

NUSSBAUMER

JUDGMENT OF THE COURT (Fifth Chamber)

7 October 2010*

In Case C-224/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Bolzano (Italy), made by decision of 2 February 2009, received at the Court on 19 June 2009, in the criminal proceedings against

Martha Nussbaumer,

THE COURT (Fifth Chamber),

composed of E. Levits, President of the Chamber, J.-J. Kasel (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

* Language of the case: Italian.

having regard to the written procedure and further to the hearing on 1 July 2010,

after considering the observations submitted on behalf of:

— the Italian Government, by G. Palmieri, acting as Agent, and F. Arena, avvocato dello Stato,

— Ireland, by D. O'Hagan, acting as Agent, and A. Collins, SC,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by A. Howard, Barrister,

— the European Commission, by G. Rozet and L. Pignataro-Nolin, acting as Agents,

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

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 245, p. 6, with corrigenda OJ 1993 L 15, p. 34, and OJ 1993 L 33, p. 18).

- 2 The reference was made in criminal proceedings against Mrs Nussbaumer, who was charged with failing to have regard to the safety duties that fall to the client supervisor or the project supervisor on temporary or mobile construction sites.

Legal context

European Union legislation

- 3 Article 3 of Directive 92/57, entitled ‘Appointment of coordinators – Safety and health plan – Prior notice’, is worded as follows:

‘1. The client or the project supervisor shall appoint one or more coordinators for safety and health matters ... for any construction site on which more than one contractor is present.

2. The client or the project supervisor shall ensure that prior to the setting up of a construction site a safety and health plan is drawn up in accordance with Article 5(b).

The Member States may, after consulting both management and the workforce, allow derogations from the provisions of the first subparagraph, except where it is a question of:

— work involving particular risks as listed in Annex II,

or

- work for which prior notice is required pursuant to paragraph 3 of this Article.

3. In the case of construction sites:

- on which work is scheduled to last longer than 30 working days and on which more than 20 workers are occupied simultaneously,

or

- on which the volume of work is scheduled to exceed 500 person-days,

the client or the project supervisor shall communicate a prior notice drawn up in accordance with Annex III to the competent authorities before work starts.

The prior notice must be clearly displayed on the construction site and, if necessary, periodically updated.

- 5 Article 6 of Directive 92/57, entitled 'Project execution stage: duties of coordinators', provides as follows:

'The coordinator(s) for safety and health matters during the project execution stage appointed in accordance with Article 3(1) shall:

- (a) coordinate implementation of the general principles of prevention and safety:
 - when technical and/or organisational aspects are being decided, in order to plan the various items or stages of work which are to take place simultaneously or in succession,

 - when estimating the period required for completing such work or work stages;

- (b) coordinate implementation of the relevant provisions in order to ensure that employers and, if necessary for the protection of workers, self-employed persons:
 - apply the principles referred to in Article 8 in a consistent manner,

 - where required, follow the safety and health plan referred to in Article 5(b);

- (c) make, or cause to be made, any adjustments required to the safety and health plan referred to in Article 5(b) and the file referred to in Article 5(c) to take account of the progress of the work and any changes which have occurred;

...'

- 6 Annex II to Directive 92/57 contains a non-exhaustive list of work involving particular risks for the safety and health of workers referred to in the first indent of the second subparagraph of Article 3(2) of the directive.

National legislation

- 7 Directive 92/57 was transposed into Italian law by Legislative Decree No 494 of 14 August 1996 (Ordinary Supplement to GURI No 223 of 23 September 1996), as amended by Legislative Decree No 528 of 19 November 1999 (GURI No 13 of 18 January 2000, p. 20) and Legislative Decree No 276 of 10 September 2003 (Ordinary Supplement to GURI No 235 of 9 October 2003) ('Legislative Decree No 494/96').
- 8 Legislative Decree No 494/96 was repealed by Legislative Decree No 81 of 9 April 2008 (Ordinary Supplement to GURI No 101 of 30 April 2008) ('Legislative Decree No 81/08'). Article 90 of Legislative Decree No 81/08, which forms part of Title IV dedicated to temporary and mobile construction sites, lays down the duties of the client supervisor or project supervisor as regards the safety coordinator on such sites.

9 Article 90 of Legislative Decree No 81/08 provides as follows:

‘1. At the planning preparation stage, in particular when technical aspects are being decided, and at the stages when the project is being executed and works on the site organised, the client supervisor or project supervisor must comply with the general protection measures and principles set out in Article 15. In order to enable the execution of the various items or stages of work which are to take place simultaneously or in succession to be planned safely, the client supervisor or project supervisor shall estimate the period required for those items or stages of work in the plan.

2. The client supervisor or project supervisor shall, at the project planning stage, evaluate the documents referred to in Article 90(1)(a) and (b).

3. On sites on which it is anticipated that a number of contractors will be present, not necessarily at the same time, the client supervisor, including where that person is also the contractor responsible for carrying out the work, or the project supervisor shall, as soon as he is entrusted with responsibility for the project, appoint the project coordinator.

4. In the case referred to in paragraph 3, before responsibility for the works is entrusted to him, the client supervisor or project supervisor shall appoint the coordinator for the execution of the works, who must meet the requirements laid down in Article 98.

5. The provision in paragraph 4 shall also apply where, after initially being entrusted to a single contractor, the works or part of them are entrusted to one or more contractors.

...

11. In the case of private works, the provision in paragraph 3 shall not apply to works not subject to planning permission. The provisions in Article 92(2) shall be applicable in any event.’

- 10 Article 91 of Legislative Decree No 81/08 sets out the duties of the project coordinator and essentially requires a safety and coordination plan to be drawn up.
- 11 Article 92(2) of the decree, which concerns the coordinator’s duties as regards the execution of the work, is worded as follows:

‘In the cases referred to in Article 90(5), the coordinator for the execution of the work shall, in addition to carrying out the duties set out in paragraph 1, draw up a safety and coordination plan and prepare the file referred to in Article 91(1)(a) and (b).’

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

- 12 On 20 June 2008, inspectors of the Office for Safety in the Workplace of the Autonomous Province of Bolzano carried out an inspection of the works on a construction site located in the municipality of Merano for the replacement of the roof of a dwelling house measuring approximately 6 to 8 metres in height. Mrs Nussbaumer was the client supervisor. The protective railing placed along the edge of the roof, the crane used to hoist up materials and the workforce were provided by three different contractors all present on the site at the same time. Under the Italian legislation applicable, no building permit was required for the works. However, a certificate confirming that the works had started was lodged with the municipality.

- 13 In the course of that inspection, the question arose as to whether, in the circumstances, a safety coordinator should have been appointed for both the project preparation stage and the stage at which the works were being executed, as required by not only Article 3(1) of Directive 92/57 but also Article 3 of Legislative Decree No 494/96, irrespective of the fact that such an appointment is not required under Article 90(11) of Legislative Decree No 81/08.
- 14 The referring court states that, in accordance with Article 90(3) and (4) of Legislative Decree No 81/08, a coordinator for the planning and the execution of the works must be appointed for any site in which more than one contractor is present. However, under Article 90(11) of the decree, the provisions in Article 90(3) are not applicable to private works not subject to planning permission. According to that court, acting on the assumption that a construction site on which private works are carried out entails work that is modest in scale and devoid of risks, the national legislature failed to recognise that works which are not subject to planning permission may also be complex and hazardous and therefore require a coordinator to be appointed for the project preparation stage. Moreover, since Article 90(4) refers to Article 90(3), the client supervisor is also exempt from the requirement to appoint a coordinator for the execution of the works.
- 15 The referring court therefore has doubts as to whether the derogation under Italian law from the requirement to appoint a coordinator is compatible with Article 3(1) of Directive 92/57.

16 Those were the circumstances in which the Tribunale di Bolzano decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Is the national legislation enacted by Legislative Decree [No 81/08], in particular the rule in Article 90(11) thereof, in breach of the rules laid down in Article 3 of Directive [92/57], in so far as it derogates, for private works not subject to planning permission, from the requirement imposed on the client or the project supervisor in Article 90(3) of the decree to appoint a coordinator for the project preparation stage for a construction site on which more than one contractor is present and fails to give any consideration to the nature of the works or to whether there are particular risks of the kind listed in Annex II to the directive?

- (2) Is the national legislation enacted by Legislative Decree [No 81/08], in particular the rule in Article 90(11) thereof, in breach of the rules laid down in Article 3 of Directive [92/57] with respect to the requirement for the client or the project supervisor to appoint, in all cases, a coordinator during the execution stage of works on construction sites, irrespective of the type of works concerned, and hence also in the case of private works not subject to planning permission which may entail the risks referred to in Annex II to the directive?

- (3) Is Article 90(11) of Legislative Decree [No 81/08], in so far as it requires the coordinator [responsible] for the execution stage to draw up a safety plan only if, in the case of private works not subject to planning permission, other undertakings besides the original contractor appointed become involved in the course of the project, in breach of Article 3 of Directive [92/57], which requires a coordinator [responsible] for the execution stage to be appointed in all cases, irrespective of the type of works involved, and which allows no derogation from the requirement

to draw up a safety and health plan where the work concerned involves particular risks, as set out in Annex II to the Directive?’

The questions referred for a preliminary ruling

- 17 It must be borne in mind at the outset that, although the Court may not, in proceedings under Article 267 TFEU, rule upon the compatibility of a provision of domestic law with European Union law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of European Union law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünnermund and Others* [1993] ECR-I-6787, paragraph 8, and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 27).
- 18 Accordingly, the questions referred, which it is appropriate to examine together, must be understood as asking, in essence, whether Article 3 of Directive 92/57 is to be interpreted as precluding national legislation under which, first, for private works not subject to planning permission on a construction site on which more than one contractor is to be present, it is possible to derogate from the requirement on the part of the client or project supervisor to appoint a coordinator for both the project preparation stage and the execution of the works and, second, the coordinator is required to draw up a safety and health plan only where, in the case of private works not subject to planning permission, more than one contractor is engaged.

- 19 It should be noted at the outset that, in its judgment of 25 July 2008 in Case C-504/06 *Commission v Italy*, the Court has already given a ruling on Article 3 of Directive 92/57.
- 20 At paragraph 28 of that judgment, the Court stated that Article 3 of Directive 92/57 is divided into three numbered paragraphs, which set out three clearly distinct legal rules relating, respectively, to the appointment of coordinators, the safety and health plan and the prior notice required for works of a certain size. That distinction between the three paragraphs is also apparent from the title of Article 3, namely 'Appointment of coordinators – Safety and health plan – Prior notice'. According to that structure, the appointment of coordinators is therefore covered solely by Article 3(1), whereas Article 3(2) sets out the rules relating to the safety and health plan.
- 21 The Court inferred from this, at paragraph 30 of the judgment in *Commission v Italy*, that the derogation in the second subparagraph of Article 3(2) of Directive 92/57 can refer only to the rule immediately preceding it, namely the rule requiring a safety and health plan to be drawn up.
- 22 Consequently, as the Court held at paragraph 35 of *Commission v Italy*, Article 3(1) of Directive 92/57, the wording of which is clear and precise and which sets out unequivocally the requirement to appoint a coordinator for safety and health matters on any construction site on which more than one contractor is to be present, does not permit any derogation from that requirement.
- 23 Accordingly, a coordinator for safety and health matters must always be appointed for a construction site on which more than one contractor is to be present, irrespective of whether the works are subject to planning permission or whether the work on the site involves particular risks.

- 24 As regards the point at which a coordinator for health and safety matters must be appointed, it is apparent from Articles 5 and 6 of Directive 92/57 that the coordinator is to be appointed at the project preparation stage or, in any event, before the works commence.
- 25 With regard to the first part of the questions referred, as reformulated at paragraph 18 above, it must be concluded that Article 3(1) of Directive 92/57 requires a coordinator for safety and health matters always to be appointed at the project preparation stage or, in any event, before the works commence on any construction site on which more than one contractor is to be present.
- 26 As regards the safety and health plan, which is the subject of the second part of the questions referred, as reformulated, the conditions governing the drawing-up of such plans must, on the same grounds as those set out at paragraphs 20 and 21 above, be determined solely by reference to Article 3(2) of Directive 92/57.
- 27 Unlike Article 3(1) of Directive 92/57, which does not permit any derogation, the second subparagraph of Article 3(2) permits the Member States, after consulting both management and the workforce, to allow derogations from the requirement to draw up a safety and health plan as referred to in the first subparagraph of Article 3(2), except where it is a question of work involving particular risks listed in Annex II to the directive or work for which prior notice is required, as set out in Article 3(3).
- 28 It follows that the requirement, prior to the setting-up of a construction site, to draw up a safety and health plan, as laid down in Article 3(2) of Directive 92/57, must be understood as being applicable to any construction site on which the works involve particular risks, as listed in Annex II to the directive, or for which prior notice

must be given, the number of contractors present on the site being irrelevant in that connection.

29 Article 3 of Directive 92/57 therefore precludes national legislation under which the requirement for the coordinator responsible for the execution stage of the works to draw up a safety and health plan is confined to the situation in which more than one contractor is engaged on a construction site involving private works that are not subject to that obligation and which does not use the particular risks such as those listed in Annex II to Directive 92/57 as criteria for that requirement.

30 In order to provide the referring court with a comprehensive answer, it should also be recalled that it has been consistently held that a directive cannot of itself impose obligations on an individual and that a provision of a directive cannot therefore be relied on as such against that individual (see Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraphs 23 to 25, and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 73 and 74).

31 In the light of the foregoing, the answer to the questions referred is that Article 3 of Directive 92/57 must be interpreted as follows:

- Article 3(1) precludes national legislation under which, for private works not subject to planning permission on a construction site on which more than one contractor is to be present, it is possible to derogate from the requirement imposed on the client or project supervisor to appoint a coordinator for safety and health matters at the project preparation stage or, in any event, before the works commence;

- Article 3(2) precludes national legislation under which the requirement for the coordinator responsible for the execution stage of the works to draw up a safety and health plan is confined to the situation in which more than one contractor is engaged on a construction site involving private works that are not subject to that obligation and which does not use the particular risks such as those listed in Annex II to the directive as criteria for that requirement.

Costs

- ³² 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 3 of Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as follows:

- **Article 3(1) precludes national legislation under which, for private works not subject to planning permission on a construction site on which more than one contractor is to be present, it is possible to derogate from the requirement imposed on the client or project supervisor to appoint a coordinator**

for safety and health matters at the project preparation stage or, in any event, before the works commence;

- **Article 3(2) precludes national legislation under which the requirement for the coordinator responsible for the execution stage of the works to draw up a safety and health plan is confined to the situation in which more than one contractor is engaged on a construction site involving private works that are not subject to that obligation and which does not use the particular risks such as those listed in Annex II to the directive as criteria for that requirement.**

[Signatures]