Case C-205/20

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:

8 May 2020

Referring court:

Landesverwaltungsgericht Steiermark (Austria)

Date of the decision to refer:

27 April 2020

Appellant:

NE

Respondent authority:

Bezirkshauptmannschaft Hartberg-Fürstenfeld (Austria)

Subject matter of the main proceedings

Penalty for failure to comply with obligations to report posted workers and to keep records of wages

Subject matter and legal basis of the reference

Implementation of the order of the Court in case C-645/18, direct applicability of Article 20 of Directive 2014/67/EU (cumulation of fines where numerous workers are concerned)

Questions referred for a preliminary ruling

1. Is the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67/EU and interpreted by the Court of Justice of the European Union in its orders in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, EU:C:2019:1108) and *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-140/19,

C-141/19, C-492/19, C-493/19 and C-494/19, EU:2019:1103) a directly applicable provision of the Directive?

2. If Question 1 is answered in the negative:

Does the interpretation of national law in conformity with EU law permit and require the national court and administrative authority to supplement – in the absence of new legislation at national level – the domestic penal provisions applicable in the present proceedings with the criteria of the requirement of proportionality laid down in the orders of the Court of Justice of the European Union in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, EU:C:2019:1108) and *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-140/19, C-141/19, C-492/19, C-493/19 and C-494/19, EU:2019:1103)?

Provisions of EU law cited

Article 56 TFEU and Article 20 of Directive 2014/67/EU

Provisions of national law cited

Paragraph 16(1) and (2) of the Verwaltungsstrafgesetz (Law on administrative penalties, 'the VStG'); Paragraph 52(1) and (2) of the Verwaltungsgerichtsverfahrensgesetz (Law on the rules of procedure for the administrative courts, 'the VwGVG'); and Paragraphs 26(1), 27(1) and 28, point 1, of the Lohn- und Sozialdumping-Bekämpfungsgesetz (Law to combat wage and social dumping, 'the LSD-BG')

Case-law of the Court of Justice cited

Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-645/18, EU:C:2019:1108; Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-140/19, C-141/19 and C-492/19 to C-494/19, EU:2019:1103; judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723; judgment of 27 June 1991, *Mecanarte*, C-348/89, EU:C:1991:278; judgment of 22 March 2017, *Euro-Team Kft. and Spirál-Gép Kft.*, C-497/15 and C-498/15, EU:C:2017:229; judgment of 4 October 2018, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N*, C-384/17, EU:C:2018:810; judgment of 19 January 1982, *Becker*, C-8/81, EU:C:1982:7; judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223; judgment of 14 September 2016, *Martínez Andrés and Castrejana López*, C-184/15 and C-197/15, EU:C:2016:680; judgment of 24 January 2018, *Pantuso and Others*, C-616/16 and C-617/16, EU:C:2018:32; judgment of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550; judgment of 28 June 2018, *Crespo Rey*, C-2/17, EU:C:2018:511; and judgment of 10 April 1984, *von Colson and Kamann*, 14/83, EU:C:1984:153

Brief summary of the facts and procedure

1 These proceedings follow on from the proceedings in which the Court delivered its order of 19 December 2019 (C-645/18, in which a summary of the facts in the main proceedings can be found). The Court found by that order that the applicable national legislation is contrary to EU law, since when the national legislature has neither enacted nor, at the very least, planned legislation to replace the provisions of the LSD-BG applicable in the present case or the penal provisions of the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals) concerned by the judgment of the Court in *Maksimovic* (C-64/18), nor has it amended the legislation on custodial sentences in the event of non-payment and on contributions to court costs.

Admissibility

2 With regard to the admissibility of the questions referred, the Court delivered judgments on similar facts and legal aspects in *Euro Team and Spirál-Gép* (C-497/15 and C-498/15) and in *Dooel Uvoz Izvoz Skopje Link Logistic N&N* (C-384/17).

Summary of the basis for the reference

3 In light of the de facto *erga omnes* effect of the judgments of the Court of Justice of the European Union cited at paragraph 1, the question arises, irrespective of the dozens, if not hundreds, of administrative penal proceedings which are already pending or which will be initiated in future in Austria, as to whether the relevant penal provisions, which continue formally to apply unchanged, should still be applied and, if so, in what form.

4 By its judgment RA 2019/11/0033 of 15 October 2019, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) concluded, in light of the findings in the judgment of the Court in *Maksimovic* as to how fines should now be assessed, that, in the event of infringement of the obligation to make records of wages available in compliance with EU law, while abiding as closely as possible by national law, a single fine should be imposed in future, even where several workers are concerned. That is because, in the absence of a legislated maximum fine for cases in which the obligation to make records available has been infringed for several workers, the alternative of disapplying the entire provision penalising non-compliance with EU law would result in even greater interference in national law. Furthermore, the Supreme Administrative Court found by that judgment that the minimum fines provided for by law should cease to apply and that custodial sentences in the event of non-payment should cease to be handed down in accordance with Paragraph 16 of the VStG.

5 Although most of the administrative courts follow that judgment, some conclude from the case-law of the Verfassungsgerichtshofs (Constitutional Court, Austria)

establishing that the courts must of their own motion disapply any provision of national law that is contrary with EU law (see, for example, judgment of 27 November 2019 E 2047/2019) that, unlike the Supreme Administrative Court, the Constitutional Court holds that it is inadmissible to continue to apply the penal provisions concerned in part and that no fines should be imposed until such time as replacement legislation has been passed. The fines assessed differ widely from case to case: in some cases, the fines now being handed down are assessed at or just above the minimum fine, even where a large number of workers are concerned, while in others an overall fine is assessed which is close to the sum of the individual fines that would have been imposed in the past for each offence. Many administrative courts continue to impose cumulative fines based on a free interpretation of the judgment of the Court in *Maksimovic*, in derogation from the judgment mentioned above of the Supreme Administrative Court. In terms of the minimum fines, although some courts deduce from the judgment of the Supreme Administrative Court that fines below the previous minimum statutory amount are permissible, the majority conclude that there is no longer any lower limit. Often, decisions are put on hold, in particular at the administrative level.

6 To summarise, the current situation is beset by *inconsistent case-law* – and hence *legal uncertainty* – that goes well beyond the case at issue; this is held to be unsatisfactory both by the authorities and courts involved in enforcement and by the persons subject to the law.

The first question

7 The Court has already answered in the negative the question referred by a Hungarian court on Article 9a of Directive 1999/62/EC (see judgment in C-384/17). However, it has to be noted that the wording of Article 9a of Directive 1999/62 may be similar, but it is not identical to the wording of Article 20 of Directive 2014/67/EU. Furthermore, in considering when a provision of EU law within the meaning of its relevant case-law (judgments in Becker, C-8/81, paragraph 25, and Impact, C-268/06, paragraphs 56 and 57) is '*as far as its subject matter is concerned, … sufficiently clear, precise and unconditional to be relied on in so far as the provisions define rights which individuals are able to assert against the State*' and is therefore directly applicable, the Court has set very different criteria, depending on the objective of the EU law in question and whether the provision in question enacts a prohibition or a right (see, in that regard, the opinion of the Advocate General in case C-384/17, points 63 to 69).

8 A comparison between the judgments delivered by the Court in *Euro Team and Spirál-Gép* and the judgments delivered in *Maksimovic* and the two *Bezirkshauptmannschaft Hartberg-Fürstenfeld* cases (C-645/18, on the one hand, and C-140/19, C-141/19, C-492/19, C-493/19 and C-494/19, on the other) illustrates that the Court can draw very different conclusions when examining national legislation, even where directives apply similar penalty rules. With regard to the Hungarian legislation on fines that was the subject matter of the judgment in *Euro Team and Spirál-Gép*, it was the lack of differentiation in the penal

provision, which did not provide for a penal framework or some other way of taking account of the particular circumstances of a case when assessing the fine, that was objected to, rather than the absolute amount of the fines. However, in the judgment forming the basis of the main proceedings and the preliminary rulings cited above, the Court objected not to the lack of precision in the relevant Austrian penal provisions but, to put it simply, to the fact that the combined effect of the large minimum fines imposed, the cumulative imposition of individual fines and the absence of an upper limit on the overall fine resulted in what the Court held to be a disproportionate penalty. Thus, the requirements imposed by each of those judgments on the national legislature (to enact replacement legislation in compliance with EU law) and on the courts and administrative authorities faced in the transitional phase, pending the enactment of replacement legislation, with the question of whether they can continue to apply the penal provisions which the Court has found to conflict with EU law and, if so, in what form, differ widely.

9 The question referred for a preliminary ruling is not a hypothetical question, as the answer given by the Court will have a direct effect in terms of the fine that can or can no longer be imposed on the appellant in the main proceedings. Furthermore, as mentioned at paragraph 5, the answer to this question will be relevant to numerous cases in addition to these main proceedings, as it will eliminate the existing legal uncertainty or inconsistency in the case-law.

Second question referred

10 If the answer to the first question is in the negative, that means, first and foremost, that the parties to the main proceedings have no right to rely on Article 20 of Directive 2014/67/EU in proceedings before the national authorities and courts. However, that does not absolve the Member States and their courts from the obligation to implement the Directive (see, for example, judgments in *Martinez Andres and Castrejana Lopez*, C-184/15 and C-197/15, paragraph 50 and the case-law cited, and in *Pantuso and Others*, C-616/16 and C-617/16, paragraph 42).

11 To fulfil that obligation, the principle of interpretation in compliance with EU law requires the national authorities to do everything within their power, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it (see, for example, judgments in *Pöpperl*, C-187/15, paragraph 43, and *Crespo Rey*, C-2/17, paragraph 70 and the case-law cited).

12 However, that principle of interpretation of national law in compliance with EU law has certain limits. Thus, the obligation for a national court to refer to the content of EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (see, for example, judgment in *Pöpperl*, C-187/15, paragraph 44).

13 In light of the case-law of the Court (judgment in *Link Logistic*, C-384/17, paragraphs 59 and 60, in which the Court did not adopt the view of the Advocate General at points 90, 95 and 96 of his opinion), the referring court is concerned that the fine assessment which it now has to make in the main proceedings, bearing in mind the aforesaid judgment of the Supreme Administrative Court RA 2019/11/0033 would, in the final analysis, constitute an application of the law *contra legem*. In any event, both the statutory requirement that fines must be imposed '*for every worker*' and the various minimum fines laid down are clear, unambiguous formulations of the law which cannot be read otherwise by way of interpretation. The Advocate General stated in *Link Logistic* in his comments on the limits of conform interpretation at points 56-60 of his opinion, with reference to the opinion of Advocate General Sharpston in *Unibet* (C-432/05, point 55), that '*a rule to "be A" cannot suddenly become "be non-A"*'.

14 In terms of the approach that now needs to be taken to minimum statutory fines, the Supreme Administrative Court states in its judgment cited at paragraph 4 above that the '*minimum statutory fine framework*' (that is the minimum fine in each case) should no longer be used as the basis for the assessment of fines; this means that a *lower* fine can be imposed even in cases in which domestic law does not allow the minimum fine to be reduced. This way of achieving a conform interpretation essentially mirrors the solution which the Advocate General considered permissible, but which the Court did not accept in *Link Logistic*. Here too, it follows from such an approach that a fine clearly laid down by amount in national law, as in *Link Logistic*, or a minimum fine quantified precisely by amount, as in the case at issue, is reduced contrary to the unambiguous wording of the law.

15 The question of whether the referring court is in fact allowed to proceed in the manner described or whether the relevant penal provisions must be disapplied in their entirety within the meaning of the operative part of the judgment in *Link Logistic*, as their application would overstep the limits of conform interpretation and the assumption by each court at its own discretion that a lower or even no minimum fine exists would in truth result in concealed law-making and thus new case-law, is of direct significance in the main proceedings. The contested penal notice imposes the minimum statutory fine in all cases in the main proceedings. As the criteria for reducing the minimum fine laid down in national law (Paragraph 20 and Paragraph 45(1)(4) of the VStG) are not fulfilled, the fines imposed could only be further reduced if the approach described above is in conformity with EU law.

16 Any such law-making application of the law would, however, appear to be questionable for another reason. The principle of conform interpretation within the meaning of the case-law of the Court cited above is limited, among other things, by the *general principles of law* which, in the Austrian legal system, include the *principle of equality* and the *principle of legality*. The principle of legality is interpreted very strictly by the Constitutional Court (for example in judgment G 49/2017), in particular in the field of criminal law, and this has set very narrow

limits on the application of the law by the courts. As stated at paragraph 5 above, current adjudication practice is already marked by inconsistencies that give cause for concern from the point of view of the principle of equality, and case-by-case fine assessments that resemble a case-law system. This is completely alien to the Austrian legal system in general and the criminal justice system in particular.

17 The referring court also has concerns as to whether the operative part of the judgment in *Maksimovic* concerning custodial sentences in the event of non-payment and contributions to court costs and of the order in case C-645/18 on the contribution to court costs are in fact to be understood as meaning that any form of custodial sentence in the event of non-payment and contribution to court costs conflicts with EU law or whether they only conflict with EU law where, as in the cases at issue, the cumulative application of Paragraph 16 of the VStG and Paragraph 52 of the VwGVG results, in the absence of an upper limit, in a disproportionate overall custodial sentence in the event of non-payment or a disproportionately high overall contribution to court costs. In any event, it follows from the cases at issue that the appellant in case C-146/18, for example, faced the risk of an overall custodial sentence in the event of non-payment of 1 736 days and a contribution to court costs of over EUR 500 000, were his application in the administrative court to be dismissed in its entirety. The referring court's concerns related not to the conformity with EU law of the custodial sentence in the event of non-payment as such, which was limited to two weeks in accordance with Paragraph 16(2) of the VStG, but with the consequences of its cumulative application in the case at issue and, with regard to the contribution to court costs in accordance with Paragraph 52 of the VwGVG, the fact that, in the absence of a maximum statutory limit and given the combination in the case at issue of large individual fines and numerous points in the operative part, it would total what would appear to be a disproportionate overall amount.

18 However, since the correct application of EU law is not so obvious as to leave no scope for any reasonable doubt and it is therefore not possible to interpret the national law in conformity with the directive at issue, the aforementioned questions are referred for a preliminary ruling pursuant to Article 267 TFEU.