Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 12 July 2012 [1]

**Case C-202/11**

**Anton Las**
**v**
**PSA Antwerp NV**

(Reference for a preliminary ruling from the Arbeidsrechtbank te Antwerpen (Belgium))

(Interpretation of Article 45 TFEU — Freedom of movement for workers — Restrictions — Use of languages — Legislation imposing an obligation on undertakings situated in the Flemish language region of the Kingdom of Belgium to draft all documents on employment relations in Dutch, on pain of nullity — International nature of employment contract — Article 4 TEU — Linguistic diversity — National identity — Disproportionate nature of the measures in question)

## I – Introduction

1. In this case, the Arbeidsrechtbank te Antwerpen (Labour Court, Antwerp (Belgium)) asks the Court to determine whether the provisions of Article 45 TFEU [2] preclude legislation such as the Decree of the Flemish Community of the Kingdom of Belgium adopted on 19 July 1973 on the use of languages in relations between employers and employees and also in company documents and papers that are required by law and by regulation [3] ('the Flemish Decree on Use of Languages').

2. Under that decree, where an employer's established place of business is in the Dutch-language region, [4] use of that language is required in respect of all 'employment relations' in the broader sense since that concept appears to cover, apart from employment contracts, all individual and collective contacts, whether oral or written, between employers and employees which are directly or indirectly related to employment.

3. Similar requirements are laid down *mutatis mutandis* in the employment law provisions of other entities in the Kingdom of Belgium and of certain EU Member States, but they give rise to different implementing rules.

1 — Original language: French.

2 — The order for reference lodged on 28 April 2011 in fact concerns 'Article 39 of the EC Treaty', but it became Article 45 TFEU upon the entry into force of the Treaty of Lisbon on 1 December 2009.

3 — Taaldecreet tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers, alsmede van de door de wet en de verordeningen voorgeschreven akten en bescheiden van de ondernemingen (Belgisch Staatsblad / Moniteur belge of 6 September 1973, p. 10089).

4 — I note that, in the file submitted to the Court, there has sometimes been confusion between 'Flemish region' within the meaning of Article 3 of the Belgian Constitution and 'Dutch-language region' within the meaning of Article 4 thereof.

4. The request for a preliminary ruling was referred to the Court in the context of a dispute over payment of various sums following his dismissal between Mr Las, a Netherlands national residing in the Netherlands but whose paid employment was mainly in Belgium, and his former employer, PSA Antwerp NV ('PSA Antwerp'), a company established in Flanders belonging to an internationally active group.

5. In essence, the referring court asks the Court to determine whether the principle of freedom of movement for workers precludes a Member State's legislation from imposing use of a specific language in respect of the drafting of written employment documents on conditions which are the same as those laid down by the decree in question on the ground that it would constitute an unjustified and/or disproportionate obstacle to that freedom where the employment relations in question take place in a cross-border context.

6. The Court has already established the key points of the answer to the question referred in that it ruled in *Groener*[5] that '[t]he EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of freedom of movement for workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'.

## II – Legal framework

7. The Flemish Decree on Use of Languages,[6] which is the subject of the reference for a preliminary ruling, was adopted on the basis of the third subparagraph of Article 129(1) of the Belgian Constitution, under which '[t]he Parliaments of the Flemish and French Communities, to the exclusion of the federal legislator, regulate by decree, each one as far as it is concerned, the use of languages for: … relations between employers and their personnel, as well as company acts and documents required by the law and by regulations'.

8. The first paragraph of Article 1 of the Flemish Decree on Use of Languages defines the scope of the decree as follows:

'This decree is applicable to natural and legal persons having a place of business in the Dutch-language region.[7] It regulates use of languages in relations between employers and employees, as well as in company acts and documents required by the law …'

9. Article 2 of the Decree provides that 'the language to be used for relations between employers and employees, as well as for company acts and documents required by law, shall be Dutch'.

10. Article 5 of the Decree is worded as follows:

'All acts and documents required by law and all documents intended for their staff shall be drawn up by employers in the Dutch language.

5 — Case C-379/87 *Groener* [1989] ECR 3967, paragraph 19.

6 — The French version of the provisions of the Flemish Decree on Use of Languages as reproduced below may be consulted on the internet at the following address: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn= 1973071901&table_name=loi.

7 — I would point out that the words 'or employing staff in the Dutch-language region' were deleted by the Cour constitutionelle (formerly Cour d'arbitrage) (Constitutional Court) in its judgment of 30 January 1986 (Moniteur belge, 12 February 1986, p. 1710), which also annulled certain terms in Article 5 of the Decree.

However, if the staff composition so justifies and at the unanimous request of the workers' representatives on the works council or, if there is no works council, at the unanimous request of the trade union delegation or, in the absence of either of these, at the request of a delegate of a representative trade union, the employer must attach a translation in one or more languages to notices, communications, acts, certificates and forms intended for staff.

…'

11. The first, second and fifth paragraphs of Article 10 of the Decree provides, in respect of civil penalties:

'Documents or acts that are contrary to the provisions of this Decree shall be null and void. The nullity shall be determined by the court of its own motion.

The competent auditeur du travail (public attorney in labour-law cases), the official of the Commission permanente de Contrôle linguistique (Permanent Committee on Linguistic Supervision) and any person or association showing a direct or indirect interest may request a finding of nullity before the labour court of the place where the employer is established.

…

A finding of nullity cannot adversely affect the worker and is without prejudice to the rights of third parties. The employer shall be liable for any damage caused by his void documents or acts to the worker or third parties.

…'

## III – The main proceedings, the question referred for a preliminary ruling and the procedure before the Court of Justice

12. On the basis of a 'Letter of Employment' of 10 July 2004 in English ('the employment contract'), Mr Las, a Netherlands national resident in the Netherlands, was employed as a Chief Financial Officer for an unlimited period by PSA Antwerp,[8] a company established in Antwerp (Belgium) but belonging to a multinational group operating port terminals whose registered office is in Singapore. The contract of employment stipulated that Mr Las was to carry out his work principally in Belgium although some work would also have to be carried out from the Netherlands.

13. By letter dated 7 September 2009, in English, Mr Las was dismissed with immediate effect. Pursuant to Article 8 of the aforementioned employment contract, PSA Antwerp made to Mr Las a payment in lieu of notice equal to three months' salary and an additional payment equal to six months' salary.

14. By letter of 26 October 2009, Mr Las's lawyer pointed out to PSA Antwerp that the employment contract, in particular Article 8 thereof, was not drafted in Dutch and that that clause therefore infringed the applicable law. A claim was made for payment in lieu of notice equal to 20 months' salary, holiday pay arrears, the 2008 bonus and the holiday pay due in relation thereto, and also for payment in lieu of leave days not taken.

8 — It being established that, at the time, it was still called NV Hesse-Noord Natie.

15. The referring court states that, although the employment contract in question contains a clause attributing jurisdiction to Netherlands courts and a clause providing for the application of Netherlands law, the parties to the dispute in the main proceedings were in agreement that the Belgian labour court had jurisdiction and that Belgian law was applicable under Article 6(1) and (2) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations.[9] On the other hand, the parties are divided on the language which should have been used for the drafting of the employment contract and its consequences.

16. On 23 December 2009, Mr Las brought an action before the Arbeidsrechtbank te Antwerpen seeking an order for PSA Antwerp to pay him amounts which were considerably higher than those received. In support of his claims, he relied in particular on the fact that Article 8 of his employment contract, which was drafted in English, was vitiated by absolute nullity because it infringed the provisions of the Flemish Decree on Use of Languages, which provides for Dutch to be used in undertakings whose place of business is established in the Dutch-language region of Belgium.

17. PSA Antwerp's defence was that the decree cannot be applied to situations in which a person exercises his right of freedom of movement as a worker, as the decree would constitute an obstacle to that fundamental freedom which cannot be justified by overriding reasons of general interest within the meaning of the Court's case-law. PSA Antwerp added that the employment contract must be respected since the document in question was in accordance with the will of the parties, which was expressed in a language that each party could understand, namely English, it being established that the director of that company who signed it is a Singapore national who is unfamiliar with Dutch.

18. Following the request for a preliminary ruling lodged by PSA Antwerp and as it had doubts as to whether a general-interest ground requires the employment contract to be drafted in Dutch in a cross-border situation such as that in question, in which the parties (in this instance, a Dutch-speaking employee and a non-Dutch-speaking employer) clearly chose, in view of the importance of the post that was to be filled, to draft an employment contract in a language understood by both parties, the Arbeidsrechtbank te Antwerpen decided to stay proceedings and to refer the following question to the Court by an order lodged at the Registry on 29 April 2011:

'Does the Flemish Decree on Use of Languages infringe Article [45 TFEU] concerning freedom of movement for workers within the European Union, in that it imposes an obligation on an undertaking situated in the Dutch-language region when hiring a worker in the context of employment relations with an international character, to draft all documents relating to the employment relationship in Dutch, on pain of nullity?'

19. Written observations were submitted to the Court by Mr Las, PSA Antwerp, the Belgian and Greek Governments, the European Commission and the EFTA Surveillance Authority.[10]

20. All these parties were represented at the hearing of 17 April 2012.

9 — Consolidated version, OJ C 334 of 30 December 2005, p. 1. That convention was replaced from 17 December 2009 by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I Regulation'), OJ 2008 L 177, p. 6.

10 — I note that the Commission states in particular that the dispute in the main proceedings should require the Court to rule on the law applicable to Mr Las's social security situation. In my view, this matter goes beyond the framework laid down by the question referred for a preliminary ruling. Nevertheless, I would point out that the law applicable to the employment contract is designated by the provisions of the aforementioned Rome I Regulation and not by the rules on determination of the law applicable in social security matters.

## IV – Analysis

### A – *Preliminary observations*

21. The parties who submitted observations to the Court are divided over the response to be given to the question referred. PSA Antwerp and the EFTA Surveillance Authority consider that the principle of freedom of movement for workers precludes legislation such as that at issue, whereas the other participants, namely Mr Las in the alternative, the Belgian and Greek Governments and the Commission, hold the opposite view.

22. Since the matter at issue in this case is the applicability of EU law, which is disputed by Mr Las, I would point out that the cross-border nature of the employment relationship in question in the main proceedings is determined by several factors: the employee concerned is a Netherlands national residing in the Netherlands, but he is required under an employment contract drafted in English to work in both Belgium and the Netherlands for an undertaking belonging to a multinational group and whose established place of business is situated in Belgium and specifically in the Dutch-language region.

23. As Mr Las has thereby exercised the freedom of EU nationals to move from one Member State to another as a worker, it follows that his situation is not 'purely internal' within the meaning of the Court's settled case-law[11] and therefore falls within the scope of the provisions of EU law of which an interpretation is sought by the referring court.

24. Moreover, the fact that freedom of movement for workers is relied on here not by himself but by his former employer does not make EU law inapplicable in the light of the Court's case-law. In fact, as the Court has already highlighted, in order to be truly effective, the right of workers to be engaged and pursue an activity without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers. Otherwise, Member States could easily circumvent the rules by imposing recruitment conditions on employers amounting to restrictions on the exercise of that freedom to which a worker is entitled.[12]

### B – *Existence of an obstacle to freedom of movement for workers*

25. In accordance with settled case-law,[13] all Treaty provisions on freedom of movement for persons preclude national measures that make the exercise by EU citizens of the fundamental freedoms guaranteed by the Treaty more difficult or less attractive. In particular, measures are prohibited which make it more difficult to engage in an economic activity in the territory of another Member State.

11 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 89 et seq., and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 33 et seq.

12 — Judgments in Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraphs 19 to 25, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 22 and 23.

13 — See, in particular, *Gouvernement de la Communauté française and Gouvernement wallon*, cited above, paragraph 44 et seq., and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 46 et seq., and the case-law cited.

26. I note that there is no harmonisation measure in EU secondary law which is applicable to use of languages in drafting employment documents.[14] In particular, as the Commission points out, Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship does not contain any provisions on the language to be used for that purpose.[15]

27. This case differs in that respect from other cases in which the Court has had to rule on obstacles resulting from language requirements in relation to freedom of movement for persons.[16] The previous case-law on restrictions of this kind which have encroached upon fundamental freedoms guaranteed by the Treaty does not suggest any easy answer to the question referred for a preliminary ruling in this case.[17]

28. I would point out that, in this case, the referring court expressly circumscribed the subject-matter of its request. In fact, the question referred concerns the drafting of employment documents, and hence only written employment relations, even though the legislation at issue appears also to govern spoken employment relations. Moreover, the question referred is placed in the particular context of, in its words, 'employment relations with an international character'.

29. According to the information at my disposal, the laws of the Member States do not, for the most part, impose any obligations regarding the language to be used in employment relations. To my knowledge, 17 of the 25 Member States[18] impose no language requirements equivalent to that which exists in the Flemish Decree on Use of Languages, although such an obligation is laid down in provisions in force in eight Member States.[19]

30. By imposing the use of Dutch in all acts and documents on employment relations, in respect both of Belgian nationals and of foreign nationals employed by undertakings established in the Dutch-language region, the decree in question is likely, in my view, to have a dissuasive effect on non-Dutch-speaking employees and employers, in other words, generally those from Member States other than the Kingdom of Belgium and the Kingdom of the Netherlands.

31. I consider that a linguistic obstacle exists in their regard not only in respect of the conditions of access to a business activity, but also in respect of the conditions for engaging in that activity.

32. Thus it is conceivable that a worker unfamiliar with Dutch would hesitate to sign a contract drafted in that language for fear of not understanding what he was committing himself to. Recruiters falling within the scope of the decree may logically give preference to a candidate because he is Dutch-speaking rather than on the basis of other recruitment criteria which the recruiters might have favoured if such legislation did not exist.

14 — In the absence of harmonisation in this regard, the Member States are free to adopt national or regional measures for such a purpose, whilst respecting the Treaty and the general principles of EU law, in particular Article 45 TFEU (see, by analogy, Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 19.

15 — (OJ 1991 L 288, p. 32). I note that, in this case, the Commission stated that, in accordance with Article 6 thereof, the directive does not harmonise the formal conditions of the employment contract, including the language in which it must be drawn up.

16 — On conditions of access to employment being dependent on language, see, regarding paid employment, *Groener*, cited above; and regarding the establishment of self-employed workers, in the case of dentists: Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 50 et seq., and in the case of lawyers: Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 70 et seq; Case C-193/05 *Commission* v *Luxembourg* [2006] ECR I-8673, paragraph 40 et seq.

17 — Regarding free movement of goods, and, in particular, labelling, an area in which national measures have been prohibited that impose use of a language without allowing another language easily understood by purchasers to be used, see Case C-366/98 *Geffroy* [2000] ECR I-6579, paragraph 24 et seq. and the case-law cited. Regarding equal treatment of persons in use of languages before criminal courts, see Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 13 et seq., and the case-law cited, which emphasises the particular importance of protecting the linguistic rights and privileges of individuals for the safeguarding of their fundamental freedoms.

18 — I have no information on the provisions applicable in this area in Cyprus and Luxembourg.

19 — This is the case in France, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, and in the various language regions of Belgium.

33. This is true notwithstanding the fact that, in the dispute in the main proceedings, Mr Las would not, in practice, have been disadvantaged if the decree had been complied with since he is familiar with Dutch, as he is arguing this point in order to claim application of the legislation for his benefit.

34. The mirror effect of the obstacle thus encountered by employees is that employers from other Member States established in the Dutch-language region of Belgium cannot offer employment conditions that are free from the linguistic controls imposed by the decree in question. They are, in practice, induced to recruit only employees who understand Dutch, for whom it will be easier to converse in that language. Moreover, unlike undertakings based in that region, internationally active employers who establish their place of business there must cope with administrative complications and additional operating costs. In fact, the working, administrative and business language of such undertakings is often a language other than Dutch. They are then forced to replace their normal employment contract forms and all other employment acts or documents relating to personnel management and to ask Dutch-speaking lawyers to help them to this end.

35. The Court has also accepted, in *Commission* v *Germany*, that the obligation imposed by a Member State on foreign employers employing workers in national territory to translate certain working documents into the language of that State was likely to constitute a restriction on the freedom to provide services in that it involved additional expenses and an additional administrative and financial burden for undertakings established in another Member State. [20]

36. I would add that such employers may be faced with considerable legal uncertainty if, as is the case under the legislation at issue in the main proceedings, infringement of the language requirement is penalised by a nullity which alters the balance of contractual relations.

37. The scale of the penalties incurred in the event of non-compliance with the rules laid down by the Flemish Decree on Use of Languages, [21] to which I shall refer later, may be another factor that could constitute an obstacle to the full exercise of workers' freedom of movement. In this regard, it is settled case-law that there may be penalties which are so severe as to impede the exercise of the fundamental freedoms guaranteed by primary law, it being for the national court to determine the extent of that severity. [22]

38. As non-Dutch-speaking employees and employers may thus be discouraged from exercising those freedoms by the linguistic constraints imposed by legislation such as that at issue in the main proceedings, there is, in my view, an obstacle to freedom of movement for workers in this context which is, contrary to what Mr Las claims, neither uncertain nor indirect. The question which then arises is whether such an obstacle can nevertheless be justified in accordance with the Court's case-law.

39. I note in passing, even though it is a different legal problem, that there is plainly no direct discrimination in this case, since the legislation at issue is applicable to employers and employees regardless of their nationality. On the other hand, it seems to me that there is indirect discrimination in that, under cover of apparently neutral criteria, the language barrier constituted by compulsory use of Dutch makes access to employment and the conditions for engaging in employment in the Dutch-language region of Belgium more difficult for nationals of Member States other than the Netherlands. However, such indirect discrimination is inherent in any requirement relating to knowledge or use of a language and may be justified for the same reasons as those relied on in relation to a language barrier. Consequently, I shall not develop a separate argument on that question.

20 — Paragraph 68 et seq.

21 — Under Article 10.

22 — See Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 41.

C – *Possible justifications for the obstacle established*

40. According to the case-law, national measures which hinder the effective exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed if they pursue an objective which may be classified as an overriding reason of general interest, are appropriate to ensuring the attainment of such an objective and do not go beyond what is necessary to attain it. [23]

41. The issue in this case is whether the obstacle to the freedom of movement for workers guaranteed by Article 45 TFEU is duly justified by legitimate objectives and by the use of means which are both appropriate and proportionate to their attainment. This is not the case, in my view, for the following reasons, it being stated from the outset that, although I accept the legitimacy per se of the three grounds relied on in defence of the legislation at issue, I dispute whether the methods used to that end are necessary or proportionate. [24]

1. Unsuitability of the measures in question in relation to the general-interest objectives relied on

42. The Flemish Decree on Use of Languages does not mention the precise reasons why the legislature of the language region concerned provided for Dutch alone to be used in all employment relations in the circumstances provided for by that legislation. All that is certain is that the legal basis of the decree is the third subparagraph of Article 129(1) of the Belgian Constitution, which confers sole competence on the Parliament of the Flemish Community to regulate the use of languages in relations between employers and their staff within its territory and in acts and documents of undertakings required by the law and the regulations, it being established that the same competence is, in parallel, conferred on the Parliament of the French Community.

43. However, according to the information submitted to the Court by the Belgian Government, three justifications may be put forward: the first being the protection of employees, the second, effective supervision by the administrative and judicial authorities, and the third, defending and encouraging use of the official language of a regional entity. It must be examined whether the obstacle identified may be justified by one of these grounds, as an overriding reason of general interest, within the meaning of the case-law cited above.

(a) Ground of protection of employees

44. The Belgian Government relies in support of the Flemish Decree on Use of Languages on social concerns, bearing in mind that the Court has repeatedly held that overriding reasons relating to the public interest capable of justifying a restriction on the fundamental freedoms include the protection of workers. [25]

45. However, the obligatory and exclusive use of Dutch can only, in fact, protect employees who are sufficiently familiar with that language to understand the meaning of the information that the employer will convey to them orally or in writing. Non-Dutch-speaking employees, on the other hand, are at a disadvantage compared with others, not only when they seek to gain access to employment, which must involve conversing in Dutch under the decree at issue, but also throughout the duration

23 — See, inter alia, Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 38, and *Commission* v *Hungary*, paragraph 69, and the case-law cited.

24 — In accordance with the basic rules defined in *Groener*, paragraph 19.

25 — See, in particular, regarding the freedom to provide services, Case C-515/08 dos *Santos Palhota and Others* [2010] ECR I-9133, paragraph 47.

of that employment where they succeed in surmounting the recruitment barrier. The legislation may in their case result in an uncertainty over the precise content of the rights and duties laid down by their employment contract and over the specific terms of their employment which, being both legal and practical, they can remedy only with the assistance of third persons.

46. Effective protection of all categories of employee would, in contrast, require the employment contract to be accessible in a language that the employee can easily understand, so that his consent is fully informed rather than vitiated. I would point out that Directive 91/533 provides that the employer is obliged to notify an employee to whom the directive applies in writing of all the essential aspects of the contract or employment relationship listed in Article 2 of the directive. It seems to me that, for it to be effective, that information, concerning a minimum number of facts of which the employee needs to be aware, must be communicated to him in a language with which he is sufficiently familiar for the purposes of understanding the issues relating to the employment relationship. However, the Flemish Decree on Use of Languages provides for inappropriate means of attaining that objective as it does not provide for it to be verified that the parties to the contract are sufficiently familiar with Dutch to be able to sign it in full knowledge of those facts.

47. The Commission supports the Belgian Government's argument that the Court admitted the particular interest in using the national language of the place in which the employees are employed in its judgment in *Everson and Barrass*.[26] It is true that, where an employee is required to work in more than one Member State, the *locus laboris* corresponds, in most cases, to the social and language environment with which he is familiar.[27] However, there are, in practice, exceptions to that general rule. In my view, the judgment in question does not imply that it is necessarily in the interest of employees to require systematic use of a specific language, the language of the main place where they are employed or even another language, in the employment contract. In fact, the vehicular language, that is to say, a language common to the employee and his employer which ensures effective, balanced communication between them, is not necessarily the official language of the place where the professional activity takes place, whether it be national or regional.

48. Therefore it is neither appropriate nor necessary to the attainment of the lawful objective pursued to impose exclusive use of Dutch for the purposes of ensuring that the employee of an undertaking whose principal place of business is located in the region concerned will have effective access to the information which he needs both before and after his contractual commitment. An alternative whereby the parties would be allowed to use other languages as well as Dutch, with translation into that language being required where appropriate, might, in my view, be more effective in ensuring that the employee's interests are safeguarded.

(b) Ground of effectiveness of administrative and judicial supervision

49. As the Commission points out, this second ground appears to be connected to the previous one in that its aim is to ensure the effectiveness of the protection afforded to employees through supervision of its implementation. This ground is lawful as such,[28] but it is as irrelevant in this case as the first one, of which it is the corollary.

26 — Case C-198/98 *Everson and Barrass* [1999] ECR I-8903, paragraph 22, concerning the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, (OJ 1980 L 283, p. 23).

27 — The Commission also refers in this regard to point 43 of the Opinion of Advocate General Mengozzi in Case C-477/09 *Defossez* [2011] ECR I-1421.

28 — See *dos Santos Palhota and Others*, paragraph 48, and the case-law cited.

50. It is true that the intervention of the administrative authorities, such as the Employment Inspectorate, or of the judicial authorities, if proceedings are brought, is facilitated where they can examine the documents relating to the employment relationship which are the subject of the dispute in a language which the representatives of those authorities know. The same concerns are reflected in legislation in force in other Member States which is analogous to the legislation at issue. [29]

51. Nevertheless, in my view, this objective too can be attained more appropriately by producing translations, where needed, of those employment documents into the official language used locally, without it being necessary to impose exclusive use of that language *ab initio*.

52. In fact, in the *Commission* v *Germany* judgment cited above, [30] the Court held that the obligation to translate employment documents imposed on foreign employers might be justified by a general-interest objective linked to the social protection of employees since it enabled the competent authorities of the host Member State to carry out the monitoring necessary to ensure compliance with relevant national provisions. However, the Court also stated in that judgment that such a requirement complied with the provisions of the EC Treaty on the freedom to provide services only in so far as it required the translation of only a few documents and did not involve a heavy financial or administrative burden for the employer. [31]

53. By analogy, in the area of freedom of movement for workers, it seems to me that there is no need for the extensive measure resorted to by the Flemish Decree on Use of Languages in requiring use of Dutch for all employment documents in pursuit of apparently the same objective in order to carry out the supervision in question.

(c) Ground of defence of the official language

54. This third justification was highlighted by the Belgian Government, which argued that promoting use of the official language was provided for by the National Constitution. I note that a number of Member States and language regions of the Kingdom of Belgium base their legislation requiring use of a specific language in employment relations on grounds of this kind. [32]

55. Protection of an official language, whether national or regional, is an objective of general interest which the Court has accepted as a legitimate justification for adopting a policy for the protection and promotion of a language. [33] Nevertheless, I consider that, in this case, the requirement laid down by the legislation at issue uses means which are inappropriate to the effective attainment of that objective.

56. In this regard, the Greek Government highlighted the principle of linguistic diversity on the basis, in particular, of Article 165 TFEU and the fourth subparagraph of Article 3(3) TEU. Article 22 of the Charter of Fundamental Rights of the European Union, [34] which has mandatory force, also contains a reference to this concept, as it provides that the Union is to respect that diversity.

29 — Thus, in Latvia, the provisions requiring use of the national language in employment relations are based, firstly, on safeguarding public interests such as security and health and, secondly, on evidence requirements, as in Slovenia and Romania. In France, the objectives invoked by the legislature are also protection of health and personal security, as well as limiting the risk of disputes.

30 — See paragraph 70 et seq.

31 — See also Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 69 et seq.

32 — Reference is made to protection of the national language and identity in Lithuania, Poland and Slovakia, and to protection of the community language and identity, as well as protection of the linguistic rights of local populations, in the French- German- and Dutch-language regions of Belgium.

33 — See, in particular, Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, paragraph 85, which cites paragraph 19 of *Groener*.

34 — OJ 2010 C 83, p. 396.

57. However, the principle of linguistic diversity, which is binding only on the institutions and bodies of the Union, cannot be relied on by a Member State against citizens of the Union in order to justify a restriction on their fundamental freedoms.

58. In his Opinion in *Spain* v *Eurojust*,[35] Advocate General Maduro emphasised that 'respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States'.[36] Nevertheless, I would point out that, in that case, the concept of linguistic diversity was relied on only by candidates who had applied for posts offered by the European Union and against it, not by Member States in order to defend their policy of linguistic uniformity against principles of EU law. In other words, that concept was used not in order to justify national measures constituting barriers in relation to use of languages, but only with a view to understanding the language regime specific to the EU.

59. National identity, which the EU institutions are obliged to respect under Article 4(2) TEU, includes linguistic aspects of a constitutional nature of a Member State which lay down, inter alia, the official language or various official languages of the State and, where appropriate, the territorial subdivisions in which the various official languages are in use.[37] The concept of 'national identity' therefore concerns the choices made as to the languages used at national or regional level,[38] whereas the concept of 'linguistic diversity' relates to the multilingualism existing at EU level. It follows from this that the latter concept is not one of the considerations that can be relied upon against natural or legal persons who are EU nationals. It would even be paradoxical to use that justification to allow Member States to force individuals to use, when communicating, a language other than one freely chosen by them.

60. The rules of EU law concerning respect for the national identity of the Member States, which, in the case of the Kingdom of Belgium, indisputably includes its division under the constitution into linguistic communities, tend to support the idea that, as the Court has already ruled, a policy of protecting a language is a justification for a Member State having recourse to measures restricting freedom of movement.[39]

61. However, obligatory use of a Member State's language by nationals or undertakings of other Member States exercising their fundamental freedoms, as laid down by the legislation at issue, does not really meet that objective. It cannot be argued that the mere drafting of employment contracts of a cross-border nature in a language other than Dutch by some undertakings based in Flanders is likely to threaten the established use of Dutch. It is different where an employment relationship involves the imparting of knowledge, as in school or university education, an area concerned with safeguarding the cultural identity of a Member State,[40] which justifies being able to require of a candidate for employment that he has particular linguistic skills.[41]

35 — Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077.

36 — See point 24 of that Opinion.

37 — Under Article 4(2) TEU, the Union must also respect the national identity of its Member States inherent in their fundamental political and constitutional structures, which includes protection of a State's official national language, as the Court stated in *Runevič-Vardyn and Wardyn*, paragraph 86.

38 — In the report submitted by a working group to the members of the European Convention, dated 4 November 2002, it had been recommended that the provisions of the TEU stating that the EU is obliged to respect the national identity of the Member States should be clarified to the effect that the key elements of that identity cover, inter alia, the fundamental structures and essential functions of a Member State, including choice of languages (CONV 375/1/02 REV 1, p. 10 to 12; the document which can be accessed on the internet at the following address: http://european-convention.eu.int/pdf/reg/fr/02/cv00/cv00375-re01.fr02.pdf).

39 — See, in particular, *Runevič-Vardyn and Wardyn*.

40 — See, to that effect, points 19 and 20 of the Opinion of Advocate General Darmon in *Groener*.

41 — See *Groener*, paragraphs 20 et seq.

62. In my view, an employee who has not exercised his freedom to work in another EU Member State can normally require that he be able to work using his own language if it is the official language of the region in which he works. This follows from the particular nature of the place of work, which lies midway between a purely public sphere and a purely private sphere. That nature of the place of work also justifies the implementation of policies to protect the national or regional language in that place, in that the official language is used as the preferred language of communication.

63. However, contractual freedom must be respected in that the employee may agree to use a language specific to his working environment which is different from his own and from that used locally, especially where the employment relationship takes place in an international context,[42] as the order for reference expressly implies. I consider that, within the EU, employers should have the possibility of determining a common language for their members of staff which, in the case of an undertaking established in more than one Member State, may be different from that used at regional or national level. This consideration applies at least to the highest posts, such as managerial staff or experts, and, generally, to posts requiring communication in the language understood by the other employees or foreign clients of the undertaking.

64. Although protection and promotion of an official language are, as such, legitimate objectives, the means used to attain those objectives must be proportionate and must not exceed what is necessary to attain them. However, a national or regional measure seeking to impose exclusive monolingualism to the effect that languages of other Member States cannot be used in a given field does not seem to me to be legitimate in the light of the principles of EU law.

65. Protection of a language cannot, therefore, be a valid justification for legislation such as that at issue in the main proceedings in that it does not allow account to be taken either of the will of the parties to the employment relationship or of the fact that the employer forms part of an international group of undertakings.

66. Consequently, I consider that the Flemish Decree on Use of Languages constitutes an unjustified impairment of the freedom of movement for workers provided for in Article 45 TFEU in that it uses means which are not appropriate for the attainment of the legitimate objectives relied upon.

67. I would add that another complaint may be upheld against that decree in that it does not respect the criterion of proportionality as defined by the Court's case-law.

2. Disproportionate nature of the means used in the measures in question

68. There are, in my view, two reasons for considering that the Flemish Decree on Use of Languages contains measures which are disproportionate to the objectives relied upon and that, consequently, they are precluded by Article 45 TFEU. Firstly, the excessively broad scope of the obligation to use exclusively one language, namely Dutch, in the employment relations covered by the decree and, secondly, the scale of the penalties imposed where that obligation is not fulfilled.

42 — I would point out that the prevalence of the principle of consensus in cross-border employment relations is accepted in Article 8 of the Rome I Regulation, which provides that the parties to an employment contract can, in principle, choose the law applicable to it.

(a) Extent of the language requirement

69. It appears that the contested decision requires all employers whose established place of business is located in the Dutch-language region of Belgium to use that language in all employment relations that they establish with their employees, whether written or oral, although language requirements may vary depending on the kind of employment relations concerned and in the light of any cross-border context in which they may occur.

70. In my view, the interests which, according to the Belgian Government, are defended by the regional legislation might be more appropriately protected by means other than a linguistic constraint which is so absolute and general in scope. I consider, for example, that a translation into Dutch of the main employment documents that are drafted in another language might be sufficient to attain the three aforementioned objectives.

71. It seems to me that the project of European integration becomes devoid of meaning if the Member States can require economic agents, such as employers and employees, to use a specific language to an extent which exceeds the restrictions on contractual freedom that are strictly necessary to fulfil objectives of general interest. In the context of international employment relations, the autonomy of the parties must predominate if cross-border trade is to be facilitated,[43] even if a fair balance must, of course, be struck between freedom of movement for workers and protection of those workers.

72. It would, in my view, be justified to allow the parties to a cross-border employment relationship to use the language of their choice in so far as that choice is in accordance with the common will of the parties or in so far as the duties to be carried out necessitate use of a language which is different from that used locally.[44] However, the Flemish Decree on Use of Languages is applicable generally, without any regard for the languages familiar to and normally used by the employer and employee concerned, or for the nature of the employment in question.

73. I consider that it would be inconsistent, and even paradoxical, for it not to be possible, according to the judgment in *Groener*, to require an employee, except in special cases, to know the language of the Member State in which he is working but for it to be permissible, on the other hand, to require the employment contract that he is to sign to be drafted in a language with which he is unfamiliar and therefore does not understand.

74. As the EFTA Surveillance Authority has suggested, it is necessary, in order to ensure the smooth functioning of the internal market, to introduce more flexibility into language requirements where employment relations are international in nature than in cases where they are purely internal. In fact, in cross-border employment relations, it is preferable for the parties to be able to use a vehicular language that they both understand rather than requiring them to exclusively use a specific language, even if that language is one of the official languages of the place where the employee works.

75. In particular, I do not see how the Dutch language would be endangered by the use of another language in an employment contract such as the one in question in the main proceedings, that is to say, one concluded between an employee who has exercised his freedom of movement and an employer which is a company forming part of an international group.

43 — See, by analogy, on the interpretation of Article 17 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, Case 150/80 *Elefanten Schuh* [1981] ECR 1671, paragraph 27, according to which the legislation of a Contracting State may not allow the validity of a jurisdiction clause to be called in question solely on the ground that the language used by the parties is not that prescribed by that legislation.

44 — I would point out that the possibility of introducing a language requirement on account of the nature of the employment to be provided is expressly laid down by the last subparagraph of Article 3(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), a provision which was interpreted in the judgment in *Groener*, which, though not applicable in the present case, gives cause, in my view, for some food for thought. A substantively identical provision is contained in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1), which codified Regulation No 1612/68 and replaced it.

76. I note that the legislation at issue allows translation into a language other than Dutch only under a cumbersome procedure imposing conditions which are particularly difficult to satisfy,[45] which, in my view, means in practice that they are probably rarely fulfilled. There are other, less restrictive, means of protecting employees which are just as, if not more, effective, whilst preserving use of the regional language, such as making it easier for the employee or employer who is not familiar with the language to use translations into a language which the person concerned understands sufficiently well.

77. It does not appear from the arguments submitted in the proceedings that the introduction of such a possibility into the legislation at issue, which would make it easier for non-Dutch-speaking employees and employers of other Member States to exercise their freedom of movement within the Dutch-language region of Belgium, would undermine the attainment of the aforementioned objectives.[46]

78. Therefore, owing to its excessively broad scope and exclusive nature, the Flemish Decree on Use of Languages contains measures that are disproportionate to the objectives of general interest relied on, which can be attained by other means.

(b) Penalties provided for in the event of non-compliance

79. Like legislation in existence in other Member States, the legislation in force in the Dutch-language region of Belgium provides that infringement of the obligation to use a specific language may be penalised under both civil and criminal law.[47]

80. Although civil penalties are a general feature of legislation that imposes language requirements in respect of employment relations, no such legislation of which I am aware is as coercive as the Flemish Decree on Use of Languages. In fact, nullity of the acts or documents that infringe the decree is incurred in the Dutch-language region of Belgium, which has a nullifying effect both in the future and in the past,[48] whereas other regions of Belgium,[49] and other Member States,[50] merely make the irregular document unenforceable against the employee and require it to be replaced by a document that complies with the legislation. It seems to me that the latter measure, which enables the continuity of employment relations to be preserved, would be as effective as retroactive nullity of the employment contract concerned in attaining the objectives of general interest which, according to the Belgian Government, are pursued by the decree. In this respect, I consider that the legislation at issue goes beyond the measures necessary to achieve that end.

81. As to the scope *erga omnes* or otherwise of the finding of nullity, I would point out that, according to the order for reference, the first paragraph of Article 10 of the Flemish Decree on Use of Languages penalises infringement of its provisions by a nullity which is 'absolute ex tunc and the document is deemed never to have existed. It follows that the court has no power to take cognisance of the documents drafted in the wrong language and that it can take no account of the contents thereof, in particular of any expression of will'.

45 — See the second paragraph of Article 5 of the Flemish Decree on Use of Languages cited in the legal framework.

46 — See, by analogy, *Bickel and Franz*, paragraph 29.

47 — The dispute in the main proceedings is classified as a civil matter, but it is nevertheless interesting to note, with regard to the general scheme of the Flemish Decree on Use of Languages, that, contrary to what applies in the other regions of Belgium, where no criminal penalty is incurred for failure to comply with the language requirement, if such an act is committed in the Dutch-language region, the offence is punishable, under Article 12 of the decree, by imprisonment and/or a fine on the employer or his representatives for contravening the provisions of the decree. Article 11 of the decree also provides for the possibility of an administrative fine.

48 — Retroactive nullity also appears to be incurred in Slovenia, but it is applicable only to the future in Romania and in Latvia, where, in the latter, it is linked to an obligation on the employer to propose conclusion of a new contract.

49 — That is to say, in the communes with specific arrangements, in the German-language region and in the bilingual Brussels-Capital region. In the French-language region, on the other hand, nullity of the employment documents drafted into another language is incurred.

50 — The unenforceability of contractual provisions complained of against an employee is provided for in Lithuania, Poland and Slovakia as well as in France, where it may be requested, on penalty of a fine, that the document concerned is produced in French.

82. It is true that the absolute nature of that nullity was discussed by the parties who submitted observations to the Court, some of whom pointed out that paragraph 5 of that article provides that 'a finding of nullity cannot adversely affect the worker and is without prejudice to the rights of third parties'. It seems to me that the referring court is aware of that rule as it also mentions in its decision that 'the employee may rely on those clauses that are advantageous to him whilst invoking the nullity of those clauses that are disadvantageous to him'. In my view, the absolute, non-relative, nature of the nullity in question follows in practice from the fact that any person who can demonstrate an interest may seek a finding from a court that an irregular document is null and void in the circumstances provided for in the second paragraph of Article 10 of the Flemish Decree on Use of Languages. In any event, any failure on the part of employers to fulfil the language requirements of the Flemish decree is heavily penalised under civil law since, according to the analysis made by that court, an employment contract such as that signed by Mr Las could have effects only against the former employer under that decree. [51]

83. The coercive power of the judicial authorities in respect of the language requirements laid down in the area of employment relations varies according to the Member State. Whereas the national legislation in certain Member States [52] prohibits the national court from raising of its own motion the failure to fulfil an obligation to use a specific language, the national legislation in other Member States provides for that possibility. [53] It is only in the Dutch- and French-language regions of Belgium that the possibility for the court of raising that failure of its own motion becomes an obligation on the court, which I consider to be going too far. [54]

84. It is settled case-law that restrictions on the fundamental freedoms imposed by the Member States must be confined to what is strictly necessary, which means choosing the course of action, and thus the measure, which is least restrictive.

85. This principle is not observed by the Flemish Decree on Use of Languages, since it appears that, in itself but also in comparison with other provisions, it imposes particularly strict requirements with far-reaching effects both on the individuals concerned and on the court hearing a legal action in this regard. I consider that other, better suited, measures which are less restrictive on freedom of movement for workers than those adopted could achieve the objectives that appear to be pursued by that decree.

86. Consequently, legislation such as that at issue in the main proceedings is not, in my view, consistent with the content of Article 45 TFEU, which corresponds to the former Article 39 EC, which the Court has been asked to interpret.

51 — I would point out that the employment contract in question was initially made subject to Netherlands law, at the wish of the parties to the main proceedings, even though they agreed to state before the referring court that Belgian law is applicable. However, Article 3(2) of the Rome I Regulation provides that any change in the law to be applied that is made after the conclusion of the contract is not to prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

52 — In France, Latvia, Lithuania and Slovakia.

53 — In Poland, Romania and Slovenia, and in the Belgian communes with specific arrangements, the bilingual Brussels-Capital region and the German-language region.

54 — On the appropriate discretion which a national court may have to vary the penalty laid down in the event of infringement of a Member State's rules requiring use of its language on the basis of the specific threat to an objective of general interest such as protection of consumers, see point 68 of the Opinion of Advocate General Cosmas in *Goerres*.

## V – Conclusion

87. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Arbeidsrechtbank te Antwerpen as follows:

Article 45 TFEU concerning freedom of movement for workers within the European Union must be interpreted as meaning that it precludes legislation by a Member State such as that at issue in the main proceedings which imposes an obligation on an undertaking situated in a region where there is only one official language when hiring a worker in the context of employment relations with an international character to use that language exclusively for the drafting of all documents relating to the employment relationship, on pain of nullity.