



Corporate insolvency and employees' rights: in the event of a transfer of assets in the context of a pre-pack procedure, the transferee is entitled to derogate from the obligation to safeguard employees' rights if that procedure is governed by statutory or regulatory provisions

The Heiploeg group ('Heiploeg-former') consisted of several companies engaged in the wholesale trade in fish and seafood. In 2011 and 2012, Heiploeg-former suffered significant financial losses and, in 2013, a fine of € 27 million was imposed on four companies in that group for having participated in a cartel. Since no bank agreed to finance the payment of that fine, a *pre-pack* procedure was initiated.

In Netherlands law, the *pre-pack* is a practice derived from case-law which is intended to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. The sales transactions organised in the context of that procedure in respect of all or part of the undertaking are prepared by a 'prospective insolvency administrator', whose tasks are determined by the competent court which appoints him or her and by the instructions given by that court or by the 'prospective supervisory judge' appointed by that court for that purpose and who supervises the 'prospective insolvency administrator'. In the event of subsequent insolvency proceedings, that court reviews whether those persons followed all of the instructions given to them and, if not, appoints other persons as 'insolvency administrator' and 'supervisory judge' when the insolvency is declared.

In that context, in January 2014, in response to a request from Heiploeg-former, the competent court appointed two 'prospective insolvency administrators' and a 'prospective supervisory judge'. In the same month, Heiploeg-former was declared insolvent and those same persons were appointed as insolvency administrators and supervisory judge, respectively.

Two Netherlands companies ('Heiploeg-new'), entered in the commercial register on 21 January 2014, took over most of Heiploeg-former's business on the basis of an asset transfer agreement. In accordance with that agreement, Heiploeg-new took over the contracts of employment of approximately two-thirds of Heiploeg-former's employees for the purpose of carrying out the same work, but under less favourable employment conditions.

The Federatie Nederlandse Vakbeweging (FNV) (Netherlands Federation of Trade Unions) lodged an appeal against the judgment declaring Heiploeg-former insolvent. That appeal was dismissed on the ground that that insolvency had become inevitable and therefore a derogation from the safeguarding of employees' rights in the event of transfers of undertakings was applicable in the present case. Consequently, Heiploeg-new was not bound by the working and employment conditions applicable before the transfer.

In accordance with Directive 2001/23¹, which is aimed at protecting employees, in particular by ensuring that their rights are safeguarded in the event of a transfer of an undertaking, three conditions must be satisfied in order for that derogation to be applicable: the transferor must be the subject of bankruptcy proceedings or any analogous insolvency proceedings, those proceedings must have been instituted with a view to the liquidation of the assets of the transferor and they must be under the supervision of a competent public authority conditions (or an insolvency practitioner authorised by a competent public authority).

The FNV brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), submitting that, on the contrary, that derogation was not applicable in the case of a *pre-pack* procedure and that, accordingly, the employment conditions of the staff which were taken over should be maintained.

Ruling on a request for a preliminary ruling from that court, the Court of Justice holds that, in the event of a transfer prepared in a *pre-pack* procedure, such as that at issue in the main proceedings, and provided that that procedure is governed by statutory or regulatory provisions, the transferee is, in principle, entitled to derogate from the obligation to safeguard employees' rights.²

Assessment of the Court

First, the Court notes, as regards the condition concerning the institution of bankruptcy proceedings or any analogous insolvency proceedings with a view to the liquidation of the assets of the transferor,³ that, in the present case, the insolvency of the transferor was inevitable and both the insolvency proceedings and the preceding *pre-pack* procedure were aimed at liquidating the assets of the transferor, which was declared insolvent. Moreover, the transfer of the undertaking was carried out during those insolvency proceedings.

The objective of the derogation from the obligation to safeguard employees' rights is to eliminate the serious risk of a deterioration of the value of the transferred undertaking or in the living and working conditions of workers, whereas the objective of a *pre-pack* procedure followed by insolvency proceedings is to secure the greatest possible reimbursement of all creditors and to safeguard employment as far as possible. The Court adds that the aim of the use of a *pre-pack* procedure, for the purposes of liquidating a company, is to increase the chances of satisfying the creditors' claims. Consequently, the *pre-pack* procedure and insolvency proceedings, taken together, may be regarded as being aimed at the liquidation of the undertaking for the purposes of Article 5(1) of Directive 2001/23, provided that that *pre-pack* procedure is governed by statutory or regulatory provisions in order to meet the requirement of legal certainty.

Secondly, the Court notes that the *pre-pack* procedure at issue in the main proceedings may be regarded as having been carried out under the supervision of a competent public authority, as required by Article 5 of Directive 2001/23, provided that that procedure is governed by statutory and regulatory provisions. The 'prospective insolvency administrator' and the 'prospective supervisory judge' are appointed by the competent court for the *pre-pack* procedure, which determines their duties and reviews the exercise of those duties when the insolvency proceedings are subsequently opened, in deciding whether or not to appoint the same persons as insolvency administrator and supervisory judge.

¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16), Article 5(1).

² The rights in question are laid down in Articles 3 and 4 of Directive 2001/23. The first sentence of Article 3(1) of that directive concerns the transfer of the transferor's rights and obligations arising from contracts of employment or from employment relationships to the transferee, whereas the first sentence of Article 4(1) prohibits the dismissal of employees on the sole ground of the transfer.

³ In that respect, the Court draws a distinction between the *pre-pack* procedure at issue in the present case and that at issue in the case that gave rise to the judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, [C-126/16](#) (see also [Press Release No 70/17](#)), indicating that the latter was not aimed at the liquidation of the undertaking concerned.

Furthermore, the transfer prepared during the *pre-pack* procedure is not carried out until after the opening of the insolvency proceedings, since the insolvency administrator and the supervisory judge may refuse to carry out that transfer if they consider that it is contrary to the interests of the transferor's creditors. In addition, the 'prospective insolvency administrator' must not only account for his or her management of the preparatory phase in the insolvency report, he or she may also be held liable under the same conditions as the insolvency administrator.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355