JUDGMENT OF THE COURT

13 January 2004 *

In Case C-440/00,

REFERENCE to the Court under Article 234 EC by the Bundesarbeitsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG

and

Kühne & Nagel AG & Co. KG,

on the interpretation of Articles 4 and 11 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),

* Language of the case: German.

THE COURT,

composed of: V. Skouris, President, P. Jann and J.N. Cunha Rodrigues (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken (Rapporteur), N. Colneric and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG, by C. Greiner-Mai, Rechtsanwältin,

— Kühne & Nagel AG & Co. KG, by H. Stange, Rechtsanwalt,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by J. Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG, of Kühne & Nagel AG & Co. KG and of the Commission at the hearing on 15 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1 By order of 27 June 2000, received at the Court on 29 November 2000, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 4 and 11 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 Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG (Central Works Council at Kühne & Nagel AG & Co. KG; 'the Works Council') and Kühne & Nagel AG & Co. KG ('Kühne & Nagel') concerning the Works Council's request to Kühne & Nagel to provide it with certain information for the purpose of establishing a European Works Council.

Legal background

Community legislation

3 The 11th recital in the preamble to the Directive states:

'... appropriate provisions must be adopted 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'.

4 The 14th recital states:

'... the mechanisms for informing and consulting employees in such undertakings or groups must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States'.

5 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.'

6 The following provision is made by Article 2(1)(a) to (e):

'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

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;

(d) "employees' representatives" means the employees' representatives provided for by national law and/or practice;

(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.'

7 'Controlling undertaking' is defined by Article 3(1) and (2) of the Directive as follows:

'1. For the purposes of this Directive, "controlling undertaking" means an undertaking which can exercise a dominant influence over another... "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 [one undertaking], in relation to another undertaking directly or indirectly:

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

or

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

or

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

8 Article 4 of the Directive provides:

'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.'

9 Pursuant to Article 5(1) and (2) of the Directive:

'1. 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.

2. For this purpose, a special negotiating body shall be established...'.

10 Article 6(1) of the Directive provides:

'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).'

11 Article 11(1) to (3) of the Directive 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.

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.'

12 Article 14(1) of the Directive provides:

'Member States shall bring into force the laws, regulations and administrative provisions 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.'

National legislation

13 The Gesetz über Europäische Betriebsräte of 28 October 1996 (Law on European Works Councils, BGBl. 1996 I, p. 1548; 'the EBRG') is intended to incorporate the Directive into German law.

14 Under Paragraph 2(1) thereof, the EBRG applies to undertakings operating in the Community which have their seat in Germany and to groups of undertakings established in the Community where the controlling undertaking has its seat in German territory.

15 Paragraph 2(2) of the EBRG provides:

'Where the central management is not located in a Member State but there is a local subordinate management for undertakings or establishments located in the Member States, this law shall apply where the local subordinate management is in Germany. In the absence of any local subordinate management, this law shall apply in cases in which the central management appoints an establishment or an undertaking as its representative in Germany. If no representative has been appointed, this law shall apply where the establishment or the undertaking with the greatest number of employees by comparison with the undertaking's other establishments, or the other undertakings of the group, present in the Member States, is located in Germany. The aforementioned shall be deemed to constitute the central management.'

16 Paragraph 3(2) of the EBRG defines 'Community-scale group of undertakings' in the same way as Article 2(1)(c) of the Directive.

17 Paragraph 5 of the EBRG provides:

'1. The central management must give to the employees' representatives, upon request, information on the average total number of employees and their distribution across the Member States, on the undertakings and establishments and on the structure of the undertaking or group of undertakings.

2. A works council or a central works council may exercise the right granted in subparagraph 1 above 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.'

18 Paragraph 6 of the EBRG defines 'controlling undertaking' in the same way as Article 3 of the Directive.

The dispute before the national court

19 The order for reference shows that Kühne & Nagel, an undertaking with its company seat in Germany, belongs to a Community-scale group of undertakings within the meaning of Paragraph 3(2) of the EBRG ('the Kühne & Nagel Group').

20 The group's parent company, namely the controlling undertaking for the purposes of Paragraph 6 of the EBRG, and thus the central management, is established in Switzerland.

21 Further, neither a European Works Council nor any procedure for informing and consulting employees has been established within the Kühne & Nagel Group. Attempts to establish a special negotiating body for this purpose have not been successful.

22 Within the Community the Kühne & Nagel Group has no local subordinate management for the undertakings located in the Federal Republic of Germany or in other Member States nor any representative appointed by central management, as provided for in the second sentence of Paragraph 2(2) of the EBRG.

23 According to the documents before the Court, Kühne & Nagel employs around 4 500 persons in Germany, distributed across 16 establishments. No information is available about the average number of employees of the Kühne & Nagel Group or about their distribution across the other Member States. However, according to the order for reference, Kühne & Nagel is the undertaking within the Kühne & Nagel Group with the greatest number of employees in any one Member State for the purposes of the third sentence of Paragraph 2(2) of the EBRG.

24 The Works Council maintained that, since Kühne & Nagel has its seat in the Federal Republic of Germany, the Member State in which the greatest number of employees are employed by comparison with the other undertakings of the Kühne & Nagel Group present in other Member States, the management of that company is deemed to constitute the central management of the Kühne & Nagel Group in accordance with the third and fourth sentences of Paragraph 2(2) of the EBRG.

25 In order to prepare for the establishment of a European Works Council, pursuant to Paragraph 5(2) of the EBRG, the Works Council asked Kühne & Nagel to provide it with the information prescribed in Paragraph 5(1), in particular with information about the average number of employees and their distribution across the Member States, the undertakings and the establishments and about the structure of the company and the group of companies, as well as the names and addresses of the Kühne & Nagel Group employee representatives in the Member States.

26 Kühne & Nagel did not dispute that it was under an obligation to provide the information prescribed in Paragraph 5(1) of the EBRG but stated that it could not perform its obligation because central management, located in Switzerland, was not subject to Community law and refused to supply it with the information. It stated that it did not itself have the information. It was therefore impossible to respond to the Works Council's request, which consequently had to be refused. Kühne & Nagel contended that there was no legal basis for the request that it provide information concerning the Group's employee representative bodies in other Member States.

27 At first instance, the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) held that the Works Council was entitled to request the information. Kühne & Nagel appealed to the Landesarbeitsgericht Hamburg (Higher Labour Court, Hamburg). Its case was dismissed but it was given leave to appeal to the Bundesarbeitsgericht (Federal Labour Court).

28 The Bundesarbeitsgericht found that the EBRG does not expressly confer on Kühne & Nagel a right to information which is enforceable against undertakings belonging to the Kühne & Nagel Group and established in Member States other than the Federal Republic of Germany. However, the management of an undertaking or group of undertakings which has its seat in Germany — even if the management in question is 'central management' under the third sentence of Paragraph 2(2) of the EBRG — is legally bound, under Paragraph 5(1) of the EBRG, to provide the information referred to in that provision to the Works Council. The EBRG thus appears to assume that the information necessary for that purpose will be obtained. In the view of the Bundesarbeitsgericht, the territorial scope of the EBRG is, however, such that it has no effect outside Germany and does not give rise to an information obligation on foreign legal persons vis-à-vis undertakings established in Germany.

29 The referring court considers that the defence thus relied on by Kühne & Nagel fails if the company has the ability to compel the undertakings of the group established in other Member States to supply the requisite information, on the basis of the national legislation enacted in those States to implement the

Directive. In the referring court's view, that ability exists only if the Directive requires the creation of a horizontal entitlement to information in the case of groups of undertakings whose central management is not situated in a Member State.

30 The Bundesarbeitsgericht states that the Directive does not specifically provide for an entitlement of that kind but that it is possible to infer that such an entitlement exists from the purpose of the Directive, from the principle of effectiveness (*effet utile*) and from the overall scheme of the Directive, in particular from Articles 1, 4(1) and (2) and 11(1) and (2) thereof.

31 Taking the view that the interpretation of the Directive was not so obvious as to leave no scope for reasonable doubt, the Bundesarbeitsgericht decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is it a requirement of... Directive 94/45/EC, in particular Articles 4 and 11 thereof, that undertakings which belong to a group of undertakings whose controlling undertaking is resident outside the Community are obliged to provide the undertaking which is regarded as the central management under the second subparagraph of Article 4(2) and Article 4(3) of the Directive with information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the undertakings controlled by it, and on the structure of the undertaking and of the undertakings controlled by it?

2. If the answer to the first question is in the affirmative:

Does the obligation to provide information also encompass the names and addresses of the employee representation which is to participate, on behalf of

the employees of the undertaking or the undertakings controlled by it, in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council?'

The first part of the first question

32 By the first part of its first question, the national court is asking essentially whether, where the central management of a Community-scale group of undertakings is not situated in a Member State and fails to make available to the management regarded as central management under the second subparagraph of Article 4(2) of the Directive ('the deemed central management') certain information for the purpose of establishing a European Works Council, Articles 4 and 11 of the Directive must be interpreted as requiring other undertakings in the same group which are situated in the Member States to supply the deemed central management with the information concerned.

Observations submitted to the Court

33 The Works Council, the German and Swedish Governments and the Commission submit that it follows from the wording of Article 11(2) and (3) of the Directive that the Member States must ensure that the obligations of the undertakings concerned are complied with. They maintain that Article 4(1) of the Directive makes the central management responsible for creating the conditions and means necessary for the setting up of a European Works Council, which requires it, *inter alia*, to supply the necessary information for such a council to be established in accordance with the Directive. In their submission, it must, of necessity, be accepted that, unless the Directive is to be rendered devoid of all practical effect, undertakings are required to provide information to the deemed central management.

34 The Works Council and the German and Swedish Governments submit that the obligation to play a role in creating a European Works Council applies equally to all the undertakings located in Member States and that therefore they must cooperate with one another. The obligation arises, in the German Government's submission, from Article 4(1) and Article 6(1) of the Directive.

35 The German Government also contends that the fact that there is a wide duty to provide information was recognised in Advocate General Saggio's Opinion in the *bofrost** case (Case C-62/99 *Bofrost** [2001] ECR I-2579).

36 The Commission submits that, if the deemed central management is to be allowed to make effective use of its right to information vis-à-vis other undertakings in the group, particularly where the latter are situated in different Member States, it is also necessary to lay down specific provisions to that end at national level when implementing the Directive. The Commission emphasises the difficulties which the deemed central management may encounter in asserting a right to information, starting with the fact that it might be unaware of the internal structure of the group and therefore would not be in a position to identify all the undertakings or all the establishments concerned.

37 Kühne & Nagel contends that recognising that central management, or the deemed central management, has a right to be provided with information by other companies in the group would seriously prejudice its fellow subsidiaries' independence and that such prejudice is not warranted merely because the objective is to put in place a European-scale employees' representative body. In Kühne & Nagel's submission, the subsidiaries of the Swiss parent company established in the other Member States are all autonomous undertakings and the Directive does not place a legal obligation on those undertakings to act on the request for information. Furthermore, the information could consist of facts which should remain confidential.

38 Kühne & Nagel none the less accepts that there is nothing to prevent the employees' representatives from gaining recognition of a right to information which is enforceable against the group undertakings.

Findings of the Court

39 According to its 11th recital and to Article 1(2), the aim of the Directive is to ensure that the employees of Community-scale undertakings and Community-scale groups of 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.

40 As is clear from the Directive's general scheme, transnational informing and consulting of employees are essentially to be ensured by means of a system of negotiations between central management and the employees' representatives (*bofrost**, paragraph 29).

41 In that connection, a European Works Council or a procedure for informing and consulting employees is to 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) of the Directive.

42 Pursuant to Article 5(1) of the Directive, central management, 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, is to initiate negotiations for the establishment of a European Works Council.

43 For that purpose, a special negotiating body, which is a body representing the employees consisting of a minimum of three and a maximum of 17 elected or appointed members, is to be established in accordance with Article 5(2) of the Directive.

44 This special negotiating body and central management must, in accordance with Article 6(1) of the Directive, negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for establishing a European Works Council.

45 It is also apparent from Article 11(2) of the Directive that the Member States must ensure that undertakings make available to the parties concerned by the application of the Directive the information on the number of employees referred to in Article 2(1)(a) and (c) thereof.

46 Furthermore, the Court has already stated that, if the Directive is to serve a useful purpose, it is essential that the employees concerned be guaranteed access to information enabling them to determine whether they have the right to demand the opening of negotiations between central management and the employees' representatives, such a right to information constituting a necessary prerequisite for determining whether a Community-scale undertaking or group of undertakings exists, which is itself a condition precedent for the setting up of a European Works Council or of a transnational procedure for informing and consulting employees (*bofrost**, paragraphs 32 and 33).

47 The Court similarly stated, in paragraph 39 of its judgment in *bofrost**, 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 such negotiations for the setting up of a European Works Council, all undertakings within the group are required to supply the information which they possess or are able to obtain to the internal employees' representative bodies requesting it.

48 The first part of the first question must be answered in light of those considerations.

49 As regards, first, the responsibility of central management, the latter must, in accordance with Article 4(1) of the Directive, create the conditions and means necessary for the setting up of a European Works Council.

50 Where the central management is situated outside the Member States, its responsibility is assumed, pursuant to the first subparagraph of Article 4(2), by its representative agent in a Member State, who is to be designated if necessary. In the absence of such a representative, that responsibility falls, under the second subparagraph of Article 4(2), to the management of the establishment or group undertaking employing the greatest number of employees in any one Member State, that is to say, the deemed central management. As is apparent from paragraphs 23 and 24 of the present judgment, that is the case in the main proceedings.

51 In order to create the conditions and means necessary for the setting up of a European Works Council, the responsibility of either central management or the deemed central management includes an obligation to supply the employees' representatives with the information essential to the opening of negotiations for establishing such a council.

52 Central management, in the case of a Community-scale group of undertakings, is the central management of the controlling undertaking, namely the undertaking which can exercise a dominant influence over all the other controlled undertakings of the group, within the meaning of Article 3(1) and (2) of the Directive. It is

thus in possession of, or is in a position to obtain, the information referred to in the preceding paragraph and can readily comply with the obligation concerned.

53 By contrast, deemed central management is not necessarily in possession of the information concerned. Moreover, as Kühne & Nagel has observed, deemed central management is not usually in a position to obtain, in the context of legal relations between undertakings within the same group, the information from other undertakings belonging to the group.

54 However, given the objective and overall scheme of the Directive and in order that deemed central management can take on the responsibility, and fulfil the obligations, which usually fall to central management, Article 4(1) of the Directive must be interpreted as meaning that deemed central management is required to request the information essential to the opening of negotiations for the establishment of a European Works Council from the other undertakings belonging to the group which are located in the Member States, and has a right to receive that information from them.

55 As regards, next, the obligations of the other undertakings belonging to the group and located in the Member States, the 14th recital in the preamble to the Directive states that the mechanisms for informing and consulting employees of the group must encompass all the group's undertakings located within the Member States, regardless of whether the group's controlling undertaking is located inside or outside the territory of the Member States.

56 Furthermore, it follows from Article 11(1) of the Directive that each Member State is to ensure that the management of undertakings belonging to a Community-scale group of undertakings which are situated within its territory abides by the obligations laid down by the Directive, regardless of whether or not the central management is situated within its territory. As the Court held in paragraph 31 of the judgment in *bofrost**, the actual wording of the provision makes it clear that the scope of the obligations to which it refers is not to be confined, on the employers' side, exclusively to central management.

57 As is clear from paragraph 47 of the present judgment, all undertakings within the group are required to supply the information essential to the opening of negotiations for the establishment of a European Works Council which is in their possession or which they are able to obtain to the internal employees' representative bodies requesting it.

58 However, the fact that that obligation exists does not negate the main obligation, owed by the deemed central management, to create the conditions and means necessary for the setting up of a Works Council in accordance with Article 4(1) of the Directive.

59 In view of the provisions of the Directive referred to in paragraphs 55 and 56 of this judgment and in order to ensure that the Directive serves a useful purpose, the other undertakings belonging to the group and located in the Member States are therefore under an obligation to assist the deemed central management in fulfilling the main obligation. It follows that the corollary of the deemed central management's right to receive essential information is an obligation on the part of the management of each of the other undertakings belonging to the group to supply the deemed central management with the information concerned where it is in possession of the information or is in a position to obtain it.

60 That interpretation of Article 4(1) and the second subparagraph of Article 4(2) and Article 11(1) of the Directive follows *inter alia* from the requirement that the system of transnational information and consultation which the Directive seeks to establish function properly. When central management is not located in a Member State and does not make essential information available to the deemed central management, the Directive enables the latter to demand the essential information from the other undertakings belonging to the group in order that the obligations normally incumbent upon central management may be fulfilled.

61 Finally, under Article 14(1) of the Directive, the Member States must take all the necessary steps in order to be able at all times to guarantee the results imposed by the Directive. Under Article 11(3) of the Directive, they must provide for appropriate measures in the event of failure to comply with the Directive and, in particular, they must ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from the Directive to be enforced. It follows from the purpose of the Directive that the Member States must take all the measures necessary to ensure that the obligations deriving from Articles 4(1) and 11(1) of the Directive are fully performed.

62 It is none the less appropriate to point out that the Member States, when ensuring that the undertakings belonging to a group comply with their obligations, must be mindful of certain of the undertakings' interests. First, the competent national authorities must ensure that, when they are required to give a decision in administrative or judicial proceedings for enforcement of these obligations, information of a confidential nature is adequately protected. Second, administrative or judicial appeal procedures must be available to those undertakings.

63 In any event, the deemed central management will be able to use the information supplied by other undertakings belonging to the group solely for the purpose of

creating the conditions and means necessary for the setting up of a Works Council, in accordance with Article 4(1) of the Directive.

64 In the light of the foregoing, the answer to be given to the first part of the first question is that Articles 4(1) and 11(1) of the Directive must be interpreted as meaning that:

— where, in a situation such as that at issue before the national court, the central management of a Community-scale group of undertakings is not located in a Member State, central management's responsibility for providing the employees' representatives with the information essential to the opening of negotiations for the establishment of a European Works Council lies with the deemed central management under the second subparagraph of Article 4(2) of the Directive;

— where central management does not, for the purpose of establishing a European Works Council, make certain information available to the deemed central management under the second subparagraph of Article 4(2) of the Directive, the latter, in order to be able to fulfil its obligation to provide information to the employees' representatives, must request the information essential to the opening of negotiations for the establishment of such a council from the other undertakings belonging to the group which are located in the Member States, and has a right to receive that information from them;

— the management of each of the other undertakings belonging to the group which are located in the Member States is under an obligation to supply the deemed central management under the second subparagraph of Article 4(2) of the Directive with the information concerned where it is in possession of the information or is in a position to obtain it;

— the Member States concerned are to ensure that the management of those other undertakings supplies the information to the deemed central management under the second subparagraph of Article 4(2) of the Directive.

The second part of the first question and the second question

65 By the second part of the first question and the second question, the national court is asking whether the obligation to provide information deriving from Articles 4(1) and 11(1) of the Directive encompasses information on the average number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council.

Observations submitted to the Court

66 In the submission of the Works Council and the German Government, the obligation laid down by the Directive to supply information also extends to the names and addresses of the employees' representatives on the ground that the latter can exercise their rights effectively only if they cooperate with each other.

67 By contrast, Kühne & Nagel and the Commission argue that information about the names and addresses of the employee representation is not essential to the initiation of negotiations for the establishment of a European Works Council in

accordance with Article 5 of the Directive. The Commission acknowledges, however, that that information may facilitate the opening of negotiations concerning the establishment of such a council.

Findings of the Court

68 Article 11(2) of the Directive specifically refers to the obligation of the Member States to ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) of the Directive is made available by undertakings at the request of the parties concerned by the application of the Directive.

69 Furthermore, the Court has already pointed out, in paragraph 64 of this judgment, that the management of each of the other undertakings belonging to the group which are located in the Member States is under an obligation to supply the deemed central management with the information essential to the opening of negotiations for the establishment of a European Works Council which is in its possession or which it is in a position to obtain.

70 It follows that the provision of information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council, may be demanded to the extent to which that provision is essential to the opening of negotiations for the establishment of such a council.

71 It is for the national courts to determine, on the basis of all the material available to them, whether the information requested is essential to the opening of the negotiations referred to in Article 5(1) of the Directive.

72 The answer to the second part of the first question and to the second question must therefore be that the obligation to provide information deriving from Articles 4(1) and 11(1) of the Directive encompasses information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council, where that information is essential to the opening of negotiations for the establishment of such a council.

Costs

73 The costs incurred by the German and Swedish 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,

in answer to the questions referred to it by the Bundesarbeitsgericht by order of 27 June 2000, hereby rules:

1. Articles 4(1) and 11(1) 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 must be interpreted as meaning that:

— where, in a situation such as that at issue before the national court, the central management of a Community-scale group of undertakings is not located in a Member State, central management's responsibility for providing the employees' representatives with the information essential to the opening of negotiations for the establishment of a European Works Council lies with the deemed central management under the second subparagraph of Article 4(2) of the Directive;

— where central management does not, for the purpose of establishing a European Works Council, make certain information available to the deemed central management under the second subparagraph of Article 4(2) of the Directive, the latter, in order to be able to fulfil its

obligation to provide information to the employees' representatives, must request the information essential to the opening of negotiations for the establishment of such a council from the other undertakings belonging to the group which are located in the Member States, and has a right to receive that information from them;

— the management of each of the other undertakings belonging to the group which are located in the Member States is under an obligation to supply the deemed central management under the second subparagraph of Article 4(2) of the Directive with the information concerned where it is in possession of the information or is in a position to obtain it;

— the Member States concerned are to ensure that the management of those other undertakings supplies the information to the deemed central management under the second subparagraph of Article 4(2) of the Directive.

2. The obligation to provide information deriving from Articles 4(1) and 11(1) of the Directive encompasses information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the Directive or in the establishment of a European Works Council, where that information is essential to the opening of negotiations for the establishment of such a council.

Skouris	Jann	Cunha Rodrigues
La Pergola	Puissochet	Schintgen
Macken	Colneric	von Bahr

Delivered in open court in Luxembourg on 13 January 2004.

R. Grass

Registrar

V. Skouris

President