

SUMMARY

ECJ 17 December 2015, joined cases C-25/14 and C-26/14. (UNIS), Free Movement – Social Insurance

Summary

The obligation of transparency precludes Member States from extending to all employers and employees within a sector a collective agreement, under which a single insurance company, selected by the social partners, manages a compulsory supplementary social insurance scheme, unless this is done in a completely transparent manner.

Facts

This case concerns two collective agreements, one for the real property sector and one for the bakeries and pastry-making sector. The collective agreements include supplementary social insurance schemes. In 2011, the government issued orders (the “extension decision”) making these schemes binding on all employers and employees in the said sectors and, at the request of the social partners in those sectors, appointed one insurance company for each sector to operate the schemes, respectively IGPM for the real property scheme and AG2R for the bakeries and pastry-making scheme. Two parties, respectively UNIS and an individual employer, brought actions before the Conseil d’Etat, seeking annulment of the government’s orders appointing IGPM and AG2R as the sole insurers of the respective schemes. They argued that the appointment of those insurers without a call for tenders and without giving competing insurers an opportunity to vie to become the operator of the schemes in question.

National proceedings

The Conseil d’Etat referred the following question to the ECJ: ‘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?’

ECJ’s findings

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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. Therefore, 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. 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 (§28-32).

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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 (§33).

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Where a public authority creates an exclusive right, the obligation of transparency is, in principle, to be complied with (see Sporting Exchange, C-203/08, 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 (§35).

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The extension decision 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 (§ 37).

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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 (§ 38).

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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. In principle, therefore, a Member State may create an exclusive right for an economic operator by rendering binding for all employers and employees 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 (§ 39-41).

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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 (§ 42).

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The following factors, even if taken together, do not represent a degree of publicity sufficient

to ensure that interested operators may 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 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 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 (§ 45).

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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 (§ 53).

Ruling (judgment)

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.

Creator: European Court of Justice (ECJ)

Verdict at: 2015-12-17

Case number: C-25/14 and C-26/14