JUDGMENT OF THE COURT (Second Chamber)

3 April 2008 *

In Case C-346/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Oberlandesgericht Celle (Germany), made by decision of 3 August 2006, received at the Court on 11 August 2006, in the proceedings

Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG,

v

Land Niedersachsen,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, P. Kūris, J.-C. Bonichot and C. Toader, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 5 July 2007,

after considering the observations submitted on behalf of:

— Land Niedersachsen, by R. Thode, Rechtsanwalt,

— the German Government, by M. Lumma, acting as Agent,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Danish Government, by J. Bering Liisberg, acting as Agent,

— the French Government, by G. de Bergues and O. Christmann, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, assisted by N. Travers, BL, and B. O'Moore, SC,

— the Cypriot Government, by E. Neofitou, acting as Agent,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Polish Government, by E. Ośniecka-Tamecka and M. Szymańska, acting as Agents, and by A. Dzięcielak, expert,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Norwegian Government, by A. Eide and E. Sivertsen, acting as Agents,

— the Commission of the European Communities, by E. Traversa and C. Ladenburger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC.

2 The reference has been made in the context of proceedings between Mr Rüffert, acting in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG ('Objekt und Bauregie'), and Land Niedersachsen (the *Land* of Lower Saxony), concerning the termination of a works contract which had been concluded between the *Land* and Objekt und Bauregie.

Legal context

Community legislation

3 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), provides in Article 1, entitled 'Scope':

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

…

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making

the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

…'

4 Under Article 3 of Directive 96/71, entitled 'Terms and conditions of employment':

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

— by law, regulation or administrative provision,

and/or

— by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

…

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

…

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

…

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

…

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

— collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

— collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

…'

The national legislation

5 The Law of Land Niedersachsen on the award of public contracts (Landesvergabegesetz Nds., 'the Landesvergabegesetz') contains provisions on the award of public contracts in so far as they have a minimum value of EUR 10 000. The preamble to the Law states:

'The Law counteracts distortions of competition which arise in the field of construction and local public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and local public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided.

…'

6 Under Paragraph 3(1) of the Landesvergabegesetz, headed 'Declaration that the collective agreements will be complied with':

'Contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective

agreement. For the purposes of the first sentence, the term "services" means services provided by the principal contractor and by subcontractors. The first sentence shall also apply to the award of transport services in local public transport.'

7 Paragraph 4(1) of the Law, headed 'Use of subcontractors', provides:

'The contractor may assign to subcontractors services for which his establishment is set up only where the contracting authority has given written consent in a given case. The tenderers are required at the stage they lodge their tenders to state which services are to be devolved to subcontractors. In so far as services are assigned to subcontractors, the contractor must also undertake to impose on the subcontractors the obligations laid down in Paragraphs 3, 4 and 7(2) applicable to contractors and to monitor compliance with these obligations by the subcontractors.'

8 Paragraph 6 of the Law, headed 'Proof', provides:

'(1) A tender shall be excluded from assessment where the tenderer fails to produce the following documents:

…

3. a declaration that the collective agreements will be complied with, pursuant to Paragraph 3.

…

(2) Where the performance of part of a contract is to be assigned to a subcontractor, the proof referred to in subparagraph (1) relating to the subcontractor must also be furnished when the contract is awarded.'

9 Paragraph 8 of the Landesvergabegesetz, headed 'Penalties', provides:

'(1) In order to ensure compliance with the obligations under Paragraphs 3, 4 and 7(2), public contracting authorities shall agree with the contractor for each case of culpable non-fulfilment a contractual penalty of 1%, and in the case of several cases of non-fulfilment a contractual penalty of up to 10%, of the contract value. The contractor shall be obliged to pay a contractual penalty under the first sentence also in the event that there is non-fulfilment on the part of a subcontractor used by it or a subcontractor used by that subcontractor, unless the contractor was not aware or could not have been aware of the non-fulfilment. Where the contractual penalty imposed is disproportionately high, the contracting authority may reduce it to the appropriate amount at the request of the contractor.

(2) The public contracting authorities shall agree with the contractor that failure to satisfy the requirements referred to in Paragraph 3 by the contractor or his subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) will entitle the contracting authority to terminate the contract without notice.

(3) Where an undertaking is proved to have failed to fulfil its obligations under this Law as a result, at least, of gross negligence or on a repeated basis, the public contracting authorities may exclude it from the award of public contracts within their field of competence for a period of up to one year.

…'

The main proceedings and the question referred for a preliminary ruling

10 According to the order for reference, in autumn 2003, following a public invitation to tender, Land Niedersachsen awarded Objekt und Bauregie a contract for the structural work in the building of Göttingen-Rosdorf prison. The value of the contract was EUR 8 493 331 net of value added tax. The contract contained a declaration regarding compliance with the collective agreements and, more specifically, with that regarding payment to employees employed on the building site of at least the minimum wage in force at the place where those services were to be performed pursuant to the collective agreement mentioned in the list of sample collective agreements under No 1 'Buildings and public works' ('the "Buildings and public works" collective agreement').

11 Objekt und Bauregie used as a subcontractor an undertaking established in Poland. In summer 2004 this undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the 'Buildings and public works' collective agreement. After investigations had commenced, both Objekt und Bauregie and Land Niedersachsen terminated the contract for work which they had concluded with one another. The latter based the termination inter alia on the fact that Objekt und Bauregie had failed to fulfil its contractual obligation to comply with the collective agreement. A penalty notice was issued against the person primarily responsible at the undertaking established in Poland, accusing him of paying 53 workers engaged on the building site only 46.57% of the minimum wage laid down.

12 At first instance, the Landgericht Hannover (Regional Court, Hanover) held that Objekt und Bauregie's outstanding claim under the contract for work was offset in full by the contractual penalty of EUR 84 934.31 (1% of the amount of the contract), in favour of Land Niedersachsen. It dismissed the remainder of that undertaking's action.

13 The case having come before it on appeal, the Oberlandesgericht Celle (Higher Regional Court, Celle) considers that the resolution of the dispute turns on whether it is precluded from applying the Landesvergabegesetz, in particular Paragraph 8(1), on the ground that it is incompatible with the freedom to provide services laid down in Article 49 EC.

14 In that regard, the national court notes that the obligations to comply with the collective agreements mean that construction undertakings from other Member States must adapt the remuneration they pay to their workers to the normally higher level in force in the place in the Federal Republic of Germany where the contract is to be performed. Such a requirement causes those undertakings to lose the competitive advantage which they enjoy by reason of their lower wage costs. Consequently, the obligation to comply with the collective agreements constitutes an impediment to market access for persons or undertakings from Member States other than the Federal Republic of Germany.

15 In addition, the national court is uncertain as to whether the requirement to comply with the collective agreements is justified by overriding reasons related to the public interest. More specifically, such a requirement goes beyond what is necessary for the protection of workers. What is necessary for the protection of workers is defined by the mandatory minimum wage which results from the application, in Germany, of the Law on the posting of workers (Arbeitnehmer-Entsendegesetz) of 26 February 1996 (BGBl. 1996 I, p. 227, 'the AEntG'). In the case of foreign workers, the obligation to comply with the collective agreements does not enable them to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition.

16 As it took the view that the resolution of the dispute before it required the interpretation of Article 49 EC, the Oberlandesgericht Celle decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?'

The question referred for a preliminary ruling

17 By its question, the national court asks essentially whether, in a situation such as that in the main proceedings, Article 49 EC precludes an authority of a Member State from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed.

18 As suggested also by a number of the Governments which have submitted observations to the Court, as well as by the Commission of the European Communities, in order to give a useful answer to the national court, it is necessary to take into consideration the provisions of Directive 96/71 when examining the question

referred for a preliminary ruling (see, to that effect, Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 27, and Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 42).

19 As follows from Article 1(3)(a) thereof, Directive 96/71 applies, inter alia, to a situation in which an undertaking established in a Member State posts, in the framework of the transnational provision of services, workers on its account and under its direction to the territory of another Member State, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, provided that an employment relationship exists between that undertaking and the employee during the period of the posting. Such appears essentially to be the situation in the main proceedings.

20 In addition, as the Advocate General stated at point 64 of his Opinion, the mere fact that the objective of the legislation of a Member State, in this case the Landesvergabegesetz, is not to govern the posting of workers does not have the effect of precluding a situation such as that in the main proceedings from coming within the scope of Directive 96/71.

21 Pursuant to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, with regard to the provision of transnational services in the construction sector, posted workers are to be guaranteed terms and conditions of employment concerning the matters referred to under subparagraphs (a) to (g) of that provision, which include, under subparagraph (c), minimum rates of pay. Those terms and conditions of employment are fixed by laws, regulations or administrative provisions and/or by collective agreements or arbitration awards which have been declared universally applicable. According to the first subparagraph of Article 3(8) of that directive, the collective agreements or arbitration awards within the meaning of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

22 The second subparagraph of Article 3(8) of Directive 96/71 gives Member States in addition the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, of basing themselves on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the profession or industry concerned or agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

23 It is necessary to examine whether the rate of pay laid down by a measure such as that at issue in the main proceedings — consisting of a legislative measure adopted by Land Niedersachsen concerning public contracts and seeking to make a collective agreement providing for the rate of pay in question binding, in particular on an undertaking such as the subcontractor Objekt und Bauregie — was fixed in accordance with one of the procedures described in paragraphs 21 and 22 of this judgment.

24 First, a legislative measure such as the Landesvergabegesetz, which does not itself fix any minimum rates of pay, cannot be considered to be a law, within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay, as provided in Article 3(1)(c) of that directive.

25 Second, as to whether a collective agreement such as that at issue in the main proceedings constitutes a collective agreement which has been declared universally applicable within the meaning of the second indent of the first subparagraph of Article 3(1) of Directive 96/71, read in conjunction with the first subparagraph of Article 3(8) of that directive, it is apparent from the case-file submitted to the Court that the AEntG, which seeks to transpose Directive 96/71, extends the application of provisions on minimum wages in collective agreements which have been declared universally applicable in Germany to employers established in another Member State which post their workers to Germany.

26 In answer to a written question from the Court, Land Niedersachsen confirmed that the 'Buildings and public works' collective agreement is not a collective agreement which has been declared universally applicable within the meaning of the AEntG. In addition, the case-file submitted to the Court does not contain any evidence to support the conclusion that that agreement is nevertheless capable of being treated as universally applicable within the meaning of the second indent of the first subparagraph of Article 3(1) of Directive 96/71, read in conjunction with the first subparagraph of Article 3(8) of that directive.

27 Third, regarding the second subparagraph of Article 3(8) of Directive 96/71, it is clear from the actual wording of that provision that it is applicable only where there is no system for declaring collective agreements to be of universal application, which is not the case in the Federal Republic of Germany.

28 In addition, a collective agreement such as that at issue in the main proceedings cannot, in any event, be considered to constitute a collective agreement within the meaning of the second subparagraph of Article 3(8) and, more specifically, to be a collective agreement, as mentioned in the first indent to that provision, 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned'.

29 In a context such as that in the main proceedings, the binding effect of a collective agreement such as that at issue here covers only a part of the construction sector falling within the geographical area of that agreement, since, first, the law which gives it such an effect applies only to public contracts and not to private contracts and, second, the collective agreement has not been declared universally applicable.

30 It follows that a measure such as that at issue in the main proceedings does not fix a rate of pay according to one of the procedures laid down in the first and second indents of the first subparagraph of Article 3(1) and in the second subparagraph of Article 3(8) of Directive 96/71.

31 Therefore, such a rate of pay cannot be considered to constitute a minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which Member States are entitled to impose, pursuant to that directive, on undertakings established in other Member States, in the framework of the transnational provision of services (see, to that effect, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 70 and 71).

32 Likewise, such a rate of pay cannot be considered to be a term and condition of employment which is more favourable to workers within the meaning of Article 3(7) of Directive 96/71.

33 More specifically, that provision cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness (see *Laval un Partneri*, paragraph 80).

34 Therefore — without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host

Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable — the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81). However, such does not appear to be the case in the main proceedings.

35 It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the 'Buildings and public works' collective agreement.

36 That interpretation of Directive 96/71 is confirmed by reading it in the light of Article 49 EC, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty.

37 As the Advocate General stated at point 103 of his Opinion, by requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the 'Buildings and public works' collective agreement, a law such as the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of

their services in the host Member State. Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC.

38 In addition, contrary to the contentions of Land Niedersachsen and a number of the Governments which submitted observations to the Court, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.

39 As stated at paragraph 29 of this judgment, since this case concerns the rate of pay fixed by a collective agreement such as that at issue in the main proceedings, that rate is applicable, as a result of a law such as the Landesvergabegesetz, only to a part of the construction sector falling within the geographical area of that agreement, since, first, that legislation applies solely to public contracts and not to private contracts and, second, that collective agreement has not been declared universally applicable.

40 The case-file submitted to the Court contains no evidence to support the conclusion that the protection resulting from such a rate of pay — which, moreover, as the national court also notes, exceeds the minimum rate of pay applicable pursuant to the AEntG — is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract.

41 For the same reasons as those set out at paragraphs 39 and 40 of this judgment, the restriction also cannot be considered to be justified by the objective of ensuring protection for independence in the organisation of working life by trade unions, as the German Government contends.

42 Lastly, with regard to the objective of ensuring the financial balance of the social security systems, also raised by the German Government in support of its contention that the effectiveness of the social security system depends on the level of workers' salaries, it does not appear from the case-file submitted to the Court that a measure such as that at issue in the main proceedings is necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, an objective which the Court has recognised cannot be ruled out as a potential overriding reason in the general interest (see, inter alia, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 103 and the case-law cited).

43 Having regard to all of the foregoing, the answer to the question referred must be that Directive 96/71, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed.

Costs

44 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 (Second Chamber) hereby rules:

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, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed.

[Signatures]