JUDGMENT OF THE COURT (Fifth Chamber)

24 January 2002 *

In Case C-164/99,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Tauberbischofsheim (Germany) for a preliminary ruling in the infringement proceedings brought before that court against

Portugaia Construções L^da^,

on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) and of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward (Rapporteur) and A. La Pergola, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Portugaia Construções L[da], by B. Buchberger, Rechtsanwalt,

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the French Government, by K. Rispal-Bellanger and C. Bergeot, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Portuguese Government, by L. Fernandes and S. Emídio de Almeida, acting as Agents,

— the Commission of the European Communities, by P. Hillenkamp and M. Patakia, acting as Agents, assisted by R. Karpenstein, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Portugaia Construções L[da], of the German Government and of the Commission at the hearing on 15 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

Judgment

1 By order of 13 April 1999, received at the Court on 4 May 1999, the Amtsgericht (District Court) Tauberbischofsheim (Germany) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) and of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The questions have been raised in proceedings between the Tauberbischofsheim Employment Office and Portugaia Construções L[da] (hereinafter 'Portugaia'), which lodged an objection against a notice which it received for recovery of a sum of DEM 138 018.52.

Law applicable

3 The Arbeitnehmer-Entsendegesetz (Law on the Posting of Employees, hereinafter 'the AEntG'), in the version of 26 February 1996 applicable to the instant case, applies to the construction industry.

4 The first sentence of Paragraph 1(1) of the AEntG extends the applicability of certain collective agreements having binding general application to employers having their seat abroad and to their workers posted to Germany. That provision is worded as follows:

'The legal provisions laid down in a collective agreement in the construction industry declared to be of binding general application within the meaning of Paragraphs 1 and 2 of the Baubetriebe-Verordnung (Regulation on the Building Industry) ..., shall also apply in so far as the undertaking is principally engaged in providing building services within the meaning of Paragraph 75(1), point 2, of the Arbeitsförderungsgesetz (Law on the Promotion of Employment) ... and German law is not in any event determinative for the employment relationship, to an employment relationship binding an employer established abroad and his employee working within the territorial scope of that collective agreement, where and to the extent to which

(1) the collective agreement lays down a single minimum wage for all workers within its scope of application and

(2) domestic employers established outside the territorial scope of application of that collective agreement must also guarantee their employees working

within the territorial scope of application of the collective agreement at the very least the collectively agreed work terms in force at the place of work.'

5 According to the third and fourth sentences of Paragraph 1(1) of the AEntG, an employer, within the meaning of the first sentence, is required to guarantee his posted workers the work terms provided for in the first sentence of that paragraph.

6 Under Paragraph 5 of the AEntG, a breach of the binding provisions of Paragraph 1 of that Law is punishable as an offence. Under Paragraph 29 of the Gesetz über Ordnungswidrigkeiten (Law on Regulatory Offences), the court may order recovery of any pecuniary advantages obtained through punishable conduct.

7 On 2 September 1996, the social partners in the German construction industry concluded, with effect from 1 October 1996 but at the earliest from the date of entry into force of its general applicability, a collective agreement laying down a minimum wage in the construction sector in the Federal Republic of Germany (hereinafter 'the collective agreement').

8 The collective agreement was declared generally applicable on 12 November 1996, but its applicability did not take effect until 1 January 1997.

9 The national court also points out that, under German law governing collective agreements, the social partners may conclude collective agreements at various levels, at the federal level as well as at the level of an undertaking. In this regard,

collective agreements specific to an undertaking in principle take precedence over general collective agreements.

The main proceedings and the questions referred for a preliminary ruling

10 Portugaia is a company established in Portugal. Between March and July 1997, it carried out structural building work in Tauberbischofsheim. In order to carry out that work, it posted a number of its workers to that building site.

11 In March and May 1997, the Arbeitsamt (Employment Office) in Tauberbischofsheim carried out an investigation into the employment conditions on that building site. On the basis of the documentation submitted by Portugaia, it concluded that Portugaia was paying the workers who had been the object of the inspection a wage lower than the minimum wage payable under the collective agreement. It accordingly ordered payment of the sum outstanding, that is to say the difference between the hourly wage payable and that actually paid, multiplied by the total number of hours worked, making a total sum of DEM 138 018.52.

12 The national court before which Portugaia lodged an objection against the recovery notice for payment of that sum has doubts about the compatibility of the German legislation with Articles 59 and 60 of the Treaty. It points out that, according to the stated grounds of the AEntG, its objective is to protect the national labour market — in particular against 'social dumping' resulting from an influx of low-wage labour —, to reduce national unemployment and to enable German undertakings to adapt to the internal market. Unlike German employers, employers from other Member States do not have the possibility of concluding more specific collective agreements with a German trade union in order to avoid application of collective agreements.

13 Taking the view that the case depended on an interpretation of the relevant Community rules, the Amtsgericht Tauberbischofsheim decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is an interpretation of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ... or, if that directive is not applicable, an interpretation of Article 59 et seq. of the EC Treaty, under which overriding requirements of public interest capable of justifying a restriction on the freedom to provide services in cases involving the posting of employees can lie not only in the social protection of the employees posted but also in the protection of the national construction industry and the reduction in national unemployment for the purpose of preventing social tension, consistent with Community law?

2. Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a domestic employer can pay less than the minimum wage laid down in a collective agreement declared to be generally binding by concluding a collective agreement specific to one undertaking (and enjoying precedence), whereas this is — at least in fact — not possible for any non-German EC employer when he plans to post workers to the Federal Republic of Germany?'

The first question

14 As the Netherlands Government rightly points out, the first question does not have to be considered with reference to Directive 96/71 since the time-limit for transposition of that directive, fixed for 16 December 1999, had not expired at the time of the events in question.

15 It follows that the legislation in question in the main proceedings must be examined in the light of Articles 59 and 60 of the Treaty alone.

16 It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; and Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 22).

17 In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services (see *Säger*, paragraph 13).

18 In that regard, the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens (*Mazzoleni and ISA*, paragraph 24).

19 However, it clear from settled case-law that, where such domestic legislation is applicable to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 25, and *Mazzoleni and ISA*, cited above, paragraph 25).

20 Overriding reasons relating to the public interest which have been recognised by the Court include the protection of workers (see, in particular, *Webb*, paragraph 19, *Arblade and Others*, paragraph 36, and *Mazzoleni and ISA*, paragraph 27).

21 As regards, more specifically, national provisions relating to minimum wages, such as those at issue in the main proceedings, it is clear from the case-law of the Court that in principle Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; *Guiot*, paragraph 12; *Arblade and Others*, paragraph 33; and *Mazzoleni and ISA*, paragraphs 28 and 29).

22 In other words, it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees.

23 However, there may be circumstances in which the application of such rules would not be in conformity with Articles 59 and 60 of the Treaty (see, to this effect, *Mazzoleni and ISA*, paragraph 30).

24 It is therefore for the national authorities or, as the case may be, the courts of the host Member State, before applying the minimum-wage legislation to service providers established in another Member State, to determine whether that legislation does indeed pursue an objective of public interest and by appropriate means.

25 In the present case, the national court points out that, according to the stated grounds of the AEntG, the purpose of that Law is to protect the domestic construction industry and to reduce unemployment in order to avoid social tensions.

26 However, according to settled case-law, measures forming a restriction on the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses (see, most recently, the judgment of 25 October 2001 in 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 39).

27 Whilst the intention of the legislature, as apparent from the statement of the grounds on which a Law was adopted, may be an indication of the aim of that Law, that declared intention is not conclusive (see *Finalarte and Others*, paragraph 40).

28 It is, however, for the national court to determine whether, viewed objectively, the rules in question in the main proceedings promote the protection of posted workers (*Finalarte and Others*, paragraph 41).

29 As the Court has already held, it is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures which it has adopted (*Finalarte and Others*, paragraph 42).

30 It follows from the foregoing considerations that the answer to be given to the first question must be that, in assessing whether the application by the host Member State to service providers established in another Member State of domestic legislation laying down a minimum wage is compatible with Articles 59 and 60 of the Treaty, it is for the national authorities or, as the case may be, the national courts to determine whether, considered objectively, that legislation provides for the protection of posted workers. In that regard, although the declared intention of the legislature cannot be conclusive, it may nevertheless constitute an indication as to the objective pursued by the legislation.

The second question

31 By its second question, the national court asks essentially whether the fact that a domestic employer may, in concluding a collective agreement specific to one undertaking, pay wages lower than the minimum wage laid down by a collective

agreement declared to be generally binding, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.

32 The German Government submits that this question is inadmissible on the ground that it is purely hypothetical and that the answer is clearly irrelevant to the determination of the case. In particular, the German Government points out that, as far as it is aware, in the economic sectors in which foreign employees must respect collective agreements relating to minimum wages, there is no collective agreement specific to one undertaking providing that the German employers concerned may apply terms of employment less favourable for workers than those to be observed under the AEntG.

33 That submission cannot be upheld. It is sufficient to recall that according to settled case-law it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular aspects of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Dismissal of a request from a national court is possible only where it is clear that the interpretation of Community law requested by that court has no bearing on the real situation or on the subject-matter of the case (see Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17). However, that is not the case here.

34 As regards the substance of the matter, the fact that, unlike an employer from the host Member State, an employer established in another Member State has no possibility of avoiding the obligation to pay the minimum wage laid down by the collective agreement governing the economic sector concerned creates unequal treatment contrary to Article 59 of the Treaty. It must be emphasised in this regard that no ground of justification provided for by the Treaty has been invoked.

35 The reply to be given to the second question must therefore be that the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.

Costs

36 The costs incurred by the German, French, Dutch and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Amtsgericht Tauberbischofsheim by order of 13 April 1999, hereby rules:

1. In assessing whether the application by the host Member State to service providers established in another Member State of domestic legislation laying

down a minimum wage is compatible with Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC), it is for the national authorities or, as the case may be, the national courts to determine whether, considered objectively, that legislation provides for the protection of posted workers. In that regard, although the declared intention of the legislature cannot be conclusive, it may nevertheless constitute an indication as to the objective pursued by the legislation.

2. The fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.

Jann Edward La Pergola

Delivered in open court in Luxembourg on 24 January 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber