Case C-471/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 June 2019

Referring court:

Grondwettelijk Hof (Belgium)

Date of the decision to refer:

6 June 2019

Appellant:

Middlegate Europe NV

Respondent:

Ministerraad

Subject matter of the action in the main proceedings

The Hof van Cassatie (Court of Cassation, Belgium) has submitted a question to the referring court (Grondwettelijk Hof) (Constitutional Court, Belgium) on the compatibility of certain provisions of the Wet Havenarbeid (Law organising dock work) with the Belgian Grondwet (Constitution).

Subject matter and legal basis of the request for a preliminary ruling

Request pursuant to Article 267 TFEU.

The referring court seeks to establish, in essence, whether the obligation to have recourse to recognised dockers for dock-work activities in Belgian port areas is contrary to EU law and, if so, whether the provision in question may provisionally be maintained in force until the legislature is able to bring it into line with EU law.

Questions referred

1. Should Article 49 of the Treaty on the Functioning of the European Union, whether or not read in conjunction with Article 56 of that Treaty, with Articles 15 and 16 of the Charter of Fundamental Rights of the European Union and with the principle of equality, be interpreted as precluding national legislative provisions that oblige persons or undertakings which, in a Belgian port area, wish to engage in dock-work activities within the meaning of the wet van 8 juni 1972 betreffende de havenarbeid (Law of 8 June 1972 organising dock work) — including activities which, strictly speaking, are unrelated to the loading and unloading of ships — to have recourse solely to recognised dockers?

2. If the first question is answered in the affirmative, may the Grondwettelijk Hof provisionally maintain the effects of Articles 1 and 2 of the wet van 8 juni 1972 betreffende de havenarbeid in order to prevent legal uncertainty and social discontent and to enable the legislature to bring those provisions into line with the obligations arising from European Union law?

Provisions of EU law cited

Articles 49 and 56 TFEU

Articles 15 and 16 of the Charter

The principle of equality

Provisions of national law cited

Articles 10, 11 and 23 of the Grondwet (Constitution)

Article II.3 of the Wetboek van economisch recht (Code of Economic Law)

Articles 1, 2, 3, 3a and 4 of the Wet van 8 juni 1972 betreffende de havenarbeid (Law of 8 June 1972 organising dock work; ‘the Wet Havenarbeid’)

Koninklijk besluit van 5 juli 2004 betreffende de erkenning van havenarbeiders in de havengebieden die onder het toepassingsgebied vallen van de wet van 8 juni 1972 betreffende de havenarbeid (Royal Decree of 5 July 2004 on the recognition of dockers in the port areas coming within the scope of the Law of 8 June 1972 organising dock work)

Koninklijke besluiten van 20 maart 1986 houdende erkenning van een werkgeversorganisatie ter uitvoering van artikel 3bis van de wet van 8 juni 1972 betreffende de havenarbeid; van 29 januari 1986 houdende erkenning van een werkgeversorganisatie ter uitvoering van artikel 3bis van de wet van 8 juni 1972 betreffende de havenarbeid; van 4 september 1985 houdende erkenning van een werkgeversorganisatie ter uitvoering van artikel 3bis van de wet van 8 juni 1972

betreffende de havenarbeid; van 14 juni 2017 houdende erkenning van een werkgeversorganisatie ter uitvoering van artikel 3bis van de wet van 8 juni 1972 betreffende de havenarbeid en tot opheffing van de koninklijke besluiten van 10 juli 1986 en 1 maart 1989 houdende erkenning van een werkgeversorganisatie ter uitvoering van artikel 3bis van de wet van 8 juni 1972 betreffende de havenarbeid (Royal Decrees of 20 March 1986 on the recognition of an employers' organisation and implementing Article 3a of the Law of 8 June 1972 organising dock work; of 29 January 1986 on the recognition of an employers' organisation and implementing Article 3a of the Law of 8 June 1972 organising dock work; of 4 September 1985 on the recognition of an employers' organisation and implementing Article 3a of the Law of 8 June 1972 organising dock work; of 14 June 2017 on the recognition of an employers' organisation and implementing Article 3a of the Law of 8 June 1972 organising dock work and repealing the Royal Decrees of 10 July 1986 and 1 March 1989 on the recognition of an employers' organisation and implementing Article 3a of the Law of 8 June 1972 organising dock work)

Article 1 of koninklijk besluit van 12 januari 1973 tot oprichting en tot vaststelling van de benaming en van de bevoegdheid van het Paritair Comité van het havenbedrijf (Royal Decree of 12 January 1973 establishing and determining the appointment and powers of the Joint Ports Committee)

Articles 35 and 37 of the wet van 5 december 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités (Law of 5 December 1968 on collective labour agreements and joint committees)

Koninklijk besluit van 10 juli 2016 tot wijziging van het koninklijk besluit van 5 juli 2004 betreffende de erkenning van havenarbeiders in de havengebieden die onder het toepassingsgebied vallen van de wet van 8 juni 1972 betreffende de havenarbeid (Royal Decree of 10 July 2016 amending the Royal Decree of 5 July 2004 on the recognition of dockers in the port areas coming within the scope of the Law of 8 June 1972 organising dock work)

Article 28(2) of the bijzondere wet van 6 januari 1989 op het Grondwettelijk Hof (Special Law of 6 January 1989 on the Constitutional Court)

Brief summary of the facts and the procedure in the main proceedings

1 Middlegate Europe is a transport company based in Zeebrugge that is active throughout Europe. In the context of international road transport, its employees place on the quay of the port of Zeebrugge, *inter alia*, trailers ready for shipment to the United Kingdom and Ireland.

2 During an inspection on 12 January 2011, the police compiled an official report against Middlegate Europe alleging an infringement of Article 1 of the Wet Havenarbeid, namely, the performance of dock work by a non-recognised docker.

By decision of 17 January 2013, an administrative fine of EUR 100 was imposed on it.

3 Its appeal against that decision was dismissed as unfounded by the Arbeidsrechtbank (Labour Court) in Ghent, Bruges Division. The Arbeidshof (Higher Labour Court) in Ghent dismissed the appeal against that judgment.

4 Middlegate Europe then lodged an appeal in cassation with the Hof van Cassatie. It argues in those proceedings that Articles 1 and 2 of the Wet Havenarbeid are contrary to Articles 10, 11 and 23 of the Grondwet (principle of equality and the freedom of commerce and industry of undertakings). The Hof van Cassatie then submitted a question for preliminary resolution on the issue of compatibility with the Grondwet to the referring court, which in turn is referring questions to the Court of Justice for a preliminary ruling in the main proceedings

Main submissions of the parties to the main proceedings

5 The Hof van Cassatie seeks to establish from the referring court whether the obligation laid down in the Wet Havenarbeid for undertakings engaged in activities in a port area to have recourse to recognised dockers for those activities, not only for the loading and unloading of ships, but also for operations that can also be carried out outside of port areas, is compatible with the constitutional principles of equality and the freedom of commerce and industry.

6 According to the Ministerraad (Council of Ministers), the situations of companies operating inside and outside a port area are not comparable. Middlegate Europe, on the other hand, claims that the same work is involved, which in the present case is, strictly speaking, unrelated to the loading and unloading of ships, and is treated differently depending on whether it is performed inside or outside the port area.

7 The Ministerraad submits, in the alternative, that undertakings which decide to have certain activities, which are covered by the definition of dock work, carried out inside the port area, whereas they could also be carried out outside the port area, choose voluntarily to place themselves in a situation where recourse must be had to recognised dockers. They are not obliged to have those activities carried out in the port area. Furthermore, the Ministerraad argues that the difference in treatment is based on objective and reasonable justification, referring in particular to grounds of safety.

8 According to the Ministerraad, the definition of dock work should be sufficiently broad to be able to cover all operations associated with the loading and unloading of ships within the port area and in that way to be able to guarantee safety within the entire port area. The Ministerraad does point out, however, that all of the various elements of that definition have a connection with the loading and unloading of ships, with the result that the definition of dock work used does not go beyond what is necessary.

9 According to the Ministerraad, there is no infringement of EU law. It also points out in this regard that, following some adjustments to the legal framework in 2016, the European Commission no longer saw any reason to continue with infringement proceedings against Belgium. The Ministerraad also refers to a judgment of the Court of Justice of 16 September 1999 on the Belgian Wet Havenarbeid (C-22/98, *J.C. Becu and Others*) from which, in its opinion, it may be deduced that the legislative provision is compatible with the principle of equality.

10 Middlegate Europe is of the opinion that the aforementioned difference in treatment is neither objective nor relevant. It argues that the demarcation of the port area, as well as that of the concept of dock work, is based on arbitrariness and the omnipotence of the dockers' unions, which seek to maintain the legal monopoly for recognised dock work. It maintains that it has not been demonstrated that the aforementioned monopoly is absolutely necessary to guarantee work safety in port areas and that such a scheme does not go beyond what is necessary to guarantee safety.

11 It contends that it cannot be deduced from the case-law of the Court of Justice cited by the Ministerraad and from the Commission's failure to act that the legislative provisions in question are in conformity with EU law. Referring to the judgment of the Court of Justice of 11 December 2014 (C-576/13, *Commission* v *Spain*), it argues that the effects of the Belgian Wet Havenarbeid are too far-reaching, *inter alia* as regards freedom of commerce and industry, in particular the free employment market for dock work.

Brief summary of the reasons for the request

12 Article 1 of the Wet Havenarbeid provides:

'No person in the port areas may have dock work carried out by workers other than recognised dockers.'

13 It follows from Articles 2 and 3 of the Wet Havenarbeid that further provisions are laid down in Royal Decrees, including the definition of 'dock work' and what the obligations are of employers and workers active in the port area.

14 It is apparent from the order for reference that 'dock work' involves more than the loading and unloading of ships and is described as follows (Article 1 of the koninklijk besluit van 12 januari 1973 tot oprichting en tot vaststelling van de benaming en van de bevoegdheid van het Paritair Comité van het havenbedrijf) (Royal Decree of 12 January 1973 establishing and determining the appointment and powers of the Joint Ports Committee):

'[...] all workers and their employers who, in the port areas:

(A.) carry out dock work as a principal or ancillary activity, that is to say, all handling of goods transported by sea-going vessels or inland vessels, by railway wagons or by trucks, whether inbound or outbound, and the ancillary services associated with those goods, irrespective of whether those activities are carried out in the docks, on navigable waterways, on the quays or in the establishments engaged in the import, export and transit of goods, as well as all handling of goods, transported by sea-going or inland vessels, whether inbound or outbound, on the quays of industrial undertakings.'

15 According to the referring court, it is clear from the provisions at issue in the main proceedings that the concept of 'dock work' is defined from both a material and a territorial point of view. From a material point of view, the concept of dock work is defined on the basis of goods-handling activities and related services. From a territorial point of view, dock work is limited to the operations thus described, carried out within the geographically defined port areas, areas that include, in particular, the docks, quays, sheds, warehouses and loading and storage places.

16 The referring court points out that the Wet Havenarbeid is based on four principles that entail a system of closed employment: (1) dock work in port areas may be carried out only by recognised dockers; (2) access to the employment market relating to dock work is possible only after recognition and inclusion in the pool of dockers in accordance with employment needs; (3) any person who arranges for dock work to be carried out within the port area must recruit recognised dockers for that purpose and is thus obliged to join a recognised employers' organisation; (4) the provisions of the Sociaal Strafwetboek (Social Criminal Code) apply to infringements of that system.

17 According to the referring court, the constitutional principles on which it must rule at the request of the Hof van Cassatie are closely related to freedom to choose an occupation, right to engage in work and freedom to conduct a business, which are guaranteed by Articles 15 and 16 of the Charter of Fundamental Rights of the European Union, and to freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU).

18 The referring court states that, in paragraph 58 of its judgment of 11 December 2014 (C-576/13, *Commission* v *Spain*), the Court of Justice ruled that Spain had failed to fulfil its obligations 'by obliging undertakings of other Member States wishing to carry out the activity of loading and unloading goods in Spanish ports of general interest, on the one hand, to register with the public limited company for the management of dockers (Sociedad Anónima de Gestion de Estibadores Portuarios)) and, as appropriate, to participate in its capital and, on the other hand, to recruit as a priority workers made available by that company, a minimum number of whom must be permanently employed' (own translation in the order for reference).

19 On 28 March 2014, the European Commission initiated infringement proceedings against Belgium on the ground that, in its view, the Belgian system of organising

dock work was, in a number of essential respects, contrary to EU law, in particular to the freedom of establishment.

20 The referring court observes that, following the Commission's letter of formal notice, neither the Wet Havenarbeid nor its underlying principles were amended. The response to the Commission's objections was the adoption of the koninklijk besluit van 10 juli 2016 tot wijziging van het koninklijk besluit van 5 juli 2004 betreffende de erkenning van havenarbeiders in de havengebieden die onder het toepassingsgebied vallen van de wet van 8 juni 1972 betreffende de havenarbeid (Royal Decree of 10 July 2016 amending the Royal Decree of 5 July 2004 on the recognition of dockers in the port areas coming within the scope of the Law of 8 June 1972 organising dock work). On 17 May 2017, the Commission decided to terminate conditionally the aforementioned infringement procedure against the Kingdom of Belgium.

21 The referring court observes that Articles 1 and 2 of the Wet Havenarbeid appear to impose a restriction on the fundamental freedoms of the FEU Treaty. In its view, the question arises as to whether, as the Court of Justice ruled in the aforementioned judgment of 11 December 2014 with regard to the Spanish system [Case C-576/13], the obligation arising from the provisions in question for undertakings to use recognised dockers for the performance of dock work within the meaning of the Wet Havenarbeid — including activities that are unrelated to the loading and unloading of ships — constitutes an unjustified restriction, taking into account the differences in legislation and the aforementioned conditional termination of the infringement procedure by the Commission. That is the subject of the first question referred.

22 If, after the Court of Justice has answered the questions referred, the referring court considers the contested provisions to be unconstitutional, it is for the legislature to put an end to the unconstitutionality found and to bring the legislative framework into line with the Grondwet, read in conjunction with EU law. However, pending the intervention of the legislature, establishing the unconstitutionality of the aforementioned provisions could lead to unexpected uncertainty for thousands of dockers in relation to their legal status on the employment market and their conditions of employment, with adverse social and financial consequences. The public authorities could also be confronted with serious consequences in the same circumstances.

23 In order to avoid such a situation, the referring court explains that, on the basis of the Belgian legislation, it has the power provisionally to maintain the effects of the relevant national legislation (Wet Havenarbeid), but asks, with reference to the judgment of the Court of Justice of 28 July 2016 (C-379/15, *Association France Nature Environnement*), whether it would thereby be acting in accordance with EU law. That is the subject of the second question referred.