# OPINION OF ADVOCATE GENERAL

# BOT

delivered on 29 October 2009 [1]

1. The present reference for a preliminary ruling concerns the interpretation of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. [2]

2. That reference has been made in the context of proceedings between the Danish Association of Engineers (Ingeniørforeningen i Danmark) ('IDA'), acting on behalf of Mr Holst, a former employee of the company Babcock & Wilcox Vølund ApS ('BWV'), and the Confederation of Danish Employers (Dansk Arbejdsgiverforening) ('DA'), acting on behalf of BWV, concerning the dismissal of Mr Holst by BWV.

3. The principal issue raised by the case is to determine whether Article 7 of Directive 2002/14, which provides that 'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them', is to be construed as meaning that those representatives must enjoy more extensive protection against dismissal.

4. In this Opinion I will propose, in the first place, that the Court rule that Directive 2002/14 must be interpreted as not precluding an employee who is not a member of a union which is party to a collective agreement from having such an agreement applied to him.

5. Secondly, I will suggest to the Court that it should rule that Article 7 of Directive 2002/14 is to be interpreted as not requiring that employees' representatives must enjoy more extensive protection against dismissal. In my view, however, it follows from that article, read in conjunction with Article 8(1) and (2) of Directive 2002/14, that employees' representatives must be in a position to obtain a ruling, where necessary on the basis of the national provisions applicable to all employees protecting them against unfair dismissal, as

1 — Original language: French.
2 — OJ 2002 L 80, p. 29.

to whether or not their dismissal was attributable to their capacity or activities as employees' representatives and, if so, to have sanctions imposed for such conduct on the part of the employer.

3. When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.'

## I — Legal framework

7. Employees' representatives are defined in Article 2(e) of Directive 2002/14 as being 'the employees' representatives provided for by national laws and/or practices'.

### A — *Community legislation*

6. According to Article 1 of Directive 2002/14:

8. Article 4(1) of Directive 2002/14 provides that '[i]n accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article'.

'1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.

2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness.

9. Furthermore, Article 5 of that directive provides that 'Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish,

while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4'.

10. Article 7 of Directive 2002/14 provides that 'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them'.

11. Article 8 of Directive 2002/14 is worded as follows:

'1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

2. Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.'

12. Lastly, Article 11(1) of Directive 2002/14 provides that 'Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than 23 March 2005 or shall ensure that management and labour introduce by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by this Directive at all times. They shall forthwith inform the Commission thereof.'

B — *National legislation*

1. The Law on informing and consulting employees

13. Directive 2002/14 was implemented in Danish law by way of Law No 303 of 2 May 2005 on informing and consulting employees (lov om information og høring af lønmodtagere) ('the 2005 Law'), which entered into force on 15 May 2005.

14. Paragraph 3 of the 2005 Law provides that that law is not to apply where the employer's duty to inform and consult employees arises from a collective agreement and that agreement contains rules which at least comply with the provisions contained in Directive 2002/14.

15. Paragraph 8 of the 2005 Law provides that '[t]he representatives who are to be informed and consulted on behalf of the employees shall be protected against dismissal or any other adverse alteration of their conditions of employment in the same manner as union representatives in the same or an equivalent professional field'.

16. The order for reference indicates that that provision refers to the general protection against dismissal for workforce representatives or union representatives contained in virtually all Danish collective agreements (with the exception of those covering management staff). That protection means that the employer bears the burden of proving that there are compelling grounds for dismissing such workforce representatives and that it was therefore not possible to avoid the dismissal by, for example, dismissing some other worker instead.

2. The Law on salaried employees

17. All employees covered by the Law on salaried employees (Funktionærloven) ('the FL') are protected against unfair dismissal under Paragraph 2b of that law, which provides for compensation of up to six months' salary if the dismissal cannot be considered to be reasonable in the light of the conduct of the employee or the situation of the undertaking.

18. The order for reference indicates that the protection provided for in Paragraph 2b of the FL is less extensive than that provided by the requirement of compelling grounds applicable to workforce representatives covered by collective agreements.

3. The Cooperation Agreement

19. The Cooperation Agreement (Samarbejdsaftalen) is a cooperation agreement concluded between the two principal labour and management organisations in Denmark, namely the Danish Confederation of Trade Unions (Landsorganisationen i Danmark) ('LO') and DA, relating to the organisation and functioning of cooperation committees in undertakings. A new version of that agreement entered into effect on 23 March 2005.

20. The Cooperation Agreement is one of a number of measures transposing Directive 2002/14 by way of collective agreement. It applies to undertakings with more than 35 employees and contains provisions providing for the establishment of a cooperation committee consisting of representatives of management and employees.

21. Under that agreement, an employees' representative who is not also designated as a union representative must, in the event of dismissal, be given six weeks' notice of termination over and above the period of notice to which he is entitled under, for example, the FL. However, an employees' representative is not entitled to that six-week extension if the total period of notice exceeds the period of notice applicable to a union representative in the same trade or professional group.

22. The information provided by the Vestre Landsret (Western Regional Court) (Denmark) indicates that the amendments made to the Cooperation Agreement in 2005 made it possible for all trade or professional groups covered by an agreement to be represented on the cooperation committee, including trade or professional groups not represented by the parties to the Cooperation Agreement. It thus became possible for any group of persons engaged in the same trade or profession or having undergone specific training to be represented on the cooperation committees. This covers professional categories or persons not covered by a collective agreement, such as engineers.

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

23. Mr Holst was engaged on 1 July 1984 by BWV under an individual contract of employment as a project engineer. He was a salaried employee and, according to the information provided by the referring court, was covered by the FL.

24. In 2001 Mr Holst was elected to serve as the employees' representative for engineers on BWV's cooperation committee. That committee, which was established pursuant to the Cooperation Agreement, is composed of representatives of management and of employees. Within that committee, the employees' representatives included representatives of employees who were affiliated to LO and representatives of other salaried employee groups.

25. Together with other employees, Mr Holst was dismissed on grounds of downsizing by the undertaking. That dismissal was notified to him on 24 January 2006, and he was given six months' notice.

26. Mr Holst is a member of IDA, the Danish association of engineers, which is not a member of LO and has no collective agreement with BWV either for the professional group of engineers or for any other employee groups.

27. BWV employs approximately 240 people. It is a member of the Confederation of Danish Industry (Dansk Industri) ('DI'), an employers' association. DI is in turn a member of DA.

28. On 8 November 2006, IDA, acting on behalf of Mr Holst, brought an action for damages before the Byretten i Esbjerg (Esbjerg District Court) (Denmark), seeking an order requiring BWV to pay Mr Holst damages for his dismissal pursuant to the FL. IDA took the view that the dismissal was not based on objective grounds. It further submitted that, as an employees' representative on the co-operation committee, Mr Holst enjoyed special protection against dismissal under Article 7 of Directive 2002/14, that is to say, protection going beyond that provided for in the FL.

29. DI, acting on behalf of BWV, submitted that the action should be dismissed, arguing inter alia that the notice to which Mr Holst was entitled under both the FL and the Cooperation Agreement was of such a kind as to satisfy the requirements of Directive 2002/14, as set out in Article 7 thereof.

30. The parties to the dispute in the main proceedings agreed to have the case examined by the referring court, and it was at that stage that DA became the representative of BWV in the proceedings.

31. Taking the view that an interpretation of Directive 2002/14 was necessary to enable it to rule on the case, the Vestre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. There is disagreement amongst the parties as to whether Directive 2002/14 … has been correctly implemented in the Cooperation Agreement between [DA] and [LO]. In that connection, do Community rules preclude implementation of that directive in such a manner that groups of employees are covered by a collective agreement between parties

which do not represent the professional group of the persons concerned and where the collective agreement does not cover the professional group of the persons concerned?

2. If Directive 2002/14 has been correctly implemented for [the applicant in the main proceedings] in the Cooperation Agreement …, has Article 7 of the Directive been correctly implemented when it is established that the Co-operation Agreement does not provide for more extensive protection against dismissal for certain professional groups?

3. If [the applicant in the main proceedings] is covered by the [2005 Law], do the requirements of Article 7 of [Directive 2002/14] concerning "adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them" preclude an implementation of Article 7 of [Directive 2002/14] in Paragraph 8 of the [2005 Law], which reads as follows: "The representatives who must be informed and consulted on behalf of the employees shall be protected against dismissal or any other adverse alteration of their conditions of employment in the same manner as union representatives in the same or an equivalent professional field", if the implementation does not provide for more extensive protection against dismissal for professional groups which are not covered by a collective agreement?'

32. IDA, DA, the Kingdom of Denmark and the Commission have submitted written observations and oral argument on those questions.

## III — Analysis

### A — *The first question*

33. By its first question, the referring court asks, in essence, whether Directive 2002/14 is to be interpreted as precluding an employee who is not a member of a union which is party to a collective agreement from being covered by that agreement.

34. The answer to that question follows directly from the judgment in *Andersen*.[3] In that case the Court had to deal with a reference for a preliminary ruling from the Danish Supreme Court (Højesteret) concerning the interpretation of a number of

3 — C-306/07 *Andersen* [2008] ECR I-10279.

provisions of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. [4]

35. In its judgment, the Court held, first, that Article 8(1) of Directive 91/533 had to be interpreted as not prohibiting national rules which provided that a collective agreement which was intended to transpose the provisions of that directive into national law were to apply to an employee even though he was not a member of a trade union which was a party to that agreement. It held, secondly, that the second subparagraph of Article 8(2) of Directive 91/533 had to be interpreted as not preventing an employee who was not a member of a union which was a party to a collective agreement governing his employment relationship from being regarded as being 'covered by' that agreement within the meaning of that provision.

36. In order to arrive at that interpretation, the Court based itself mainly on the authorisation granted by Directive 91/533 to the Member States to permit management and labour to introduce, in particular by means of collective agreements, the provisions required to attain the objectives of that directive. [5] It observed that the power thus granted to the Member States by that directive was in accordance with the Court's case-law that Member States may leave the implementation of the social-policy objectives envisaged by a directive in this area in the first instance to management and labour. [6]

37. The Court also pointed out that that possibility did not discharge the Member States from the obligation of ensuring, by appropriate laws, regulations or administrative measures, that all workers are afforded the full protection provided for in Directive 91/533; that State guarantee had to cover all cases in which protection was not ensured by other means, and, in particular, where the workers in question were not protected because they were not union members. [7]

38. Having clarified that point, the Court concluded that Directive 91/533 did not, in itself, prohibit national rules under which a worker who is not a member of a union which is a party to a collective agreement implementing the provisions of that directive is not, for that reason alone, prevented from enjoying under that collective agreement the

4 — OJ 1991 L 288, p. 32.
5 — *Andersen*, paragraphs 24 and 35.
6 — *Andersen*, paragraph 25 and case-law cited.
7 — *Andersen*, paragraph 26.

full extent of the protection provided for in the directive. [8] It added, in its examination of the second question, that, where the category of persons who may be covered by a collective agreement — as, in particular, in the case of an agreement which has been declared to be of general application — can be completely independent of whether or not those persons are members of a union which is a party to that agreement, the fact that a person was not a member of such a union did not in itself deprive that person of the legal protection conferred by the agreement in question. [9]

39. The Court thus recognised that Community law, in that case Directive 91/533, did not preclude the scope of application of a collective agreement transposing a directive from extending beyond only employees who were members of unions which were parties to such a collective agreement. That directive therefore had no bearing on the determination of the scope of application *ratione personæ* of transposing collective agreements. What mattered for the purposes of complying with the requirements in that directive was that each Member State ultimately guaranteed that no group of employees was excluded from the protection provided for therein.

40. The Court also left it for the national court to examine a number of points intended to ensure the correct transposition of Directive 91/533. It thus invited the national court to ascertain whether the Danish legislation effectively allowed all employees coming within the scope of the collective agreement in question, irrespective of whether or not they were union members, to rely on the protective provisions of the collective agreement before the national courts, with the result that all those employees enjoyed the same protection. [10] The Court added that it was for the national court to ascertain whether an employee such as Mr Andersen was covered by that collective agreement. [11]

41. The reasoning thus developed by the Court in respect of Directive 91/533, in my view, lends itself perfectly to the interpretation of Directive 2002/14 as well. Directive 2002/14 reflects the same intention on the part of the Community legislature to allow the Member States to permit management and labour to introduce the provisions required to attain the objectives fixed by that

8 — *Andersen*, paragraph 27.
9 — *Andersen*, paragraph 34.
10 — *Andersen*, paragraphs 28 and 29.
11 — *Andersen*, paragraph 37.

directive. It suffices in this regard to refer to recital 23 in the preamble to Directive 2002/14 and to Articles 1(2), 5 and 11(1) of that directive. Directive 2002/14 is, moreover, not intended to define the scope of application *ratione personæ* of transposing collective agreements; what matters is that each Member State adopts the necessary provisions to ensure, inter alia through the establishment of a system of alternatively applicable protection, that the results intended by Directive 2002/14 are attained.

42. Accordingly, in my view, the answer to be given by the Court to the Vestre Landsret must be, as it ruled in *Andersen*, that Directive 2002/14 is to be interpreted as not precluding an employee who is not a member of a union which is party to a collective agreement from being covered by that agreement.

43. Lastly, I would like to add that the questions discussed before the Court, first, as to whether an employees' representative such as Mr Holst is or is not covered by the Cooperation Agreement, and, second, as to whether, despite not being a member of a union which is a party to the Cooperation Agreement, he may rely on the protective provisions of that agreement before the national courts, are matters which must be resolved by the Vestre Landsret.

B — *The second and third questions*

44. In asking its second and third questions, the Vestre Landsret postulates two different situations, depending on whether employees such as Mr Holst are covered by the Cooperation Agreement or by the alternative protection mechanism contained in the 2005 Law. As we have seen, it is for that court to determine which national transposition rule applies to Mr Holst.

45. It is accordingly necessary to look beyond this issue of national law and to consider the second and third questions together, in so far as they both seek an interpretation of Article 7 of Directive 2002/14. By those questions, the referring court asks, in essence, whether that article is to be interpreted as imposing a requirement that employees' representatives must enjoy more extensive protection against dismissal.

46. An examination of the wording of that article and consideration of the objective behind Directive 2002/14 lead me to answer that question in the negative.

47. It should be borne in mind that, according to the terms of Article 7 of Directive 2002/14,

'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them'. The formulation thus adopted by the Community legislature leaves the Member States and management and labour with a broad discretion in adopting the measures which they believe necessary to enable employees' representatives to perform their tasks properly. No specific measures are imposed. The Community legislature could, for example, have imposed more detailed requirements that employees' representatives be provided with the premises and materials necessary for fulfilling their functions, or that they be provided with training or be entitled to take paid absences from work. Nothing of the kind is stated expressly in Article 7 of Directive 2002/14, any more than is a requirement of a higher level of protection for employees' representatives against dismissal.

48. It is, moreover, evident from Article 137(2) EC, which is the legal basis for that directive, and from recital 18 in the preamble to and Article 1(1) of that directive, that it is intended to establish a general framework fixing minimum requirements concerning the right of employees in undertakings and establishments situated within the Community to be informed and consulted. [12] The general nature of the framework thus established and the finding that Directive 2002/14 lays down only minimum requirements are, in my view, difficult to reconcile with an interpretation which would have the effect of compensating for the lack of precision in Article 7 by reading into it a higher standard of protection against dismissal for employees' representatives.

49. That is why I take the view that Article 7 of Directive 2002/14 must be interpreted as not requiring that employees' representatives must enjoy a higher standard of protection against dismissal.

50. The fact remains, however, that it follows, in my view, from Article 7 of Directive 2002/14, read in conjunction with Article 8(1) and (2) of that same directive, that employees' representatives must enjoy effective protection against adverse or discriminatory measures which might be taken in respect of them by employers during their term as representative, or even afterwards, particularly in the event of dismissal attributable to their status or activities as employees' representatives. Dismissal of employees' representatives on grounds relating to their accomplishment of their mission is incompatible with the requirement that they must be enabled to perform properly the duties which have been assigned to them.

12 — Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611, paragraph 36.

51. Employees' representatives who are dismissed must, therefore, be in a position to have the grounds for their dismissal reviewed, through an administrative or judicial procedure, or even by means of a professional arbitration mechanism. Should it transpire that the grounds for that dismissal related to the performance of their functions as employees' representatives, adequate sanctions must be imposed for such conduct on the part of the employer, that is to say, sanctions which are effective, proportionate and dissuasive.

52. The minimum basis of protection for employees' representatives faced with a decision taken by their employer to dismiss them therefore consists in the possibility for them to obtain a determination as to whether the grounds for that dismissal were connected with their status or activities as employees' representatives and, if so, to have sanctions imposed for such conduct on the part of the employer.

53. Turning now to Danish law and comparing it with what I consider to be the correct interpretation of Article 7 of Directive 2002/14, I find that law to be in compliance with what is provided for in that article, as it does not lie below the minimum basis of protection as just outlined.

54. The description given before the Court of the different rules and measures adopted in Danish law with a view to transposing Directive 2002/14 indicates that an employees' representative may enjoy a degree of protection against dismissal which varies depending on whether he is covered by a collective agreement or rather by transposing legislation.

55. Thus, the protection of an employees' representative who is covered by the Co-operation Agreement and who is not also a union representative consists, essentially and within certain limits, in a six-week extension to the period of notice of termination. If, on the other hand, it turns out that an employees' representative is not covered by that collective agreement and therefore comes under the alternative protection mechanism provided for by the 2005 Law, he may enjoy the same protection as that conferred on union representatives in the same or equivalent employee groups, that is to say, he may be dismissed only if there are compelling grounds for doing so.

56. The existence of such differences in the protection granted to employees' representatives in the event of dismissal does not seem to me to be in itself incompatible with what is provided for in Directive 2002/14. Indeed, quite the contrary: those variations are the consequence of both the discretion which that directive leaves to the Member States and the option it gives them of allowing management and labour to achieve implementation of that directive. Moreover, the Community legislature has expressly allowed for the possibility of

such variations in Article 5 of Directive 2002/14, with respect to the definition of the practical arrangements for informing and consulting employees.

57. The existence of differences in the protection granted to employees' representatives in the event of dismissal also follows from the minimum nature of the requirements laid down in Directive 2002/14, which allows for the adoption of provisions or practices which are more favourable to such representatives. Thus it is possible, as in the present case, that legislation transposing that directive may offer employees' representatives greater protection against dismissal in comparison with what is provided for in a collective agreement which also transposes that directive. The reverse situation could also arise.

58. Irrespective of the path chosen to transpose that directive, and in particular Article 7 thereof, what matters is that the national law guarantees observance of the minimum basis provided for in that article; in other words, an employees' representative who is dismissed must be in a position to obtain a determination, if necessary on the basis of the national provisions applicable to all employees protecting them against unfair dismissal, as to whether or not that dismissal was attributable to his status or activities as an employees' representative and, if so, he must be able to have sanctions imposed for such conduct on the part of the employer. In the case where an employee has held the post of employees' representative, the exercise of that function must therefore be an aspect which may be taken into account in determining whether his dismissal is based on specific, objective reasons or whether it must be held to be unfair.

59. Danish law appears to me to be consistent with that requirement, as it is evident from the observations submitted to the Court that an employees' representative such as Mr Holst may, in his capacity as an employee coming within the scope of the FL, avail at any time of Paragraph 2b of that law, which, it must be remembered, provides for compensation of up to six months' salary if the dismissal cannot be considered to have been reasonable in the light of the employee's conduct or the undertaking's situation. Since, pursuant to that paragraph, the dismissal of an employees' representative for reasons relating to his capacity or activities as an employees' representative could be considered to be an unfair dismissal leaving the employer open to sanctions, in my view Danish law does comply with the essential elements of the protection of employees' representatives which result from Article 7 of Directive 2002/14, read in conjunction with Article 8(1) and (2) thereof.

60. For all of the foregoing reasons, I take the view that, although Article 7 of Directive 2002/14 must, in my opinion, be interpreted as not requiring that employees' representatives must enjoy more extensive protection against dismissal, it does follow

from that article, read in conjunction with Article 8(1) and (2) of Directive 2002/14, that employees' representatives must be in a position to obtain a determination, if necessary on the basis of the national provisions applicable to all employees protecting them against unfair dismissal, as to whether or not their dismissal was attributable to their capacity or activities as employees' representatives and, if so, to be able to have sanctions imposed for such conduct on the part of the employer.

## IV — Conclusion

61. In the light of all the foregoing considerations, I propose that the Court give the following ruling:

(1) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community must be interpreted as not precluding an employee who is not a member of a union which is party to a collective agreement from being covered by that agreement.

(2) Article 7 of Directive 2002/14 must be interpreted as not requiring that employees' representatives must enjoy more extensive protection against dismissal. It follows, however, from that article, read in conjunction with Article 8(1) and (2) of Directive 2002/14, that employees' representatives must be in a position to obtain a

determination, if necessary on the basis of the national provisions applicable to all employees protecting them against unfair dismissal, as to whether or not their dismissal was attributable to their capacity or activities as employees' representatives and, if so, to be able to have sanctions imposed for such conduct on the part of the employer.