



Employees' rights in the event of transfers of undertakings may be maintained where a 'pre-pack' is put into effect following insolvency

A declaration of insolvency in the context of a 'pre-pack', which is aimed at preparing the transfer of an undertaking in order to enable a swift relaunch of the undertaking's viable units once the insolvency has been declared, may not satisfy all the conditions required by EU law

Until its insolvency, Estro Groep, a Netherlands company, was the largest childcare company in the Netherlands. It had almost 380 childcare centres in the country and employed approximately 3,600 workers. On 5 June 2014, Estro Groep submitted an application to the rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) for the appointment of a prospective insolvency administrator, which was done on 10 June 2014.

On 20 June 2014, the company Smallsteps was created as a relaunch undertaking on behalf of H.I.G. Capital (a sister company of Bayside Capital, the principal shareholder of Estro Groep) in order to take over a large part of the childcare centres of Estro Groep.

On 5 July 2014, Estro Groep was declared insolvent. That same day a 'pre-pack' was signed between the insolvency administrator and Smallsteps. A 'pre-pack' procedure is aimed at preparing the transfer of an undertaking down to its every last detail in order to enable a swift relaunch of the undertaking's viable units once the insolvency has been declared and in order to avoid the disruption that would result from an abrupt cessation of the undertaking's activities on the day of the declaration of insolvency, so as to safeguard the value of the undertaking and the employment posts.

On 7 July 2014, the insolvency administrator dismissed all the Estro Groep employees. Smallsteps offered a new contract of employment to almost 2,600 staff formerly employed by Estro Groep, but over a thousand of the total number of staff was dismissed.

The Federatie Nederlandse Vakvereniging (FNV), a Netherlands trade union organisation, and four employees who worked in childcare centres taken over by Smallsteps, but were not offered new contracts of employment after the insolvency of Estro Groep, brought an action before the Rechtbank Midden-Nederland (District Court, Central Netherlands). They claimed that an EU directive¹ intended to protect workers, in particular by ensuring that their rights are safeguarded in the event of the transfer of an undertaking, must apply to the 'pre-pack' concluded between Estro Groep and Smallsteps. Thus, those four workers must be regarded as henceforth working for Smallsteps, as of right, while retaining their conditions of employment.

In those circumstances, the Rechtbank Midden-Nederland decided to refer questions to the Court of Justice. That court essentially seeks to ascertain whether the directive must be interpreted as meaning that the protection of workers is maintained in a situation, such as that in the present case, in which the transfer of an undertaking takes place following a declaration of insolvency and in the context of a 'pre-pack' prepared before the declaration of insolvency and put into effect immediately after that declaration.

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).

In today's judgment, the Court has first stated that even if a 'pre-pack' procedure is prepared before a declaration of insolvency, it is in fact put into effect after that declaration. According to the Court, such a procedure, in fact entailing insolvency, may be covered by the concept of 'bankruptcy proceedings or any analogous insolvency proceedings' within the meaning of the directive.²

Secondly, subject to verification by the Rechtbank Midden-Nederland, the Court considers that such a procedure, contrary to the requirement laid down in the directive, is not ultimately aimed at liquidating the undertaking and so, the economic and social objectives it pursues are no explanation of, or justification for, its employees losing the rights conferred on them by the directive when all or part of the undertaking concerned is transferred.

The mere fact that a 'pre-pack' procedure may also be aimed at maximizing satisfaction of creditors' collective claims does not make it a procedure instituted with a view to the liquidation of the assets of the transferor within the meaning of the directive.

Lastly, as regards the requirement of the directive that the bankruptcy proceedings or any analogous insolvency proceedings must be under the supervision of a public authority, the Court points out that the stage of the 'pre-pack' procedure preceding a declaration of insolvency has no basis in Netherlands legislation. Therefore, this procedure is not carried out under the supervision of a court, but rather, as is apparent from the file submitted to the Court, by the undertaking's management which conducts the negotiations and adopts the decisions concerning the sale of the insolvent undertaking.

Although appointed by a court, at the request of the insolvent undertaking, the prospective insolvency administrator and the prospective supervisory judge have no formal powers. Therefore, they are not supervised by a public authority.

In addition, given that, very soon after the opening of the insolvency proceedings, the insolvency administrator asks for and receives authorisation from the supervisory judge for the transfer of the company, the judge must have been informed of the transaction, and essentially raised no objection to it, before the declaration of insolvency.

Such an approach may defeat almost entirely the purpose of the supervision of the insolvency procedure by a competent public authority and cannot, therefore, satisfy the condition for supervision by such an authority required under the directive.

The Court accordingly concludes that a 'pre-pack' procedure such as that at issue in the main proceedings does not satisfy all the conditions laid down in the directive and that, therefore, there can be no derogation from the protection scheme provided for under the directive.

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 EU 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.

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² Article 5(1) of the directive.