JUDGMENT OF THE COURT (Second Chamber)

28 June 2012 (*)

(Freedom of movement for workers — Article 45 TFEU — Regulation (EEC) No 1612/68 — Article 7(4) — Principle of non-discrimination — Top-up amount on wages paid to workers placed on a scheme of part-time work prior to retirement — Cross-border workers subject to income tax in the Member State of residence — Notional taking into account of the tax on wages of the Member State of employment)

In Case C-172/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Ludwigshafen am Rhein (Germany), made by decision of 4 April 2011, received at the Court on 11 April 2011, in the proceedings

Georges Erny

v

Daimler AG — Werk Wörth,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 28 March 2012,

after considering the observations submitted on behalf of:

– Mr Erny, by G. Turek, Rechtsanwalt,

– Daimler AG — Werk Wörth, by U. Baeck and N. Kramer, Rechtsanwälte,

– the European Commission, by G. Rozet and S. Grünheid, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 45 TFEU and Article 7(4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The reference has been made in proceedings between Mr Erny, a French national residing in France and working in Germany, and his employer, Daimler AG — Werk Wörth ('Daimler'), concerning the calculation of a top-up amount on wages ('the top-up amount'), which is payable to him under a scheme of 'part-time working for older employees prior to retirement'.

Legal context

European Union law

3 Under Article 7 of Regulation No 1612/68:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

…

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

4 Regulation No 1612/68 was repealed and replaced, with effect from 16 June 2011, by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

National law

The Law on part-time working for older employees

5 Paragraph 1 of the Law on part-time working for older employees (Altersteilzeitgesetz) provides:

'1. The scheme of part-time working for older employees is intended to enable such employees to make a gradual transition from working life to a retirement pension.

2. The Bundesanstalt für Arbeit [Federal Labour Office] … shall, by way of benefits provided for by this Law, subsidise part-time working for older employees who reduce their working hours on or after reaching the age of 55, at the latest by 31 December 2009, and thereby make it possible for their employer to recruit workers who would otherwise be unemployed.'

6 The version of point (1)(a) of Paragraph 3(1) of the Law on part-time working for older employees in force until 30 June 2004 provided:

'Entitlement to benefits under Paragraph 4 [reimbursement of the top-up amounts up to the statutory amount by the Federal Labour Office] presupposes that:

1. the employer, on the basis of a collective agreement, … a works agreement or an agreement with the employee,

   (a) has topped up the pay due under the scheme of part-time working for older employees by at least 20% of that pay, but to at least 70% of the previous pay within the meaning of Paragraph 6(1) less the statutory deductions normally applicable to employees

(minimum net amount) …’

7 The first sentence of Paragraph 15 of the Law on part-time working for older employees provides:

‘The Bundesministerium für Arbeit und Soziales [Federal Ministry of Labour and Social Affairs] may, by way of order, determine the minimum net amounts provided for in point (1)(a) of Paragraph 3(1) in the version in force until 30 June 2004 …’

The Order on Minimum Net Pay

8 On the basis of the authority conferred by Paragraph 15 of the Law on part-time working for older employees, the competent Federal Minister adopted the Order on Minimum Net Pay (Mindestnettobetrags-Verordnung), the version resulting from the Order of 19 December 2007 (BGBl. 2007 I, p. 3040) being that which is applicable in the main proceedings.

9 As the national court has pointed out, that order includes a table which shows levels of gross pay rounded up to the nearest five euros and assigns to each pay level minimum net amounts staggered according to wage-tax bands. Depending on the tax band, income tax (not taking into account individual tax allowances) and the solidarity contribution are deducted from those amounts. A social insurance deduction at a flat rate of 21%, limited to the monthly earnings ceiling for the assessment of contributions to the statutory pension fund is applied. The minimum net amounts determined in this way are shown at 70% in that table.

The collective agreement on part-time working for older employees

10 Paragraph 7 of the collective agreement on part-time working for older employees (Tarifvertrag zur Altersteilzeit), concluded on 23 November 2004 between the Pfalz Metal and Electrical Industry Association and the regional office of the Metal Industry Trade Union (‘the collective agreement’), states:

‘The employee shall receive a top-up to the pay due to him under the scheme of part-time working for older employees in accordance with point (1)(a) of Paragraph 3(1) of the [Law on part-time working for older employees] in the version in force at the relevant time. However, that amount is to be calculated in such a way that his monthly net pay comes to at least 82% of his previous monthly gross pay … less the statutory deductions normally applicable to employees.’

The group-wide works agreement

11 A group-wide works agreement (Gesamtbetriebsvereinbarung) relating to the utilisation of the scheme of part-time working for older employees (‘the group-wide agreement’), which increased the top-up amount from 82% to 85%, was concluded on 24 July 2000 within DaimlerChrysler AG (now Daimler).

12 Point 8.3 of that agreement states:

‘The top-up amount is to be calculated in such a way that, during the working phase, the employee receives at least 85% of his previous pay under point 8.2.2 less the statutory deductions normally applicable to employees, and, during the exemption from work phase, at least 85% of his previous pay under point 8.2.3 less the statutory deductions normally applicable to employees.’

The contract of part-time working for older employees

13 Subparagraph 1 of Paragraph 5, headed ‘additional benefits on the part of the employer’, of the contract of part-time working for older employees concluded between the parties

(Altersteilzeitvertrag der Parteien) states:

‘In accordance with the [group-wide agreement], the monthly net part-time pay is to be topped up to 85% of the flat-rate monthly net full-time pay (basis: current Order on Minimum Net Pay). In addition to the net part-time pay provided for in Paragraph 4, a top-up amount is therefore to be paid every month.’

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

14 Mr Erny is a cross-border worker for the purposes of the Convention concluded between the French Republic and the Federal Republic of Germany for the avoidance of double taxation. The income that he earns in Germany is subject to tax in France, after deduction of the social insurance contributions paid in Germany. Inasmuch as the rate of tax on wages is lower in France than in Germany, a worker such as Mr Erny receives a net income which is higher than that of a comparable worker residing in Germany.

15 On 17 November 2006, the parties in the main proceedings entered into a contract of part-time working for older employees under which Mr Erny’s original contract of full-time employment became a contract of part-time employment with effect from 1 September 2007.

16 Under that contract, the employment relationship between the parties will end on 31 August 2012 at the latest. During the period of part-time working in preparation for his retirement, Mr Erny receives the top-up amount in addition to his part-time pay. Under Paragraph 5 of that contract, the monthly net part-time pay ‘is to be topped up to 85% of the flat-rate monthly net full-time pay (basis: current Order on Minimum Net Pay)’.

17 As has been pointed out in paragraph 9 of the present judgment, the Order on Minimum Net Pay includes a table which links to gross pay levels what are know as minimum net amounts staggered according to German tax bands. German income tax (not taking into account individual tax allowances), the solidarity contribution and a flat rate of 21% in respect of social insurance contributions are deducted from the gross pay on the basis of the tax band. 70% of the net pay thus determined is set out in the table as the minimum net amount.

18 Under the Law on Income Tax (Einkommensteuergesetz), top-up amounts paid to workers liable to tax in Germany are exempt from tax and are therefore also not subject to deductions for German social insurance contributions, although the top-up amount is taken into account for the purpose of determining the applicable tax rate.

19 As regards the determination of the top-up amount, Daimler establishes, first, as a basis for calculation, notional pay equivalent to 85% of the flat-rate net monthly pay paid for full-time work. In order to do this, it determines, on the basis of the gross pay which Mr Erny would receive if he were not engaged in part-time working for older employees, a figure corresponding to 70% of the flat-rate net pay based on the table of minimum net amounts and adjusts that pay upwards to 85%. In the case in the main proceedings, the employer, for the purposes of establishing correspondences in that table, took German tax band III (married workers) as a notional basis.

20 Secondly, the employer establishes the worker’s ‘individual net pay under the scheme of part-time working for older employees’. In the case of workers who are liable to tax in Germany, it deducts for that purpose the taxes and social insurance contributions actually payable from the pay due under the scheme of part-time working for older employees (equal to 50% of the gross pay received before commencing part-time working for older employees). In the case of cross-border workers, the employer deducts the social insurance contributions actually payable and a notional German tax

on wages. This latter amount corresponds to the tax on wages that a worker liable to tax in Germany with the same individual characteristics as the cross-border worker (gross pay, family circumstances) would have to pay.

21 Lastly, the top-up amount corresponds to the difference between the notional pay equivalent to 85% of the flat-rate net monthly pay for full-time work and the individual net pay under the scheme of part-time working for older employees.

22 Daimler takes the view that its method of calculation makes it possible to establish a uniform basis of calculation for all workers engaged in the scheme of part-time working for older employees. No worker's individual tax liability is taken into account, only the flat-rate tax on wages being applied, and no worker, even if he is liable to tax in Germany, receives exactly 85% of the net amount of the pay which he earned previously. The use of a flat-rate amount helps, above all, to assess the overall tax burden, save administration costs and simplify the procedure. Unlike the case which gave rise to the judgment in Case C-400/02 *Merida* [2004] ECR I-8471, the top-up does not have a compensatory function and Daimler did not, moreover, undertake to pay guaranteed net wages for which it would bear all or part of the related taxes or social insurance contributions.

23 Mr Erny submits, in contrast to Daimler, that the top-up amount is subject to income tax in France and that the *de facto* double taxation resulting from the disputed method of calculation results in discrimination inasmuch as different situations are treated in the same way.

24 Consequently, Mr Erny brought a case before the referring court seeking from his employer the payment of a higher top-amount than that which he receives, the amount of which he calculates as follows.

25 First, he establishes the notional pay equivalent to 85% by deducting social insurance contributions at a flat rate of 21% from his last gross pay for full-time work, but he does not deduct, notionally, the German tax on wages in accordance with the table of minimum net amounts reproduced in the Order on Minimum Net Pay. He then determines the amount corresponding to 85% of that sum. Secondly, he calculates the net pay due under the scheme of part-time working for older employees by deducting from his pay under that scheme, which is equal to half of the gross salary for full-time employment, the social security contributions actually payable, without deducting, notionally, the German tax on wages. If this method of calculation is applied, the difference between the top-up amount which Daimler pays to Mr Erny and the amount resulting from that method of calculation represents a loss of earnings of EUR 424.40 per month.

26 The national court notes that cross-border workers who are liable to tax in France receive an amount that is appreciably less than 85% of the net income that they received before they began part-time work for older employees, whereas workers who are liable to tax in Germany receive an amount which corresponds, at a flat rate, to 85% of their previous net income. That situation is due mainly to the fact that the German tax rates are higher than the tax rates in France. Furthermore, it is conceivable that persons in Mr Erny's position also have to pay tax on the top-up amount in France.

27 In those circumstances, the Arbeitsgericht Ludwigshafen am Rhein (Labour Court, Ludwigshafen am Rhein) decided, in the light of the judgment in *Merida*, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does a provision concerning part-time working for older employees contained in an individual contract according to which, as in Paragraph 5(1) of the contract on part-time working for older employees concluded between the parties, the agreed top-up amount for cross-border workers from France must also be calculated in accordance with the Order on

Minimum Net Pay infringe Article 45 TFEU, as implemented by Article 7(4) of [Regulation No 1612/68]?

2. If the Court of Justice answers Question 1 in the affirmative:

In the light of the requirements of Article 45 TFEU, as implemented by Article 7(4) of [Regulation No 1612/68], are analogous provisions in collective agreements, such as point 8.3 of the [group-wide agreement] and Paragraph 7 of the [collective agreement], to be interpreted as meaning that, in the case of cross-border workers, the top-up amount is not to be calculated in accordance with the table set out in the Order on Minimum Net Pay?'

Consideration of the questions referred

Admissibility

28 Daimler submits that the referring court has no doubts as to the scope of European Union law and is in fact asking the Court to help it to interpret the relevant German legislation, the group-wide agreement and the collective agreement. The Court, however, has jurisdiction to rule only on the interpretation and the validity of European Union law, with the result that the reference for a preliminary ruling must be declared inadmissible.

29 That line of argument must be rejected.

30 It is true that, under Article 267 TFEU, the Court has no jurisdiction to rule either on the interpretation of contractual clauses or provisions of national laws or on their conformity with European Union law (see, to that effect, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 16 and the case-law cited).

31 However, as the referring court has expressly stated, the reference for a preliminary ruling concerns the 'interpretation of European Union law' and, more specifically, Article 45 TFEU and Article 7(4) of Regulation No 1612/68.

32 According to settled case-law, it is for the Court to restrict its analysis to the provisions of European Union law and provide an interpretation of them which will be of use to the national court, which has the task of determining the compatibility of the provisions of national law and of the contractual clauses with that law (*Attanasio Group*, paragraph 19).

33 Subject to that reservation, the Court will answer the questions referred for a preliminary ruling.

Substance

34 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 45 TFEU and Article 7(4) of Regulation No 1612/68 are to be interpreted as meaning that they preclude clauses in collective and individual agreements under which a top-up amount such as that at issue in the main proceedings, which is paid by an employer under a scheme of part-time working for older employees, must be calculated in such a way that the tax on wages payable by the worker in the Member State of employment is notionally deducted when establishing the basis for the calculation of that top-up amount, even though, under a tax convention for the avoidance of double taxation, the pay, salaries and analogous remuneration paid to workers who do not reside in the Member State of employment are taxable in their Member State of residence. If the answer to that question is in the affirmative, the referring court wishes to know what consequences result for the calculation of the top-up amount payable to those workers.

35 Article 45(2) TFEU prohibits all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

36 The prohibition of discrimination laid down in that provision applies not only to the actions of public authorities, but also to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see, inter alia, Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraph 45 and the case-law cited).

37 Moreover, Article 7(4) of Regulation No 1612/68, which clarifies and gives effect to certain rights conferred on migrant workers by Article 45 TFEU (*Merida*, paragraph 19), provides that any clause of a collective or individual agreement concerning, inter alia, remuneration and other conditions of work or dismissal is null and void in so far as it lays down discriminatory conditions in respect of workers who are nationals of the other Member States.

38 A benefit such as the top-up amount, which is paid in addition to the remuneration granted to workers placed under a scheme of part-time working for older employees, comes unquestionably, as a part of the remuneration, within the substantive scope of the provisions cited in the preceding paragraph, irrespective of the fact that, under the Law on part-time working for older employees, the top-up amount is, in part, financed through public funds in the form of a repayment to the employer. A cross-border worker in Mr Erny's situation may rely on those provisions in regard to such a top-up amount (see, to that effect, *Merida*, paragraph 20).

39 The Court has consistently held that the equal treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see, inter alia, Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17).

40 The principle of non-discrimination requires not only that comparable situations must not be treated differently but also that different situations must not be treated in the same way (see, inter alia, *Merida*, paragraph 22).

41 Unless it is objectively justified and proportionate to its aim, a provision of national law or a clause in an agreement must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (see, inter alia, *Merida*, paragraph 23). In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (see to that effect, inter alia, Case C-542/09 *Commission* v *Netherlands* [2012] ECR, paragraph 38).

42 In the present case, the taking into account, notionally, of the German tax on wages has a detrimental effect on the situation of cross-border workers, in so far as the deduction of that tax, at the time when the basis for the calculation of the top-up amount is established, places persons who, like Mr Erny, reside and are liable to tax in a Member State other than the Federal Republic of Germany at a disadvantage as opposed to workers who have their residence and are liable to tax in that latter State.

43 According to the findings of the referring court, when the top-up amount is calculated on the basis of the Order on Minimum Net Pay, workers engaged in part-time working in preparation for retirement who are liable to tax in Germany receive an amount which corresponds approximately to

85% of the net income which they previously received in respect of their last period of full-time employment. The reason for this is that, as that order is based on the tax bands and characteristics of the German tax on wages, the tax situation of those wage-earners before they were admitted to the scheme of part-time working in preparation for retirement is taken into account and reflected in the method of calculation.

44 By contrast, in the case of cross-border workers, the amount received is significantly less than 85% of their previous net income. According to the referring court, this is due primarily to the fact that the table in that order integrates the rates of the German tax on wages which were applicable when that order entered into force and that those rates are higher than the comparable rates of tax in France. The method by which the top-up amount is calculated is thus based on a 'notional' tax position which bears no relation to the income which those cross-border workers received previously in respect of their last period of full-time employment.

45 Consequently, in the case of cross-border workers, the notional application of the rate of the German tax on wages prevents the amount paid from corresponding approximately to 85% of the net remuneration previously received in respect of full-time employment, contrary to what is generally the case for workers residing in Germany.

46 Furthermore, as was pointed out by Mr Erny and not disputed by Daimler at the hearing before the Court, the top-up amount paid to cross-border workers such as Mr Erny is subject to tax in France.

47 In order to justify the application of that method of calculation to cross-border workers, Daimler highlights the administrative difficulties which would stem from the application of different methods of calculation depending on the place of residence of the person concerned and the financial consequences of not taking the German tax on wages into account.

48 However, those justifications, which are based on the increase in financial burdens and possible administrative difficulties, must be rejected. Grounds of that kind cannot, in any event, justify the failure to comply with the obligations arising out of the prohibition of discrimination based on nationality set out in Article 45 TFEU (see, to that effect, inter alia, *Merida*, paragraph 30), as neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the disputed provisions (see, to that effect, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 86).

49 Daimler also invokes the autonomy which the social partners should enjoy in developing working conditions.

50 However, although it is apparent, in particular from the first subparagraph of Article 152 TFEU, that the European Union respects the autonomy of the social partners, the fact none the less remains, as is stated in Article 28 of the Charter of Fundamental Rights of the European Union, that the right of workers and employers, or their respective organisations, to negotiate and conclude collective agreements at the appropriate levels must be exercised in accordance with European Union law (see, to that effect, inter alia, Case C-447/09 *Prigge and Others* [2011] ECR I-8003, paragraph 47) and, consequently, with the principle of non-discrimination.

51 Lastly, the fact that workers in Mr Erny's position were informed in advance of the method used by their employer for calculating the top-up amount and could have waived the benefit of the scheme of part-time working in preparation for retirement is irrelevant. The prohibition of discrimination set out in Article 45 TFEU applies, as has been pointed out in paragraph 36 of the present judgment, to all agreements intended to regulate paid labour collectively and to contracts between individuals.

52 In accordance with Article 7(4) of Regulation No 1612/68, clauses of collective or individual agreements which establish direct or indirect discrimination based on nationality are null and void.

53 Neither Article 45 TFEU nor Regulation No 1612/68 prescribes a specific measure to be taken by the Member States or by a private employer such as Daimler in the event of a breach of the prohibition of discrimination. Those provisions leave them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise (*Raccanelli*, paragraph 50).

54 In those circumstances, the answer to the questions referred is that Article 45 TFEU and Article 7(4) of Regulation No 1612/68 preclude clauses in collective and individual agreements under which a top-up amount such as that at issue in the main proceedings, which is paid by an employer under a scheme of part-time working for older employees in preparation for retirement, must be calculated in such a way that the tax on wages payable in the Member State of employment is notionally deducted when the basis for the calculation of that top-up amount is being established, even though, under a tax convention for the avoidance of double taxation, the pay, salaries and similar remuneration paid to workers who do not reside in the Member State of employment are taxable in their Member State of residence. In accordance with Article 7(4) of Regulation No 1612/68, such clauses are null and void. Article 45 TFEU and the provisions of Regulation No 1612/68 leave the Member States or the social partners free to choose between the different solutions suitable for achieving the objective of those respective provisions.

Costs

55 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 (Second Chamber) hereby rules:

Article 45 TFEU and Article 7(4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community preclude clauses in collective and individual agreements under which a top-up amount such as that at issue in the main proceedings, which is paid by an employer under a scheme of part-time working for older employees in preparation for retirement, must be calculated in such a way that the tax on wages payable in the Member State of employment is notionally deducted when the basis for the calculation of that top-up amount is being established, even though, under a tax convention for the avoidance of double taxation, the pay, salaries and similar remuneration paid to workers who do not reside in the Member State of employment are taxable in their Member State of residence. In accordance with Article 7(4) of Regulation No 1612/68, such clauses are null and void. Article 45 TFEU and the provisions of Regulation No 1612/68 leave the Member States or the social partners free to choose between the different solutions suitable for achieving the objective of those respective provisions.

[Signatures]

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* Language of the case: German.