Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 May 2024*

(Reference for a preliminary ruling – European company – Regulation (EC) No 2157/2001 – Article 12(2) – Involvement of employees – Registration of the European company – Conditions – Prior implementation of the negotiation procedure on the involvement of employees referred to in Directive 2001/86/EC – European company which was established and registered without employees but which became the parent company of subsidiaries employing employees – No obligation to conduct a negotiation procedure retrospectively – Article 11 – Misuse of a European company – Deprivation of the rights of employees to employee involvement – Prohibition)

In Case C-706/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 17 May 2022, received at the Court on 17 November 2022, in the proceedings

Konzernbetriebsrat der O SE & Co. KG

v

Vorstand der O Holding SE,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the Second Chamber, F. Biltgen (Rapporteur), J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 28 September 2023,

after considering the observations submitted on behalf of:

– Konzernbetriebsrat der O SE & Co. KG, by T. Lemke, Rechtsanwalt,

– Vorstand der O Holding SE, by C. Crisolli, Rechtsanwalt,

* Language of the case: German.

– the German Government, by J. Möller, R. Kanitz and N. Scheffel, acting as Agents,

– the Luxembourg Government, by T. Schell, acting as Agent, and by S. Sunnen and V. Verdanet, avocats,

– the European Commission, initially by G. Braun, B.-R. Killmann and L. Malferrari, and subsequently by B.-R. Killmann and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2023,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 12(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) and of Articles 3 to 7 of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22).

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

Legal context

European Union law

Regulation No 2157/2001

3 Recitals 1, 2, 19 and 21 of Regulation No 2157/2001 are worded as follows:

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

(2) Such reorganisation presupposes that existing companies from different Member States are given the option of combining their potential by means of mergers. Such operations can be carried out only with due regard to the rules of competition laid down in the Treaty.

…

(19) The rules on the involvement of employees in the European [public limited-liability company ("the SE")] are laid down in Directive [2001/86], and those provisions thus form an indissociable complement to this Regulation and must be applied concomitantly.

…

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

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

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

…

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

5 Article 2(2)(a) of Regulation No 2157/2001 provides:

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

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

6 Under Article 8(1) of that regulation:

'The registered office of an SE may be transferred to another Member State in accordance with paragraphs 2 to 13. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.'

7 Article 10 of Regulation No 2157/2001 provides:

'Subject to this Regulation, an SE shall be treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office.'

8 Article 12(1) and (2) of that regulation provides:

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

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

Directive 2001/86

9 Recitals 3, 6 to 8 and 18 of Directive 2001/86 are worded as follows:

‘(3) In order to promote the social objectives of the Community, special provisions have to be set, notably in the field of employee involvement, aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. This objective should be pursued through the establishment of a set of rules in this field, supplementing the provisions of [Regulation No 2157/2001].

…

(6) Information and consultation procedures at transnational level should … be ensured in all cases of creation of an SE.

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

(8) The concrete procedures of employee transnational information and consultation, as well as, if applicable, participation, to apply to each SE should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules.

…

(18) It is a fundamental principle and stated aim of this Directive to secure employees’ acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the “before and after” principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.’

10 Article 1 of that directive, entitled ‘Objective’, provides:

‘1. This Directive governs the involvement of employees in the affairs of [SEs], as referred to in Regulation [No 2157/2001].

2. To this end, arrangements for the involvement of employees shall be established in every SE in accordance with the negotiating procedure referred to in Articles 3 to 6 or, under the circumstances specified in Article 7, in accordance with the Annex.’

11 Article 2 of Directive 2001/86, entitled ‘Definitions’, provides, in points (b), (c) and (g):

‘For the purposes of this Directive:

…

(b) “participating companies” means the companies directly participating in the establishing of an SE;

(c) “subsidiary” of a company means an undertaking over which that company exercises a dominant influence …

…

(g) “special negotiating body” means the body established in accordance with Article 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE …’

12 Article 3 of that directive, entitled ‘Creation of a special negotiating body’, provides, in paragraphs 1 to 3 and 6:

‘1. Where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE, take the necessary steps, including providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the companies’ employees on arrangements for the involvement of employees in the SE.

2. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created …

…

3. The special negotiating body and the competent organs of the participating companies shall determine, by written agreement, arrangements for the involvement of employees within the SE.

To this end, the competent organs of the participating companies shall inform the special negotiating body of the plan and the actual process of establishing the SE, up to its registration.

…

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

…

The special negotiating body shall be reconvened on the written request of at least 10% of the employees of the SE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree to negotiations being reopened sooner. …’

13 Article 4 of Directive 2001/86, entitled 'Content of the agreement', sets out, in paragraph 2(h), one of the various elements that the agreement on arrangements for the involvement of employees within the SE, concluded between the competent organs of the participating companies and the special negotiating body, is to specify, namely 'the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation'.

14 Article 6 of that directive, entitled 'Legislation applicable to the negotiation procedure', is worded as follows:

'Except where otherwise provided in this Directive, the legislation applicable to the negotiation procedure provided for in Articles 3 to 5 shall be the legislation of the Member State in which the registered office of the SE is to be situated.'

15 Article 7 of Directive 2001/86, entitled 'Standard rules', provides, in paragraph 1:

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

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

(a) the parties so agree; or

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

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

– the special negotiating body has not taken the decision provided in Article 3(6).'

16 Under Article 11 of Directive 2001/86, entitled 'Misuse of procedures':

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

17 Article 12 of that directive, entitled 'Compliance with this Directive', provides, in paragraph 2:

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

18 Part 1 of the annex to Directive 2001/86, containing the standard rules referred to in Article 7 of that directive, governs the composition of the body representative of the employees. It provides, in the first subparagraph of point (g), that 'four years after the representative body is established, it shall examine whether to open negotiations for the conclusion of the agreement referred to in Articles 4 and 7 [of Directive 2001/86] or to continue to apply the standard rules adopted in accordance with this Annex'.

German law

19 Directive 2001/86 was transposed into German law by the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company) of 22 December 2004 (BGBl. I, p. 3675, 3686; 'the SEBG').

20 Paragraph 18 of the SEBG, entitled 'Resumption of negotiations', provides, in subparagraph 3:

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

21 Paragraph 43 of the SEBG provides:

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

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 On 28 March 2013, O Holding SE, established, in accordance with Article 2(2) of Regulation No 2157/2001, by O Ltd and O GmbH, two companies with no employees, which have no subsidiaries, within the meaning of Article 2(c) of Directive 2001/86, at which employees are employed and which are established respectively in the United Kingdom and in Germany, was registered in the companies register for England and Wales. Therefore, no negotiations on the involvement of employees, as provided for in Articles 3 to 7 of Directive 2001/86, took place prior to that registration.

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

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

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

26 The group Works Council of O KG, taking the view that the management of O Holding SE was obliged retrospectively to conduct the procedure for the purpose of creating a special negotiating body, since the latter had subsidiaries, within the meaning of Article 2(c) of Directive 2001/86, which had employees in several Member States, brought employment litigation proceedings.

27 Following the dismissal of the application of the group Works Council of O KG by the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) and the confirmation of that decision by the Landesarbeitsgericht Hamburg (Higher Labour Court, Hamburg, Germany), the dispute was brought before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court.

28 In order to resolve that dispute, the referring court requests an interpretation, first, of Article 12(2) of Regulation No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, and, secondly, of Article 6 of that directive.

29 It observes that it is true that those provisions do not expressly provide that, if it has not been conducted at the outset, the negotiation procedure on the involvement of employees is to be conducted retrospectively. However, it considers that, as is apparent, in particular, from recitals 1 and 2 of Regulation No 2157/2001, that regulation and Directive 2001/86 assume that the companies participating in the establishment of an SE or their subsidiaries are economically active and thus employ employees, and that therefore, upon the formation and before the registration of the SE, it is possible to open such a negotiation procedure.

30 Accordingly, the referring court wonders whether, in the case of registration of an SE none of whose participating companies or their subsidiaries employ employees, the objective pursued by Articles 3 to 7 of Directive 2001/86 might require that the negotiation procedure for the involvement of employees be conducted retrospectively if the SE becomes the controlling company of subsidiaries which employ employees in several Member States.

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

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

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

'(1) Is Article 12(2) of Regulation [No 2157/2001], in conjunction with Articles 3 to 7 of Directive [2001/86], to be interpreted as meaning that, where a [holding SE] is formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, and the holding SE was registered in the register of a Member State (a so-called

"SE without employees") without a negotiation procedure for the involvement of employees in the SE having first been conducted, under that directive that negotiation procedure has to be conducted retrospectively if the SE becomes the controlling undertaking of subsidiaries in several Member States … which employ employees?

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

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

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

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

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

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

Consideration of the questions referred

The first question

34 By its first question, the referring court asks, in essence, whether Article 12(2) of Regulation No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, must be interpreted as requiring, where a holding SE, formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, is registered without negotiations on the involvement of employees having first been conducted, the subsequent opening of those negotiations on the ground that that SE has acquired control of subsidiaries in one or more Member States which employ employees.

35 In that regard, according to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (judgment of 18 October 2022, *IG Metall and ver.di*, C-677/20, EU:C:2022:800, paragraph 31 and the case-law cited).

36 In the first place, it is apparent from Article 12(2) of Regulation No 2157/2001 that, save where the special negotiating body has decided, in accordance with Article 3(6) of Directive 2001/86, not to open negotiations or to terminate negotiations already opened, or where the period for negotiations referred to in Article 5 of that directive has expired without an agreement having been concluded, 'an SE may not be registered unless an agreement on arrangements for

employee involvement pursuant to Article 4 of Directive [2001/86] has been concluded'. It follows that the conclusion of such an agreement, and therefore the negotiations for the conclusion of that agreement, are to take place before the registration of an SE.

37 As illustrated by Article 12(2), and as is apparent from Article 1(4) of Regulation No 2157/2001, read in the light of recital 19 of that regulation, the rules of Directive 2001/86 on the involvement of employees form an indissociable complement to that regulation, with the result that they must be applied concomitantly.

38 Article 3(1) of that directive provides that 'where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of … creating a holding company …, take the necessary steps … to start negotiations with the representatives of [those] companies' employees on arrangements for the involvement of employees in the SE'.

39 In accordance with paragraph 2 and the second subparagraph of paragraph 3 of that Article 3, a special negotiating body is to be created 'for this purpose', which is to be kept informed by the competent organs of the participating companies 'of the plan and the actual process of establishing the SE, up to its registration'. The creation of a special negotiating body and the negotiations on arrangements for the involvement of employees within the SE are therefore closely linked to the establishment of an SE and are to take place in that context.

40 As correctly observed by the referring court as well as by all of the parties to the main proceedings and all of the interested parties which submitted observations to the Court, it is apparent from a combined reading of Article 12(2) of Regulation No 2157/2001 and Article 3(1) to (3) of Directive 2001/86 that the negotiation procedure between the parties on arrangements for the involvement of employees in the SE with a view to concluding an agreement on those arrangements is, as a general rule, to be conducted during the formation of the SE and prior to its registration. Those provisions are not therefore applicable to an SE already established, where the participating companies that established it did not, at the time of its establishment, employ employees, with the result that the management or administrative organs of those companies could not open negotiations with the representatives of the employees of those companies on the involvement of employees in the SE prior to its registration.

41 That directive provides, however, for three situations in which that procedure is to be or may be opened at a later stage.

42 First, it is apparent from the first subparagraph of Article 3(6) of Directive 2001/86 that the special negotiating body may decide not to open negotiations or to terminate negotiations already opened, thus opening up the possibility for the SE to be registered. The special negotiating body is then to be reconvened, under the conditions laid down in the fourth subparagraph of that Article 3(6), at the earliest two years after that decision for the purpose of deciding whether to reopen negotiations with the management.

43 Secondly, it may be inferred from Article 4(2)(h) of that directive that a subsequent reopening of negotiations is also possible where an agreement between the parties on arrangements for employee involvement in the SE has been concluded and is in force. As one of the various elements that such an agreement is to contain, that point (h) requires that 'cases where the agreement should be renegotiated and the procedure for its renegotiation' be specified.

44 Thirdly, Part 1(g) of the annex to Directive 2001/86, the standard rules of which are to apply, under the conditions laid down in Article 7(1) and (2) of that directive, where the parties so agree or in the absence of an agreement, provides that four years after it is established, the body representative of the employees, set up in accordance with the provisions of that annex, is to examine whether to open negotiations for the conclusion of an agreement laying down arrangements for the involvement of employees within the SE.

45 However, the situation referred to in the first question, namely that in which a holding SE, formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, and registered without negotiations on the involvement of employees having been conducted by a special negotiating body created for that purpose, does not correspond to any of the situations referred to above, which presuppose that such a special negotiating body was created during the establishment of the SE. Consequently, the wording of Directive 2001/86 does not require, in such a situation, the subsequent implementation of the negotiation procedure on the involvement of employees within an SE already established.

46 In the second place, it is apparent, first, from recital 21 of Regulation No 2157/2001 that Directive 2001/86 is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE and, in addition, from recital 3 of that directive that the special provisions to be set for this purpose are 'aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE'. Recitals 6 to 8 of that directive state, moreover, that 'information and consultation procedures at transnational level should … be ensured in all cases of creation of an SE'; that employees' acquired participation rights 'should be preserved through their transfer to the SE, once established'; and that the concrete procedures for this purpose which are to apply to each SE 'should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules'.

47 It follows from those recitals of Directive 2001/86 that both the securing of acquired rights as regards employee involvement and the negotiations between the parties on the concrete procedures for that involvement relate to 'the creation' and to 'the establishment' of an SE. Therefore, those recitals do not support the view that the negotiation procedure referred to in Articles 3 to 7 of that directive is to be opened subsequently within an SE already established in the situation referred to in the first question.

48 Secondly, according to recitals 1 and 2 of Regulation No 2157/2001, that regulation aims at enabling existing companies from different Member States, the business of which is not limited to satisfying purely local needs, to reorganise their business on an EU scale and thus to combine their potential. However, there is nothing in those recitals to indicate that the provisions of Directive 2001/86 relating to the negotiation procedure on employee involvement are to be applied *mutatis mutandis* to an SE already established where the participating companies that established it have begun to carry on an economic activity and thus to employ employees after its establishment.

49 Thirdly, it is true that recital 18 of Directive 2001/86 provides that 'employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the 'before and after' principle)', adding that, 'consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes'.

50 However, that directive does not contain any corresponding provision which would give rise to an obligation to open negotiations on the involvement of employees or which would extend the guarantee of employees' existing participation rights to situations in which structural changes are made to a holding SE already established by participating companies which do not employ employees, and do not have subsidiaries employing employees. In those circumstances, an obligation subsequently to open such negotiations in the situation referred to in the first question cannot be inferred from that recital.

51 In the third place, the literal, contextual and teleological interpretation set out in paragraphs 36 to 50 above is supported by the *travaux préparatoires* for Directive 2001/86, from which it is apparent, as the Advocate General observed in point 54 of his Opinion, that the impossibility of opening retrospective negotiations is not the result of an oversight when that directive was drawn up, but of a genuine choice by the EU legislature resulting from the compromise on the 'before and after' principle.

52 It is apparent from paragraphs 49 and 50 of the final report of the Group of Experts, entitled 'European Systems of Worker Involvement' of May 1997 (Davignon Report) (C4-0455/97), that that group, which made a contribution to the relaunch of the legislative debate on the Statute for an SE as regards employee involvement within the SE, specifically examined whether negotiations were to take place before or after its registration. That group had clearly advocated holding such negotiations before registration in the interest of foreseeability for shareholders and employees as well as stability for the life of the SE.

53 That approach was confirmed when Directive 2001/86 was adopted, as illustrated by the fact that the Council of the European Union did not accept an amendment proposed by the European Parliament for a recital 7a explicitly providing for fresh negotiations on worker participation in the case of substantial structural changes following the creation of an SE.

54 It follows from the foregoing elements of interpretation that Article 12(2) of Regulation No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, does not impose any obligation subsequently to open, within an SE already established and registered, the negotiation procedure on employee involvement in the situation referred to in the first question.

55 However, in order to provide a useful answer to the referring court, which also raised the possibility that an obligation to open a subsequent negotiation procedure within an SE already established may be based on Article 11 of that directive, it should be noted, in the fourth and last place, that that article, entitled 'Misuse of procedures', requires Member States to take appropriate measures in conformity with EU law 'with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights'.

56 Article 11 of Directive 2001/86, which, as regards the Federal Republic of Germany, was transposed into the internal legal system of that Member State by means of Paragraph 43 of the SEBG, leaves a margin of discretion to the Member States as regards the choice of appropriate measures to be taken for that purpose, subject to compliance with EU law, and does not lay down, in the situation referred to in the first question, an obligation subsequently to open that negotiation procedure.

57 In so far as the referring court's questions must be understood as relating to the concept of 'misuse', referred to in Article 11 of Directive 2001/86, it is sufficient to bear in mind that, according to the case-law of the Court, a finding of an abusive practice requires, first, a

combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgment of 21 December 2023, *BMW Bank and Others*, C-38/21, C-47/21 and C-232/21, EU:C:2023:1014, paragraph 285 and the case-law cited).

58 In the light of all the foregoing considerations, the answer to the first question is that Article 12(2) of Regulation No 2157/2001, in conjunction with Articles 3 to 7 of Directive 2001/86, must be interpreted as not requiring, where a holding SE, formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, is registered without negotiations on the involvement of employees having first been conducted, the subsequent opening of those negotiations on the ground that that SE has acquired control of subsidiaries in one or more Member States which employ employees.

The second to fourth questions

59 In view of the answer given to the first question, there is no need to answer the second to fourth questions.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 12(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), in conjunction with Articles 3 to 7 of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees,

must be interpreted as not requiring, where a holding European company (SE), formed by participating companies which do not employ employees, and do not have subsidiaries employing employees, is registered without negotiations on the involvement of employees having first been conducted, the subsequent opening of those negotiations on the ground that that SE has acquired control of subsidiaries in one or more Member States which employ employees.

[Signatures]