Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

12 September 2019*

(References for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Posting of workers — Retention and translation of records of wages — Work permit — Penalties — Proportionality — Fines of a minimum predefined amount — Cumulative — No upper limit — Court costs — Custodial sentence in lieu of a fine)

In Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), made by decisions of 25 January 2018 (C-64/18), of 31 January 2018 (C-140/18) and of 16 February 2018 (C-146/18 and C-148/18), received at the Court on 1 February 2018 (C-64/18), 22 February 2018 (C-140/18) and 23 February 2018 (C-146/18 and C-148/18), in the proceedings

Zoran Maksimovic (C-64/18)

Humbert Jörg Köfler (C-140/18, C-146/18 and C-148/18)

Wolfgang Leitner (C-140/18 and C-148/18)

Joachim Schönbeck (C-140/18 and C-148/18)

Wolfgang Semper (C-140/18 and C-148/18)

v

Bezirkshauptmannschaft Murtal,

intervener:

Finanzpolizei

THE COURT (Sixth Chamber),

composed of C. Toader, President of the Chamber, L. Bay Larsen (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Bobek,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2019,

* Language of the case: German.

after considering the observations submitted on behalf of:

– Mr Maksimovic, by R. Grilc, R. Vouk, M. Škof, M. Ranc and S. Grilc, Rechtsanwälte,

– Mr Köfler, Mr Leitner, Mr Schönbeck and Mr Semper, by E. Oberhammer and P. Pardatscher, Rechtsanwälte,

– the Finanzpolizei, by B. Schlögl, acting as Agent,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš and by L. Dvořáková, acting as Agents,

– the Croatian Government, initially by T. Galli, and subsequently by M. Vidović, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Tornyai et G. Koós, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Slovenian Government, by A. Grum and J. Morela, acting as Agents,

– the European Commission, by M. Kellerbauer, L. Malferrari and H. Krämer, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 56 TFEU, Articles 47 and 49 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), and Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014, on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2014 L 159, p. 11).

2 The requests have been made in proceedings between Zoran Maksimovic, Humbert Jörg Köfler, Wolfgang Leitner, Joachim Schönbeck and Wolfgang Semper of the one part, and the Bezirkshauptmannschaft Murtal (district administrative authority, Murtal, Austria), of the other, concerning the fines imposed on them by that authority for various breaches of Austrian labour law.

Legal context

European Union law

Directive 2006/123/EC

3 Article 1(6) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) provides:

'This directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this directive does not affect the social security legislation of the Member States.'

Directive 2014/67

4 The first subparagraph of Article 23(1) of Directive 2014/67 provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 18 June 2016. They shall forthwith inform the Commission thereof.'

Austrian law

5 Paragraph 7d of the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract law, BGBl. 459/1993), in the version applicable to the dispute in the main proceedings ('the AVRAG'), provides:

'1. For the entire duration of the posting …, employers … shall keep the following documents available at the place of work (or the place of deployment), in German: employment contract or written record of rights and obligations arising from the contract …, pay slip, proof of payment of wages …, for the purposes of verification of the remuneration payable to the posted worker under law for the period of employment in accordance with the law …

2. In cases involving the cross-border hiring-out of labour, the obligation to keep wage records available shall fall to the domestic third-party employer. The hiring-out entity shall make that information available to the third-party employer, and shall retain evidence of having done so.

…'

6 Paragraph 7i(4) of the AVRAG reads as follows:

'Whosoever

1. in his capacity as an employer … does not keep available records of wages, in breach of Paragraph 7d, or

2. as a hiring-out entity in cases involving the cross-border hiring-out of labour, fails to supply documents relating to wages to the third-party employer, in a way that can be verified, in breach of Paragraph 7d(2), or

3. as a third-party employer, in cases involving the cross-border hiring-out of labour, fails to keep wage documents available, in breach of Paragraph 7d(2),

commits an administrative offence punishable by the district administrative authority by way of a fine in the amount, in respect of each worker, of EUR 1 000 to EUR 10 000 and, in the event of a repeat offence, of EUR 2 000 to EUR 20 000, and where more than three workers are affected, in the amount, in respect of each worker, of EUR 2 000 to EUR 20 000 and, in the event of a repeat offence, of EUR 4 000 to EUR 50 000.'

7 Paragraph 28(1) of the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals, BGB1. 218/1975), in the version applicable to the dispute in the main proceedings, ('the Aus1BG'), is worded as follows:

'Where the act does not fall within the jurisdiction of the courts as a punishable offence (Paragraph 28c), it shall be an administrative offence, which it is for the district administrative authority to sanction,

1. for any person,
   a) in breach of Paragraph 3, to employ a foreign national worker in respect of whom no work permit has been issued …

…

that offence shall be punishable, in the event of the unlawful employment of a maximum of three foreign nationals, by a fine of between EUR 1 000 and EUR 10 000 in respect of each foreign worker employed unlawfully and, in the event of the first and subsequent repeated offence, by a fine of between EUR 2 000 and EUR 20 000; in the event of the unlawful employment of more than three foreign nationals, by a fine of between EUR 2 000 and EUR 20 000 in respect of each foreign worker employed unlawfully and, in the event of the first and subsequent repeated offence, by a fine of between EUR 4 000 and EUR 50 000;

…'

8 Paragraph 52(1) and (2) of the Verwaltungsgerichtsverfahrensgesetz (Law on the rules of procedure for the administrative courts, BGB1. I, 33/2013), in the version applicable to the dispute in the main proceedings, is worded as follows:

'1. Every judgment delivered by an administrative court upholding an administrative penalty order shall include an order requiring the person penalised to pay a contribution to the costs.

2. That contribution, in appeal proceedings, shall be 20% of the penalty, but not less than EUR 10; if a custodial sentence is imposed, 1 day of detention shall be equal to EUR 100 for the purposes of calculating the costs …'

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

9 On 23 March 2014, an explosion at the factory of Zellstoff Pöls AG in Pöls (Austria) destroyed large parts of a liquor recovery boiler.

10 By contract of 11 July 2014, Zellstoff Pöls gave Andritz AG, established in Austria, the task of the repair and return to operation of the boiler plant.

11 On 27 August 2014, Andritz gave Bilfinger Duro Dakovic Montaza d.o.o. ('Bilfinger'), established in Croatia, the task of dismantling and mechanically assembling the boiler. Bilfinger posted workers to Austria to carry out that work, and the competent Austrian authorities issued posting certificates for those workers.

12 As Bilfinger was unable to meet the scheduled completion date for the works of 25 August 2015, Bilfinger and Andritz agreed that Brodmont d.o.o., established in Croatia, would take over and complete the work initially entrusted to Bilfinger. A contract to that effect was concluded on 11 September 2015.

13 Between 14 September 2015 and 30 October 2015, 217 workers were deployed to the site at issue in the main proceedings by Brodmont, which had taken on all the workers employed by Bilfinger on that site.

14 On 27 September, 13 October and 28 October 2015, when the Finanzpolizei (Finance Police, Austria) carried out inspections of that site, it was not possible to provide it with complete records of the wages of each of the 217 workers.

15 Based on the findings of the Finance Police during those inspections, the Murtal district administrative authority imposed administrative penalties on the applicants in the main proceedings. That authority took the view that the case did not involve posted workers, but a hiring-out of cross-border labour by Brodmont to Andritz. However, it is apparent from the orders for reference that those undertakings have not been accused of failing in their obligations as regards payment of the minimum pay rates.

16 By decision of 19 April 2017, the Murtal district administrative authority ordered Mr Maksimovic, the managing director of Brodmont, to pay a fine in the total amount of EUR 3 255 000. That authority found that Brodmont had failed in its obligation, as the hiring-out entity of the 217 workers, to provide Andritz, the third-party employer, with the wage records in respect of those workers, as provided for in Article 7d of the AVRAG.

17 By decisions of 25 April and 5 May 2017, that authority also imposed fines of EUR 2 604 000 and EUR 2 400 000, respectively, on all four members of the board of Andritz, namely Mr Köfler, Mr Leitner, Mr Schönbeck and Mr Semper, for failure to fulfil certain obligations incumbent on that company under Article 7d of the AVRAG and Article 28(1) point 1(a) of the Aus1BG, read in conjunction with Article 3(1) of the Aus1BG, to keep records of wages as a third-party employer of those workers and to obtain administrative permits in respect of 200 Croatian, Serbian or Bosnian workers. The referring court states that, if unpaid, those fines will be substituted by custodial sentences of 1 736 days and 1 600 days, respectively.

18 The persons subject to those penalties appealed against those decisions before the referring court.

19 That court expresses doubts, first and foremost, as to whether penalties provided for by legislation, such as that at issue in the present proceedings, which, although it allows the courts discretion in determining the penalty, significantly narrows that discretion in consideration of the cumulative nature of the fine, the circumstances influencing the amount of the fine and the high amount of the minimum fine, with the result that, even where the fine imposed is of the lowest possible amount, its total amount remains very high, satisfy the principle of proportionality under EU law.

20 Next, the referring court asks whether the possibility of a custodial sentence of several years being imposed if the fine remains unpaid, as a penalty for an administrative offence committed by negligence, is compatible with the principle of proportionality.

21 Finally, that court states that if the appeal is dismissed, under Article 52(2) of the Verwaltungsgerichtsverfahrensgesetz (Law on the rules of procedure for the administrative courts), in the version applicable to the dispute in the main proceedings, the applicants would be required to pay a contribution to the court costs of an amount equivalent to 20% of the fine.

22 In those circumstances, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

In Case C-64/18:

'(1) Must Article 56 TFEU, [Directive 96/71] and [Directive 2014/67] be interpreted as precluding a national provision which, for infringements of formal obligations in connection with the cross-border deployment of labour, such as the failure by the hiring-out entity to make wage records available to the third-party employer, provides for heavy fines, in particular high minimum penalties, which are imposed cumulatively in respect of each worker concerned?

(2) If the first question itself is not answered in the affirmative:

Must Article 56 TFEU, [Directive 96/71] and [Directive 2014/67] be interpreted as precluding the imposition of cumulative fines in the case of infringements of formal requirements in connection with the cross-border deployment of labour which have no absolute upper limits?'

In Case C-140/18:

'(1) Must Article 56 TFEU, [Directive 96/71] and [Directive 2014/67] be interpreted as precluding a national provision which, for infringements of formal obligations in connection with the cross-border deployment of labour, such as the failure by the hiring-out entity to provide wage records to the third-party employer, provides for heavy fines, in particular high minimum penalties, which are imposed cumulatively in respect of each worker concerned?

(2) If the first question itself is not answered in the affirmative:

Must Article 56 TFEU, [Directive 96/71] and [Directive 2014/67] be interpreted as precluding the imposition of cumulative fines for infringements of formal obligations in connection with the cross-border deployment of labour which have no absolute upper limits?

(3) If the answer to the first question or the second question is not in the affirmative:

Must Article 49(3) of the [Charter] be interpreted as precluding a national provision which provides for heavy fines with no upper limit and, in the event of non-payment, several years' imprisonment for offences committed as a result of negligence?'

In Case C-146/18:

'Must Articles 47 and 49 of the [Charter] be interpreted as precluding a national provision which provides for a mandatory contribution to the procedural costs of appeal proceedings of 20% of the fine imposed?'

In Case C-148/18:

'Must Article 49(3) of the [Charter] be interpreted as precluding a national provision which provides for heavy fines with no upper limit, in particular for high minimum penalties and, in the event of non-payment several years' imprisonment for offences committed as a result of negligence?'

23 By decisions of the President of the Court, cases C-64/18, C-140/18, C-146/18 and C-148/18 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

24 By its questions, which should be examined together, the referring court asks, in essence, whether Article 56 TFEU, Articles 47 and 49 of the Charter, Directive 96/71, and Directive 2014/67 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, in respect of non-compliance with labour law obligations in relation to obtaining administrative permits and keeping records on wages, for fines to be imposed:

– which may not be lower than a predefined minimum amount;

– which apply cumulatively in respect of each worker concerned and without an upper limit;

– to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed, and

– which are replaced by custodial sentences in the event of non-payment.

Preliminary observations

25 It should be noted from the outset that the information provided by the referring court states that the national legislation at issue in the main proceedings does not directly determine the working and employment conditions applicable under Austrian law, but rather is intended to ensure that the competent Austrian authorities can carry out effective monitoring in order to ensure compliance with those conditions.

26 The Court has already held that such monitoring measures do not fall within the scope of Directive 96/71, since that directive seeks to coordinate the substantive national rules on the terms and conditions of employment of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored (judgment of 3 December 2014, *De Clercq and Others*, C-315/13, EU:C:2014:2408, paragraph 47).

27 It is also apparent from the orders for reference that the facts at issue in the main proceedings took place in September and October 2015. It follows that Directive 2014/67, the period for transposition of which expired, under Article 23 thereof on 18 June 2016 and which was transposed into Austrian law by a law adopted in June 2016 that entered into force on 1 January 2017, does not apply to those facts (see, by analogy, judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 27).

28 Finally, while some of the parties who have submitted observations before the Court have argued that it should answer the questions for a preliminary ruling on the basis of Directive 2006/123, it must be pointed out that, in accordance with Article 1(6) thereof, that directive is not applicable where deterrent measures are established for the purpose of ensuring compliance with substantive labour law (see, to that effect, judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraphs 29 to 35).

29 In the light of the foregoing, it must be concluded that Directives 96/71, 2014/67 and 2006/123 are not relevant for the answer to the questions referred by the national court for a preliminary ruling.

The restriction on freedom to provide services

30 It must be recalled that, in accordance with the settled case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions on that freedom. Moreover, Article 56 TFEU confers rights not only on the provider of services himself but also on the recipient of those services (judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraphs 37 and 38 and the case-law cited).

31 The Court has further held that national law which provides for an obligation to draw up and keep social and labour documents on posted workers in the host Member State might give rise to additional expenses and administrative and economic burdens for undertakings established in another Member State and therefore constitutes a restriction on the freedom to provide services (see, to that effect, judgments of 23 November 1999, *Arblade and Others*, C-369/96 and C-376/96, EU:C:1999:575, paragraphs 58 and 59; of 18 July 2007, *Commission* v *Germany*, C-490/04, EU:C:2007:430, paragraphs 66 to 69; and of 7 October 2010, *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589, paragraphs 42 to 44).

32 As regards the posting of third-country workers by a service provider established in a Member State of the European Union, the Court has held that national law which makes the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative permit constitutes a restriction on the freedom to provide services within the meaning of Article 56 TFEU (judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 44 and the case-law cited).

33 Therefore, it is clear that national legislation imposing penalties on both a service provider and the recipient of those services for non-compliance with such obligations which, as such, constitute restrictions on the freedom to provide services, is likely to render the exercise of that freedom less attractive.

34 Accordingly, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services.

Justification of the restriction on freedom to provide services

35 According to the well-established case-law of the Court, national measures which are liable to restrict or to render less attractive the exercise of the fundamental freedoms guaranteed by the FEU Treaty may nonetheless be permitted where they serve overriding reasons in the public interest, are appropriate for attaining their objective, and do not go beyond what is necessary to attain that objective (judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 42 and the case-law cited).

36 In the present case, the Austrian Government argues that the restriction on the freedom to provide services at issue in the main proceedings is justified by the objectives of social protection of workers and of combating fraud, particularly social security fraud, and preventing abuse.

37 On that point, it must be observed that social protection of workers and combating fraud, particularly social security fraud, and preventing abuse are objectives that are among the overriding reasons in the public interest capable of justifying a restriction on freedom to provide services (judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 44).

38 In that context, legislation such as that at issue in the main proceedings, which provides for penalties in the event of infringement of labour law obligations intended to achieve those objectives, may be regarded as appropriate for the purpose of ensuring compliance with those obligations and, accordingly, achieving the objectives pursued.

39 In that regard, as to the necessity of a restriction on the freedom to provide services such as that at issue in the main proceedings, it must be borne in mind that the severity of the penalty must be commensurate with the seriousness of the offence. In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation (see, by analogy, judgment of 31 May 2018, *Zheng*, C-190/17, EU:C:2018:357, paragraphs 41 and 42 and the case-law cited).

40 In that context, in the first place, it should be noted that the object of legislation such as that at issue in the main proceedings is to penalise non-compliance with labour law requirements as regards obtaining administrative permits and keeping wage records.

41 In the second place, it must be acknowledged that legislation providing for penalties of which the amount varies depending on the number of workers affected by non-compliance with certain labour law obligations does not, in itself, appear to be disproportionate (see, by analogy, judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 26).

42 However, the combination of the high amount of the fines for failure to comply with those obligations and the unlimited cumulation of those fines where the offence concerns a number of workers may give rise to heavy fines that can amount to several million euro, as in the present case.

43 Furthermore, the fact that those fines cannot, in any case, fall below a predefined amount might lead to their being imposed where it has not been established that the offence at issue is particularly serious.

44 In the third place, the referring court specifies that under the national legislation at issue in the main proceedings, if the appeal against the decision imposing that fine on the person in question is dismissed, that person will have to pay an amount equivalent to 20% of that fine by way of contribution to the court costs.

45 In the fourth place, it is apparent from the orders for reference that the legislation at issue in the main proceedings provides for a custodial sentence in the event of failure to pay the fine, which is particularly onerous considering the implications for the person concerned (see, to that effect, judgments of 3 July 1980, *Pieck*, 157/79, EU:C:1980:179, paragraph 19; of 29 February 1996, *Skanavi and Chryssanthakopoulos*, C-193/94, EU:C:1996:70, paragraph 36, and of 26 October 2017, *I*, C-195/16, EU:C:2017:815, paragraph 77).

46 In the light of the foregoing, legislation such as that at issue in the main proceedings does not appear to be proportionate to the seriousness of the infringements penalised, namely failure to comply with labour law obligations on obtaining administrative permits and keeping records on wages.

47 Furthermore, effective implementation of the obligations, non-compliance with which carries penalties under such legislation, could be achieved through less restrictive measures such as a lower fine or the introduction of an upper limit on such fines, and without necessarily imposing a custodial sentence as an alternative penalty.

48 Accordingly, it must be found that legislation such as that at issue in the main proceedings goes beyond what is necessary in order to ensure compliance with labour law obligations in relation to obtaining administrative permits and keeping records on wages and to attain the objectives pursued.

49 Having regard to those considerations, there is no need to examine whether such legislation is compatible with Articles 47 and 49 of the Charter.

50 In the light of all the foregoing considerations, the answer to the questions is that Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, in respect of non-compliance with labour law obligations in relation to obtaining administrative permits and keeping records on wages, for fines to be imposed:

– which may not be lower than a predefined minimum amount;

– which apply cumulatively in respect of each worker concerned and without an upper limit;

– to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed, and

– which are replaced by custodial sentences in the event of non-payment.

Costs

51 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 (Sixth Chamber) hereby rules:

Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, in respect of non-compliance with labour law obligations in relation to obtaining administrative permits and keeping records on wages, for fines to be imposed:

– **which may not be lower than a predefined minimum amount;**

– **which apply cumulatively in respect of each worker concerned and without an upper limit;**

– **to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed, and**

– **which are replaced by custodial sentences in the event of non-payment.**

[Signatures]