

JUDGMENT OF THE COURT (Second Chamber)

12 October 2004^{*}

In Case C-60/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesarbeitsgericht (Germany), made by decision of 6 November 2002, received at the Court on 14 February 2003, in the proceedings

Wolff & Müller GmbH & Co. KG

v

José Filipe Pereira Félix,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber;
C. Gulmann and R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Múgica Arzamendi, Principal Administrator,

^{*} Language of the case: German.

after considering the written observations submitted on behalf of:

- Wolff & Müller GmbH & Co. KG, by T. Möller, Rechtsanwalt,
- Pereira Félix, by M. Veiga, Rechtsanwältin,
- the German Government, by A. Tiemann, acting as Agent,
- the French Government, by G. de Bergues, and by C. Bergeot-Nunes and O. Christmann, acting as Agents,
- the Austrian Government, by E. Riedl and G. Hesse, acting as Agents,
- the Commission of the European Communities, by M. Patakia, acting as Agent, assisted by R. Karpenstein, Rechtsanwalt,

having regard to the decision, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 EC.

2 It was submitted in the context of a dispute between Wolff & Müller GmbH & Co. KG (Wolff & Müller), a construction undertaking, and Pereira Félix, concerning the liability of that undertaking as guarantor of the payment of the minimum rate of pay payable to the latter by his employer.

Legal background

Community legislation

3 The fifth recital in the preamble to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) states:

‘any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers’.

4 Article 1 of Directive 96/71 entitled ‘Scope’ provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

- (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

...’

5 Article 3(1) of Directive 96/71 entitled ‘Terms and conditions of employment’ provides:

‘1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted

to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

...

- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

...'

6 Under Article 5 of Directive 96/71 entitled 'Measures':

'Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.’

National legislation

- 7 Paragraph 1 of the Verordnung über zwingende Arbeitsbedingungen im Baugewerbe (Regulation on mandatory working conditions in the building trade) of 25 August 1999 (BGBl. 1999 I, p. 1894) provides as follows:

‘The rules of the Tarifvertrag zur Regelung eines Mindestlohnes im Baugewerbe im Gebiet der Bundesrepublik Deutschland (collective agreement regulating the minimum wage in the building trade within the territory of the Federal Republic of Germany, hereinafter the “collective agreement on the minimum wage”) of 26 May 1999, contained in Annex 1 hereto ..., shall apply to all employers and workers not bound by it who come within its scope on 1 September 1999 where the principal activity of the establishment is the provision of building services within the meaning of Paragraph 211(1) of the third book of the Sozialgesetzbuch (Social Security Code, hereinafter the ‘SGB III’). The rules contained in the collective agreement shall also apply to employers established abroad and their workers employed within the scope of the Regulation.’

- 8 Under Paragraph 1(a) of the Arbeitnehmer-EntsendeGesetz (law on the posting of workers, hereinafter the ‘AEntG’), inserted by Article 10 Gesetz zu Korrekturen der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte (Law amending

social security and safeguarding workers' rights) of 19 December 1998 (BGBl. 1998 I, p. 3843), which entered into force on 1 January 1999:

'An undertaking which appoints another undertaking to provide building services within the meaning of Paragraph 211(1) of the third book of the Sozialgesetzbuch (hereinafter 'SGB III') is liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligations of that undertaking, of any subcontractor and of any hirer of labour appointed by that undertaking or subcontractor concerning payment of the minimum wage to a worker or payment of contributions to a communal scheme for parties to a collective agreement under the second and third sentences of Paragraph 1(1), Paragraph 1(2)(a), the second and third sentences of Paragraph 1(3) or the fourth and fifth sentences of Paragraph 1(3)(a). The minimum wage for the purposes of the first sentence, means the sum payable to the worker after deductions in respect of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay).'

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

9 Mr Pereira Félix is a Portuguese national who, from 21 February to 15 May 2000, was employed in Berlin (Germany) as a bricklayer on a building site by a construction undertaking established in Portugal. The latter carried out concreting and reinforced-concrete work on that building site for Wolff & Müller.

- 10 By an application lodged on 4 September 2000 with the Arbeitsgericht (Labour Court) Berlin (Germany), Mr Pereira Félix sought payment jointly and severally from his employer and from Wolff & Müller of unpaid remuneration amounting to DEM 4,019.23. He claimed that Wolff & Müller, as guarantor, was liable, under Paragraph 1(a) of the AEntG, for sums in respect of wages not received by him.
- 11 Wolff & Müller opposed the claims by Mr Pereira Félix, arguing in particular that it was not liable on the ground that Paragraph 1(a) of the AEntG constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 of the Grundgesetz (Basic Law) and of the freedom to provide services enshrined by the EC Treaty.
- 12 The Arbeitsgericht Berlin upheld the claim by Mr Pereira Félix. The Landesarbeitsgericht (Higher Labour Court), before which the case was brought by Wolff & Müller, partially dismissed its appeal, whereupon it appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court).
- 13 The referring court finds that the preconditions for establishing the liability of Wolff & Müller as a guarantor under Paragraph 1(a) of the AEntG are met. It also adjudges that provision to be compatible with Article 12 of the Basic law because it is a proportionate restriction. However, that provision appears to it to be capable of impeding freedom of movement of services within the meaning of Article 49 EC.
- 14 In that regard the referring court observes that liability as guarantor under Paragraph 1(a) of the AEntG can result in national general contractors having to carry out particularly intensive checks and obtain evidence from foreign subcontractors in particular. This involves additional expenses and administrative burdens, not only on the part of the general contractor but also on the part of the subcontractors. These burdens impede the provision of construction services in Germany on the part of construction firms from Member States and render them less attractive.

15 Moreover, the referring court questions whether the infringement of freedom to
provide services stemming from Paragraph 1(a) of the AEntG is justified.

16 First, according to the referring court, liability as guarantor certainly provides
workers with a genuine benefit that contributes to their protection. Workers are
given another party, in addition to their employer, against whom they can pursue
their claims for net wages under national legislation.

17 The referring court considers that that benefit is however limited in its effects. It will
often be difficult in practice for posted foreign workers to enforce their pay claims in
court against an undertaking liable as guarantor. Since their postings will generally
only be for a few months for a particular construction project and since the foreign
workers will generally not be conversant with either German or the legal position in
Germany, enforcement of a guarantee claim in the German courts will involve
considerable difficulty in practice. This protection also becomes less valuable
economically if any real chance of obtaining employment in the Federal Republic of
Germany is significantly reduced.

18 Secondly, according to the referring court, the explanatory memorandum to the
legislation states that the objective of liability as guarantor is to make it more
difficult to award contracts to subcontractors from so-called cheap-wage countries
so as thereby to revive the German labour market in the construction sector, protect
the economic existence of small and medium-sized establishments in Germany and
combat unemployment in Germany. It is clear, not just from the wording of the
explanatory memorandum but also, in particular, from an objective viewpoint, that
these were the primary considerations. The expressly stated aims of Paragraph 1(a)
of the AEntG do not include guaranteeing to foreign workers, for social reasons,
twice or even three times their wages when working on building sites in Germany.

- 19 Taking the view that resolution of the dispute before it depended on the interpretation of Article 49 EC, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 49 EC (formerly Article 59 of the EC Treaty) preclude a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligation on that undertaking or that undertaking’s subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers’ pay is not the primary objective of the legislation or is merely a subsidiary objective?’

The question referred

Admissibility

- 20 The Commission of the European Communities maintains that the issue of liability as guarantor for contributions to a joint scheme for parties to a collective agreement does not come within the scope of the main proceedings and must therefore be left out of the request for a preliminary ruling made by the referring court.

21 In that regard it should be borne in mind that a question referred by a national court for a preliminary ruling is inadmissible only if it is quite obvious that the question does not concern the interpretation of Community law or that it is hypothetical (Case C-201/02 *Wells* [2004] ECR I-723, paragraph 35 and case-law cited). That is not the situation in the present case.

22 In fact, it is plain from the wording of the question referred, which paraphrases Paragraph 1(a) of the AEntG, the provision at issue in the main proceedings, that the question of the payment of contributions to a joint scheme for the parties to a collective agreement is intimately related to the question of payment of the minimum rate of pay.

23 The request for a preliminary ruling is therefore admissible in its entirety.

Substance

24 It should be noted that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer in its question (Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 27 and case law cited).

25 As the Austrian Government and the Commission point out in their written observations, the facts in the main proceedings, as described in the order for reference, must be regarded as coming within the scope of Directive 96/71. In fact, they correspond to the situation provided for in Article 1(3)(a) thereof.

- 26 Moreover, it is common ground that the facts at issue in the main proceedings occurred in 2000, that is to say on a date subsequent to expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999.
- 27 Thus the provisions of the abovementioned directive are to be taken into consideration for the purposes of the examination of the question referred for a preliminary ruling.
- 28 Under Article 5 of Directive 96/71, the Member States are to take appropriate measures in the event of non-compliance with its terms. In particular they are to ensure that the workers and/or their representatives have available to them adequate procedures for the enforcement of obligations under this Directive. Included in those obligations, as is apparent from Article 3(1)(c) of the directive, is the obligation to ensure that undertakings guarantee to workers posted in their territory the payment of minimum rates of pay.
- 29 It follows that the Member States must ensure, in particular, that workers posted have available to them adequate procedures in order actually to obtain minimum rates of pay.
- 30 It is apparent from the wording of Article 5 of Directive 96/71 that the Member States have a wide margin of appreciation in determining the form and detailed rules governing the adequate procedures under the second paragraph of Article 5. In applying that wide margin of appreciation they must however at all times observe the fundamental freedoms guaranteed by the Treaty (Case C-390/99 *Grand Satélite Digital* [2002] ECR I-607, paragraphs 27 and 28 and Case C-71/02 *Karner* [2004] ECR I-3025, paragraphs 33 and 34) and, thus, in regard to the main proceedings, freedom to provide services.

- 31 In that regard it should first be recalled that, under settled case-law, Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services (Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16 and case-law therein cited).
- 32 As the Court held, the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens (*Portugaia Construções*, paragraph 18 and case-law cited).
- 33 It is for the referring court to determine whether that is the case in the main proceedings concerning liability as guarantor. In that connection it is important to take account of the effect of that measure on the provision of services not only by subcontractors established in another Member State but also by any general undertakings from that State.
- 34 It is further clear from settled case-law that, where legislation such as Paragraph 1a of the AEntG, on the supposition that it constitutes a restriction on freedom to provide services, is applicable to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is

subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (*Portugaia Construções*, paragraph 19 and case-law cited).

- 35 Overriding reasons relating to the public interest which have been recognised by the Court include the protection of workers (*Portugaia Construções*, paragraph 20 and case-law cited).
- 36 However, although it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees (*Portugaia Construções*, paragraph 22), the same is true in principle of measures adopted by the host Member State and intended to reinforce the procedural arrangements enabling a posted worker usefully to assert his right to a minimum rate of pay.
- 37 In fact, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection.
- 38 In regard to the national court's observation that the priority purpose pursued by the national legislature on adoption of Paragraph 1(a) of the AEntG is to protect the national job market rather than remuneration of the worker, it should be pointed out that it is for that court to verify whether, on an objective view, the legislation at issue in the main proceedings secures the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned,

which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures which it has adopted (*Portugaia Construções*, paragraphs 28 and 29 and case law cited).

39 The referring court has doubts concerning the genuine benefit to posted workers of liability as guarantor owing both to the practical difficulties with which they would be faced in asserting before the German courts their right to pay as against the general undertaking and owing to the fact that that protection would lose its economic value when the actual chance to be gainfully employed in Germany is appreciably reduced.

40 However, as Mr Pereira Félix, the German, Austrian and French Governments and the Commission rightly point out, it is none the less the case that a provision such as Paragraph 1(a) of the AEntG benefits posted workers on the ground that, to the advantage of the latter, it adds to the primary obligant in respect of the minimum rate of pay, namely the employer, a further obligant who is jointly liable with the first debtor and is generally more solvent. On an objective view a rule of that kind is therefore such as to ensure the protection of posted workers. Moreover, the dispute in the main proceedings itself appears to confirm that Paragraph 1(a) of the AEntG is of protective intent.

41 Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided that the conditions mentioned in paragraph 34 hereof are met.

- 42 Moreover, as the Austrian Government has rightly pointed out in its observations, there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.
- 43 Finally, as regards the observations of Wolff and Müller according to which liability as guarantor is disproportionate in relation to the objective pursued, it is in fact clear from the case-law cited at paragraph 34 hereof that, in order to be justified, a measure must be apt to ensure attainment of the objective pursued by it and must not go beyond what is necessary in that connection.
- 44 It is for the national court to determine that those conditions are met in regard to the objective sought, which is to ensure protection of the worker concerned.
- 45 In those circumstances the reply to the question referred must be that Article 5 of Directive 96/71, interpreted in the light of Article 49 EC, does not preclude, in a case such as that in the main proceedings, a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.

Costs

⁴⁶ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT (Second Chamber) hereby rules:

Article 5 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, does not preclude, in a case such as that in the main proceedings, a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.

Signatures.