) of the Directive and that, even in the absence of express provisions to that effect, the national measures transposing the Directive and, where necessary, the legislation as a whole are to be interpreted in accordance with the explicit wish of the Directive.

37. On the basis of the foregoing considerations, I therefore hold that the reply to the first question should be that Articles 4 and 14 of the Directive are to be interpreted as meaning that the Member States are required to oblige an undertaking established in their territory which is to be regarded as the central management of a Community-scale group of undertakings within the meaning of the Directive to provide the group undertakings established in other Member States with the information requested of the latter undertakings by their internal employees' representation bodies if such information is not available to those undertakings and is necessary for the setting up of a European Works Council or a procedure for informing and consulting employees.

B — *The second question submitted for a preliminary ruling*

38. In its second question the national court asks the Court to clarify the scope of the central management's obligation to inform other group undertakings, if it recognises that the central management has such an obligation. This question is almost identical, *mutatis mutandis*, to the second question in the *Kühne & Nagel* case.

39. In this regard, the works council notes that the right to information laid down in Article 5 of the EBRG is intended not solely to permit employees to know whether the conditions for setting up a European Works Council are met but also, if that be the case, to enable them to obtain all the data necessary for its establishment. As Article 5 of the Directive provides that the European Works Council may be established at the request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States, the employees of one establishment or undertaking who wish to promote the establishment of such a works council must be informed about the employees' representation bodies and their representatives in other undertakings or establishments belonging to the group. In the opinion of the works council, the reply to the second question should therefore be in the affirmative.

40. The German Government also maintains that the reply to this question should be in the affirmative, simply recalling the observations it presented with regard to the second question submitted for a preliminary ruling in Case C-440/00.

41. ADS Anker, by contrast, maintains that the reply to this question should be in the negative, for two reasons. First and foremost, the request for information about the name of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council is too vague. In its opinion, this vagueness would oblige the central management to identify the information necessary for the setting up of the European Works Council, whereas this is the responsibility of the employees who have taken the initiative to form it. Secondly, in the opinion of ADS Anker, such information is not necessary in order to submit a request in accordance with Article 5(1) of the Directive, and consequently the employees have no right to request it.

42. The Commission, for its part, cites the judgment in the *Bofrost** case and maintains that the reply to this question should be that an undertaking is required to provide the representation bodies of its own employees with the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council if it has such data or is able to obtain it and if, in the opinion of the national court, such data constitutes information that is essential for opening negotiations on the establishment of a European Works Council.

43. As for myself, I see no reason to modify the position I adopted in this regard in my Opinion in the *Kühne & Nagel* case, to which I therefore take the liberty of referring. [13] In my opinion, namely, the reply to this question should be that the central management of the group is required to provide other group undertakings that have received a request to that effect from the internal representation bodies of their employees with information on the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council if, in the opinion of the national court, such information is necessary for the purpose of establishing a European Works Council in the group.

13 — See points 41 to 44 of my Opinion in Case C-440/00 *Kühne & Nagel*.

V — Conclusion

44. In the light of the foregoing considerations, I therefore suggest that the Court reply as follows to the questions submitted to it by the Arbeitsgericht Bielefeld by order of 24 July 2001:

(1) Articles 4 and 14 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 is to be interpreted as meaning that the Member States are required to oblige an undertaking established in their territory which is regarded as the central management of a Community-scale group of undertakings within the meaning of the Directive to provide the group undertakings established in other Member States with the information requested of the latter undertakings by their internal employees' representation bodies if such information is not available to those undertakings and is necessary for the setting up of a European Works Council or a procedure for informing and consulting employees.

(2) The central management of the group is required, if so requested, to provide a group undertaking that has received a request to that effect from the internal representation bodies of their employees with information on the names of the employees' representation bodies and their representatives able to participate, on behalf of the employees of the undertakings or of undertakings controlled by them, in the establishment of a European Works Council if, in the opinion of the national court, such information is necessary for the purpose of establishing a European Works Council in the group.