



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

4 September 2014*

(Reference for a preliminary ruling — Freedom of establishment — Freedom of movement for workers — Non-discrimination — Article 346(1)(b) TFEU — Protection of a Member State's essential security interests — Legislation of a Member State under which the statutory representatives of a business engaged within the national territory in the trading of arms, munitions and war material must hold the nationality of that Member State)

In Case C-474/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 25 September 2012, received at the Court on 22 October 2012, in the proceedings

Schiebel Aircraft GmbH

v

Bundesminister für Wirtschaft, Familie und Jugend,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek and T. Müller, acting as Agents,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the Swedish Government, by A. Falk and U. Persson, acting as Agents,
- the European Commission, by J. Enegren and V. Kreuzschitz, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 18 TFEU, 45 TFEU, 49 TFEU and 346(1)(b) TFEU.
- 2 The request has been made in proceedings between Schiebel Aircraft GmbH and the Bundesminister für Wirtschaft, Familie und Jugend (Austrian Federal Minister for Economy, Family and Youth) ('the Bundesminister') concerning the Bundesminister's refusal to grant Schiebel Aircraft authorisation to engage in business in the arms sector.

Legal context

- 3 Paragraph 94(80) of the Austrian Trade Code 1994 (Gewerbeordnung 1994), in the version applicable to the dispute in the main proceedings (BGBl. I, 111/2010) ('the GewO 1994'), provides:

'The following activities shall be treated as regulated trades:

...

80. Activities in the arms sector ([including] the manufacture of ammunition), including weapons trading.'

- 4 Paragraph 95 of the GewO 1994 provides:

'(1) In the case of an activity listed in Paragraph 94(5), (10), (16), (18), (25), (32), (36), (56), (62), (65), (75), (80) and (82), the administrative authority shall assess whether the applicant or, where authorisation is sought by a legal person or a registered partnership, the persons referred to in Paragraph 13(7), possess the necessary trustworthiness to engage in that activity (Paragraph 87(1)(3)). The declarant may not engage in the activity until the decision referred to in Paragraph 340 has become final.

(2) In the case of an activity referred to in subparagraph (1), the appointment of a manager or branch manager for the purposes of engaging in that activity shall be subject to prior authorisation. Authorisation shall be granted following a request from the owner of the business, if the conditions listed in ... Paragraph 39(2) or Paragraph 47(2) are met.'

- 5 Under Paragraph 139 of the GewO 1994:

'(1) Authorisation shall be required in order to engage in the following activities in the arms sector (Paragraph 94(80)):

1. in the case of non-military weapons and non-military munitions:
 - (a) manufacture, modification and installation (including the manufacture of ammunition),
 - (b) trading,
 - (c) leasing,
 - (d) brokering of sales and purchases;

2. in the case of military weapons and military munitions:

- (a) manufacture, modification and installation,
- (b) trading,
- (c) brokering of sales and purchases.

...

(4) The leasing and preparation for use of guns and the sale of shooting accessories at officially approved shooting locations shall be permitted in the case of persons and companies authorised under subparagraph (1)(1)(a), (b) or (c) or subparagraph (1)(2)(a) or (b). In other cases, the leasing of military weapons shall be prohibited.'

6 Paragraph 141 of the GewO 1994 is worded as follows:

'(1) Authorisation to engage in the arms sector activities listed in Paragraph 139(1) shall be subject to the following conditions in addition to the assessment of trustworthiness (Paragraph 95):

- 1. In the case of natural persons, they must hold Austrian nationality and be resident in the national territory; and
- 2. In the case of legal persons and registered partnerships:
 - (a) their seat or principal office must be located in Austrian territory; and
 - (b) members of their statutory representation bodies, or managing partners empowered to represent the partnership, must hold Austrian nationality and be resident in Austrian territory; and
- 3. Engagement in the activity in question must not be precluded by considerations relating to the preservation of public order, safety or security.

...

(3) The condition relating to Austrian nationality, laid down in subparagraph (1), shall not apply to nationals of States party to [the European Economic Area (EEA)] in the case of the activities referred to in Paragraph 139(1)(1).'

7 Paragraph 340 of the GewO 1994 provides:

'(1) The district administrative authority shall examine the statement submitted under Paragraph 339(1) to ensure that the statutory conditions for engaging in the activity concerned are satisfied by the declarant at the place of establishment indicated. ...

...

(3) If the conditions referred to in subparagraph (1) are not met, the district administrative authority must, without prejudice to any proceedings under Paragraph 366(1)(1), make a finding to that effect by administrative decision and prohibit engagement in the activity concerned.'

Background to the dispute and the question referred for a preliminary ruling

- 8 By notice of 27 September 2010, Schiebel Aircraft applied to the Bundesminister for authorisation to engage in certain activities in the arms sector — such as trading in arms and military munitions and brokering the purchase and sale of such goods — that are to be treated as regulated trades under Paragraph 94(80) of the GewO 1994.
- 9 By decision of 16 February 2011, contested before the Verwaltungsgerichtshof (Administrative Court or ‘the referring court’), the Bundesminister found that Schiebel Aircraft did not meet the statutory conditions for engaging in those activities and refused to allow the company to do so.
- 10 As grounds for his decision, the Bundesminister essentially explained that, together with two other persons, Mr H. was entered in the business register as Schiebel Aircraft’s Managing Director under commercial law (handelsrechtlicher Geschäftsführer), and that Mr H. is a UK national who does not hold Austrian nationality. Given, then, that one of the persons empowered to represent Schiebel Aircraft does not possess Austrian nationality, the conditions laid down in Paragraph 141(1)(2)(b) and Paragraph 141(3) of the GewO 1994 for engaging in activities covered by Paragraph 139(1)(2)(b) and (c) of the GewO 1994 are not satisfied.
- 11 In its action contesting that decision before the referring court, Schiebel Aircraft submits that, under Article 18 TFEU, any discrimination on grounds of nationality is prohibited. In any event, Mr H., as a UK national managing a company, is covered by the protection attaching to freedom of establishment under Article 49 TFEU because he wishes to engage in a cross-border activity for remuneration. Schiebel Aircraft argues that, on the facts, the case before the referring court falls within the scope of EU law, which is why the principle of non-discrimination applies in accordance with Article 18 TFEU. According to Schiebel Aircraft, the condition relating to possession of Austrian nationality, laid down in Paragraph 141(1)(2)(b) and Paragraph 141(3) of the GewO 1994 (‘the nationality condition’) constitutes direct discrimination contrary to EU law.
- 12 On the other hand, Schiebel Aircraft acknowledges that, under primary law, Article 346 TFEU allows Member States to derogate from all the provisions of the Treaties. Being in the nature of an exception, however, Article 346 TFEU falls to be narrowly construed. Moreover, derogations from the principles of freedom of movement and non-discrimination cannot go beyond the specific purpose for which they were provided.
- 13 According to Schiebel Aircraft, although it is for each Member State — given the implications of the phrase ‘it considers’ used in Article 346 TFEU — to assess whether its essential security interests are jeopardised, the Court has made it clear that measures taken on the basis of that provision must be consistent with the principle of proportionality. There is no possible justification, therefore, for the nationality condition. That condition, which is additional to other stringent measures already in place, cannot be regarded as necessary for safeguarding the Republic of Austria’s essential security interests, the key feature of which is that country’s neutrality.
- 14 The Bundesminister contended before the referring court that he was bound by the wording of the provision of Austrian law and had no authority to make a request to the Court for a preliminary ruling.
- 15 The referring court observes that, when the nationality condition was incorporated in legislation, the Austrian legislature referred, without further explanation, to the derogation allowed under Article 223(1)(b) of the EEC Treaty and carried over to Article 346(1)(b) TFEU.

- 16 According to the referring court, Article 346(1)(b) TFEU allows Member States to adopt unilateral protective measures in derogation from their obligations under the Treaties, in order to take due account of the essential interests of their security. Those interests include internal security as well as external security. The measure of discretion thus accorded to Member States is limited by the principle of proportionality enshrined in EU law and by general principles of law.
- 17 The referring court states that it was unable to establish that, for the purposes of Article 346(1)(b) TFEU, Austria had ‘essential interests of ... security’ sufficient to justify the nationality condition and the ensuing non-observance of the principle of non-discrimination laid down in Articles 18 TFEU, 45 TFEU and 49 TFEU.
- 18 In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does EU law — and, in particular, Articles 18 TFEU, 45 TFEU and 49 TFEU, read in conjunction with Article 346(1)(b) TFEU — preclude legislation of a Member State, such as the legislation applicable in the main proceedings, under which, in the case of businesses wishing to trade in military weapons and munitions and broker the sale and purchase of such goods, members of their statutory representation bodies, or managing partners empowered to represent a partnership, must hold Austrian nationality, the possession of the nationality of another Member State of the EEA not being sufficient?’

The question referred for a preliminary ruling

Preliminary observations

- 19 First of all, it should be noted that the question referred for a preliminary ruling refers both to Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, and to Articles 45 TFEU and 49 TFEU, relating respectively to freedom of movement for workers and freedom of establishment.
- 20 In that regard, it should be borne in mind that Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the Treaty lays down no specific prohibition of discrimination (see the judgments in *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 37, and *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 25).
- 21 As it is, in respect of freedom of movement for workers and freedom of establishment, the principle of non-discrimination is given specific effect by Articles 45(2) TFEU and 49 TFEU respectively (see, to that effect, the judgments in *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 99; *Lyyski*, C-40/05, EU:C:2007:10, paragraph 34; *UTECA*, C-222/07, EU:C:2009:124, paragraph 38; and *Hervis Sport- és Divatkereskedelmi*, EU:C:2014:47, paragraph 25).
- 22 There is therefore no need for the Court to make a ruling in relation to Article 18 TFEU.
- 23 As regards Articles 45 TFEU and 49 TFEU, it should be noted that the legislation at issue in the main proceedings draws no distinction according to whether management of the business is an activity engaged in for remuneration. Nor is there anything in the order for reference or the documents before the Court to indicate whether the situation under consideration by the referring court falls within the scope of one or other of those provisions. It must therefore be held that legislation such as that at issue in the main proceedings may affect both freedom of movement for workers and freedom of establishment and, in consequence, must be examined in the light both of Article 45 TFEU and of Article 49 TFEU.

24 Accordingly, the question referred must be understood as asking whether Articles 45 TFEU, 49 TFEU and 346(1)(b) TFEU are to be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, under which, in the case of businesses wishing to trade in military weapons and munitions and broker the sale and purchase of such goods, members of their statutory representation bodies, or their managing partner, must hold the nationality of that Member State.

The existence of restrictions of freedom of movement for workers and freedom of establishment

- 25 Before considering whether the legislation at issue in the main proceedings constitutes a measure contrary to freedom of movement for workers and freedom of establishment, it should first of all be borne in mind that the rule laid down in Article 45 TFEU, requiring equal treatment in relation to freedom of movement for workers, may also be relied upon by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State (see the judgment in *Clean Car Autoservice*, C-350/96, EU:C:1998:205, paragraph 25).
- 26 That consideration, which related to a situation in which a business established in a Member State was precluded by a provision of national law from registering for a trade because the person whom it had appointed as manager — who, in that instance, was salaried — did not reside in that Member State, also applies, by analogy, where the condition at issue concerns a manager who is not an employee. The Court found that the rules governing freedom of movement for workers could easily be frustrated if Member States were able to circumvent prohibitions under those rules merely by imposing on employers conditions to be met by any worker whom they wished to employ, which, if imposed directly on the worker, would constitute restrictions of the exercise of the worker's right to freedom of movement under Article 45 TFEU (see, to that effect, the judgment in *Clean Car Autoservice*, EU:C:1998:205, paragraph 21). A finding to that effect must also be made where the employer wishes to employ, not a salaried worker, but a worker with self-employed status whose situation is covered by Article 49 TFEU (see also, so far as concerns the possibility for employees of a service provider to rely on freedom to provide services, the judgment in *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, paragraph 106).
- 27 The freedom of establishment conferred by Article 49 TFEU on EU nationals entails for them access to, and pursuit of, activities as self-employed persons and the forming and management of undertakings, under the same conditions as those laid down for its own nationals by the laws of the Member State of establishment. According to settled case-law, Article 49 TFEU is thus intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State, and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from national legislation (see, inter alia, the judgments in *Commission v France*, 270/83, EU:C:1986:37, paragraph 14, and *Commission v Belgium*, C-47/08, EU:C:2011:334, paragraph 80).
- 28 Moreover, under the terms of Article 45(2) TFEU, freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
- 29 Consequently, it must be found that legislation such as that at issue in the main proceedings establishes a difference in treatment on grounds of nationality that is prohibited, in principle, both by Article 49 TFEU and by Article 45(2) TFEU, since it makes authorisation for businesses to trade in military weapons and munitions, or to broker the sale and purchase of such goods, subject to the condition that the members of their statutory representation bodies, or their managing partner, must hold Austrian nationality.

30 It must be held that the nationality condition directly precludes nationals of other Member States from establishing themselves in Austria as members of the statutory representation bodies, or managing partners, of a business trading in military weapons and munitions or the brokering of the sale and purchase of such goods, or from engaging in such activities as salaried workers in that Member State.

The possibility of justifying restrictions of freedom of establishment and freedom of movement for workers on the basis of Article 346(1)(b) TFEU

31 According to the order for reference, when the nationality condition was incorporated in legislation, the Austrian legislature referred, without further explanation, to the derogation allowed under Article 223(1)(b) of the EEC Treaty and carried over to Article 346(1)(b) TFEU.

32 It is therefore necessary to consider whether Article 346(1)(b) TFEU, under which the provisions of the Treaties are not to preclude any Member State from taking such measures as it considers necessary for the protection of essential interests of its security which are connected with the production of or trade in arms, munitions and war material, may justify the restrictions, of freedom of establishment and freedom of movement for workers, established by legislation such as that at issue in the main proceedings.

33 In that regard, the derogation allowed under Article 346 TFEU must, in accordance with settled case-law concerning derogations from fundamental freedoms, be narrowly construed (see, to that effect, the judgments in *Commission v Finland*, C-284/05, EU:C:2009:778, paragraph 46, and *Insinööritoimisto InsTiimi*, C-615/10, EU:C:2012:324, paragraph 35).

34 Moreover, even though Article 346(1)(b) TFEU refers to measures that a Member State may consider necessary for the protection of the essential interests of its security, that provision cannot be construed as conferring on Member States a power to depart from the provisions of the Treaty simply in reliance on those interests (see, to that effect, the judgments in *Commission v Finland*, EU:C:2009:778, paragraph 47, and *Insinööritoimisto InsTiimi*, EU:C:2012:324, paragraph 35). The Member State which wishes to avail itself of the derogation allowed under Article 346(1)(b) TFEU must show that such derogation is necessary in order to protect its essential security interests (see, to that effect, the judgments in *Commission v Finland*, EU:C:2009:778, paragraph 49, and *Insinööritoimisto InsTiimi*, EU:C:2012:324, paragraph 45).

35 Although the activities for which Schiebel Aircraft applied for authorisation — namely, trading in military weapons and munitions and brokering the sale and purchase of such goods — may fall within the scope of the derogation allowed under Article 346(1)(b) TFEU, it is not apparent either from the order for reference or from the documents before the Court that the Republic of Austria, whose government has not submitted observations to the Court, has shown that the nationality condition imposed on that company is necessary for the protection of the essential interests of Austrian security, a matter that is ultimately for the referring court to verify.

36 However, in order to give the referring court a useful answer, the Court may, in a spirit of cooperation with national courts, provide that court with all the guidance that it deems necessary (to that effect, see, inter alia, the judgment in *AES-3C Maritza East 1*, C-124/12, EU:C:2013:488, paragraph 42).

37 In that regard, even assuming that it could be shown that the objectives referred to, inter alia, by the Czech and Swedish Governments and by the European Commission in their written observations — of ensuring the trustworthiness of persons authorised to trade in military weapons and munitions or to broker the sale and purchase of such goods, of ensuring security of supply as regards defence material and of preventing the disclosure of strategic information — constitute essential interests of the Republic of Austria's security, for the purposes of Article 346(1)(b) TFEU, the nationality

condition would still, in accordance with the principle of proportionality, not have to go beyond what is appropriate and necessary for achieving those objectives (see, to that effect, the judgments in *Johnston*, 222/84, EU:C:1986:206, paragraph 38, and *Albore*, C-423/98, EU:C:2000:401, paragraph 19).

- 38 However, as the Czech Government and the Commission point out, even if the nationality condition were suitable for achieving the objectives referred to in paragraph 37 above, such objectives can, in the circumstances, be achieved through the use of less restrictive measures, such as regular controls of the production of and trade in arms, or an obligation of confidentiality under administrative law, or even the imposition of penalties for the disclosure of strategic information, on the basis of criminal law.
- 39 In the light of all the foregoing considerations, the answer to the question referred is that Articles 45 TFEU and 49 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, under which, in the case of businesses wishing to trade in military weapons and munitions and broker the sale and purchase of such goods, members of their statutory representation bodies, or their managing partner, must hold the nationality of that Member State. It is for the national court, however, to verify whether the Member State which, in order to justify that legislation, relies on the derogation allowed under Article 346(1)(b) TFEU is able to show that such derogation is necessary in order to protect its essential security interests.

Costs

- 40 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:

Articles 45 TFEU and 49 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, under which, in the case of businesses wishing to trade in military weapons and munitions and broker the sale and purchase of such goods, members of their statutory representation bodies, or their managing partner, must hold the nationality of that Member State. It is for the national court, however, to verify whether the Member State which, in order to justify that legislation, relies on the derogation allowed under Article 346(1)(b) TFEU is able to show that such derogation is necessary in order to protect its essential security interests.

[Signatures]