Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 12 November 2014[1]

Case C-343/13

Modelo Continente Hipermercados SA
v
Autoridade Para As Condições de Trabalho — Centro Local do Lis (ACT)
(Request for a preliminary ruling

from the Tribunal do Trabalho de Leiria (Portugal))

(Rules on mergers of public limited liability companies — Directive 2011/35/EU — Merger by acquisition — Transfer of all the assets and liabilities of the company being acquired to the acquiring company — Liability for administrative offences — National law providing for transfer of this liability from the company being acquired on a merger by acquisition)

I – **Introduction**

1. This request for a preliminary ruling has been made in the context of proceedings between Modelo Continente Hipermercados SA ('MCH') and the Autoridade para as Condições de Trabalho — Centro Local do Lis ('the ACT') (Authority for working conditions) concerning the decision of the ACT to fine MCH for infringements of the labour code committed by Good and Cheap — Comércio Retalhista SA ('Good and Cheap') prior to the merger by acquisition of Good and Cheap and MCH.

2. In this context, the present case raises the question whether the merger by acquisition of Good and Cheap and MCH entails the transfer to MCH of Good and Cheap's debts, given that the creditor did not demand payment from Good and Cheap prior to the merger although the factual circumstances in which the debt arose pre-dated the merger.

3. This case presents the Court with its first opportunity to interpret a provision of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies,[2] most recently amended by Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009[3] ('the Third Directive') and by Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies.[4]

1 — Original language: French.
2 — OJ 1978 L 295, p. 36.
3 — OJ 2009 L 259, p. 14.
4 — OJ 2011 L 110, p. 1.

II – **Legal framework**

A – *EU law*

4. This reference for a preliminary ruling concerns the interpretation of Article 19(1) of the Third Directive, which was still in force at the date of the merger which is the subject of the case in the main proceedings.

5. The Third Directive has been codified by Directive 2011/35. The recitals and provisions of Directive 2011/35 which are relevant to this case are in essence identical to the corresponding recitals and provisions of the Third Directive. For that reason, even though the merger at issue in the main proceedings took place under the system put in place by the Third Directive, like the referring court and the parties I shall refer to Directive 2011/35.

6. Recitals 4 and 7 in the preamble to Directive 2011/35 state:

'(4) The protection of the interests of members and third parties requires that the laws of the Member States relating to mergers of public limited liability companies be coordinated and that provision for mergers should be made in the laws of all the Member States.

…

(7) Creditors, including debenture holders, and persons having other claims on the merging companies should be protected so that the merger does not adversely affect their interests.'

7. Article 3(1) of Chapter II of Directive 2011/35, entitled 'Regulation of merger by the acquisition of one or more companies by another company and of merger by the formation of a new company', provides:

'For the purposes of this Directive, "merger by acquisition" shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.'

8. Chapter III of that directive, entitled 'Merger by acquisition', includes, among others, the following provisions:

'Article 6

Draft terms of merger must be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC, for each of the merging companies, at least 1 month before the date fixed for the general meeting which is to decide thereon.

…

Article 11

1. All shareholders shall be entitled to inspect at least the following documents at the registered office at least 1 month before the date fixed for the general meeting which is to decide on the draft terms of merger:

(a) the draft terms of merger;

(b) the annual accounts and annual reports of the merging companies for the preceding three financial years;

(c) where applicable, an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than 6 months before that date;

…

Article 12

Protection of the rights of the employees of each of the merging companies shall be regulated in accordance with Directive 2001/23/EC.

Article 13

1. The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

2. To that end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.

3. Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.

…

Article 18

1. A merger must be publicised in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 2009/101/EC, in respect of each of the merging companies.

2. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

Article 19

1. A merger shall have the following consequences *ipso jure* and simultaneously:

(a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

(b) the shareholders of the company being acquired become shareholders of the acquiring company;

(c) the company being acquired ceases to exist.

…'

B – *Portuguese law*

9. The Commercial Companies Code (Código das Sociedades Comerciais) transposes the provisions of Directive 2011/35 into Portuguese law.

10. Article 98 of that code, entitled 'Draft Terms of Merger', provides:

'1. The management of the companies planning to merge must jointly draw up the draft terms of merger to include the following elements, in addition to any other elements required or appropriate for full legal and economic transparency of the transaction:

…

(d) the balance sheet for each of the participating companies, specifying the value of assets and liabilities to be transferred to the acquiring or the new company;

…

(h) the measures taken to protect creditors' rights;

…

2. The balance sheet to which (d) above refers is:

(a) The balance sheet for the last financial period, provided that this ended no more than six months prior to the draft terms of merger; or

(b) A reported balance sheet issued on a date not before the first day of the third month prior to the date of the draft terms of merger.'

11. Article 100 of that code, entitled 'Registration of Draft Terms of Merger and Notice of Meeting', states:

'1. The draft terms of merger must be registered.

2. The members of each of the participating companies shall decide on the draft terms of merger at a general meeting, whatever the nature of the company. The general meeting shall be called following registration and at least one month prior to the date of the notice.

3. The notice of meeting must state that the draft terms of merger and attached documentation are available for examination by the partners and company creditors at the registered office of each company and must give the date of the meeting.

…

5. Registration of the draft terms of merger shall be carried out automatically by the registration service and shall specify that creditors have the right to oppose the merger, according to the terms of Article 101-A.

…'

12. Article 101-A of the same code, entitled 'Objections by Creditors', is worded as follows:

'Within a period of one month following publication of registration of the draft terms of merger, creditors of the participating companies with claims pre-dating that publication may judicially object to the merger based on the fact that it would damage their rights, provided that the creditors have asked the company to discharge the debt or provide appropriate safeguards in the preceding 15 days but have had that request ignored.'

13. Article 101-B of the code, entitled 'Effects of Objection' provides:

'1. Judicial objection by any creditor shall prevent the final registration of the merger on the commercial register from proceeding until such time as one of the following occurs:

(a) the objection is dismissed in a final judgment or, where there is a finding of inadmissibility, the opposing party fails to lodge a new action within 30 days;

(b) the opposing party discontinues the action;

(c) the company pays the opposing creditor or provides the guarantee defined by agreement or judicial decision;

(d) the opposing party agrees to the registration;

(e) the amount owed to the opposing party has been deposited.

…'

14. Article 111 of the Commercial Companies Code, entitled 'Merger Registration', provides:

'Once all of the participating companies have approved the merger, and as long as no objection has been lodged within the period provided in Article 101-A or, if an objection was made, one of the events set out in paragraph 1 of Article 101-B has occurred, registration of the merger at the commercial registry must be applied for by one of the directors of the companies participating in the merger or of the new company.'

15. Article 112 of the code states:

'Once the merger has been registered:

(a) The incorporated companies shall be dissolved or, if a new company is formed, all of the merged companies shall be dissolved and their rights and liabilities transferred to the acquiring or the new company;

(b) The shareholders of the dissolved companies shall become shareholders in the acquiring or the new company.'

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

16. Good and Cheap was a company incorporated under Portuguese law operating in the supermarket and hypermarket retail trade.

17. MCH is a trading company incorporated under Portuguese law operating in the food retail sector, among other activities. It owns and operates around 180 stores in Portugal.

18. On 15 February 2011, at Good and Cheap's premises in Pombal (Portugal), the ACT inspected the register of hours worked by Good and Cheap's employees for December 2010 and January 2011.

19. On 22 February 2011, Good and Cheap and MCH registered with the relevant office of the commercial registry draft terms of merger that had been approved by their boards of directors. Those draft terms of merger were published on the website for Ministry of Justice publications (https://publicacoes.mj.pt/Index.aspx).

20. On 7 March 2011, a work inspector ('inspectora do trabalho') from the ACT issued two notices ('auto de notícia') accusing Good and Cheap of having infringed Portuguese labour law, which provides that employees may not work for more than five consecutive hours and have the right to a minimum rest period of 11 uninterrupted hours between two consecutive periods of work.

21. The merger by acquisition of the assets of Good and Cheap with MCH was registered at the commercial registry on 31 March 2011. Good and Cheap was dissolved with effect from the same date.

22. On 4 April 2011, the ACT served the notices dated 7 March 2011 on Good and Cheap along with two fines ('coima'): one for EUR 459 (payable no later than 12 April 2011) for infringement of the prohibition on making employees work for more than five consecutive hours (notice 161100188) and the other (the amount of which and the payment date are not apparent from the file lodged with the Court) for infringement of employees' rights to a minimum rest period of 11 uninterrupted hours between two work periods (notice 161100190).

23. In its written response ('resposta escrita') MCH contested the legality of that decision and, among other arguments, relied on the registration of the merger by acquisition of Good and Cheap and MCH which had taken place on 31 March 2011.

24. In proposals for a decision ('proposta de decisão') dated 18 and 21 September 2012, the instructing agent ('instrutora') proposed to the director of the ACT that the two notices of 7 March 2011 should be confirmed and that MCH should be fined EUR 714 for each of the infringements in question.

25. By a cumulative legal decision ('decisão de cúmulo jurídico') of 24 September 2012, the director of the ACT adopted those proposals for a decision and imposed on MCH a cumulative fine for the two notices of EUR 1 250. That decision was notified to MCH on 26 September 2012.

26. MCH lodged an appeal ('recurso de impugnação judicial') before the Tribunal do Trabalho de Leiria (labour court, Leiria, Portugal) disputing the legality of the latter decision. Among the arguments raised, MCH claimed that interpreting Article 112 of the Commercial Companies Code in such a way as to allow MCH to be fined for infringements of labour law committed by Good and Cheap was contrary to Article 19(1)(a) of Directive 2011/35.

27. In those circumstances, the Tribunal do Trabalho de Leiria decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the light of [EU] law and, in particular, [Article 19(1)(a)] of Directive 2011/35/EU, does the merger of companies entail a system of transfer of liability for administrative offences to the acquiring company for acts committed by the company being acquired before registration of the merger?

(2) Can a penalty for administrative offences be considered a debt owed to third parties (in the present case the State, for infringement of rules concerning administrative offences) for the purposes of the application of Directive 2011/35, with the consequence that the corresponding debt (fine) for an administrative offence, in respect of which the State is the creditor, is transferred to the acquiring company?

(3) Does an interpretation of Article 112 of the Commercial Companies Code according to which it does not imply termination of proceedings for an administrative offence committed before the merger, or of the corresponding fine to be imposed, conflict with Directive 2011/35, which sets out the consequences of a company merger, thereby constituting a broad interpretation of the provision contrary to the principles of Community law and, in particular, Article 19 of the directive?

(4) Does that interpretation constitute a breach of the principle that there can be no administrative offence without strict (mitigated) liability or liability for fault on the part of the acquiring entity?'

IV – **Procedure before the Court**

28. This request for a preliminary ruling was lodged at the Court on 24 June 2013. Written observations have been submitted by MCH, by the Portuguese, German, Hungarian and Austrian Governments, and by the European Commission.

29. On 20 June 2014, the Court addressed a list of questions to MCH and to the Portuguese Government to be answered in writing before the hearing. The responses of the Portuguese Government and of MCH were received by the Court on 15 and 28 July 2014 respectively.

30. A hearing took place on 3 September 2014 during which MCH, the Portuguese and German Governments and the Commission submitted their oral observations.

V – **Analysis**

A – *Admissibility*

31. The German and Austrian Governments harbour doubts as to the admissibility of some of the questions referred by the national court. The German Government considers that the third and fourth questions concern an interpretation of national law. The Austrian Government submits that the second question concerns a situation where, unlike the facts in the main proceedings, the fine had already been imposed prior to the merger and the question is therefore hypothetical in nature. In addition, the matter of criminal responsibility raised in the fourth question is not governed by Directive 2011/35 and does not have the connection with EU law as required by Article 51 of the Charter of Fundamental Rights of the European Union.

32. I do not share the Austrian Government's view on the second question, by which the referring court asks the Court of Justice whether a penalty for administrative offences, such as the fine in question in the main proceedings, can be considered as a claim and the Portuguese State as a creditor for the purposes of Directive 2011/35.[5] Taken in that way, the second question applies not only to the categorisation of a fine imposed before the merger but equally to one imposed after the merger. For that reason, the second question is not hypothetical.

33. As for the third question, I do not consider that it concerns an interpretation of national law. By its question, the referring court asks the Court of Justice how to interpret Article 19 of the Third Directive in order to be able to state whether or not Article 112 of the Commercial Companies Code as it is interpreted in Portugal, namely to the effect that a merger does not cause the extinguishment of either the proceedings relating to an offence committed prior to the merger or the fine imposed or to be imposed, is compatible with that provision. The third question is therefore admissible.

34. By contrast, I share the view of the German and Austrian Governments that the fourth question is not admissible. That question concerns an interpretation of a principle of Portuguese law and, as such, in accordance with settled case-law, does not fall within the jurisdiction of the Court.[6]

B – *Substance*

35. I am in agreement with the Hungarian Government that the aim of the referring court's questions, taken as a whole, is to determine whether Article 19(1) of Directive 2011/35 should be interpreted so as to preclude national legislation which, as in the case of Article 112 of the Portuguese Commercial Companies Code as it is applied in Portugal, provides that a company merger by acquisition entails the transfer to the acquiring company of the liability to pay a fine for infringements of labour law committed by the company being acquired, when those infringements were committed prior to the merger but the fine not imposed by final decision until after the merger. I shall therefore deal with the questions posed by the referring court taken as a whole.

1. The arguments submitted to the Court

36. MCH and the German Government assert that the transfer of all the assets and liabilities from the company being acquired to the acquiring company that occurs on a merger by acquisition, as provided by Article 19(1)(a) of Directive 2011/35, includes the transfer of the debts of the company being acquired. However, an administrative fine imposed on the company being acquired should be considered as a claim by the State — and, therefore, as a debt owed by the company being acquired — only from the time when the State takes an administrative or judicial decision that has become final, in the sense that it is enforceable. In this instance, the merger took place before the intervention of that decision and, therefore, Good and Cheap's liability for administrative offences in relation to the infringements of labour law in question did not pass to MCH.

37. In addition, according to MCH, if the transfer of liability for administrative offences in such circumstances were allowed, shareholders and creditors of the companies involved in the merger would not be in a position to evaluate the economic consequences of the merger. For that same reason, the German Government considers that the reference date for determining the amount of the assets and liabilities to be transferred is that on which the merger takes effect.

5 — The terms 'claim' and 'creditor' appear in Article 13 of Directive 2011/35, but are not defined.

6 — See the judgments in *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 25); *dos Santos Palhota and Others* (C-515/08, EU:C:2010:589, paragraph 18); *Idryma Typou* (C-81/09, EU:C:2010:622, paragraph 35); and *Texdata Software* (C-418/11, EU:C:2013:588, paragraph 28).

38. The Austrian Government considers that Directive 2011/35 provides only for the civil liability of the acquiring company to creditors or persons having other claims. It does not contain provisions relating to the liability of the companies participating in the merger for administrative offences which, it says, constitutes a criminal liability. Consequently, the circumstances behind this reference for a preliminary ruling do not fall within the scope of that directive.

39. However, the Austrian Government considers that Directive 2011/35 does not rule out the possibility of the acquiring company taking on liability for administrative offences in respect of acts for which the company being acquired is accountable. As a result, national legislation under which criminal administrative penalties could be imposed on the acquiring company does not run contrary to Article 19(1)(a) of that directive.

40. The Portuguese and Hungarian Governments and the Commission consider, in essence, that Article 19(1)(a) of Directive 2011/35 imposes a transfer of liability for administrative offences from the company being acquired to the acquiring company at the time of the merger. They stress the comprehensive nature of the transfer of all the assets and liabilities mentioned in that provision. A fine should be considered as a claim by the State, which that directive seeks to protect as a creditor. It should therefore form part of the liabilities of a company acquired on a merger and, therefore, be transferred to the acquiring company.

2. Assessment

a) Applicable law

41. First, it is necessary to determine the law applicable to the question of the transfer to an acquiring company of the liability to pay a fine which was imposed after the registration of the merger for infringements committed by the company being acquired which, by the operation of the merger, has ceased to exist. Is this a question governed by Directive 2011/35 or solely by national law?

42. Article 19(1)(a) of Directive 2011/35 provides that '[a] merger shall have the following consequences ipso jure and simultaneously … the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired'.

43. The use of the term 'ipso jure' shows that the merger automatically causes the transfer of all the assets and liabilities, without any other essential condition or requirement as to form. Transfer in the case of a merger is thus governed by EU Law.[7] It is, however, necessary to determine the scope of application of Article 19(1)(a) of Directive 2011/35.

b) Material scope of Article 19(1)(a) of Directive 2011/35: 'all the assets and liabilities'

44. Does Article 19(1)(a) of Directive 2011/35 apply to a liability arising under administrative law, in this case a fine imposed for an infringement of Portuguese labour law, where the underlying facts took place before the date of publication of the draft terms of merger but where the party liable was first notified of this after registration of that merger?

7 — I note that Article 14(1)(a) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1), as amended, provides that '[a] cross-border merger … shall … have the following consequences: (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company; …'. In my opinion, omission of the term 'ipso jure' should not lead to a different interpretation from that in Directive 2011/35. In the case of limited liability companies also, the merger automatically causes the transfer of all the assets and liabilities, without any conditions other than those provided for in Directive 2005/56.

45. It is therefore necessary to determine whether the terms 'all the assets and liabilities', and in particular the term 'liabilities', are sufficiently broad to cover a situation such as the one in the main proceedings. As the German Government points out, it is a question of interpreting terms that are used several times in the directive but not defined. These terms must be given an autonomous and uniform interpretation throughout the European Union, [8] while also taking into account the context in which the terms are used and the purpose of Directive 2011/35. [9]

i) Does a liability under administrative law form part of the liabilities of the company being acquired?

46. In relation to the nature of administrative law, the Austrian Government considers, without stating specific reasons, that Article 19(1)(a) of Directive 2011/35 applies only to civil liability. As a liability under administrative law, the fine at issue is criminal in nature, meaning that it falls outside the scope of that article. The Austrian Government's view is that a provision of national law allowing for the transfer of liability for administrative offences can therefore not be contrary to Directive 2011/35.

47. The Commission has also devoted a large part of its written observations to the origins of administrative law ('Ordnungsstrafrecht') in Germany, its history, its quasi-criminal nature and the differences between it and classic or secondary criminal law.

48. In my opinion, these considerations, despite being of theoretical interest, have no effect whatsoever on the scope of Directive 2011/35. Article 19(1)(a) of that directive refers to 'liabilities', that is, all of the debts [10] encumbering the whole of the property and the obligations of the same person, considered to form a comprehensive estate. [11]

49. By using those broad terms, the article therefore clearly seeks to cover every possible debt, whatever its origin and whatever the nature of the civil responsibility, whether criminal or quasi-criminal, inasmuch as it concerns the responsibility of the company being acquired itself [12] and can be translated into a monetary value.

50. This is more apparent in the English version of Directive 2011/35. While the French version qualifies the transfer as 'universal', which the English does not, the English refers to 'all the assets and *liabilities*'. [13] There can be no doubt that a debt that is quasi-criminal in nature, such as the one at issue in the main proceedings, constitutes a 'liability' of the company being acquired.

51. I share the view of MCH and the Portuguese and German Governments that a fine such as the one at issue can be categorised as a 'claim' in favour of the State and the State as a 'creditor' within the meaning of Article 13 of Directive 2011/35.

52. Consequently, all debts encumbering a company participating in a merger, including debts owing to the State, form part of the liabilities and are therefore transferred automatically and without any other condition to the company that results from the merger.

8 — See, in that regard, the judgments in *Linster* (C-287/98, EU:C:2000:468, paragraph 43); *Brüstle* (C-34/10, EU:C:2011:669, paragraph 25); and *Ziolkowski and Szeja* (Joined Cases C-424/10 and C-425/10, EU:C:2011:866, paragraph 32).

9 — See, to that effect, the judgments in *easyCar* (C-336/03, EU:C:2005:150, paragraph 21); *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 17); and *Ziolkowski and Szeja* (EU:C:2011:866, paragraph 34).

10 — By the term 'debt' I mean the obligation under which a person called the debtor is bound to another, called the creditor, to perform a service (to give, do or not do something): see Cornu, G., *Vocabulaire juridique*, 9th ed., PUF, Paris, 2011, p. 340.

11 — See Cornu, G., *Vocabulaire juridique*, 9th ed., PUF, Paris, 2011, p. 737 and 738.

12 — Obviously, criminal liability of directors or other organs of the company being acquired is not covered by Article 19(1)(a) of Directive 2011/35. However, a criminal fine levied on the company being acquired for a crime it committed is transfererable to the acquiring company.

13 — My emphasis. The term 'liability' is defined as 'a thing for which someone is responsible, especially an amount of money'. See *Oxford Dictionary of English*, Oxford University Press, Oxford, 2005, 2nd ed. rev., p.1008.

ii) Do debts that are *in statu nascendi* at the time of the merger form part of the liabilities of the company being acquired?

53. It remains to be determined whether the concept of liabilities also covers a debt that is *in statu nascendi* at the time when the merger is registered, in other words, a debt, like the one at issue in the main proceedings, where the underlying facts occurred prior to the registration but which only became due and was first notified to the debtor only after registration of the merger.

54. I think, for the following reasons, that debts *in statu nascendi* such as the one at issue in the main proceedings form part of the liabilities of the company being acquired and are therefore transferred to the acquiring company.

55. First of all, nothing in the wording of Directive 2011/35 prevents that interpretation being given to the concept of the liabilities of the company being acquired, or, for that matter, to the concept of liabilities used in Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies,[14] as amended by Directive 2009/49/EC of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 164, p. 42) ('Directive 78/660'), and, in particular, in Article 9, under the heading 'Liabilities', paragraphs B3 and C8, to which the parties referred at the hearing.[15]

56. In its written observations, the Commission submitted the argument that the debt at issue in the case in the main proceedings formed part of the liabilities of the acquiring company within the meaning of Directive 78/660, but that a corresponding provision should be made in that company's annual accounts. The Commission based this opinion on the fact that the company acquired had first been served with the notices prior to the registration of the merger, which is not apparent from the file before the Court.

57. However, at the hearing, the Commission submitted that the rules applicable to the drawing-up of annual accounts were not relevant to this case. I share this latter opinion because, in the opposite situation, a debt the existence of which was declared by the creditor for the first time after the annual accounts had been drawn up could not be transferred to the acquiring company, given that the annual accounts can only reflect foreseeable and quantifiable debts.

58. Accordingly, the fact that a debt *in statu nascendi* does not fall within the concept of liabilities for the purposes of Directive 78/660 and therefore is not shown on the balance sheet attached to the draft terms of merger is not sufficient to exclude it from the liabilities within the meaning of Directive 2011/35.

59. If this were the case, the merger would operate to extinguish the liabilities and indeed that would be its only effect.

60. The following examples help to illustrate this point:

— the day before the merger of two oil companies, one of them causes an environmental disaster by spilling oil into the sea. Insisting on the interpretation that a debt must be existent, certain and payable by the debtor company prior to the merger in order to be transferred to the acquiring

14 — OJ 1978 L 222, p. 11.

15 — That article provides that the liabilities shown in the company's annual accounts must include, inter alia, '[o]ther provisions' (paragraph B3), namely provisions other than the provisions for pensions and similar obligations and provisions for taxation, and '[o]ther debts including tax and social security'. It is, in my opinion, natural that that article does not include in the definition of liabilities debts *in statu nascendi* since the annual accounts can show only debts that are certain and due for payment or, in any event, debts which are likely or predicted to arise inasmuch as they are quantifiable.

company would mean that the administrative authorities would have no means of imposing the fines provided for under environmental law and the injured parties would not be able to obtain damages,

— following a merger like the one in the main proceedings, the tax authorities discover that, for several years, the company acquired operated a scheme to avoid paying tax. If the same interpretation were applied, the tax authorities would have no means of recovering the unpaid tax.

61. A merger by acquisition therefore implies that the acquiring company acquires the entirety of the company being acquired, including its past history. As indicated in Article 3(1) of Directive 2011/35, merger by acquisition operates by means of the merging companies being 'wound up *without going into liquidation*',[16] which implies the transfer of the whole of the company being acquired without extinguishment of liabilities as would be the case with liquidation. It is for that reason, namely the risk of some of the liabilities of the company being acquired being unknown to the acquiring company at the time of the merger, that in practice a merger agreement usually contains a disclosure and warranties clause in favour of the acquiring company.

62. In addition, there is nothing novel in the idea that the acquiring company takes over the legal liability of the company acquired following the merger. I am referring to numerous cases in Europe and the United States where acquiring companies have been sued, sometimes by way of class actions, because the company acquired had exposed its employees to asbestos, leading to asbestosis and mesothelioma. In all those cases, the fact that the acquiring company was unaware of that liability at the time of the merger did nothing to prevent it from being transferred from the company being acquired to the acquiring company.[17]

63. It has even happened that the amount of damages far exceeds the purchase price of the company acquired, to the point where certain legislatures have intervened in order to limit the liability, such as in Texas, 'to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation'.[18]

64. In the absence of an explicit provision of this type, I consider that Article 19(1)(a) of Directive 2011/35 provides for the transfer of debts *in statu nascendi* from the company being acquired to the acquiring company.

65. It should also be emphasised that this rule does not always operate to the detriment of the acquiring company, which also acquires all the assets, in other words, not only claims that are due at the time of the merger but also the expectation of a future claim (*spes debiturum iri*)[19] and rights which only arise after registration of the merger.

16 — My emphasis.

17 — See, to that effect, Havard-Williams, V., '*Asbestos liability: Managing the risks*' (available on the Practical Law website at the following address: http://uk.practicallaw.com/0-102-9187). See, also, the judgment of the Texas Supreme Court in *Barbara Robinson* v *Crown Cork & Seal Co* (335 S.W.3d 126, 129-130 (2010)).

18 — Section 149.003(a) of the Texas Civil Practice and Remedies Code: '… the cumulative successor asbestos-related liabilities of a corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation', held to be incompatible with the prohibition on retroactive law in Article I, Section 16 of the Texas Constitution by the Texas Supreme Court: see *Barbara Robinson* v *Crown Cork & Seal Co* (335 S.W.3d 126, (2010)).

19 — The expectation of a future claim has long been recognised as forming part of a person's assets. To that effect, I would cite from the *Institutes of Justinian*, Book III.15.4 ('The immediate effect of a conditional stipulation is not a debt, but merely the expectation that at some time there will be a debt: and this expectation devolves on the stipulator's heir, supposing he dies himself before fulfilment of the condition': *The Institutes of Justinian*, translated into English by Moyle, J.B., Oxford Fifth Edition, 1913), and the passage at Book L.16.54 of the *Digest of Justinian*, attributed to the Roman jurist Ulpian ('Conditional creditors are those who are not yet entitled to an action, but who will be entitled to it; or such as expect that an action will lie in their favour': *The Digest or Pandects of Justinian*, translated by Samuel P. Scott, Cincinnati, 1932).

66. In that way, an acquiring company such as MCH would have the right to repayment of any tax overpaid by the company acquired prior to the merger or of tax deducted from the company acquired prior to the merger but declared incompatible with EU law after the merger.

67. One might also ask whether, instead of imposing the transfer of debts *in statu nascendi* on the acquiring company, Directive 2011/35 merely allows Member States to provide for this transfer in their national law. I do not think it does.

68. Article 19(1)(a) of Directive 2011/35, and also Article 14(1)(a) of Directive 2005/56[20] which consists of a similar provision to that one, clearly impose a common definition of the concept of liabilities, without an option for Member States to restrict or extend that concept. In the situation debated at the hearing, in which the law applicable to the company acquired required the transfer of the debt at issue and the law applicable to the acquiring company excluded it, there would be a conflict between the two laws that Directive 2005/56 would be incapable of resolving, which would be contrary to its objective of facilitating cross-border mergers.

69. It remains to be determined whether my proposed interpretation of Article 19(1)(a) of Directive 2011/35 should apply equally to a debt *in statu nascendi* when the creditor, who is aware of the imminence of the merger, does nothing to draw attention to the existence of his claim or the possibility of its existence prior to registration of the merger.

70. In its written observations and during the hearing, MCH emphasised the fact that the ACT had carried out the inspection that gave rise to the fines at issue in the main proceedings, prior to publication of the draft terms of merger. In its written response to the Court's questions, the Portuguese Government accepted that official publication of the draft terms of merger on the website for Ministry of Justice publications, which occurred on 22 February 2011, constituted information for potential creditors, including the ACT, who should therefore have alerted the companies in the course of negotiating their merger.

71. Even though I recognise that, against such a factual background, a creditor in good faith should not omit to alert the debtor to his claim prior to the merger,[21] I consider that the merger does not entail the extinguishment of that claim. Nothing in Directive 2011/35 enables the contrary position to be argued.

72. In the light of all these factors, I consider that Article 19(1) of Directive 2011/35 must be interpreted as not precluding national law which, as with Article 112 of the Portuguese Commercial Companies Code as it is applied in Portugal, under which a merger of companies by acquisition entails the transfer to the acquiring company of the liability to pay a fine for infringements of labour law committed by the company being acquired, when those infringements were committed prior to the merger but where the fine was imposed by a final decision only after the merger.

20 — See footnote 7 of this Opinion.

21 — I would point out that Directive 2011/35 establishes a system of transparency seeking to guarantee and protect the interests of the companies involved in the merger and those of their shareholders, employees and creditors. In accordance with this system, the adminstrative organs of the merging companies draw up in writing draft terms of merger (Article 5) which must be published in accordance with the methods provided for by the legislation of each Member State (Article 6). The merger requires at least the approval of a general meeting of each of the merging companies (Article 7). In order for the shareholders to approve the merger, they have the right, at least one month prior to the date of the general meeting called to decide on the merger, to inspect, among other things, the draft terms of merger, the annual accounts and the annual reports (Article 11). Directive 2011/35 obliges Member States to provide an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication (Article 13). In transposing this last article into Portuguese law, Article 101-A of the Commercial Companies Code allows that category of creditors to object to the merger in certain circumstances, in the month following publication of the draft terms of merger.

VI – **Conclusion**

73. I therefore propose that the Court should answer the questions referred by the Tribunal do Trabalho de Leiria as follows:

Article 19(1) of Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies must be interpreted as not precluding national law which, as with Article 112 of the Portuguese Commercial Companies Code (Código das Sociedades Comerciais) as it is applied in Portugal, under which a merger of companies by acquisition entails the transfer to the acquiring company of the liability to pay a fine for infringements of labour law committed by the company being acquired, when those infringements were committed prior to the merger but where the fine was imposed by a final decision only after the merger.