



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 December 2012*

(Freedom of movement for workers — Article 45 TFEU — Subsidy for the recruitment of older unemployed persons and the long-term unemployed — Condition of registration with a placement office of the national employment administration — Residence condition — Restriction — Justification)

In Case C-379/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour administrative (Luxembourg), made by decision of 14 July 2011, received at the Court on 18 July 2011, in the proceedings

Caves Krier Frères Sàrl

v

Directeur de l'Administration de l'emploi,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, U. Lõhmus, A. Ó Caoimh (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2012,

after considering the observations submitted on behalf of:

- Caves Krier Frères Sàrl, by M. Mailliet, avocat,
- the Luxembourg Government, by C. Schiltz, acting as Agent, and by G. Pierret and S. Coï, avocats,
- the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,
- the European Commission, by G. Rozet, acting as Agent,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 27 September 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 21 TFEU and 45 TFEU.
- 2 The reference has been made in proceedings between Caves Krier Frères Sàrl ('Caves Krier') and the Administration de l'emploi (the Employment Office) ('ADEM') concerning the refusal to grant a subsidy for the recruitment of older unemployed or long-term unemployed persons.

Luxembourg legal context

- 3 Article L. 541-1 of the Code du travail ('Labour Code') provides as follows:

'When an employer in the private sector recruits an unemployed worker, the employment fund shall reimburse both the employer's and the employee's share of social security contributions to the employer, regardless of whether the worker had previously been receiving unemployment benefit but on condition that he is over [45] years of age and had been registered as a job seeker with a placement office of [ADEM] for at least one month.

Job seekers aged from [40] to [44] must have been registered as job seekers with a placement office of [ADEM] for at least three months and those aged from [30] to [39] for at least twelve months.

The condition of registration with a placement office of [ADEM] does not apply to job seekers aged [40] and over and who are affected by an employment maintenance plan as defined in Article L. 513-3, recognised by the Minister having responsibility for employment.'

- 4 Article L. 622-6 (1) of that Labour Code states that all unemployed persons seeking work are obliged to register as job seekers with ADEM.

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

- 5 Ms Schmidt-Krier, a Luxembourg national born on 30 July 1955, lives with her husband in Germany, close to the border with Luxembourg. She has spent her entire working life in Luxembourg.
- 6 On 1 May 2008, Ms Schmidt-Krier, who was then 52 years old, was recruited by Caves Krier, a company whose registered office is in Remich (Luxembourg), on a permanent employment contract.
- 7 On 2 September 2008, following her recruitment, Caves Krier submitted to ADEM an application for a subsidy in respect of the recruitment of older unemployed and long-term unemployed persons pursuant to the first paragraph of Article L. 541-1 of the Labour Code.
- 8 By decision of 4 September 2008, ADEM rejected that application on the ground that Ms Schmidt-Krier did not fulfil the condition of having been registered as a job seeker with ADEM for at least one month, as provided for by that provision ('the contested decision').

- 9 On 11 January 2010, Caves Krier brought an action before the Tribunal administratif (Administrative Court of First Instance) seeking annulment of that decision, in which it pointed out that Ms Schmidt-Krier was registered as a job seeker in Germany and that she had worked in Luxembourg for her entire life, having registered as unemployed in Germany solely because she and her spouse had transferred their domicile there, while continuing to work in Luxembourg.
- 10 Caves Krier based its action on a single plea, alleging a breach of the principle of equality before the law as enshrined in the Constitution of the Grand-Duchy of Luxembourg, inasmuch as the applicable legislation, and therefore the contested decision, operated, for purposes of the grant of the subsidy in question, a difference in treatment between a Luxembourg national residing in Luxembourg and a Luxembourg national residing outside Luxembourg, where both have worked in Luxembourg, without that difference in treatment being justified on objective grounds.
- 11 By judgment of 14 July 2010, the Tribunal administratif dismissed that action on the ground that, at the time of her recruitment, Ms Schmidt-Krier did not fulfil the condition of registration with ADEM. As regards the breach of the constitutional principle of equal treatment, that court held that the situation of an unemployed person who is resident in Luxembourg and is, accordingly, entitled to register as unemployed with ADEM is not comparable to that of an unemployed person who, not being resident in Luxembourg, cannot register with ADEM, but who must, on the contrary, register with the employment office of his Member State of residence.
- 12 On 12 August 2010, Caves Krier appealed against that judgment to the Cour administrative (Higher Administrative Court), pleading the unconstitutionality of the first paragraph of Article L. 541-1 of the Labour Code.
- 13 The Cour constitutionnelle (Constitutional Court), before which the matter was brought, concluded, by its judgment number 64/11 of 4 May 2011 (*Mémorial* A 2011, p. 1572), that that provision was consistent with the Luxembourg Constitution.
- 14 In its order for reference, the Cour administrative expresses the view, however, that the case raises a question of European Union law. It states that it is common ground that only residents may register with ADEM. Therefore, given that the recruitment subsidy provided for by the first paragraph of Article L. 541-1 of the Labour Code is conditional on such registration, that subsidy is, as a matter of fact, reserved for employers who recruit resident unemployed persons. This provision could therefore constitute an obstacle to the free movement of citizens of the European Union as provided for by Articles 21 TFEU and 45 TFEU, the potential employer of an unemployed person aged over 45 years being led to prefer the recruitment of a Luxembourg resident since the recruitment of such a person alone will enable the employer to benefit from the subsidy in question.
- 15 The referring court notes that the Luxembourg State, not being represented in the proceedings before it, did not have an opportunity to state whether the residence restriction was based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective pursued by the national provision at issue. That court takes the view that it is not in a position to provide those justifications of its own motion.
- 16 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the first paragraph of Article L. 541-1 of the Luxembourg Labour Code compatible with EU law, and more particularly with Articles 21 [TFEU] and 45 [TFEU], in so far as it subjects the right of private-sector employers to reimbursement of both the employer’s and the employee’s share of social security contributions upon the recruitment of unemployed persons aged over 45 years, regardless of whether they were receiving unemployment benefit, to the condition that the unemployed persons

must have been registered as job seekers with a placement office of [ADEM] for at least one month, while employers who recruit unemployed persons registered as job seekers with equivalent foreign bodies do not benefit from that measure?’

Consideration of the question referred

Admissibility

- 17 In the first place, the Austrian Government contends that the request for a preliminary ruling is inadmissible on the ground that the referring court has not set out precisely the relevant facts of the case and the applicable national provisions. Even though it does not appear from the actual wording of the first paragraph of Article L. 541-1 of the Labour Code and from the text of the question that the grant to the employer of the recruitment subsidy in issue is limited to persons resident in Luxembourg, the decision making the reference appears to presuppose such a limitation. Therefore, it is contended, it is not clear whether what must be examined in the present case is the compatibility with European Union law of a residence condition or, simply, of the compulsory registration with ADEM.
- 18 That objection cannot be accepted. Indeed, as is apparent from paragraph 14 of the present judgment, the referring court has set out with all requisite clarity, in its decision to make a reference to the Court for a preliminary ruling, the relevant facts of the dispute in the main proceedings and has identified with precision the national provision applicable to that dispute, namely, the first paragraph of Article L. 541-1 of the Labour Code. That court, furthermore, has set out its interpretation of the applicable national legislation, noting that it is common ground that only persons resident within the national territory may register as job seekers with ADEM. The Court therefore has before it all the information necessary to provide the referring court with a useful answer in order to enable it to resolve the dispute in the main proceedings.
- 19 In the second place, the Czech Government enquires whether the question raised by the referring court is not hypothetical in so far as, notwithstanding what is laid down in the first paragraph of Article L. 541-1 of the Labour Code, Ms Schmidt-Krier was recruited by Caves Krier.
- 20 While it is true that the refusal to grant Caves Krier the recruitment subsidy provided for by the first paragraph of Article L. 541-1 of the Labour Code did not prevent that company from hiring Ms Schmidt-Krier, the fact is that, as the Czech Government itself acknowledges in its written observations, such a refusal nevertheless had the effect of making the terms of that recruitment less favourable than the recruitment of a job seeker aged over 45 years and registered with ADEM, a fact which, according to Caves Krier, constitutes an obstacle to the free movement of workers provided for by European Union law, and, consequently, has given rise to a dispute between that company and ADEM. In those circumstances, the question raised by the referring court cannot be considered to be hypothetical.
- 21 Finally, and in the third place, the Czech Government raises the point that the question referred may also be inadmissible in so far as it appears to follow from the order for reference that Ms Schmidt-Krier was registered as a job seeker in Germany, whilst at the same time working in Luxembourg.
- 22 However, as the referring court has found that the first paragraph of Article L. 541-1 of the Labour Code was applicable to the dispute in the main proceedings, which presupposes that Ms Schmidt-Krier was unemployed at the time of her recruitment, the Court, which, in the context of a reference for a preliminary ruling, does not have the task of assessing the facts, cannot call that premiss into question.

23 Therefore, the present request for a preliminary ruling must be regarded as admissible.

Substance

- 24 By its question, the referring court asks, in essence, whether Articles 21 TFEU and 45 TFEU must be interpreted as precluding legislation of a Member State which makes the grant to employers of a subsidy for the recruitment of unemployed persons aged over 45 years subject to the condition that the unemployed person recruited has been registered as a job seeker in that same Member State, where such registration is subject to a condition of residence in the national territory.
- 25 According to settled case-law, any national of a Member State who, irrespective of his place of residence and of his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of Article 45 TFEU (see, *inter alia*, Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31, and Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17).
- 26 Furthermore, according to the case-law of the Court, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a ‘worker’. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (see Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32 and the case-law cited).
- 27 It follows that the situation of a frontier worker such as Ms Schmidt-Krier, who, after having lost her job in a Member State other than that of her actual residence, finds work in that other Member State under a permanent contract, comes within the scope of Article 45 TFEU.
- 28 While it is established that the rights to freedom of movement laid down under that article benefit workers, including those seeking employment, there is nothing in the wording of that article to indicate that those rights may not be relied upon by others. In order to be truly effective, the right of workers to be engaged and employed 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 (see Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraphs 19 and 20, and Case C-208/05 *ITC Innovative Technology Center* [2007] ECR I-181, paragraphs 22 and 23).
- 29 In those circumstances, an employer such as Caves Krier may rely on the rights directly conferred on workers by Article 45 TFEU.
- 30 To the extent that the case in the main proceedings falls within the scope of that provision, it is not necessary to rule on the interpretation of Article 21 TFEU. The latter provision, which sets out generally the right of every citizen of the European Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU in relation to freedom of movement for workers (see, *inter alia*, *ITC*, paragraphs 64 and 65; Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraphs 61 and 62; and Case C-367/11 *Prete* [2012] ECR, paragraph 20).
- 31 As regards the question whether national legislation such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 45 TFEU, it must be pointed out that all of the provisions of the FEU Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place nationals of the Member States at a

disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, *inter alia*, *ITC*, paragraph 31, and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 33).

- 32 However, the Luxembourg Government contends that the national legislation at issue in the main proceedings does not undermine the free movement of workers since it does not prescribe any condition of residence. The question referred is in that regard, it argues, based on a misinterpretation of the national legislation by the referring court. Any non-resident unemployed person may, it submits, register with ADEM. Accordingly, Article L. 622-6 (1) of the Labour Code provides clearly that all unemployed persons seeking work are obliged to register as job seekers with ADEM. Whilst, admittedly, an employee of Luxembourg nationality who lives in Germany must register with the German employment administration in order to receive any potential unemployment benefits, there is no Luxembourg legislation which would prevent such an employee from registering with ADEM in order to be kept informed about vacant posts in Luxembourg and to enable the recruiting employer to enjoy the rights which arise from the first paragraph of Article L. 541-1 of the Labour Code.
- 33 The Luxembourg Government therefore takes the view that neither that provision nor Article L. 622-6 (1) of the Labour Code is discriminatory under European Union law, since, in order for an employer to be able to request the subsidy in issue, no criterion of nationality or of residence concerning the job seeker is imposed. Indeed, the first paragraph of Article L. 541-1 of that Code states clearly that the social security contributions for recruited unemployed persons are to be reimbursed to the employer, regardless of whether the person had previously been receiving unemployment benefit. In the contested decision in the main proceedings, ADEM thus confined itself to finding that Ms Schmidt-Krier did not meet the condition of registration with that office. By contrast, it did not in any way take a decision to refuse registration based on discriminatory grounds under European Union law.
- 34 It follows, according to the Luxembourg Government, that workers residing in the territory of Luxembourg, in the same way as nationals of other Member States working in Luxembourg or Luxembourg nationals working in Luxembourg and residing in another Member State, are subject to the same requirements. No difference in treatment therefore exists between them since they may all register with ADEM.
- 35 In that context, it should be observed that it is settled case-law that the Court does not have jurisdiction to interpret the internal law of a Member State (see, *inter alia*, Joined Cases C-128/10 and C-129/10 *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia* [2011] ECR I-1885, paragraph 40).
- 36 Thus, it is not for the Court, in the context of a reference for a preliminary ruling under Article 267 TFEU, to give a ruling on the interpretation of provisions of national law and to decide whether the interpretation given by the referring court of those provisions is correct (Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 48 and the case-law cited).
- 37 Rather, under the division of jurisdiction between the European Union Courts and the national courts, the Court of Justice must take account of the factual and legislative context in which the questions put to it are set, as described in the order for reference (Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 38 and the case-law cited).
- 38 Therefore, irrespective of the criticism expressed by the Luxembourg Government in regard to the interpretation of national law adopted by the referring court, the present reference for a preliminary ruling must be examined in the light of that court's interpretation of that law (see, by analogy, *Pontin*, paragraph 38).

- 39 As is already apparent from paragraph 18 of the present judgment, even though it is not disputed in the present case that the national legislation in issue in the main proceedings does not provide explicitly that registration with ADEM is conditional on residence in Luxembourg, the referring court noted, in its decision to make a reference to the Court for a preliminary ruling, that it is common ground that only residents may register with ADEM.
- 40 Furthermore, it is clear from the documents submitted to the Court that this interpretation was also accepted, in the context of the main proceedings, by the Tribunal administratif in its decision of 14 July 2010 and also by the Cour constitutionnelle in its judgment No 64/11 of 4 May 2011.
- 41 Moreover, the documents provided by Caves Krier in response to a written question from the Court show that, whilst the internet site directed at job seekers in Luxembourg states briefly that frontier workers who so wish may register with ADEM, this statement is inconsistent with other passages on the same site as well as with several other documents which make clear, on the contrary, that, in order to register with ADEM, a job seeker must be resident in that Member State. Furthermore, while it appears from the preparatory documents relating to the reform of ADEM, also provided by Caves Krier, that, with effect from 2012, frontier workers who lose their jobs in Luxembourg have access to all of the services of ADEM, the fact is that that reform, which was not in force at the time of the facts of the dispute in the main proceedings, strongly suggests that such access was not possible prior to 2012.
- 42 In consequence, for the purposes of examining the question referred for a preliminary ruling, it is appropriate to assume that the national legislation in issue in the main proceedings makes registration with ADEM, and therefore the grant of the recruitment subsidy provided for by the first paragraph of Article L. 541-1 of the Labour Code, conditional on residence in Luxembourg, this, however, being a matter for the referring court to verify in the context of the exercise of its jurisdiction.
- 43 In those circumstances, it appears that the national legislation in issue in the main proceedings introduces a difference in treatment between, on the one hand, nationals of the Member States who have the status of job seekers residing in the territory of Luxembourg and, on the other hand, those same nationals who are resident in another Member State.
- 44 In making the grant of the recruitment subsidy subject to the condition that the job seeker is resident in Luxembourg, that national legislation thus places certain workers at a disadvantage by virtue merely of the fact that they have established their place of residence in another Member State.
- 45 As a result, such legislation is liable to deter an employer established in Luxembourg from recruiting a job seeker who, like Ms Schmidt-Krier in the main proceedings, is not resident in that Member State, since that recruitment, unlike the recruitment of a job seeker who is resident in Luxembourg, does not make it possible for that employer to obtain the recruitment subsidy.
- 46 It follows that that legislation is liable to make access to employment in Luxembourg more difficult for a frontier worker who, like Ms Schmidt-Krier, becomes unemployed.
- 47 Such national legislation, which affords non-resident workers less favourable treatment than that enjoyed by workers who reside in Luxembourg, constitutes a restriction of the freedom afforded to workers by Article 45 TFEU (see, by analogy, Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 44, and *Ritter-Coulais*, paragraphs 37 and 38).
- 48 A measure which restricts the free movement of workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose (see, inter alia, *ITC*, paragraph 37, and *Olympique Lyonnais*, paragraph 38).

- 49 According to settled case-law, it is for the Member States, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 71).
- 50 In the present case, the Luxembourg Government, notwithstanding the questions raised in this regard by the Court during the hearing, did not seek to describe the objective pursued by the condition of residence imposed by the national legislation at issue in the main proceedings for purposes of registration with ADEM and thus for the grant of the recruitment subsidy, limiting itself to justifying the condition of registration with that office, and therefore did not put forward any evidence whatsoever to justify that residence condition in terms of overriding reasons in the public interest protected by Article 45 TFEU.
- 51 In order to provide the referring court with a complete answer, it should be observed that the Court has, it is true, already ruled that it is for the Member States to choose the measures likely to attain the objectives that they pursue in the field of employment. The Court has recognised that the Member States have a broad discretion in exercising that power. In addition, it cannot be disputed that encouragement of recruitment constitutes a legitimate aim of social policy (see *ITC*, paragraph 39 and the case-law cited).
- 52 However, the discretion which the Member States enjoy in matters of social policy may not have the effect of undermining the rights granted to individuals by the Treaty provisions in which their fundamental freedoms are enshrined (see *ITC*, paragraph 40 and the case-law cited).
- 53 In that regard, it should be noted, in particular, that, according to the case-law of the Court, a condition of residence is, as a rule, inappropriate as regards migrant workers and frontier workers since, having participated in the employment market of a Member State, they have in principle established a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment, as compared with, respectively, national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant and frontier workers also contribute to the financing of the social policies of that State (see, to that effect, inter alia, Case C-542/09 *Commission v Netherlands* [2012] ECR, paragraphs 63, 65 and 66 and the case-law cited).
- 54 It is thus common ground in the case in the main proceedings that, although she does not reside in Luxembourg, Ms Schmidt-Krier is a frontier worker and a national of that Member State who has spent her entire working life there. Accordingly, she would appear to be integrated into the Luxembourg labour market.
- 55 In the light of the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding legislation of a Member State which makes the grant to employers of a subsidy for the recruitment of unemployed persons aged over 45 years subject to the condition that the unemployed person recruited has been registered as a job seeker in that same Member State, in the case where such registration is subject to a condition of residence in the national territory, this being a matter for the referring court to verify.

Costs

- ⁵⁶ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

Article 45 TFEU must be interpreted as precluding legislation of a Member State which makes the grant to employers of a subsidy for the recruitment of unemployed persons aged over 45 years subject to the condition that the unemployed person recruited has been registered as a job seeker in that same Member State, in the case where such registration is subject to a condition of residence in the national territory, this being a matter for the referring court to verify.

[Signatures]