



## **Posting of workers: national courts must ensure that penalties for non-compliance with administrative obligations are proportionate**

*National courts may apply a national system of penalties contrary to the Directive concerning the posting of workers as long as it ensures proportionality of the penalties*

The company CONVOI s. r. o., established in Slovakia and represented by NE, posted workers to a company established in Fürstenfeld (Austria). By a decision adopted in June 2018, on the basis of findings made during an inspection carried out on 24 January 2018, the Bezirkshauptmannschaft Hartberg-Fürstenfeld (administrative authority of the district of Hartberg-Fürstenfeld, Austria) imposed a fine of EUR 54 000 on NE, for failure to comply with a number of obligations laid down by Austrian employment law, relating, in particular, to the retention and making available of wage and social security records. NE brought an action against that decision before the referring court, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria).

In October 2018, that court, questioning the conformity with EU law and, in particular, with the principle of proportionality set out *inter alia* in Article 20 of Directive 2014/67<sup>1</sup> of penalties such as those imposed by the Austrian legislation at issue, had brought the matter before the Court for a preliminary ruling. In its order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*,<sup>2</sup> the Court had held that the combination of various elements of the Austrian system of penalties imposed for non-compliance with obligations – essentially administrative – to retain documents concerning the posting of workers was disproportionate.

Noting that, following that order, the national legislature did not amend the legislation at issue, and having regard to the solution adopted by the Court in the judgment of 4 October 2018, *Link Logistik N&N*,<sup>3</sup> the referring court decided to ask the Court whether and, if so, to what extent that legislation may be disapplied. Indeed, in that judgment of 4 October 2018, *Link Logistik N&N*, the Court had considered that a provision of EU law similar to Article 20 of Directive 2014/67<sup>4</sup> has no direct effect.

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<sup>1</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2014 L 159, p. 11).

<sup>2</sup> Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, [C-645/18](#). More specifically, in that order, the Court held that Article 20 of Directive 2014/67, which requires the penalties provided for therein to be proportionate, precludes national legislation which provides, in respect of non-compliance with employment law obligations in relation to declaring workers and keeping records on wages, for the imposition of high fines which may not be lower than a predefined minimum amount, which apply cumulatively in respect of each worker concerned and without an upper limit, and to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed.

<sup>3</sup> Judgment of 4 October 2018, *Link Logistik N&N*, [C-384/17](#).

<sup>4</sup> In that judgment of 4 October 2018, *Link Logistik N&N*, [C-384/17](#), the Court was ruling on Article 9a of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42), as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011 (OJ 2011 L 269, p. 1). That provision also provides for a requirement of proportionality of penalties imposed in the event of infringements of national provisions adopted pursuant to Directive 1999/62.

By its judgment, the Court, sitting as the Grand Chamber, rules, first, on whether the requirement of proportionality of penalties is directly effective. Second, it specifies the extent of the obligations incumbent on a national court hearing a dispute in which it is called upon to apply national rules imposing disproportionate penalties.

### Findings of the Court

As a first step, the Court holds that Article 20 of Directive 2014/67, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may those be relied on by individuals before national courts against a Member State which has transposed it incorrectly. In finding, first of all, that the requirement of proportionality of penalties laid down in that legislation is unconditional, the Court notes that the wording of that article sets out that requirement in absolute terms. Moreover, the prohibition on adopting disproportionate penalties, which is the consequence of that requirement, does not require the adoption of any measure of the EU institutions and that provision does not in any way confer on Member States the right to limit the scope of that prohibition. In that regard, the fact that Article 20 of that directive needs to be transposed is not such as to call into question the unconditional nature of the requirement of proportionality of penalties laid down in that article. Next, in finding that the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67 is sufficiently precise, the Court holds that the margin of discretion left by that provision to the Member States in defining the rules on penalties applicable in the event of infringements of the national provisions adopted pursuant to that directive is limited by the prohibition, laid down by that provision in a general manner and in unequivocal terms, on imposing disproportionate penalties. Thus, the existence of such a margin of discretion does not preclude judicial review from being carried out on the transposition of that provision.

As a second step, the Court finds that the principle of primacy of EU law imposes on national authorities the obligation to disapply national legislation of which a part is contrary to the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67 only to the extent necessary to enable the imposition of proportionate penalties. Recalling that, although national legislation such as that at issue in the main proceedings is appropriate for attaining the legitimate objectives pursued, the Court reiterates that that legislation goes beyond the limits of what is necessary to attain those objectives due to combination of its various characteristics.<sup>5</sup> However, taken in isolation, such characteristics do not necessarily breach that requirement. Therefore, in order to ensure the full effectiveness of the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67, it is for the national court hearing an action against a penalty such as that at issue in the main proceedings to disregard that part of the national legislation from which the disproportionate nature of the penalties stems in such a way as to result in the imposition of proportionate penalties, which are at the same time effective and dissuasive. The fact that the penalty imposed will be less severe than the penalty provided for by the applicable national legislation cannot be regarded as infringing the principles of legal certainty, legality and proportionality of criminal offences and penalties and non-retroactivity of the criminal law, the penalty remaining adopted under the said legislation. Furthermore, since the requirement of proportionality provided for in Article 20 of Directive 2014/67 entails a limitation of penalties which must be observed by all the national authorities called upon within the exercise of their powers to apply that requirement, while allowing those authorities to impose different penalties depending on the seriousness of the offence on the basis of the applicable national legislation, such a requirement cannot be regarded as undermining the principle of equal treatment.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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<sup>5</sup> Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, [C-645/18](#).

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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