Case C-431/23

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:

11 July 2023

Referring court:

Tribunal du travail de Liège (Belgium)

Date of the decision to refer:

26 May 2023

Applicants:

AE and Others

Defendants:

BA, EP and RI, acting as insolvency administrators of WIBRA BELGIË SA

WIBRA BELGIË SRL

I. Facts

1 WIBRA is a Netherlands retailer, operating in Belgium and the Netherlands, selling consumer goods of all kinds (textile, decoration, cleaning products, etc.) at discount prices.

2 Following the temporary closure of its stores due to the COVID-19 pandemic, the Belgian subsidiary – the public limited company Wibra België (‘Wibra België SA’) – suffered a significant loss of turnover for 2020. At that time, it operated 81 stores and employed 439 workers.

3 On 20 July 2020, Wibra België SA held an extraordinary works council meeting and issued a press release describing a very difficult situation, the intention to keep some of its stores in Belgium and the need to submit a request to open proceedings for judicial restructuring.

4 On 30 July 2020, Wibra België SA lodged a request to open proceedings for judicial restructuring before the tribunal de l'entreprise de Gand, division de Dendermonde (Business Court, Ghent, Dendermonde section, Belgium) ('the Business Court'). By judgment of the same day, three court officers (Messrs BA, EP and RI) were appointed and given the task of organising and transferring all or part of the company's business.

5 The court officers sent the Business Court the only successful offer, from the Netherlands company Wibra Nederland BV, which intended '*to make a fresh start, in a simplified/reduced/less binding form, on the Belgian market with a company yet to be created, with some of the stores currently in operation*'. [1] The offer involved the acquisition of 36 of the 81 commercial premises, including the company headquarters, and the takeover of 183 of the 439 employees, selected by the proposed transferee.

6 On 30 September 2020, the private limited liability company Wibra België ('Wibra België SRL') was created in order to take over and ensure the continuation of part of Wibra België SA's business.

7 On 1 October 2020, a second extraordinary works council meeting of Wibra België SA was held in the presence of union representatives. According to Wibra België SA, the management and court officers thus intended to provide the necessary information to the employees within the framework of the application for approval of the takeover offer in the context of the proceedings for judicial restructuring by transfer under judicial supervision.

8 On 8 October 2020, the application for approval was rejected by the Business Court. It held that some of the provisions of the proposed transaction were contrary, first, to Collective Labour Agreement No 102 of 5 October 2011 concerning the safeguarding of employees' rights in the event of a change of employer as a result of a judicial restricting by transfer under judicial supervision (*Moniteur belge* of 25 April 2013, p. 25097; 'the CLA') and, second, to 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).

9 On the same day, the Business Court declared Wibra België SA insolvent and appointed Messrs BA, EP and RI as insolvency administrators.

10 All employees were immediately informed of the judgment and of the termination of their employment contract on payment of compensation in lieu of notice.

[1] Judgment of the Business Court, Ghent, 8 October 2020 [paragraph 5], free translation of the referring court.

11 On 9 October, notwithstanding the refusal of the Business Court to grant approval of the takeover offer and the judgment declaring insolvency, WIBRA announced, by press release, the rapid reopening of 36 stores and the re-engagement of 183 employees under new employment contracts.

12 On the same day, the insolvency administrators transferred some of the assets of Wibra België SA to Wibra België SRL, which re-engaged 183 of the 439 dismissed employees.

13 On 1 April 2021, some of the employees not re-engaged questioned the insolvency administrators on compliance with the prior information and consultation procedure and on the manner in which parts of the business of Wibra België SA were transferred to the transferee on 9 October 2020.

14 The insolvency administrators replied that, during the proceedings for judicial restructuring by transfer under judicial supervision, obligations relating to information and consultation of workers' representatives had been observed.

They stated that, independently of the decision rejecting the proposed takeover, the Business Court had checked and approved the conduct of the proceedings and heard the workers' representatives at the time of the hearing.

15 It is apparent from the file that, since 2021, Wibra België SRL has been making large profits and that, since the bankruptcy, new Belgian stores have reopened under the WIBRA brand.

II. Subject matter of the dispute and positions of the parties

16 An action for damages has been brought by 60 former employees ('the applicants') against the insolvent Wibra België SA (Messrs BA, EP and RI, in their capacity as insolvency administrators; 'the first defendants') and against the new company, Wibra België SRL, before the referring court.

Their forms of order sought are as follows:

– declare that the defendants failed to fulfil their prior information and consultation obligations in regard to collective redundancies pursuant to CLA No 24 of 2 October 1975 concerning the procedure for informing and consulting employees in regard to collective redundancies (*Moniteur belge* of 17 February 1976, No 1975100250, p. 1716) and Article 66 of the Law of 13 February 1998 on measures in favour of employment (*Moniteur belge* of 19 February 1998, No 1998012088, p. 4643; 'the Law of 13 February 1998');

– declare that the transfer of business from the insolvent Wibra België SA to Wibra België SRL constitutes a legal transfer of an undertaking within the meaning of CLA No 32a of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of the legal

transfer of an undertaking and regulating the rights of employees re-engaged in the event of a takeover of assets following insolvency (*Moniteur belge* of 9 August 1985, No 1985800218, p. 11528);

– consequently, quantify the damage suffered by the applicants, establish, on that basis, the claims for damages brought by the applicants against the insolvent Wibra België SA and refer the case back to the Business Court for a ruling on the eligibility of those debts in the undertaking's liabilities in insolvency;

– order Wibra België SRL, jointly and severally or, failing that, in a personal capacity, to pay the amounts corresponding to the damages awarded.

17 Wibra België SA contends that the claims are unfounded, both in so far as they concern an infringement of CLA No 24 relating to collective redundancies and in that they are based on CLA No 32a relating to the transfer of an undertaking.

With regard to the claim relating to the lack of specific and concrete information on the collective redundancy, it maintains that a distinction should be made between the period prior to the proceedings for judicial restructuring, the period after the proceedings for judicial restructuring and the bankruptcy itself.

It considers that the transaction carried out between the insolvent Wibra België SA and Wibra België SRL cannot be qualified as a legal transfer of an undertaking within the meaning of CLA No 32a, but that the rights of the re-engaged workers must be examined in the context of a takeover of assets following insolvency.

18 Wibra België SRL contends that the claims are unfounded. Pursuant to Article 65 of the Law of 13 February 1998, the application of CLA No 24 is expressly ruled out in the event of insolvency.

It also submits that the applicants may not rely on the provisions of EU law to impose obligations on the employer; where Directive 2001/23 has not been transposed into national law, its interpretation has no direct horizontal effect.

It maintains that it cannot be held jointly and severally liable with Wibra België SA for the debts existing on the date of the transfer of assets and personnel, since the provisions applicable to the present case are set out in Chapter III of CLA No 32a and not in Chapter II.

III. Law – Obligations relating to information and consultation of workers' representatives in the event of collective redundancy

19 Various national provisions provide for obligations to inform and consult workers' representatives in advance in the event of collective redundancy. The objective of those provisions is to avoid, reduce or mitigate the consequences of collective redundancy, by having recourse to accompanying social measures, through a

greater focus on dialogue and providing full and transparent information in good faith. Those provisions are set out, inter alia, in CLA No 24, to which Article 66 of the Law of 13 February 1998 refers.

20 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16) establishes, in Article 2, the obligations relating to information and consultation incumbent on any employer contemplating collective redundancies.

21 By judgment of 12 October 2004, *Commission* v *Portugal* (C-55/02, EU:C:2004:605), the Court clarified that the rules on collective redundancies applied to all redundancies for reasons not related to the individual workers, such as in the event of insolvency.

22 In the judgment of 3 March 2011, *Claes and Others* (C-235/10 to C-239/10, EU:C:2011:119), the Court held that Articles 1 to 3 of Directive 98/59 must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect. Until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator.

1. The obligations on the part of the first defenders in their capacity as insolvency administrators

23 Article 65 of the Law of 13 February1998 expressly excludes the application of Chapter VII of that law, relating to prior information and consultation obligations, in the case of collective redundancies occurring in the context of insolvency proceedings.

24 Similarly, Directive 98/59 does not expressly impose such obligations on an insolvent employer.

25 Neither Directive 98/59, nor the Court's interpretation of it, allow the employer to be made subject to prior information and consultation obligations in the event of insolvency.

Directives do not have direct horizontal effect; before they are transposed into national law; they can be a direct source of rights but cannot impose obligations on individuals.

26 In so far as the only provisions providing for information and consultation obligations preceding collective redundancies do not apply in the event of insolvency proceedings, Wibra België SA cannot be found to have breached its obligations after the declaration of insolvency.

27 Therefore, in their capacity as insolvency administrators of Wibra België SA, Messrs BA, EP and RI cannot be held liable for the damage claimed by the applicants, since they were not, in that capacity, required to comply with the CLAs providing for a prior consultation procedure or for a conciliation procedure preceding a collective redundancy.

2. The obligations on the part of the first defenders in their capacity as court officers

28 Everything else is the responsibility of Messrs BA, EP and RI in their capacity as court officers appointed during the proceedings for judicial restructuring.

29 In that capacity, they negotiated the takeover of part of the business and personnel by the parent company, Wibra Nederland [BV]. On 21 September 2020, they accepted the offer of that company, which provided for the re-engagement of 183 of the 439 members of staff.

30 Therefore, even at the stage of the negotiations with Wibra Nederland [BV] and at the latest when they accepted the offer, on 21 September 2020, the first defenders knew or ought to have known that a collective redundancy was inevitable.

31 Contrary to what is provided for in the event of insolvency, the information and consultation obligations prior to a collective redundancy are not expressly excluded in the event of judicial restructuring. Such obligations thus applied to Wibra België SA in the context of the proceedings for judicial restructuring ordered by the Business Court on 30 July 2020.

32 The requirements of Article 2(3) of Directive 98/59 are incorporated in detail in the relevant national provisions:

'To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the planned redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers usually employed;

(iv) the period over which the redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor on the employer;

(vi) the method to be used for calculating any redundancy payments other than those arising out of national legislation and/or practice. …'

33 Wibra België SA maintains that, through the court officers, it consulted and informed the workers' representatives with regard to their economic situation and the solutions envisaged. It refers to various meetings held after the proceedings for judicial restructuring were brought.

34 However, the minutes of the meetings produced make no mention of any accompanying measures or information measures specific to a collective redundancy.

35 The various communications from Wibra België SA and the content of the works council meetings held prior to the bankruptcy highlight a lack of social dialogue and a failure to comply with the collective redundancy procedure.

36 There is no record of any written communication as provided for in Article 66(1) of the Law of 13 February 1998. Yet, on 1 October 2020, Wibra België knew, or ought to have known, that a collective redundancy was inevitable, that that redundancy was to take place following acceptance of the takeover offer in the context of the proceedings for judicial restructuring or, in the event of that offer being rejected, due to the insolvency of the company.

37 The fact that the workers' representatives presented oral argument at the hearing of 5 October 2020 that gave rise to the judgment declaring insolvency of 8 October 2020 is not sufficient to establish compliance with the obligations at issue.

38 Since the takeover offer submitted in the context of the proceedings for judicial restructuring was unsuccessful, the workers' representatives could not have foreseen the company's imminent bankruptcy. Thus, the legal context in which the transaction took place did not allow the workers' representatives to put questions, properly and within a reasonable time, to company management.

39 The workers were not provided with clear and sufficient information regarding their fate. At the same time, the company was preparing its restructuring; it could not be unaware of the impending collective redundancy and the resulting obligations.

40 For the sake of completeness, contrary to what Wibra België SA maintains, the fact that the task of the court officers is carried out '*under the supervision and authority of the court*' does not exempt them from their information and

consultation obligations. The proceedings for judicial restructuring have no bearing on the management of the company, since the management of the undertaking remains in the hands of those responsible.

41 The defendants' reasoning amounts to considering that the Business Court failed to find an infringement of the rules on collective redundancies. However, Wibra België SA deliberately circumvented the court's refusal to approve the takeover offer, by transferring, despite that refusal, part of its business, premises and personnel to Wibra België SRL, which was established beforehand for that purpose, and by leaving the employees not re-engaged in the care of the liquidator and the Fonds de fermeture d'entreprises (FFE) (Closure of Undertakings Fund) (and, therefore, the local authorities).

42 It is therefore pointless to argue that the obligations incumbent on Wibra België SA would have been covered by a judicial review, especially since that review ultimately resulted in the offer submitted by the court officers being refused.

IV. Legal categorisation of the transfer of assets from Wibra België SA to Wibra België SRL: legal transfer of an undertaking or sale of assets following insolvency?

43 Directive 2001/23 establishes two mechanisms for the protection of workers in the event of transfers of undertakings: first, the takeover by the transferee of all personnel of the undertaking transferred (Article 4(1)); second, the transfer to the transferee of all rights and obligations arising from contracts of employment existing on the date of transfer (Article 3(1)).

44 That directive is transposed into Belgian law, inter alia, by CLA No 32a. Article 6 thereof provides that Chapter II, relating to the rights of employees in the event of a change of employer following a legal transfer of an undertaking, is to '*apply to any change of employer as a result of legal transfer of an undertaking or part of an undertaking, except in the event* [of a takeover of assets following insolvency]. *Subject to the first subparagraph, there is a transfer within the meaning of this agreement where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*'.

45 The transfer of an undertaking, within the meaning of Directive 2001/23 and CLA No 32a, requires three elements to be present:

– a change of employer;

– the transfer of the undertaking or part of the undertaking;

– the contractual origin of the transfer. The Court gave the concept of legal transfer a flexible interpretation to meet the objective of the directive, which is to protect employees in the event of transfers of undertakings, and held that that

directive was '*applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking*' (judgment of 15 June 1988, *Bork International and Others*, 101/87, EU:C:1988:308, paragraph 13).

46 According to Article 7 of CLA No 32a, '*The transferor's rights and obligations arising from a contract of employment existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee'*.

47 Article 8 provides for joint liability for debts between the transferor and transferee with regard to '*debts existing on the date of a transfer within the meaning of Article 1(1) and arising from a contract of employment existing on that date …*'.

48 Article 11 et seq., in Chapter III, concern the situation of employees in the event of a takeover of assets following insolvency. In such a situation, by way of exception from the rules set out in Chapter II, there is neither transfer to the transferee of the social debts existing on the date of the transfer, or joint liability with the transferor.

49 Similarly, Article 5 of Directive 2001/23 provides:

'*Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency [practitioner] authorised by a competent public authority).*'

50 Lastly, CLA No 102 was concluded following the entry into force of the Law of 31 January 2009 on the continuity of undertakings (*Moniteur belge* of 9 February 2009, No 2009009047, p. 8436) which established a mechanism for transfer under judicial supervision.

51 In the context of the Covid-19 crisis, the legislature introduced various measures to help undertakings, including the 'pre-pack' or 'silent bankruptcy' procedures, provided for in Article XX.39/1 of the Code de droit économique (Code of Economic Law), in the section concerning the judicial restructuring of undertakings.

52 Such procedures are preliminary to the restructuring of the undertaking and during which a court officer may be appointed with a view to obtaining a settlement or collective agreement provided that the debtor can demonstrate that the continuation of the undertaking is in jeopardy in the short- or long-term.

53 The pre-pack procedure '*consists essentially of a two-step procedure: the first, generally confidential, during which a restructuring is negotiated and concluded with the various parties involved or with some of them and, second, by which that agreement is formalised within the framework of insolvency proceedings, which will, in principle, be brief since the restructuring will have already been drawn up and negotiated during the first stage'.* [2]

54 The Belgian legislature thus intended to regulate the negotiation of a restructuring plan in a confidential manner, without any associated negative publicity (pre-pack plan), [3] but it did not legislate on the preparation of the transfer of the undertaking (pre-pack transfer).

55 The pre-pack transfer, applicable under Netherlands law, was held to be contrary to Article 5 of Directive 2001/23 in the judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others* (C-126/16, EU:C:2017:489). According to the Court, '*even though the "pre-pack" procedure at issue in the main proceedings was prepared before the declaration of insolvency, it was in fact put into effect after that declaration. Such a procedure, in fact entailing insolvency, may therefore be covered by the concept of "bankruptcy proceedings or any analogous insolvency proceedings", within the meaning of Article 5(1) of Directive 2001/23*' (paragraph 46); and '*the stage of the "pre-pack" procedure, such as that at issue in the main proceedings, preceding a declaration of insolvency, has no basis in the national legislation at issue'* (paragraph 53).

56 According to the Court, that procedure '*is therefore 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'* (paragraph 54). In conclusion, '*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. Accordingly, they are not supervised by a public authority'* (paragraph 55).

57 In the judgment of 16 May 2019, *Plessers* (C-509/17, EU:C:2019:424), the Court confirmed its case-law, on the basis of identical grounds: '*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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to*

[2] ALTER, C. and PLETINCKX, Z, 'Loi du 21 mars 2021 modifiant le livre XX du Code de droit économique et le Code des Impôts sur les revenus 1992', *Journal des Tribunaux*, 2021/20, No 6858, p. 367.

[3] Doc. parl., Ch., 2019/2020, No 1337/004, p. 10.

maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on'.

58 In the judgment of 28 April 2022, *Federatie Nederlandse Vakbeweging (Pre-pack procedure)* (C-237/20, EU:C:2022:321), the Court reviewed its position in a case where an insolvent Netherlands company transferred its business, by means of the pre-pack procedure, to two new subsidiaries and took over the contracts of employment of some of the employees under less favourable conditions of employment. The Court held that: '*Article 5(1) of [Directive 2001/23] must be interpreted as meaning that the condition which it lays down, according to which Articles 3 and 4 of that directive are not to apply to the transfer of an undertaking where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings "instituted with a view to the liquidation of the assets of the transferor", is satisfied where the transfer of all or part of an undertaking is prepared, prior to the institution of insolvency proceedings with a view to the liquidation of the assets of the transferor and in the course of which that transfer is carried out, in the context of a pre-pack procedure which has as its primary aim 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, provided that that pre-pack procedure is governed by statutory or regulatory provisions*' (paragraph 55) and that '*the fact that the transfer of all or part of an undertaking is prepared as part of a pre-pack procedure preceding the declaration of insolvency by a "prospective insolvency administrator", placed under the supervision of a "prospective supervisory judge", does not preclude the third condition laid down in Article 5(1) of Directive 2001/23 from being satisfied'* (paragraph 65).

59 The Court held in that judgment that a pre-pack procedure, provided that it is governed by statutory or regulatory provisions, falls within the scope of the exception contained in Article 5 of Directive 2001/23.

60 Wibra België SA is liable, in respect of each of the applicants, for damages for breach of its information and consultation obligations preceding a collective redundancy.

61 However, in the light of the declaration of insolvency, the debts should be included in the liabilities in insolvency and the assets in insolvency should be sufficient for the applicants to obtain effective payment.

62 Consequently, if the transaction carried out between the insolvent Wibra België SA and Wibra België SRL is to be regarded as a legal transfer of an undertaking, within the meaning of CLA No 32a, the second company will be held jointly and severally liable for the obligations of the first company, and thus for the debts existing on the date of the transfer, pursuant to Articles 7 and 8 of CLA No 32a.

63 In the context of the proceedings for judicial restructuring, the proposed transfer of assets was unsuccessful because the Business Court found it to be contrary to CLA No 102 and to Directive 2001/23.

64 Notwithstanding the court's refusal to approve the takeover of assets, the transfer plan prepared during the insolvency proceedings by the court officers was finally carried out by those same officers the day after the declaration of insolvency, but in their capacity as insolvency administrators.

65 The defendants do not dispute the fact that the substance of the transaction carried out between the two companies, the day after the declaration of insolvency, is identical to that of the takeover offer. The only difference between the two transactions lies in the identity of the transferee but, in so far as Wibra België SRL is a subsidiary of the parent company, that fact is inconsequential.

66 Specifically, the court officers accepted the offer of Wibra Nederland BV, which concerned the acquisition of some of the premises, company headquarters and all the tangible and intangible assets needed to enable that acquisition, in addition to the takeover of 183 of the 439 members of staff.

67 Indisputably, that transaction must be regarded as 'pre-pack transfer', which allows the transferee to rely on the exception contained in Article 5 of Directive 2001/23, provided that that transaction is governed by statutory or regulatory provisions, in accordance with the judgment of 28 April 2022, *Federatie Nederlandse Vakbeweging (Pre-pack procedure)* (C-237/20, EU:C:2022:321).

68 As noted in the academic commentary, '*…the judgment granting authorisation, which has neither the purpose nor effect of "validating" the transfer on a social level, does not prevent the exercise of their rights by the employees, any more than it calls into question the very principle of the transfer. The transfer under judicial supervision thus has the same effect for the employees covered by CLA No 102, as a legal transfer for those covered by CLA No 32a'.* [4]

69 In the light of the foregoing, the transaction carried out in the present case falls within the scope of the exception contained in Article 5(1) of Directive 2001/23 only if it is governed by statutory and regulatory provisions.

70 There are no such provisions under Belgian positive law, since ArticleXX.39/1 of the Code of Economic Law concerns the preparatory stage (pre-pack plan) and not the transfer stage (pre-pack transfer).

71 The specific character of the present case is the following:

[4] AYDOGDU, R. and WILDEMEERSCH, J., 'L'arrêt Plessers de la Cour de Justice de l'Union Européenne: une condamnation avec sursis de la réorganisation judiciaire par transfert sous autorité de justice', *JLMB*, 2019, p. 1269.

– The first part of the transaction – the preparation of the transfer – took place under the supervision of the court officers appointed by the Business Court in the context of proceedings for judicial restructuring, that is to say, governed by statutory provisions.

– The second part of the transaction – the transfer of assets and employees – immediately followed the refusal of the Business Court to approve the transaction originally agreed, on a ground relating, moreover, to the protection of the rights of employees (refusal of the transferee to take over social liabilities linked to holiday pay and end-of-year bonuses).

72 Consequently, the following question arises: does the transfer of assets prepared in the context of proceedings for judicial restructuring by transfer under judicial supervision, but in respect of which that authority refused to grant approval, fall within the scope of the exception contained in Article 5 of Directive 2001/23, where that transaction was carried out after the bankruptcy of the company concerned?

V. The question referred

73 *Must 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 transfers of undertakings, businesses or parts of undertakings or businesses be interpreted as meaning that the condition which it lays down, according to which Articles 3 and 4 of that directive are not to apply to the transfer of an undertaking where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor, is not satisfied where the transfer of all or part of an undertaking is prepared prior to the opening of insolvency proceedings with a view to the liquidation of the assets of the transferor, in the present case in the context of proceedings for judicial restructuring ending in a transfer agreement approval of which is refused by the competent court but which is then carried out immediately after the declaration of insolvency, outside the application of any statutory or regulatory provisions under national law?*