ECLI:EU:C:2015:821

JUDGMENT OF THE COURT (Fifth Chamber)

17 December 2015 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Principles of equality and of non-discrimination — Obligation of transparency — Scope of that obligation — National collective agreements — Social protection scheme supplemental to the general scheme — Appointment by the social partners of an insurer responsible for managing that scheme — Extension of that scheme by ministerial order to all employees and employers of the sector concerned — Limitation of the temporal effects of a preliminary ruling of the Court of Justice)

In Joined Cases C-25/14 and C-26/14,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 30 December 2013, received at the Court on 20 January 2014, in the proceedings

Union des syndicats de l'immobilier (UNIS)

v

Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social,

Syndicat national des résidences de tourisme (SNRT) and Others (C-25/14)**,**

and

Beaudout Père et Fils SARL

v

Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social,

Confédération nationale de la boulangerie et boulangerie-pâtisserie française,

Fédération générale agro-alimentaire — CFDT and Others (C-26/14)**,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2015,

after considering the observations submitted on behalf of:

– Union des syndicats de l'immobilier (UNIS), by C. Bertrand and F. Blancpain, avocats,

– Beaudout Père et Fils SARL, by F. Uroz and P. Praliaud, avocats,

– Syndicat national des résidences de tourisme (SNRT) and Others, by J.-J. Gatineau, avocat,

– Confédération nationale de la boulangerie and boulangerie-pâtisserie française, by D. Le Prado and J. Barthélémy, avocats,

– Fédération générale agroalimentaire — CFDT and Others, by O. Coudray, avocat,

– the French Government, by D. Colas, R. Coesme and F. Gloaguen, acting as Agents,

– the Belgian Government, by M. Jacobs, L. Van den Broeck and J. Van Holm, acting as Agents,

– the European Commission, by A. Tokár and O. Beynet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2015,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 56 TFEU.

2 The requests have been made in two separate sets of proceedings brought by (i) the Union des syndicats de l'immobilier (UNIS) and (ii) Beaudout Père et Fils SARL, seeking annulment of two orders made by the ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social (Minister for Labour, Employment, Professional Training and Social Dialogue), which extend to all employers and employees in the sector concerned collective agreements appointing a provident society as the single managing body of one or more supplementary schemes for insurance or for reimbursement of healthcare costs.

Legal context

3 Under Article L. 911-1 of the Social Security Code (code de la sécurité sociale), in the version applicable to the cases before the referring court, the collective cover afforded to employees as a supplement to the cover provided by the social security system may be determined, inter alia, by means of collective agreements. In accordance with Article L. 911-2 of that code, such collective cover may be provided against risks relating to personal physical injury or associated with maternity in order to supplement the cover provided by the social security system. Under Article L. 2262-1 of the Labour Code (code du travail), in the version applicable to those cases, those collective agreements are, in principle, binding on the signatories to them and on members of the signatory organisations or groups. Article L. 911-3 of the Social Security Code provides that the agreements may, however, be extended by an order made by the competent Minister.

4 The procedure for extending those agreements is governed by the Labour Code, in particular Articles L. 2261-15, L. 2261-16, L. 2261-19, L. 2261-24, L. 2261-27 and D. 2261-3 thereof.

5 It follows that sectoral agreements and occupational or inter-occupational agreements concluded in joint committees composed of representatives of employers and employees, as well as the addenda and annexes thereto, may, under certain conditions, be extended by an order made by the competent Minister, so as to make them binding on all employees and employers falling within the scope of the collective agreement concerned. Such a procedure may be instigated either (i) at the request of an employer or employee organisation represented on the joint committee within which that agreement was concluded or (ii) on the initiative of the Minister responsible for labour.

6 That procedure entails a notice being published in the *Official Journal of the French Republic* stating where the agreement has been filed and inviting interested bodies and persons to submit their observations within a period of 15 days starting from the date of publication of the notice. The National Commission for Collective Bargaining must have been consulted in advance, and must have issued a reasoned opinion in favour of the extension. In the event that at least two employers' organisations or two employees' organisations represented on that commission oppose the extension, giving

reasons for so doing, the Minister may hold further, detailed consultations with the commission, and may subsequently decide to extend the agreement having regard to any new opinion which the commission may issue.

7 In accordance with Article L. 912-1 of the Social Security Code, in the version applicable to the cases before the referring court, when collective agreements affording employees cover provide for a pooling of the risks with one or more bodies authorised to act as insurers, to which undertakings subject to those agreements are required to be affiliated, those agreements must contain a clause providing for the arrangements for the pooling of risks to be reviewed within a period not exceeding five years.

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

8 So far as Case C-25/14 is concerned, the Conseil d'État (Council of State) explains that Addendum No 48, of 23 November 2010, and Addenda Nos 49 and 50, of 17 May 2011, to the National Collective Agreement on Real Property set up an insurance scheme covering death, incapacity for work and invalidity, and a scheme for reimbursement of healthcare costs, for all employees in the sector concerned.

9 Article 17 of Addendum No 48 appoints the provident society Institution de prévoyance de groupe Mornay (IPGM) as the sole insurer for those two schemes.

10 By order of 13 July 2011, the Minister for Labour, Employment and Health made those addenda binding on all employees and employers in the sector concerned.

11 By an action brought on 23 September 2011, UNIS sought annulment of that ministerial order on the ground, inter alia, that IPGM had been appointed as the sole insurer for those schemes in breach of the obligation of transparency arising from the principles of non-discrimination on grounds of nationality and of equal treatment which derive from Article 56 TFEU

12 According to the referring court, IGPM, despite being a non-profit-making organisation operating on the principle of solidarity, must be considered to be an undertaking engaged in economic activity, which was selected by the social partners from among other undertakings with which it is in competition on the market in the relevant insurance services.

13 So far as Case C-26/14 is concerned, the referring court explains that Addendum No 83 of 24 April 2006 to the National Collective Agreement for Traditional Bakery and Pastry-Making Undertakings established a supplementary scheme for the reimbursement of healthcare costs for all employees in that sector, the basis for the scheme being a pooling of the insured risks and compulsory participation by employers.

14 Article 6 of Addendum No 100 to the aforementioned collective agreement appoints the provident society AG2R Prévoyance as the sole insurer for that scheme. The

services and contributions relating to the scheme are also established by an addendum to the collective agreement.

15 By order of 23 December 2011, the Minister for Labour, Employment and Health made Addendum No 100 binding on all employees and employers in the sector concerned.

16 Relying implicitly on paragraphs 59 to 65 of the judgment in *AG2R Prévoyance* (C-437/09, EU:C:2011:112), which left this question to be determined by national courts, the referring court considers that AG2R Prévoyance, although it is non-profit-making and acts on the basis of the principle of solidarity, was freely chosen by the social partners, following negotiations which concerned inter alia the arrangements pertaining to its appointment, from among the provident societies, mutual associations and insurance firms that were suitable to be appointed as the manager of a supplementary scheme such as the scheme concerned. AG2R Prévoyance must accordingly be regarded as an undertaking engaged in an economic activity which was chosen by the social partners from among other undertakings with which it is in competition on the market in the relevant insurance services.

17 However, the referring court, still implicitly relying on the judgment in *AG2R Prévoyance* (C-437/09, EU:C:2011:112), adopts the analysis in paragraphs 66 to 81 of that judgment and consequently considers that neither the addendum at issue nor the order extending the agreement is unlawful from the point of view of Articles 102 TFEU and 106 TFEU. It also rejects, as unrelated to those articles, the complaint that the appointment of the insurer was not preceded by any call for tenders.

18 On the other hand, the Conseil d'État (Council of State) mentions, in the two orders for reference, the judgment in *Sporting Exchange* (C-203/08, EU:C:2010:307), relating to the grant of an exclusive right to operate games of chance. It states that, according to paragraph 47 of that judgment, the obligation of transparency is a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator.

19 In that connection, the referring court is uncertain whether compliance with that obligation is also a prior condition for the extension, by a Member State, to all undertakings within a sector, of a collective agreement under which a single insurer, chosen by the social partners, is entrusted with the management of a compulsory supplementary social insurance scheme for employees in that sector.

20 Accordingly, the Conseil d'État (Council of State) decided to stay both sets of proceedings and to refer to the Court of Justice, in each case, the following question:

'Is compliance with the obligation of transparency flowing from Article 56 TFEU a mandatory prior condition for the extension, by a Member State, to all undertakings within a sector, of a collective agreement under which a single operator, chosen by the

social partners, is entrusted with the management of a compulsory supplementary social insurance scheme for employees?'

21 By order of the President of the Court of 29 January 2014, Cases C-25/14 and C-26/14 were joined for the purposes of the written and oral procedure and the judgment.

The request that the oral procedure be reopened

22 By a letter received at the Court Registry on 8 April 2015, the Confédération nationale de la boulangerie et boulangerie-pâtisserie française requested the reopening of the oral procedure. It maintained, in essence, that certain arguments, which were presented as being vital for the purposes of the present references, had not been debated between the interested persons. The point in question is, in essence, whether the contract at issue in the main proceedings presents certain cross-border interest in view of its characteristics and the consequences arising both from the self-administered nature of the supplementary scheme at issue in the main proceedings in Case C-26/14 and from the procedures for concluding a collective agreement and the powers which the competent Minister has concerning the extension of such an agreement as regards the assessment of whether there is any restriction of the freedom to provide services and the possible justification for such a restriction.

23 It should be recalled in that regard that the Court, under Article 83 of its Rules of Procedure, may at any time, after hearing the Advocate General, order that the oral procedure be reopened, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument that has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

24 In the present case, the Court, having heard the Advocate General, takes the view that it has all the information necessary to answer the question referred and that that information has been debated between the parties.

25 The request made by the Confédération nationale de la boulangerie et boulangerie-pâtisserie française must therefore be rejected.

The question referred for a preliminary ruling

26 By the question which it raises in each of the requests for a preliminary ruling, the Conseil d'État (Council of State) asks, in essence, whether the obligation of transparency, which flows from Article 56 TFEU, applies to the extension by a Member State, to all employers and employees within a sector, of a collective agreement concluded by the employers' and employees' respective representatives for a sector, under which a single economic operator, chosen by the social partners, is entrusted with the management of a compulsory social insurance scheme established for employees.

27 As a preliminary point, it should be recalled, first, that, in the case of supplies of services which involve action on the part of national authorities, such as the award of a services concession, the obligation of transparency does not apply to every operation but only to those that present certain cross-border interest because they are, objectively, of such a kind as to be of interest to economic operators established in Member States other than the State of the authority which awards them (see by analogy, inter alia, judgment in *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 24).

28 It should be noted in this regard that the referring court has not established the facts needed to enable the Court to ascertain whether, in the cases in the main proceedings, there is certain cross-border interest. It must be borne in mind that, as is apparent from Article 94 of the Rules of Procedure, the Court must be able to find in a request for a preliminary ruling an account of the facts on which the questions are based and of the connection, inter alia, between those facts and those questions. Accordingly, the findings of fact needed to make it possible to ascertain whether there is certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary or primary EU legislation depends, should be made before the questions are referred to the Court (see judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).

29 However, because of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the preliminary ruling procedure, the lack of such preliminary findings by the referring court concerning the existence of certain cross-border interest does not necessarily lead to the request being inadmissible if the Court, in the light of the information in the documents before it, considers that it is in a position to give a useful answer to the referring court. That is the case, in particular, where the order for reference contains sufficient relevant information for the existence of such an interest to be determined (judgment in *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 19 and the case-law cited).

30 Whether there is certain cross-border interest must be determined on the basis of all the relevant factors, such as the financial value of the contract, the place where it is to be performed or its technical features, having regard to the particular characteristics of the contract concerned (see to that effect, inter alia, judgment in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 29 and the case-law cited).

31 So far as the existence of certain cross-border interest is concerned, the Court notes that the observations of the interested parties show that there are differences of opinion on this issue.

32 Consequently, the Court's answer is given subject to the proviso that the referring court establishes that there is certain cross-border interest in the case in the main proceedings (judgment in *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 19 and the case-law cited). Accordingly, the following statements are made on the premiss that the grant of the right to manage each of the supplementary social insurance schemes at issue in the main proceedings for all employers and employees

within the sectors concerned presents certain cross-border interest, a matter which must, however, be determined by the referring court.

33 Secondly, where a public authority renders binding, for all employers and employees in a sector, a collective agreement appointing a single body to manage a compulsory social insurance scheme throughout a given period, that decision also binds those who, since they are not members of an organisation which is a signatory to that agreement, were not represented when the agreement in question was negotiated and concluded.

34 Thirdly, it is by operation of that decision that that body acquires an exclusive right (see, to that effect, judgment in *Albany*, C-67/96, EU:C:1999:430, paragraph 90). The extension decision has the effect of excluding operators established in other Member States which might be interested in carrying out that management activity (see, by analogy, judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraph 47).

35 Fourthly, where a public authority creates an exclusive right, the obligation of transparency is, in principle, to be complied with (see, to that effect, judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraph 47). Accordingly, where a public authority exercises its power to extend the binding nature of a collective agreement appointing a single body to manage a supplementary social insurance scheme, it must previously have given potentially interested operators other than the one appointed an opportunity to express their interest in providing such management and must have acted with full impartiality when appointing the operator entrusted with management of that supplementary scheme.

36 So far as the question raised is concerned, it is apparent that, in a process such as that at issue in the main proceedings, it is the action of a public authority which creates an exclusive right and, thus, when that action is taken, the obligation of transparency flowing from Article 56 TFEU must, in principle, be complied with.

37 It should be observed in this regard that the extension decision at issue in the main proceedings is not exempt, because of its subject-matter (an agreement concluded following collective bargaining between organisations representing respectively employers and employees within a sector), from the requirements of transparency resulting from Article 56 TFEU.

38 According to the case-law, the obligation of transparency stems from the principles of equal treatment and non-discrimination, compliance with which is required by the freedom to provide services guaranteed by Article 56 TFEU. Indeed, in the absence of all transparency, an award to an undertaking located in the Member State in which the award procedure takes place, amounts to a difference in treatment which operates mainly to the detriment of all undertakings which might be interested but which are located in other Member States, since those undertakings have had no real opportunity of expressing their interest, and that difference in treatment amounts, in principle, to indirect discrimination on grounds of nationality, which is, in principle, prohibited by Article 56 TFEU (see, to

that effect, inter alia, judgments in *Coname*, C-231/03, EU:C:2005:487, paragraphs 17 to 19, and *Belgacom*, C-221/12, EU:C:2013:736, paragraph 37 and the case-law cited).

39 Although the obligation of transparency does not necessarily require there to be a call for tenders, it does require there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed (see, to that effect, inter alia, judgment in *Engelmann*, C-64/08, EU:C:2010:506, paragraph 50 and the case-law cited).

40 It should be recalled that the question raised in each of the cases concerns only the decision by which a public authority decides to extend a collective agreement to all employers and employees within a sector. Moreover, the rights of employers which did not take part in the conclusion of that agreement are affected only by that extension.

41 In principle, therefore, a Member State may create an exclusive right for an economic operator by rendering binding for all employers and employers in a sector a collective agreement under which that operator, chosen by the social partners, is entrusted with the management of a compulsory supplementary social insurance scheme established for the employees in that sector, but may do so only if the adoption of the decision extending the collective agreement appointing a single managing body is conditional upon the obligation of transparency being complied with.

42 In this regard, it must be noted that neither the referring court nor the French Government has mentioned any possible justification for the fact that the exclusive right to manage a supplementary social insurance scheme is awarded without any form of publicity.

43 The French Government maintains that procedures such as those around the adoption of the extension orders at issue in the main proceedings ensure that the obligation of transparency is complied with.

44 As has been recalled at paragraph 39 of the present judgment, although that obligation does not necessarily entail an obligation to call for tenders, it does require there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed.

45 The following factors, even if taken together, do not represent a degree of publicity sufficient to ensure that interested operators may — in keeping with the objectives of the obligation of transparency — express their interest in managing the social insurance scheme at issue in the main proceedings, before an extension decision is adopted with full impartiality: (i) the fact that the collective agreements and the addenda thereto have been filed with an administrative authority and may be consulted on the Internet, (ii) the fact that notice is published in an official journal of the intention to start the procedure for extending such an addendum and (iii) the fact that any interested party has an opportunity to submit observations following that publication. Indeed, interested parties have only 15 days within which to submit their observations, an appreciably shorter time than the

periods laid down, except in urgent cases, in Articles 38, 59 and 65 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OL 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319), which is not applicable in the present case but which may serve as a reference point in this regard. Furthermore, according to the observations made by the French Government at the hearing before the Court, the competent Minister merely conducts a review of legality. It thus appears to be the case that the fact that a more advantageous offer exists and that an interested party has informed the Minister about it cannot prevent the extension of that agreement, this being a matter which the referring court must determine.

46 In view of the foregoing considerations, the answer to the question raised in both cases is that the obligation of transparency, which flows from Article 56 TFEU, precludes the extension by a Member State, to all employers and employees within a sector, of a collective agreement concluded by the employers' and employees' respective representatives for a sector, under which a single economic operator, chosen by the social partners, is entrusted with the management of a compulsory social insurance scheme established for employees, where the national rules do not provide for publicity sufficient to enable the competent public authority to take full account of information which has been submitted concerning the existence of a more favourable offer.

Temporal limitation of the effects of the present judgment

47 In its observations, the French Government has asked that, in the event that the Court considers that publicity measures such as those applying to the adoption of the extension orders at issue in the main proceedings do not satisfy the requirements resulting from the obligation of transparency, the effect of the Court's judgment should be limited in time. It submits that that limitation should enable those extension orders to continue to produce effects until the end of the current period, as provided for by the schemes concerned, and that the effects of the present judgment should apply only to similar collective agreements extended after delivery of the present judgment.

48 The French Government maintains, first, that, if the general obligation to conclude a contract with a single managing body appointed by the social partners in the framework of existing supplementary social insurance schemes were called in question, that would have serious repercussions, since, in addition to the 142 000 and 117 476 employees in the real property and bakery and pastry-making sectors respectively, approximately 2 400 000 employees, when all occupations are taken into account, would be affected. That would cause detriment to the principle of risk pooling, as it has been applied. The latter is particularly important in these schemes, which are characterised by a high degree of solidarity, and thus their financial equilibrium and the benefits they provide would be affected. As a consequence, calling that general obligation into question in this way would jeopardise the cover to which the employees concerned are currently entitled under

those schemes. The French Government also contends that it would also be liable to give rise to vast numbers of cases before the national courts.

49 Secondly, the French Government submits that the operators concerned have acted in good faith, fully complying with the national legislation in force, in particular so far as concerns the obligation to review, within a period not exceeding five years, agreements appointing a managing body, and wholly unaware that there has been any infringement of the obligation of transparency.

50 In that regard, it should be noted that, according to settled case-law, it is only exceptionally that the Court may decide to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith (see, inter alia, judgment in *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 41 and the case-law cited). Application of that case-law in the context of the cases in the main proceedings requires, however, that the specific features of public procurement law and the very particular nature of the situation at issue in the main proceedings be taken into account.

51 In the area of public procurement, Articles 2d and 2f of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31), read in the light of recitals 25 to 27 of Directive 2007/66, enable the Member States to limit, under certain conditions, the right to bring actions against contracts concluded in breach of EU law (see, to that effect, judgment in *MedEval*, C-166/14, EU:C:2015:779, paragraphs 34 and 35). It follows that, in certain circumstances, the interest in preventing legal uncertainty may justify putting the stability of contractual arrangements already in the course of performance before observance of EU law.

52 In this case, maintaining the effects of the extension decision at issue in the main proceedings is justified, above all, in view of the situation of the employers and employees who, on the basis of the extended collective agreements at issue, have entered into a contract for supplementary social insurance in a particularly sensitive social context. Given that those employers and employees were not directly involved in the extension procedure, they must be found to have entered into contractual commitments affording them guarantees as to supplementary insurance, in reliance on a legal situation in respect of which the Court has given clarification — as regards the specific scope of the obligation of transparency flowing from Article 56 TFEU — only in the present judgment.

53 In the specific circumstances of the cases in the main proceedings, it must be held that the effects of the present judgment will not concern the collective agreements under which a single body was appointed to manage a supplementary social insurance scheme and which a public authority has, before the date of delivery of the present judgment,

made binding on all employers and employees within a sector, without prejudice to legal proceedings brought before that date.

Costs

54 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 (Fifth Chamber) hereby rules:

The obligation of transparency, which flows from Article 56 TFEU, precludes the extension by a Member State, to all employers and employees within a sector, of a collective agreement concluded by the employers' and employees' respective representatives for a sector, under which a single economic operator, chosen by the social partners, is entrusted with the management of a compulsory social insurance scheme established for employees, where the national rules do not provide for publicity sufficient to enable the competent public authority to take full account of information which has been submitted concerning the existence of a more favourable offer.

The effects of the present judgment do not concern the collective agreements under which a single body was appointed to manage a supplementary social insurance scheme and which a public authority has, before the date of delivery of the present judgment, made binding on all employers and employees within a sector, without prejudice to legal proceedings brought before that date.

[Signatures]

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* Language of the case: French.