

Case C-237/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

5 June 2020

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

29 May 2020

Applicant:

Federatie Nederlandse Vakbeweging

Defendant:

Heiploeg Seafood International BV

Heitrans International BV

Subject of the action in the main proceedings

Under the provision of national law implementing Article 5(1) of Directive 2001/23/EC, in the event of the transfer of an undertaking after bankruptcy, an employer's rights and obligations from an employment contract do not automatically transfer to the transferee. At issue in the main proceedings is whether that exception also applies if the transfer of an undertaking declared bankrupt had already been prepared before the declaration of bankruptcy in a so-called 'pre-pack' (for the concept of pre-pack, see paragraphs 2 and 3).

Subject and legal basis of the request for a preliminary ruling

The request for a preliminary ruling under Article 267 TFEU concerns the preparation for bankruptcy in a pre-pack. The Court of Justice of the European Union ('the Court of Justice') has ruled, in the circumstances giving rise to the judgment of 22 June 2017 in Case C-126/16 *Federatie Nederlandse Vakvereniging and Others* EU:C:2017:489, that the exception provided for in

Article 5(1) of Directive 2001/23 did not apply in the case of a pre-pack. The question is whether the situation is different in the circumstances of the present case and therefore whether that provision is applicable.

Questions referred

1. Must Article 5(1) of Directive 2001/23/EC be interpreted as meaning that the condition that ‘bankruptcy proceedings or any analogous insolvency proceedings ... have been instituted with a view to the liquidation of the assets of the transferor’ has been met, where
 - (i) the bankruptcy of the transferor is inevitable and the transferor is therefore effectively insolvent,
 - (ii) under Dutch law, the objective of the bankruptcy proceedings is to secure the highest possible return for the joint creditors by liquidating the debtor’s assets, and
 - (iii) in a so-called pre-pack prior to the declaration of bankruptcy, preparations are made for the transfer of (part of) the undertaking but it is only carried out after the declaration of bankruptcy, in terms of which
 - (iv) prior to the declaration of bankruptcy, the prospective insolvency administrator appointed by the Rechtbank (District Court) must be guided by the interests of the joint creditors as well as by social interests such as the importance of job preservation, and the prospective Rechter-commissaris (supervisory judge), also appointed by the Rechtbank, must exercise a supervisory function in that regard,
 - (v) the objective of the pre-pack is to enable, in the subsequent bankruptcy proceedings, a method of liquidation whereby (part of) the undertaking belonging to the assets of the transferor is sold as a going concern so as to obtain the highest possible return for the joint creditors and jobs are preserved as far as possible, and
 - (vi) the structure of the procedure ensures that that objective is in fact the guiding principle?

2. Must Article 5(1) of the Directive be interpreted as meaning that the condition that ‘the bankruptcy proceedings or any analogous insolvency proceedings are under the supervision of a competent public authority’ is fulfilled if the transfer of (part of) the undertaking is prepared in a pre-pack prior to the declaration of bankruptcy and is carried out after the declaration of bankruptcy, and

(i) is monitored, prior to the declaration of bankruptcy, by a prospective insolvency administrator and a prospective Rechter-commissaris who have been appointed by the Rechtbank but who do not have legal powers,

(ii) under Dutch law, prior to the declaration of bankruptcy, the prospective insolvency administrator is obliged to be guided by the interests of the joint creditors and by other social interests, such as the preservation of jobs, and the prospective Rechter-commissaris is obliged to exercise a supervisory function in that regard,

(iii) the duties of the prospective insolvency administrator and the prospective Rechter-commissaris do not differ from those of the insolvency administrator and the Rechter-commissaris in a bankruptcy,

(iv) the agreement on the basis of which the company is transferred and which has been prepared during a pre-pack is only concluded and executed after the bankruptcy has been declared,

(v) the Rechtbank, when declaring the bankruptcy, may proceed to appoint an insolvency administrator or a Rechter-commissaris other than the prospective insolvency administrator or the prospective Rechter-commissaris, and

(vi) the same requirements of objectivity and independence apply to the insolvency administrator and the Rechter-commissaris as apply to an insolvency administrator and a Rechter-commissaris in a bankruptcy that was not preceded by a pre-pack and, irrespective of the degree of their involvement prior to the declaration of bankruptcy, they are obliged by virtue of their statutory duty to assess whether the transfer of (part of) the undertaking prepared prior to the declaration of bankruptcy is in the interests of the joint creditors, and if they answer that question in the negative, to decide that such a transfer will not take place, while they are also always entitled to decide on other grounds, for example, because other social interests, such as the interest of employment, are opposed to it, that the transfer of (part of) the undertaking prepared prior to the declaration of bankruptcy will not take place?

Provisions of Union law cited

Article 5(1) of 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 transfer of undertakings, businesses or parts of undertakings or businesses

Provisions of national law cited

Burgerlijk wetboek (Civil Code), Articles 7:662, 7:663 and 7:666.

Brief summary of the facts and the procedure in the main proceedings

- 1 The Heiploeg group ('Heiploeg-old'), which operated a fish wholesale business, consisted of various undertakings. After the European Union imposed fines totalling EUR 27 082 000 on four undertakings of the group on 27 November 2013, bankruptcy was inevitable. Following the bankruptcy, a large part of the business was taken over by a number of newly established undertakings, including the defendants (Heiploeg Seafood International BV and Heitrans International BV; 'Heiploeg-new'). A significant proportion of the staff was reemployed, but on less favourable employment conditions.
- 2 The transfer of the Heiploeg undertakings was prepared in a so-called 'pre-pack'. That is a procedure which is not laid down in legislation or regulations and which takes place prior to the declaration of the bankruptcy of the debtor, whereby the sale of the company to be declared bankrupt is prepared by negotiating with potential buyers. A pre-pack can be distinguished from other sales transactions prepared prior to a declaration of bankruptcy by the fact that in a pre-pack the Rechtbank appoints a 'prospective insolvency administrator' and a 'prospective Rechter-commissaris'. Their position is not regulated by law and they therefore have no statutory powers. However, the intention is that, when the bankruptcy is declared at a later date, they assume the duties of insolvency administrator and Rechter-commissaris. In reality, this starts in advance of the declaration, to ensure that the transfer of the business after the bankruptcy can take place very quickly, that the business activities are halted for as short a period of time as possible and thus that the highest possible return is guaranteed. Furthermore, it is then more likely that some of the staff can be reemployed.
- 3 According to the case-law of the Hoge Raad (Supreme Court), the prospective insolvency administrator, just like the insolvency administrator who is appointed later, must be guided by the interests of the joint creditors and, in so doing, must also take account of social interests, including the interests of employment. The prospective Rechter-commissaris must supervise this in the same way as he is required to do after his formal appointment. After the bankruptcy, the insolvency administrator and the Rechter-commissaris are obliged by legislation to assess whether the transfer prepared prior to the bankruptcy declaration is in the interests of the joint creditors. If, in their opinion, that is not the case, they are obliged to decide that the transfer cannot proceed. Moreover, they are always entitled to decide on other grounds that a transfer prepared prior to the declaration of bankruptcy will not take place, for example, because of the consequences for employment.
- 4 Heiploeg-old had been investigating whether a pre-pack could be successful from the moment the fine was imposed. First, parties were invited to make a bid, after

which further negotiations were started with one of the three bidders. Only then, on 16 January 2014, did the Rechtbank Noord-Nederland (District Court, Noord-Nederland) appoint a prospective insolvency administrator and a prospective Rechter-commissaris to prepare for the transfer of the business. On 24 January, the defendants were entered in the trade register with the negotiating parties as administrators. This was followed on 28 January by the bankruptcy, which lasted only half a day. In the middle of the following night, the agreement was signed which made the transfer of the old companies a reality and enabled the defendants to continue their activities almost without interruption.

Main submissions of the parties to the main proceedings

- 5 The applicant challenges in cassation the ruling of the gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden) that Heiploeg-new was not bound, by virtue of the national provision transposing Article 5(1) of Directive 2001/23, by the terms and conditions of employment applicable to its employees prior to the transfer. The latter provision is only applicable in the event of, first, the existence of bankruptcy proceedings, second, ‘proceedings which have been instituted with a view to the liquidation of the assets of the transferor’ and third, ‘proceedings under the supervision of a competent public authority’. According to the applicant, the last two conditions are not fulfilled in the case of a pre-pack, since negotiations take place without a formally appointed insolvency administrator, after which the undertaking is de facto continued. The Court of Justice has already confirmed that in its judgment of 22 June 2017 in Case C-126/16 *Federatie Nederlandse Vakvereniging and Others* EU:C:2017:489.

Brief summary of the reasons for the referral

- 6 The first condition laid down in Article 5(1) of Directive 2001/23 is not at issue in the present case. The parties agree that Heiploeg-old was involved in bankruptcy proceedings. Moreover, the Gerechtshof had already ruled that bankruptcy was inevitable, which has been established as a fact in cassation.
- 7 As regards the condition in Article 5(1) of Directive 2001/23 that there must be proceedings aimed at the liquidation of the assets, the referring court observes that, in the present case, the purpose of the pre-pack was to obtain the highest possible return for the benefit of the joint creditors. The prospective insolvency administrators investigated whether that could best be achieved not by selling Heiploeg-old piecemeal, but rather, by effecting the transfer through a single undertaking the continuity of which was guaranteed. In doing so, they also examined how many jobs could be preserved. The actions of the prospective insolvency administrators were essential for that transfer, because it meant that the company did not come to a standstill for more than one day. That increased the return.

- 8 As regards the condition that the liquidation must take place under the supervision of a competent public authority, the referring court observes that the court which appointed the prospective insolvency administrators and the prospective Rechter-commissaris stressed that they had to be guided by the interests of the joint creditors. Accountability had to be monitored through public reports. If it transpired that that objective was compromised, the court involved in the bankruptcy could decide to appoint different insolvency administrators and a different Rechter-commissaris. The fact that that did not happen shows that the interests of the joint creditors were paramount.
- 9 Furthermore, although the transfer from Heiploeg-old to Heiploeg-new had been prepared during the pre-pack, the negotiations had not yet been concluded when the bankruptcy was declared. That did not happen until the next night. At that time, therefore, the insolvency administrators and the Rechter-commissaris, who had in the meantime been formally appointed, were legally required to be guided by the interests of the joint creditors and they could, on that basis, decide not to proceed with the transfer. Therefore, according to the referring court, the supervision by a competent public authority was not undermined in the present case by the course of events in the pre-pack prior to the declaration of bankruptcy.
- 10 The referring court emphasises that, in paragraph 50 of the judgment in *Federatie Nederlandse Vakvereniging and Others*, the Court of Justice gave its ruling ‘subject to determination by the referring court’. The referring court infers from this that, in any case which it is called upon to adjudicate, it must assess whether the case concerns a pre-pack such as that at issue in the judgment in *Federatie Nederlandse Vakvereniging and Others* or a different type of pre-pack, to which that judgment would not apply. Furthermore, it is of the opinion that what it stated in its order for reference with regard to Dutch bankruptcy law and the purpose and structure of the pre-pack in general was not as comprehensively submitted to the Court of Justice in the case that led to the judgment in *Federatie Nederlandse Vakvereniging and Others*, so that the Court of Justice was not able to take that into account in its judgment. It is also relevant to the question of the applicability of the judgment in *Federatie Nederlandse Vakvereniging and Others* that in the present case the negotiations on the transfer of the old undertaking did not take place with an undertaking associated with it. That was the situation in the case that led to the judgment in *Federatie Nederlandse Vakvereniging and Others*. For those reasons, there may be reasonable doubt as to whether the ruling of the Court of Justice in the judgment in *Federatie Nederlandse Vakvereniging and Others* also applies to a case such as the one at issue here.