JUDGMENT OF THE COURT (Fifth Chamber)

15 March 2001 *

In Case C-165/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Correctionnel d'Arlon, Belgium, for a preliminary ruling in the criminal proceedings pending before that court against

André Mazzoleni,

and

Inter Surveillance Assistance SARL, as the party civilly liable,

third parties:

Éric Guillaume and Others,

on the 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 (OJ 1997 L 18, p. 1) and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), acting for the President of the Fifth Chamber, J.-P. Puissochet and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Ministère Public (Auditorat du Travail), by P. Nazé, substitut,

— the Belgian Government, by J. Devadder, acting as Agent, assisted by B. van de Walle de Ghelcke, avocat,

— the German Government, by E. Röder, acting as Agent,

— the French Government, by K. Rispal-Bellanger et C. Chavance, acting as Agents,

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

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Mazzoleni and Inter Surveillance Assistance SARL, represented by M. Gamelon, avocat; of the Belgian Government, represented by B. van de Walle de Ghelcke; of the French Government, represented by C. Bergeot, acting as Agent; and of the Commission, represented by D. Gouloussis, at the hearing on 3 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 29 September 1999,

gives the following

Judgment

1 By judgment of 2 April 1998, received at the Court on 29 April 1998, the Tribunal Correctionnel d'Arlon (Criminal Court, Arlon) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the 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 (OJ 1997 L 18, p. 1; 'the Directive') and of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC).

2 Those questions have been raised in the course of criminal proceedings against Mr Mazzoleni, in his capacity as manager of Inter Surveillance Assistance SARL ('ISA'), a company incorporated under French law, and ISA itself, in its capacity as the civilly liable party, for failure to comply with the provisions of Belgian law relating to minimum wages.

National rules

3 The Collective Labour Agreement of 14 June 1993, concluded within the Joint Committee on Private Security Services, concerning the promotion of employment and the fixing of certain conditions of employment of those working as security officers in the private sector ('the CLA') was made mandatory by the Royal Decree of 1 March 1995 (*Moniteur Belge* of 4 May 1995, p. 11923).

4 According to Article 1(2) thereof, the CLA is to apply to all private security undertakings carrying out any activity whatsoever in Belgian territory, whether they have their headquarters in Belgium or abroad.

5 Under Article 2 of the CLA, workers employed in undertakings providing private security services for third persons are to be classified in nine categories on the basis of the type of work carried out, professional competence, and the degree of independence and responsibility in the performance of the tasks which are assigned to them.

6 Article 3 of the CLA fixes, in respect of each category of workers, the minimum hourly rate of pay and the amount of various bonuses and allowances.

7 Article 56 of the Law of 5 December 1968 on Collective Labour Agreements and Joint Committees (*Moniteur Belge* of 15 January 1969) provides, in particular, that failure to comply with a mandatory collective labour agreement is to be a criminal offence. That law is public-order legislation within the meaning of Article 3 of the Belgian Civil Code and, as such, is binding on all those who carry out activities in Belgian territory.

The main proceedings

8 Between 1 January 1996 and 14 July 1997 ISA, which is established in Mont-Saint-Martin, France, employed 13 workers as security officers at a shopping mall in Messancy, Belgium.

9 Some of those workers were employed full-time in Belgium, while others were employed there for only some of the time and also worked in France.

10 In the course of a check carried out on 21 March 1997, the Belgian Social Law Inspectorate requested Mr Mazzoleni to produce various documents required by Belgian legislation, in particular pay slips. They showed that the basic monthly wage of an ISA worker employed in Belgium was FRF 6 692 for 169 hours of work, that is to say approximately BEF 40 152, which corresponded to an hourly rate of pay of approximately BEF 237.59, whereas the minimum hourly rate of pay laid down by the CLA was BEF 356.68.

11 Proceedings were brought against Mr Mazzoleni and ISA before the Tribunal Correctionnel d'Arlon for failure to fulfil the obligation to pay a wage which was not below the minimum hourly rate of pay fixed by the CLA. Mr Guillaume and four more of the 13 workers concerned claimed civil damages.

12 Before the Tribunal Correctionnel d'Arlon, ISA asserted that, as far as the minimum wage was concerned, it was required only to comply with the French legislation.

13 It contended, first, that the particular nature of security operations meant that staff needed to be rotated in order to avoid customers' identifying them too easily and that its employees thus worked 'part-time' in Belgium, in the sense that an employee might, in the course of a day, a week or a month, be required to perform a part of his services in an adjacent country. According to ISA, the Directive is not applicable to such instances of 'part-time' work.

14 Second, ISA submitted that the 13 workers concerned enjoyed, under French legislation, the same, or essentially comparable, protection to that provided for under Belgian legislation. French minimum wages are admittedly lower, but, for the purposes of comparison, it is necessary to take account of the workers' overall position, including the impact of taxation which, according to ISA, is more favourable in France, and welfare protection.

15 Since it took the view that it needed an interpretation of Community law in order to give judgment, the Tribunal Correctionnel d'Arlon decided to stay proceedings and to refer the following questions to the Court of Justice:

'(1) In 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, does the term "period of posting" encompass the part-time period spent, whether randomly or not, by a frontier worker who comes from an undertaking in a Member State, performing, in the course of days, weeks or a month, a part of his services in the adjacent territory or territories of one or more other Member States?

(2) Are Articles 59 and 60 of the [EC] Treaty to be interpreted as being infringed where a Member State, for overriding reasons relating to the public interest, requires any undertaking from another Member State employing persons, even temporarily, on the territory of the first State to comply with its legislation or national collective labour agreements relating to minimum wages, where that interest is already protected by the rules of the State in which the service provider is established and workers there are already in a comparable or similar position on the basis not solely of the legislation relating to minimum wages but of the overall position (impact of taxation, welfare protection in relation to illness, including under the obligatory supplementary insurance which applies in France, and to industrial accidents, widowhood, unemployment, retirement and death)?

In the same context, put differently: are the temporary national obligations set for employees to be understood as solely the minimum hourly rate of pay without assessing the overall position as regards the welfare protection enjoyed by employees who are required in their work to move from one State to another?'

The first question

16 The German, French and Netherlands Governments express doubts as to the admissibility of this question. They point out that the period prescribed for the implementation of the Directive expired only on 16 December 1999 and that the facts of the main proceedings occurred before that date. In their submission, an individual could not rely on any right derived from the Directive before the expiry of the period prescribed for its implementation. Consequently, since, in the context of a reference for a preliminary ruling, the Court has jurisdiction only to answer questions relevant to the outcome of the main proceedings, the first question is inadmissible.

17 Since the period prescribed for the implementation of the Directive had not in fact expired and the Directive had not been transposed into national law at the

material time, it is not necessary to interpret its provisions for the purposes of the main proceedings.

18 However, the hypotheses of fact set out in the first question must be taken into account for the purposes of examining the second question.

The second question

19 The second question, read in the light of the first, must be understood as seeking essentially to ascertain whether an undertaking established in a frontier region, some of whose employees may be required to perform, on a part-time basis and for brief periods, a part of their services in the adjacent territory of a Member State other than that in which the undertaking is established, is required to comply with the host Member State's national rules on minimum wages where the workers enjoy comparable overall protection in the Member State of establishment although the minimum wage there is lower.

20 Since ISA is established in France and carries on activities of a temporary nature in a Member State other than that in which it is established, in this case Belgium, it is a company which provides services for the purposes of Articles 59 and 60 of the Treaty.

21 Those provisions of the Treaty are of particular importance to service providers established in a frontier zone which regularly carry out their activities in several Member States.

22 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 where 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; and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33).

23 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 and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services (see *Säger*, paragraph 13).

24 In that regard, the application of the host Member State's national rules to service providers is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative and economic burdens.

25 The freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, 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 where he is established (see, in particular, Case

279/80 *Webb* [1981] ECR 3305, paragraph 17; *Säger*, paragraph 15; *Vander Elst*, paragraph 16; *Guiot*, paragraph 11; and *Arblade*, paragraph 34).

26 The application of the national rules of a Member State to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see, in particular, *Guiot*, paragraphs 11 and 13; and *Arblade*, paragraph 35).

27 The 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; and *Arblade*, paragraph 36).

28 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 Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established (Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 14; *Guiot*, paragraph 12; and *Arblade*, paragraph 41). It follows that the provisions of a Member State's legislation or collective labour agreements which guarantee minimum wages may in principle be applied to employers providing services within the territory of that State, regardless of the country in which the employer is established (*Arblade*, paragraph 42).

29 It follows that 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 fixed by the national rules of that State.

30 However, there may be circumstances in which the application of such rules would be neither necessary nor proportionate to the objective pursued, namely the protection of the workers concerned.

31 Whereas the cases cited in paragraph 28 of this judgment concerned workers employed in the construction industry who were actually sent to work, for varying periods, from the Member State in which their employer was established in order to carry out a specific project in another Member State, the present case concerns an undertaking established in a frontier region, some of whose employees may, for the purposes of the provision of services by the undertaking, be required, on a part -time basis and for brief periods, to carry out a part of their work in the adjacent territory of a Member State other than that in which the undertaking is established.

32 In that regard, ISA contends that the particular nature of the security operations which it undertakes means that the staff assigned to that work need to be changed in order to avoid their being recognised too easily.

33 Furthermore, although the minimum wage laid down by the French rules is lower than that laid down by the Belgian rules, ISA maintains that the overall situation should be taken into account, that is to say not only remuneration, but also the impact of taxation and of social security contributions. It contends that employees subject to French social law and French taxation are in a position which is similar to, if not more favourable than, that in which they would be if they were subject to the Belgian rules.

34 If such be the circumstances, even if it be accepted that the rules of the host Member State imposing a minimum wage have the legitimate objective of protecting workers, the national authorities of that State must, before applying them to a service provider established in an adjacent region of another Member

State, consider whether the application of those rules is necessary and proportionate for the purpose of protecting the workers concerned.

35 The host Member State's objective of ensuring the same level of welfare protection for the employees of such service providers as that applicable in its territory to workers in the same sector may be regarded as attained if all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment.

36 Furthermore, application of the host Member State's national rules on minimum wages to service providers established in a frontier region of a Member State other than the host Member State may result, first, in an additional, disproportionate administrative burden including, in certain cases, the calculation, hour-by-hour, of the appropriate remuneration for each employee according to whether he has, in the course of his work, crossed the frontier of another Member State and, second, in the payment of different levels of wages to employees who are all attached to the same operational base and carry out identical work. That last consequence might, in its turn, result in tension between employees and even threaten the cohesion of the collective labour agreements that are applicable in the Member State of establishment.

37 In a case such as that at issue in the main proceedings, it is therefore incumbent on the competent authorities of the host Member State, for the purpose of determining whether application of its rules imposing a minimum wage is necessary and proportionate, to evaluate all the relevant factors.

38 That evaluation means, first, that they must take account, in particular, of the duration of the provision of services, of their predictability, and of whether the

employees have actually been sent to work in the host Member State or continue to be attached to the operational base of their employer in the Member State in which it is established.

39 Second, in order to ensure that the protection enjoyed by employees in the Member State of establishment is equivalent, they must, in particular, take account of factors related to the amount of remuneration and the work-period to which it relates, as well as the level of social security contributions and the impact of taxation.

40 In the main proceedings, since the competent Belgian authorities have prosecuted ISA for failing to comply with the Belgian rules imposing a minimum wage, it is for the court before which the case has been brought to determine whether the application of those rules to ISA was actually necessary and proportionate to the interference with the freedoms enshrined in Articles 59 and 60 of the Treaty.

41 Accordingly, the answer to the second question must be that Articles 59 and 60 of the Treaty do 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 fixed by the national rules of that State. The application of such rules might, however, prove to be disproportionate where the workers involved are employees of an undertaking established in a frontier region who are required to carry out, on a part-time basis and for brief periods, a part of their work in the territory of one, or even several, Member States other than that in which the undertaking is established. It is consequently for the competent authorities of the host Member State to establish whether, and if so to what extent, application of national rules imposing a minimum wage on such an undertaking is necessary and proportionate in order to ensure the protection of the workers concerned.

Costs

42 The costs incurred by the Belgian, German, French, Netherlands and Austrian 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 Tribunal Correctionnel d'Arlon by judgment of 2 April 1998, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) do 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 fixed by the national rules of that State. The application of such rules might, however, prove to be disproportionate where the workers involved are employees of an undertaking established in a frontier region who are required to carry out, on a part-time basis and for brief periods, a part of their work in the territory of one, or even several, Member States other than that in which the undertaking is established. It is consequently for the competent authorities of the host Member State to establish whether, and if so to what extent, application of national rules imposing a minimum wage on such an undertaking is necessary and proportionate in order to ensure the protection of the workers concerned.

Edward Puissochet Sevón

Delivered in open court in Luxembourg on 15 March 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber