JUDGMENT OF THE COURT (Eighth Chamber)

6 October 2011 *

In Case C-381/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Unabhängiger Verwaltungssenat Wien (Austria), made by decision of 22 July 2010, received at the Court on 29 July 2010, in the proceedings

Astrid Preissl KEG

v

Landeshauptmann von Wien,

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent,

— the European Commission, by B. Schima and A. Marcoulli, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of paragraph 4 of Chapter 1 of Annex II to Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1, and corrigendum OJ 2004 L 226, p. 3; 'the regulation').

2 The reference was made in proceedings between Astrid Preissl KEG and the Landeshauptmann von Wien (head of government of the province of Vienna) regarding a decision concerning the installation of a washbasin in the staff toilet of the establishment managed by the applicant in the main proceedings, in which food is sold.

Legal context

European Union legislation

3 Recital 7 in the preamble to the regulation states:

'The principal objective of the new general and specific hygiene rules is to ensure a high level of consumer protection with regard to food safety.'

4 Article 1(1) of the regulation, entitled 'Scope', provides:

'This Regulation lays down general rules for food business operators on the hygiene of foodstuffs, taking particular account of the following principles:

(a) primary responsibility for food safety rests with the food business operator;

...

(d) general implementation of procedures based on the HACCP [hazard analysis and critical control point] principles, together with the application of good hygiene practice, should reinforce food business operators' responsibility;

...'

5 According to Article 2(3) of the regulation:

'In the Annexes to this Regulation the terms "where necessary", "where appropriate", "adequate" and "sufficient" shall mean respectively where necessary, where appropriate, adequate or sufficient to achieve the objectives of this Regulation.'

6 Article 4(2) of the regulation, under the heading 'General and specific hygiene requirements' states:

'Food business operators carrying out any stage of production, processing and distribution of food, after those stages to which paragraph 1 applies, shall comply with the general hygiene requirements laid down in Annex II...'

7 Article 5(1) and (2) of the regulation, under the heading 'Hazard analysis and critical control points', provide:

'1. Food business operators shall put in place, implement and maintain a permanent procedure or procedures based on the HACCP principles.

2. The HACCP principles referred to in paragraph 1 consist of the following:

(a) identifying any hazards that must be prevented, eliminated or reduced to acceptable levels;

...'

8 In Annex II to the regulation, headed 'General hygiene requirements for all food business operators (except when Annex I applies)', Chapter I of that annex, itself headed 'General requirements for food premises (other than those specified in chapter III)' states, in paragraph 4:

'An adequate number of washbasins is to be available, suitably located and designated for cleaning hands. Washbasins for cleaning hands are to be provided with hot and cold running water, materials for cleaning hands and for hygienic drying. Where necessary, the facilities for washing food are to be separate from the hand-washing facility.'

National legislation

9 According to the order for reference, Paragraph 39(1)(13) of the Law on food safety and consumer protection (Lebensmittelsicherheits- und Verbraucherschutzgesetz, BGBl. I, 13/2006) provides that, where an infringement of the applicable legal rules on foodstuffs is established, the Landeshauptmann is to take the necessary measures, in accordance with the nature of the infringement and taking into account the principle of proportionality, in order to eliminate any deficiency or reduce a risk while laying down, as the case may be, an appropriate time-limit and any essential requirements or conditions. Those measures may relate, inter alia, to the carrying out of structural or technical improvements or concern fittings. The cost of those measures is to be borne by the trader.

10 Under Paragraph 90(3)(1) of that law, a person who infringes Paragraphs 96 or 97 of that law commits an administrative offence which is sanctioned by the district administrative authority by a fine of up to EUR 20 000 but which may reach EUR 40 000 in case of reoffending and, where the fine is not paid, may be replaced by a prison sentence of up to six weeks.

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

11 By decision of 10 March 2010, the Landeshauptmann von Wien ordered the applicant in the main proceedings to install a washbasin with hot and cold running water, a soap dispenser and a paper towel dispenser in the staff toilet of the establishment managed by it. It was also laid down that the taps may not be hand-operable.

12 In the appeal brought before it against that decision, the referring court rejected the Austrian authorities' interpretation that only a washbasin installed in a toilet can be regarded as a washbasin within the meaning of paragraph 4 of Chapter I of Annex II to the regulation (hereafter 'paragraph 4'). According to it, such an additional condition cannot be found in the text of that provision.

13 That court notes, however, that that assessment is not sufficient, in the present case, to enable it to rule on the entirety of the legal proceedings before it, since it is also under a duty, as the reviewing court, itself to check whether the installations in question are in conformity with the requirements of paragraph 4.

14 In that regard, the referring court observes that, in that establishment, which consists in a bar which serves almost no food, except toast, there is a sink which is equipped with hot running water which can be used at any time for washing hands, but which is also used for washing dishes. It is uncertain whether that sink meets the requirements stemming from paragraph 4.

15 The referring court states that, given that hardly any fresh foodstuffs are prepared in the establishment managed by the applicant in the main proceedings, it must be assumed that the requirement contained in the last sentence of paragraph 4 does not apply in such a situation

16 The referring court is however uncertain whether the term 'washbasin' within the meaning of paragraph 4 refers to every installation, equipped with a hot water connection, where hands can be washed or whether, taking into account the German language version of paragraph 4, which contains the term 'Handwaschbecken', that provision requires that the washbasin be used exclusively for washing hands. It is also uncertain whether that paragraph may impose the requirement that the washbasin and soap dispenser function without manual contact.

17 As it took the view that resolution of the dispute before it required an interpretation of paragraph 4, the Unabhängiger Verwaltungssenat Wien (Independent Administrative Tribunal Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should the requirement in paragraph 4 of Chapter I of Annex II to [the regulation] that "[a]n adequate number of washbasins is to be available … with hot and cold running water" be interpreted as meaning that the term "Handwaschbecken" used in the German language version is to be understood as any hand-washing facility (connected to a hot water supply), or only as a washbasin which is used exclusively for washing hands?

(2) What are the criteria for determining whether the hygiene requirements laid down in paragraph 4 of Chapter 1 of Annex II to [the regulation], as expressed with the words "materials for cleaning hands and for hygienic drying", are met? Should that provision of the Annex be interpreted as meaning, for example, that a hand-dryer or a water tap only meets the hygiene requirements of [that provision] if the hand-dryer or water tap can be used without touching by hand?'

Consideration of the questions referred

18 By its questions, which should be examined together, the referring court asks, in essence, whether paragraph 4 must be interpreted as requiring that a washbasin within the meaning of that provision must be used exclusively for washing hands and that it must be possible to use the water tap and hand-drying material without touching them.

19 In that regard, it must be noted that paragraph 4 lays down a general hygiene rule with which the food business operators referred to in Article 4(2) of the regulation must, by virtue of that provision, comply.

20 Point 4, read in conjunction with Article 4(2) of the regulation, thus obliges those operators to comply with certain detailed requirements concerning the presence of washbasins and their fittings in their establishment.

21 In that regard, it must be held, in the first place, that the very wording of paragraph 4 does not allow the conclusion to be drawn that, pursuant to that provision, a washbasin within the meaning thereof must be used exclusively for washing hands and that it must be possible to use the water tap and hand-drying material without touching them by hand.

22 First, the last sentence of paragraph 4 provides that '[w]here necessary, the facilities for washing food are to be separate from the hand-washing facility.' Thus, as correctly stated by the Czech Government and the European Commission, that sentence only makes sense if, in the first place, the washbasins referred to in that provision are not exclusively for washing hands, but may also be used for washing food.

23 Moreover, as is apparent from the definition contained in Article 2(3) of the regulation, the phrase 'where necessary' means 'where necessary to achieve the objectives of the present regulation' and cannot therefore be understood as meaning that it is always necessary to have a washing facility exclusively for washing hands where there is a facility for washing food, as stated inter alia by Ireland.

24 It follows that the term 'Handwaschbecken' used in the German language version of the text of paragraph 4 to which the referring court refers in its first question – a term which, in contrast to the terminology used in the other language versions of that provision, refers expressly to washing of the hands – cannot, in its overall context, be interpreted as designating a facility which must be used exclusively for washing hands.

25 Second, as correctly argued by the Czech Government and the Commission, the wording of paragraph 4 does not require that it must be possible to use the water tap or hand-drying material without touching by hand. In particular, the term 'hygienic' used in that provision is not such as to lead to a general requirement of that kind, irrespective of the facts of each case.

26 In the second place, with regard to the more general context of paragraph 4 which must also be taken into consideration for the purposes of interpretation (see, to that effect, Case C-116/10 *Feltgen and Bacino Charter Company* [2010] ECR I-14187, paragraph 12 and case-law cited), Article 5 of the regulation must be taken into account, as correctly contended by the Czech Government and the Commission.

27 Under Article 5(1) of the regulation, food business operators are to put in place, implement and maintain a permanent procedure or procedures based on the HACCP principles. Among those principles is that contained in Article 5(2)(a) of the regulation, which requires identification of any hazards that must be prevented, eliminated or reduced to acceptable levels.

28 As is apparent, inter alia, from Article 1(1)(a) and (d) of the regulation, the obligation laid down in Article 5(1) thereof expresses the European Union legislature's objective of allocating primary responsibility for food safety to food business operators.

29 In that regard, requirements additional to those set out explicitly in paragraph 4 may admittedly, where appropriate, be imposed in order to achieve the principal objective pursued by that legislature in adopting the regulation, which is, as is apparent from recital 7 in the preamble thereto, 'to ensure a high level of consumer protection with regard to food safety'.

30 However, taking into account the objective intended by that same legislature when inserting Article 5 in the regulation, as noted in paragraph 28 above, it must be considered that such additional requirements result, as the case may be, from the application of that article in a specific case, taking into account the particular circumstances of that case, rather than, in a general way and irrespective of those circumstances, from paragraph 4.

31 The answer to the questions referred is therefore that paragraph 4 must be interpreted as not requiring that a washbasin within the meaning of that provision be used exclusively for washing hands or that it be possible to use the water tap or hand-drying material without touching by hand.

Costs

32 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 (Eighth Chamber) hereby rules:

Paragraph 4 of Chapter I of Annex II to Council Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs must be interpreted as not requiring that a washbasin within the meaning of that provision be used exclusively for washing hands or that it be possible to use the water tap or hand-drying material without touching by hand.

[Signatures]