Case C-407/19

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:

24 May 2019

Referring court:

Raad van State (Belgium)

Date of the decision to refer:

16 May 2019

Applicants:

Katoen Natie Bulk Terminals NV

General Services Antwerp NV

Defendant:

Belgische Staat

Subject of the action in the main proceedings

The action in the main proceedings seeks the annulment 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 falling within the scope of the Law of 8 June 1972 organising dock work) (*Belgisch Staatsblad* 13 July 2016).

Subject and legal basis of the request for a preliminary ruling

Request pursuant to Article 267 TFEU.

In essence, the seven questions referred for a preliminary ruling raise the issue of whether Belgian legislation on the recognition of dockers, which was amended by the contested decree in 2016 pursuant to a letter of formal notice from the

Commission, is in conformity with the provisions on freedom of movement (Articles 34, 35, 45, 49, 56 TFEU) and on competition (Articles 101, 102 and 106 TFEU).

Questions referred

1. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not read in conjunction with Article 106(1) of the TFEU, be interpreted as precluding the rule laid down in Article 1 of the Koninklijk Besluit van 5 juli 2004 (Royal Decree of 5 July 2004) 'betreffende de erkenning van havenarbeiders in de havengebieden die onder het toepassingsgebied vallen van de wet van 8 juni 1972 betreffende de havenarbeid' ('on the recognition of dockers in the port areas falling within the scope of the Law of 8 June 1972 organising dock work'), read in conjunction with Article 2 of the aforementioned decree of 5 July 2004, namely, the rule that the dockers referred to in Article 1(1), first subparagraph, of the aforementioned Royal Decree of 5 July 2004, upon their recognition by the administratieve commissie (Administrative Commission), composed jointly, on the one hand, of members designated by the employer organisations represented in the relevant joint subcommittee and, on the other hand, of members designated by the employee organisations represented on the joint subcommittee, are either included in the pool of dockers or are not included in that pool, whereby recognition for the purpose of inclusion takes into account the need for manpower and also takes into account that a decision-making deadline has not been prescribed for that Administrative Commission and that against its recognition decisions provision has been made only for a jurisdictional appeal?

2. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) of the TFEU, be interpreted as precluding the rule introduced by Article 4(1), subparagraphs 2, 3, 6 and 8 of the Royal Decree of 5 July 2004 as replaced or inserted respectively by Article 4, subparagraphs 2, 3, 4 and 6 of the contested Koninklijk Besluit van 10 juli 2016 (Royal Decree of July 10, 2016), namely, the rule that lays down as a condition for recognition as a docker that the worker (a) has been declared medically fit by the external service for prevention and protection at the work with which the employer organisation designated as an agent under Article 3a of the Wet van 8 juni 1972 'betreffende de havenarbeid' (Law of 8 June 1972 'organising dock work') is associated, and (b) has passed the psychotechnical tests conducted by the body designated for that purpose by the recognised employer organisation designated as an agent under the same Article 3a of the Wet van 8 juni 1972, (c) has attended for three weeks the preparatory courses on safety at work and the attainment of professional competence and has passed the final test and (d) already be in possession of an employment contract in the case of a docker who is not included in the pool, which, read in conjunction with Article 4(3) of the Royal Decree of 5 July 2004, means that foreign dockers must be able to prove that they satisfies comparable conditions in another Member State so that, for the purpose of the application of the contested rule, they are no longer subject to those conditions?

3. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) of the TFEU, be interpreted as precluding the rule introduced by Article 2(3) of the Royal Decree of 5 July 2004, as replaced by Article 2 of the contested Royal Decree of 10 July 2016, namely, the rule whereby the dockers who are not included in the pool and who are therefore directly recruited by an employer on an employment contract in accordance with the Wet van 3 juli 1978 'betreffende de arbeidsovereenkomsten' (Law of 3 July 1978 'on employment contracts') have the duration of their recognition limited to the duration of that employment contract so that each time a new recognition procedure must be started?

4. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) TFEU, be interpreted as precluding the rule introduced by Article 13/1 of the Royal Decree of 5 July 2004, as inserted by Article 17 of the Royal Decree of 10 July 2016, namely, the transitional measure whereby the employment contract referred to in Question 3 must initially be concluded for an indefinite period: from 1 July 2017 for at least two years from 1 July 2018 for at least one year, from 1 July 2019 for at least six months, from 1 July 2020 for a period to be freely determined?

5. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) TFEU, be interpreted as precluding the rule laid down in Article 15/1 of the Royal Decree of 5 July 2004, as inserted by Article 18 of the Royal Decree of 10 July 2016, namely, the (transitional) measure whereby the dockers recognised under the old rule are automatically recognised as dockers in the pool, as a result of which the possibility of direct employment (on a permanent contract) of those dockers by an employer is hindered and the employers are prevented from engaging and retaining good workers by concluding a permanent contract with them directly and offering them job security in accordance with the general rules of labour law?

6. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) TFEU, be interpreted as precluding the rule introduced by Article 4(2) of the Royal Decree of 5 July 2004, as replaced by Article 4(7) of the Royal Decree of 10 July 2016, namely, the rule whereby a collective labour agreement determines the conditions and detailed rules under which a docker can be employed in a port area other than the one where he was recognised, thereby limiting the mobility of workers between port areas without the regulator itself providing clarity as to what those terms and conditions might be?

7. Should Article 49, 56, 45, 34, 35, 101 or 102 of the TFEU, whether or not in conjunction with Article 106(1) TFEU, be interpreted as precluding the rule introduced by Article 1(3) of the Royal Decree of 5 July 2004, as replaced by Article 1, subparagraph 2, of the Royal Decree of 10 July 2016, namely, the rule whereby (logistics) workers who perform work within the meaning of Article 1 of the Koninklijk Besluit van 12 januari 1973 'tot oprichting en vaststelling van de

benaming en van de bevoegdheid van het Paritair Comité voor het Havenbedrijf' (Royal Decree of 12 January 1973 'establishing and determining the appointment and powers of the Joint Ports Committee') at locations where goods which, in preparation for their further distribution or dispatch, undergo a transformation that leads indirectly to demonstrable added value, must have a security certificate, whereby that security certificate constitutes recognition within the meaning of the Law of 8 June 1972 'organising dock work', taking into account that that certificate is requested by the employer who has signed an employment contract with a worker for activities in that sense to be performed and issued upon presentation of the employment contract and identity card and whereby the detailed rules of the procedure to be followed are laid down by collective agreement, without the regulator providing clarity on that point?

Provisions of EU law cited

Articles 34, 35, 45, 49, 56, 101, 102 and 106 TFEU

Provisions of national law cited

Article 23 of the Grondwet (Constitution)

Article 583 of the Gerechtelijk Wetboek (Judicial Code)

Article II.3 and II.4 of the Wetboek Economisch Recht (Code of Economic Law)

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 falling within the scope of the Law of 8 June 1972 on dock work) (the contested decree in the main proceedings)

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)

Wet van 8 juni 1972 betreffende de havenarbeid (Law of 8 June 1972 organising dock work)

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

1 The contested decree amends the 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 falling within the scope of the Law of 8 June 1972 on dock work).

2 Those amendments were pursuant to a letter of formal notice from the European Commission of 28 March 2014.

3 According to the order for reference, the Commission was of the opinion that the rules concerning dockers constituted an infringement of Article 49 TFEU. In essence, the Commission stated that the Belgian rules concerning the employment of dockers discouraged foreign undertakings from setting up establishments in Belgium, in that they did not have a free choice of staff but were obliged to have recourse to recognised dockers, even for logistical tasks. Moreover, the deployability of those dockers was limited from a geographic point of view. According to the order for reference, the Commission notified the Belgian State on 17 May 2017 that the infringement procedure was being terminated.

Main submissions of the parties to the main proceedings

4 A number of pleas which fall exclusively under national law were rejected by the referring court.

5 The applicants in the main proceedings claim that the contested decree infringes fundamental freedoms under European law relating to freedom of movement and competition rules, each read in conjunction with Article 106(1) TFEU.

6 More specifically, the applicants claim that the contested decree, which was adopted pursuant to a letter of formal notice issued by the European Commission on 28 March 2014, apparently sought to liberalise the labour market but that, in essence, seven unnecessary and disproportionate restrictions were reaffirmed or added to existing legislation on dock work.

7 *First restriction*: the requirement of recognition of all dockers not involved in logistics by an Administrative Commission composed of employer organisations and employee organisations. On the employer side, participation is limited to recognised local employer associations and, likewise, on the employee side, to existing representatives (‘closed shop’). According to the applicants, that requirement leads to an artificial closure of the labour market by monopoly holders. There is also a lack of basic procedural safeguards because, for example, there is no provision either for a time limit within which that commission must take a decision or for appeal procedures. In addition, recognition for inclusion in the pool means taking into account the need for manpower, thereby hampering free access to the labour market: the Administrative Commission, within which the trade unions have a right of veto, can continue to subject the labour market to a fixed number of workers and thus exclude ‘outsiders’.

8 *Second restriction*: according to the applicants, the contested decree introduces two new exclusive rights. First, medical fitness for dock work must be assessed by the (exclusively competent) external service for prevention and protection at the work with which the recognised employer organisation is associated and, second, the candidate docker must pass the psychotechnical tests conducted by the body

designated for that purpose by the same recognised employer organisation. According to the applicants, that new double monopoly reinforces the existing monopoly of the local employer associations. The liberalisation of the labour market is therefore entirely illusory.

9 *Third restriction*: the liberalisation of access to the dock-work market for non-pool workers, that is to say, the workers who conclude a contract directly with an employer, is purely theoretical since the duration of the recognition of those non-pool workers is limited to the duration of their employment contract. In the event that the worker in question wishes to work again as a docker, with the same or a different employer, he must go through the full recognition procedure once again. Both for dockers who were initially (or repeatedly) recruited for a short period (for example, daily or weekly contracts) and for the employer(s) concerned, such a restriction is unrealistic and prohibitive, unnecessary and disproportionate. Employment outside the pool is made unattractive and the contested decree seeks to prevent a real opening up of the labour market.

10 *Fourth restriction*: the applicants challenge the unnecessary, unjustified and excessively long transitional arrangement — until 1 July 2020 — provided for in the contested decree.

11 *Fifth restriction*: the automatic recognition of all current dockers as dockers included in the pool erodes the possibility of direct employment by the employer of (experienced) dockers.

12 *Sixth restriction*: according to the applicants, unnecessary new restrictions are introduced on the right of employers and their workers to perform work or have work performed in a port area other than the one where the worker concerned has been recognised. Such restrictions do not exist anywhere else in the European Union.

13 *Seventh restriction*: unnecessary new obstacles to the employment of workers who perform logistical tasks are introduced. Those workers are required to hold a security certificate. Decided on was the so-called Alfapass card, which was introduced for the purpose of combating terrorism and has now been extended to logistics companies based in the port area, without any justification and in stark deviation from what is customary elsewhere in the European Union. The company Alfapass bvba is controlled by the monopolistic Antwerp port employer association Cepa, and Alfaport, the Antwerp-based private-sector port federation, which further reinforces the monopolistic position of the employer association concerned. Moreover, the Alfapass results in considerable additional cost for the employer.

14 The restrictions summarised above go beyond what is necessary to achieve the public interest objectives pursued and cannot be justified. The overriding reasons in the public interest put forward by the defendant are unconvincing.

15 The applicants further submit that the contested decree also infringes Article 106(1) TFEU by taking measures in respect of the employer associations, the external services for prevention and protection at the work with which they are associated and the bodies designated by them for conducting the psychotechnical tests, all of which are granted an exclusive right, measures which lead to an infringement of the freedom of establishment.

16 According to the applicants, the aforementioned restrictions also constitute an infringement of Articles 101 and 102 of the TFEU, in conjunction with Article 106(1) TFEU. After all, the contested decree reaffirms, reorganises and reinforces the exclusive rights and controlling powers of the local employer organisations, which thereby continue to control access to the labour market, directly and indirectly. Furthermore, the members of those employer associations enjoy a collective monopoly on providing goods handling services in the port areas. Such a competition-restricting — if not eliminating — structure distorts to a significant extent normal competition or makes it impossible.

17 According to the applicants, it cannot be inferred from the fact that, for policy reasons, the European Commission ultimately closed the infringement procedure subject to monitoring that the contested decree and the dock-work regulations thereby amended are in accordance with EU law.

18 The defendant disputes that the contested decree breaches the freedom of establishment or other freedoms and submits that neither the Commission's letter of formal notice nor the case-law of the Court of Justice cited by the applicant provide sufficient evidence that there has been any breach. The defendant claims that the Commission did not close the infringement procedure for policy reasons but because it was responding to the concerns it had expressed.

19 The applicants have not shown that the contested decree constitutes direct or indirect discrimination that can infringe the Treaty provisions, since all companies, regardless of where they are established, are subject to those rules. Companies from other Member States are not placed in a legally or factually more disadvantageous position than national companies. Even if the contested decree were directly or indirectly discriminatory, the applicants would be required to demonstrate specifically what disadvantage they suffered in the setting up or running of their business.

20 In addition, the defendant contends that, even if restrictions did exist (which it disputes), the regulation of dock work, of which the contested decree forms part, is a necessary and proportionate arrangement which is justified, in particular because it simultaneously (1) guarantees improved livelihoods for dockers, (2) provides sufficient flexibility because those dockers are (or can be) deployed in a way that takes into account the constantly fluctuating nature of the work supply, and (3) ensures the quality of dock work and the security of dockers.

21 As regards the alleged breaches of the competition rules, the defendant submits that the applicants misrepresent the facts and the position of the employer organisations, that the current system is actually more flexible than the previous one and that the Commission had made no observations from the perspective of Articles 101 and 102 TFEU, in conjunction with Article 106(1) TFEU. Moreover, the applicants adduce no evidence of breach of competition rules and some of the rights and powers of employer organisations cited by them follow from legislation other than the contested decree.

Brief summary of the reasons for the referral

22 The defendant in the main proceedings had argued that the situation at issue was a purely internal one, as a result of which the TFEU was not applicable. However, in line with the applicants' position, the referring court is of the view that there are several cross-border aspects in the present case and that, therefore, there is no question of a purely internal situation.

23 The interpretation of the fundamental freedoms enshrined in the TFEU is important in the present case because the referring court is required to assess the legality of a decree which regulates dock work and subjects it to certain restrictions and which applies to all workers and employers without distinction of nationality who perform work or who have work performed in a port area.

24 The referring court finds that the Treaty articles concerning the freedom of movement are fundamental rules for the European Union and that any obstacle to those freedoms, however minor, is prohibited. Measures which may hinder the utilisation of the fundamental freedoms guaranteed in the TFEU or make them less attractive may nevertheless be permissible provided that they pursue an objective in the public interest, are suitable for securing the attainment thereof and do not go beyond what is necessary to achieve the stated objective.

25 According to the referring court, it is necessary, first, to examine whether the restrictions on the recruitment of recognised dockers inside and outside the pool and the manner of decision-making of the Administrative Commission are compatible with the provisions concerning free movement as guaranteed by the TFEU. As regards the lack of an appeal procedure alleged by the applicants, however, the referring court finds that under Belgian law (Article 583(4) of the Gerechtelijk Wetboek), a positive or negative decision on the grant of recognition as a docker by the Administrative Commission can indeed be challenged directly by means of a jurisdictional appeal.

26 The question then arises as to whether it is proportionate that only an external service for prevention and protection at work involving the local employer organisation may declare the candidate docker medically fit for dock work. The same question arises with regard to the psychotechnical tests, with the referring court pointing out that foreign workers, too, should have to prove that they meet comparable conditions for dock work. According to the referring court, the

question also arises with regard to the professional competence tests that must be taken. It also doubts whether the requirement of having an employment contract is appropriate in view of the objective pursued by the regulator of ensuring the security of dock work.

27 Furthermore, with regard to the duration of the recognition and the detailed transitional arrangements, the referring court also questions whether they are compatible as such with EU law.

28 The contested decision means, in concrete terms, that, as a transitional measure, the employment contract should initially be concluded for an indefinite period: from 1 July 2017 for at least two years, from 1 July 2018 for at least one year and from 1 July 2019 for at least six months. The duration will be able to be determined freely only from 1 July 2020.

29 As long as the worker has an employment contract, he is a recognised docker, and every time he obtains an employment contract he can apply for recognition, which also means that, regardless of the reason for terminating the employment contract (short contracts, too), he must go through the recognition procedure repeatedly. In the light of the objective of the contested decree — guaranteeing the security of dockers — the question arises, according to the referring court, as to the appropriateness and proportionality of that measure in the light of the overriding reason in the public interest.

30 According to the referring court, if the employment status of the recognised docker is less attractive than that of the docker included in the pool, this may have the effect of limiting the attractiveness of dock work outside the pool and the availability of such dockers, resulting in an unjustified restriction on freedom of movement.

31 Moreover, it must not be made more difficult for a foreign worker to be part of the pool than a Belgian worker. In that light, and taking into account the requirement of 'need for manpower' to be included in the pool — which applies to domestic and foreign workers — the question arises as to whether that scheme in its entirety is compatible with free movement and does not go beyond what is necessary to achieve the desired security objective.

32 Furthermore, the automatic recognition of all current dockers as 'dockers included in the pool' implies that employers are not entitled to retain good workers by entering into a permanent contract with them directly and offering them job security according to general labour law rules. Again, states the referring court, the question arises as to whether such a measure is appropriate and proportionate to the objective pursued and is therefore compatible with the fundamental freedom of establishment and free movement of workers.

33 The question also arises as to whether the obligation to lay down, via a collective agreement, the conditions and detailed rules under which a docker may be employed 'in a port area other than that where he was recognised' is a measure

which is reasonable and proportionate (defendant's position) or whether, 'from a security point of view, it is not reasonable to understand why mobility between different port areas should be restricted or subject to additional conditions' (applicants' position).

34 Finally, there is the issue of workers who carry out logistical work needing to have a security certificate and the question of whether that is a measure aimed at security in general and therefore also at the workers concerned. The referring court takes the view that, taken on its own, that does not constitute an infringement of the provisions the applicants consider to have been infringed. The question does indeed arise as to whether the measure — interpreted as meaning that the aforementioned security certificate must be applied for anew with each contract, undoubtedly entailing an administrative burden which, even with (successive) short-term monthly, weekly or daily contracts, must be repeated each time — is proportionate in the light of the freedom of establishment and the free movement of workers. In that regard, for the sake of completeness, the order for reference notes that, in the case of temporary agency work, under Belgian law the employment contract is concluded by the worker not with the third-party user, but with the employment agency.