Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

15 January 2014 * [i]

(Social policy – Directive 2002/14/EC – Charter of Fundamental Rights of the European Union – Article 27 – Subjecting the setting up of bodies representing staff to certain thresholds of employees – Calculation of the thresholds – National legislation contrary to European Union law – Role of the national court)

In Case C-176/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 11 April 2012, received at the Court on 16 April 2012, in the proceedings

Association de médiation sociale

v

Union locale des syndicats CGT,

Hichem Laboubi,

Union départementale CGT des Bouches-du-Rhône,

Confédération générale du travail (CGT),

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič and M. Safjan, Presidents of Chambers, J. Malenovský, E. Levits (Rapporteur), J.-C. Bonichot, A. Arabadjiev, C. Toader, D. Šváby, M. Berger and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2013,

* Language of the case: French.

after considering the observations submitted on behalf of:

– the Union locale des syndicats CGT, Mr Laboubi, the Union départementale CGT des Bouches-du-Rhône and the Confédération générale du travail (CGT), by H. Didier and F. Pinet, avocats,

– the French Government, by N. Rouam, G. de Bergues and J. Rossi, acting as Agents,

– the German Government, by K. Petersen, acting as Agent,

– the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,

– the Polish Government, by J. Faldyga, A. Siwek, B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by J. Enegren, D. Martin and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2013,

gives the following

Judgment

1 This request concerns the interpretation of Article 27 of the Charter of Fundamental Rights of the European Union ('the Charter') and 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 (OJ 2002 L 80, p. 29).

2 The request has been made in the course of proceedings between, on the one hand, the Association de médiation sociale ('the AMS') and, on the other, the Union locale des syndicats CGT, Mr Laboubi, the Union départementale CGT des Bouches-du-Rhône and the Confédération générale du travail (CGT) regarding the setting up, by the trade union with jurisdiction for the district, of bodies representing staff within the AMS.

Legal context

European Union legislation

3 Article 27 of the Charter is worded as follows:

'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.'

4 Article 1 of Directive 2002/14, entitled 'Object and principles', provides:

'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.

…'

5 Article 2 of the Directive, entitled 'Definitions', provides as follows:

'For the purposes of this Directive:

…

(d) "employee" means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice;

…'

6 Article 3 of that directive, entitled 'Scope', states in paragraph 1 thereof:

'This Directive shall apply, according to the choice made by Member States, to:

(a) undertakings employing at least 50 employees in any one Member State, or

(b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.'

7 Article 4 of Directive 2002/14, entitled 'Practical arrangements for information and consultation', provides, in paragraph 1 thereof, as follows:

'In 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.'

8 Article 11 of Directive 2002/14 provides that Member States must adopt the laws, regulations and administrative provisions necessary to comply with that directive not later than 23 March 2005 or must ensure that management and labour introduce by that date the required provisions, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by that directive at all times.

French legislation

9 In accordance with Article L. 2312-1 of the Labour Code (Code du Travail), the election of staff representatives is obligatory for all establishments with 11 or more employees.

10 Where the undertaking or establishment has 50 employees or more, the trade union organisations must designate, pursuant to Articles L. 2142-1-1 and L. 2143-3 of that code, a union representative and must create, pursuant to Article L. 2322-1 of that code, a works council.

11 Article L. 1111-2 of the Labour Code provides:

'For the purpose of implementing the provisions of this Code, the staff numbers in an undertaking shall be calculated in accordance with the following provisions:

1. Employees with a full-time contract of indefinite duration and homeworkers shall be taken fully into account in calculating the staff numbers in an undertaking;

2. Employees with a fixed-term contract, employees with an intermittent employment contract, employees provided to the undertaking by an outside undertaking who are present in the premises of the hiring undertaking and who have worked there for at least one year, and temporary employees, shall be taken into account in calculating the staff numbers in an undertaking pro-rata to the amount of time they have spent at the undertaking during the preceding 12 months. However, employees with fixed term contracts and employees provided to the undertaking by an outside undertaking, including temporary employees, shall be excluded from the calculation of the staff numbers where they replace an employee who is absent or whose employment contract has been suspended, in particular on account of maternity leave, leave for adoption or parental leave for education;

3. Part-time employees, whatever the nature of their employment contract, shall be taken into account by dividing the total number of working hours laid down in their employment contracts by the statutory or standard working hours.'

12 Article L. 1111-3 of the Labour Code provides:

'1. Apprentices;

2. holders of an employment-initiative contract, for the duration of the agreement under Article L. 5134-66;

3. (repealed);

4. holders of an accompanied-employment contract for the duration of the agreement referred to in Article L. 5134-19-1;

5. (repealed);

6. holders of a professional training contract until the expiry provided for by the contract where it is for a limited duration or until the end of the professional training where the contract is for an unlimited duration;

shall be excluded from the calculation of staff numbers.

However, those employees shall be taken into account for the purposes of applying the legal provisions relating to the calculation of the risk of accidents at work and occupational diseases.'

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

13 The AMS is an association governed by the Law of 1 July 1901 on the contract of association. That association participates in the implementation of social mediation measures and measures for the prevention of crime in the city of Marseille (France). Its objective is also to promote the reintegration into working life of unemployed persons or persons with social and professional difficulty in gaining access to employment. In this connection, the AMS offers them the opportunity to gain professional training in the field of social mediation after having followed an individual career plan.

14 On 4 June 2010, the Union départementale CGT des Bouches-du-Rhône appointed Mr Laboubi as representative of the trade union section created within the AMS.

15 The AMS challenges that appointment. It takes the view that it has staff numbers of fewer than 11 and, *a fortiori*, fewer than 50 employees and that, as a result, it is not required, under the relevant national legislation, to take measures for the representation of employees, such as the election of a staff representative.

16 In order to determine whether those thresholds of 11 or 50 employees are met within the association, the AMS considers that it is necessary to exclude from the calculation of its staff numbers, in accordance with Article L. 1111-3 of the Labour Code, apprentices, employees with an employment-initiative contract or accompanied-employment contract and employees with a professional training contract ('employees with assisted contracts').

17 The Tribunal d'instance de Marseille (Marseille District Court), hearing an application brought by the AMS for the annulment of Mr Laboubi's appointment as representative for the CGT trade union section and a counterclaim by that trade union for an order that the AMS organise elections for the purposes of setting up within it bodies representing staff, referred a priority question on constitutionality to the Cour de cassation (Court of Cassation) concerning the provisions of Article L. 1111-3 of the Labour Code.

18 The Cour de cassation referred that question to the Conseil constitutionnel (Constitutional Council). On 29 April 2011, the Conseil constitutionnel declared that Article L. 1111-3 of the Labour Code was not unconstitutional.

19 Before the Tribunal d'instance de Marseille, Mr Laboubi and the Union locale des syndicats CGT des Quartiers Nord – supported by the Union départementale CGT des Bouches-du-Rhône and the CGT as interveners – submitted that the provisions of Article L. 1111-3 of the Labour Code are nevertheless contrary to European Union law and to the French Republic's international commitments.

20 Ruling again on 7 July 2011, the Tribunal d'instance de Marseille upheld those arguments and did not apply Article L. 1111-3 of the Labour Code on the grounds that it did not comply with European Union law. The tribunal thus declared the appointment of Mr Laboubi as trade union section representative to be valid, after finding that, without the exclusions established by Article L. 1111-3 of the Labour Code, the staff numbers of the association in question would be far above the threshold of 50 employees.

21 The AMS brought an appeal before the Cour de cassation against that judgment.

22 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) May the fundamental right of workers to information and consultation, recognised by Article 27 of the [Charter], and as specified in the provisions of Directive [2002/14], be invoked in a dispute between private individuals in order to assess the compliance [with European Union law] of a national measure implementing the directive?

(2) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with [assisted] contracts?’

The questions referred

23 By its questions, which it is appropriate to consider together, the referring court seeks to ascertain, in essence, whether Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision.

24 In this connection, it must first be observed that the Court has already held that, since Directive 2002/14 has defined, in Article 2(d) thereof, the group of persons to be taken into account at the time of the calculation of the staff numbers of the undertaking, Member States cannot exclude from that calculation a specific category of persons initially included in that group (see Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611, paragraph 34).

25 National legislation such as that at issue in the main proceedings, which excludes from the calculation of the staff numbers of an undertaking a specific category of employees, has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that directive. Consequently, it is liable to render those rights meaningless and thus make that directive ineffective (see *Confédération générale du travail and Others*, paragraph 38).

26 Admittedly, it is settled case-law that the encouragement of recruitment, which is highlighted by the French Government in the case in the main proceedings, constitutes a legitimate aim of social policy and that the Member States have, in choosing the measures capable of achieving the aims of their social policy, a broad margin of discretion (see *Conféderation générale du travail and Others*, paragraph 28 and the case-law cited).

27 However, the margin of discretion which the Member States enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of European Union law or of a provision of that law (see *Confédération générale du travail and Others*, paragraph 29).

28 An interpretation of Directive 2002/14 according to which Article 3(1) thereof allows the Member States to exclude from the calculation of the staff numbers of the undertaking a specific category of workers on grounds such as those put forward by the French Government in the case in the

main proceedings is incompatible with Article 11 of that directive, which requires Member States to take all necessary steps enabling them to guarantee the results imposed by Directive 2002/14, in that it implies that the States would be allowed to evade that obligation to reach a clear and precise result imposed by European Union law (see *Confédération générale du travail and Others*, paragraph 40 and the case-law cited).

29 Having regard to the foregoing considerations, it must therefore be concluded that Article 3(1) of Directive 2002/14 must be interpreted as precluding a national provision, such as Article L. 1111-3 of the Labour Code, under which workers with assisted contracts are excluded from the calculation of staff numbers in the undertaking when determining the legal thresholds for setting up bodies representing staff.

30 Secondly, it is necessary to examine whether Directive 2002/14, in particular Article 3(1) thereof, meets the conditions to have direct effect and, if so, whether the defendants in the main proceedings may rely on it against the AMS.

31 In this connection, it should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103 and the case-law cited).

32 In the present case, Article 3(1) of Directive 2002/14 provides that it is for the Member States to determine the method for calculating the thresholds of employees.

33 Although Article 3(1) of Directive 2002/14 grants the Member States a certain degree of discretion when adopting the measures necessary to implement that directive, that does not alter the precise and unconditional nature of the obligation in that article to take account of all employees.

34 The Court has already held, as pointed out in paragraph 24 above, that, since Directive 2002/14 has defined the group of persons to be taken into account at the time of that calculation, Member States cannot exclude from that calculation a specific category of persons initially included in that group. Thus, although that directive does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, it does nevertheless require that they be taken into account (see *Confédération générale du travail and Others*, paragraph 34).

35 Having regard to that case-law concerning Article 3(1) of Directive 2002/14 (see *Confédération générale du travail and Others*, paragraph 40), it follows that that provision fulfils all of the conditions necessary for it to have direct effect.

36 However, it must be recalled that, according to settled case-law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (see *Pfeiffer and Others*, paragraph 109, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 46).

37 In this connection, it was noted in paragraph 13 above that the AMS is an association governed by private law, even if it has a social objective. It follows from this that, because of the legal nature of the AMS, the defendants in the main proceedings cannot rely on the provisions of Directive 2002/14, as such, against that association (see, to that effect, Case C-282/10 *Dominguez* [2012] ECR, paragraph 42).

38 None the less, the Court has held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 111; *Pfeiffer and Others*, paragraph 119; and *Dominguez*, paragraph 27).

39 Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (see Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100, and *Dominguez*, paragraph 25).

40 In the case in the main proceedings, it is apparent from the order for reference that the Cour de cassation is faced with such a limitation, so that Article L. 1111-3 of the Labour Code cannot be interpreted in conformity with Directive 2002/14.

41 Accordingly, it is necessary to ascertain, thirdly, whether the situation in the case in the main proceedings is similar to that in the case which gave rise to *Kükükdeveci*, so that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, can be invoked in a dispute between individuals in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive.

42 In respect of Article 27 of the Charter, as such, it should be recalled that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law (see Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 19).

43 Thus, since the national legislation at issue in the main proceedings was adopted to implement Directive 2002/14, Article 27 of the Charter is applicable to the case in the main proceedings.

44 It must also be observed that Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.

45 It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.

46 A prohibition, as provided for in Article 3(1) of Directive 2002/14 and addressed to the Member States, on excluding from the calculation of the staff numbers in an undertaking a particular category of employees initially included in the group of persons to be taken into account in that calculation, cannot be inferred as a directly applicable rule of law either from the wording of Article 27 of the Charter or from the explanatory notes to that article.

47 In this connection, the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.

48 Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

49 That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.

50 However, a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained (see *Dominguez*, paragraph 43).

51 It follows from the foregoing that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

Costs

52 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 27 of the Charter of Fundamental Rights of the European Union, by itself or in conjunction with the provisions 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, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the French Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

[Signatures]

[i] — The wording of paragraph 46 of this judgment has been amended since it was first put online.