2022/8

Port Labour Act not in conflict with the Belgian Constitution (BE)

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Summary

In its judgment of 25 November 2021, the Belgian Constitutional Court has upheld the obligation to call on recognised dock workers for the activity consisting of preparing trailers on a dock for shipment with a vehicle specifically intended for that purpose (known as a 'tugmaster tractor'). The obligation to rely solely on recognised dock workers for the performance of port work is justified, among other things, by the need to improve safety in port areas and to prevent accidents at work. The identical treatment of, on the one hand, the loading and unloading of ships in the strict sense and, on the other hand, the activity of preparing trailers on a dock for shipment with a tugmaster tractor, does not breach the principle of equality and non-discrimination. Therefore, equal treatment of both types of port labour, with regard to the obligation to call on recognised dock workers, is reasonably justified.

Legal background

This judgment relates to various provisions of the Belgian Act of 7 June 1972 on dock work (the 'Port Labour Act'). The Port Labour Act provides for the obligation to call on recognised dock workers to perform dock work in the port areas. The conditions and modalities of the recognition of the dock workers are further detailed in Royal Decrees.

Facts

Middlegate Europe NV, with its registered office in Zeebrugge, is a transport company active throughout Europe. In the context of international road transport, its employees are responsible, among other tasks, for preparing trailers on a shipment dock, using a tugmaster tractor specifically intended for that purpose.

On 12 January 2011, an employee of Middlegate Europe NV was setting up trailers with a tugmaster tractor in the port of Zeebrugge in the context of the international road transport of a shipment from Virton (Belgium) to Bury (United Kingdom). This employee was subject to a police control.

In the context of this control, the police services drew up an official report against Middlegate Europe NV due to an infringement of Article 1 of the Port Labour Act, namely the performance of dock work by an unrecognised dock worker.

By a decision of 17 January 2013, an administrative fine of EUR 100 was imposed on Middlegate Europe NV by the Federal Public Service for Employment. Middlegate Europe NV contested the decision before the Labour Court in Ghent, Bruges division. On 17 December 2014, the Labour Court dismissed the claim as unfounded. By a ruling of 3 November 2016, the Ghent Labour Court of Appeal dismissed the appeal against the judgment rendered in the first instance as unfounded.

Middlegate Europe NV subsequently lodged a final recourse before the Belgian Court of Cassation (Supreme Court) against the ruling of the Labour Court of Appeal. In those proceedings, Middlegate Europe NV argued that Articles 1 and 2 of the Port Labour Act were in breach of Articles 10 and 11 of the Constitution (principle of equality and non-discrimination) and Article 23 of the Constitution (right to work).

Since the question pertained to whether the restrictions imposed by the Port Labour Act breach the constitutional principle of equality, the Court of Cassation decided to refer the following question to the Constitutional Court for a preliminary ruling:

> Do Articles 1 and 2 of the Port Labour Act breach the principle of equality/non-discrimination (Articles 10 and 11 of the Constitution), the right to work (Article 23, second paragraph of the Constitution) and the freedom of trade and industry to the extent that these provisions impose the obligation to call on recognised dock workers for activities in the port area, even for activities which are not limited to load-

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doi: 10.5553/EELC/187791072022007001009

ing and unloading of ships that can also be carried out outside port areas?

Judgment

No breach of constitutional principle of equality/non-discrimination

The Constitutional Court first of all emphasised that its investigation was limited to the specific question of the referring court, i.e. whether the identical treatment of, on the one hand, the loading and unloading of ships in the strict sense and, on the other hand, the activity of preparing trailers on a dock for shipment with a vehicle specifically intended for that purpose breaches the principle of equality and non-discrimination.

The Constitutional Court ruled that this is not the case:

- The obligation to rely solely on recognised dock workers for the performance of port work is justified by the need to improve safety in the port areas and to prevent accidents at work, among other things.
- Taking into account both the nature of the activities in question and the place where they are performed, namely setting up trailers on a dock for shipment with a vehicle specifically intended for that purpose, it does not appear that these activities involve risks of a magnitude that significantly differs from the risks involved in loading and unloading ships in the strict sense. From a port security perspective, the impact of these activities in terms of risk is thus similar.

Therefore, equal treatment of both types of port labour, with regard to the obligation to appeal on recognised dock workers, is reasonably justified.

Preliminary question to the ECJ

During the course of the proceedings, the Constitutional Court itself referred a question to the ECJ for a preliminary ruling. The Constitutional Court wished to determine whether the obligation in the Port Labour Act to call on recognised dock workers to carry out dock labour activities, including activities other than loading and unloading on ships in the strict sense, breaches the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU).

The ECJ answered this question in the negative (judgment of 11 February 2021 *Katoen Natie Bulk Terminals NV e.a.* Joined Cases C-407/19 and C-471/19). It ruled that the objective of ensuring safety in port areas and preventing workplace accidents is one of the overriding reasons in the public interest capable of justifying a restriction on the freedom of movement.

Since Articles 1 and 2 of the Port Labour Act only provide for the introduction of a system for the recognition of dock workers, but the conditions and implementing provisions must be determined via Royal Decrees, the provisions of Articles 1 and 2 are as such not inappropriate or disproportionate to ensure safety in port areas and to prevent workplace accidents.

Whether the system is necessary must, according to the ECJ, be assessed taking into account the recognition conditions and the way in which the scheme is executed. In that regard, the ECJ gave the Belgian government and social partners some guidelines:

- National legislation requiring companies to use recognised dockers solely for dock work is only proportionate to the aim pursued insofar as the recognition of dockers is based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the discretion of the authority responsible for recognising them and to ensure that it is not used arbitrarily.
- Since the objective of such legislation is to ensure safety in port areas and to prevent accidents at work, the conditions for recognition of dockers must logically pertain only to whether they have the qualities and skills necessary to ensure the performance of their tasks in complete safety.
- To that end, it might be provided that, in order to be recognised, dockers must have sufficient vocational training. However, Member States cannot require that such training be provided or certified by a particular body in the Member State concerned. That Member State should also take into account any recognition of the workers concerned as dockers in another Member State of the European Union, or the training or professional skills they have acquired in another Member State.
- Limiting the number of dockers who may be recognised and, therefore, establishing a limited quota of such workers, to which any undertaking wishing to carry out port activities must obligatorily have recourse, is certainly disproportionate for ensuring safety in port areas. That objective can also be attained by providing that any worker able to prove that he or she has the necessary professional skills and, where appropriate, has followed appropriate training may be recognised as a docker.

Referring to this judgment of the ECJ (B.6.-B.12) in its decision, the Constitutional Court used a similar reasoning to conclude the absence of discrimination under the Belgian Constitution. Like the ECJ, the Constitutional Court confirmed that the Port Labour Act only provides for the introduction of a system for the recognition of dock workers, but the conditions and implementing provisions are determined via Royal Decrees. The Constitutional Court is, however, not competent to judge whether the Royal Decrees (implementing the Port Labour Act) are in breach of Articles 10 and 11 of the Constitution.

The Constitutional Court therefore only focused on whether the identical treatment of the activities of 'loading and unloading on ships' and 'setting up trailers on a dock for shipment with a vehicle specifically intended for that purpose' constitutes a breach of the principle of equality (Articles 10 and 11 of the Constitution).

doi: 10.5553/EELC/187791072022007001009

According to the Constitutional Court, that is not the case as both activities involve similar safety risks.

Commentary

Limited scope of the judgment

In this judgment, the Constitutional Court ruled that Articles 1 and 2 of the Port Labour Act do not breach the constitutional principle of equality and non-discrimination, read in conjunction with the freedom of trade and industry. The Constitutional Court, however, only upheld the obligation to call on recognised dock workers for a specific activity in the port area, i.e. the activity of preparing trailers on a dock for shipment with a tugmaster tractor. It ruled that this activity seems to involve safety risks similar to those posed by the activity of loading and unloading of ships in the strict sense (for which activity companies should also call on recognised dock workers). The Constitutional Court failed, however, to elaborate on why both activities involve similar safety risks, whereas both activities do appear to differ substantially.

Next procedural steps

After the Constitutional Court's ruling, the case will be brought back to the Court of Cassation, which needs to take a final decision. Before the Court of Cassation, it was argued that the Ghent Labour Court of Appeal judgment wrongly applied Articles 1 and 2 of the Port Labour Act as these provisions excessively affect the freedom of trade and industry and are thus discriminatory (violation of Articles 10, 11 and 23 of the Constitution).

As the Constitutional Court (competent for assessing whether Articles 1 and 2 of the Port Labour Act are compatible with the constitutional principle of equality) ruled that there was no violation of Articles 10, 11 and 23 of the Constitution, the Court of Cassation will probably accept this ruling and dismiss the appeal in cassation on this point. The fine imposed on Middlegate Europe NV is likely to be confirmed by the Court of Cassation. The final judgment of the Court of Cassation is still expected.

Katoen Natie case

The ECJ, in its ruling of 11 February 2021, did not only answer preliminary questions in the *Middlegate Europe* case, but also preliminary questions in a case involving Katoen Natie. Both cases were actually dealt with together before the ECJ in view of the similar preliminary questions asked by Belgian courts.

In the *Katoen Natie* case, two companies that perform logistics work in the Antwerp port area (Katoen Natie Bulk Terminals NV and General Services Antwerp NV) lodged an appeal with the Council of State for the annulment of the Royal Decree of 10 July 2016 (i.e. the decree implementing the Port Labour Act, setting out the exact conditions and procedure for the recognition of dock workers). The Council of State referred several questions to the ECJ for a preliminary ruling about the compatibility of that Royal Decree with EU law (including the freedom of establishment and the freedom to provide services).

In its ruling, the ECJ raised a number of concerns on the Royal Decree, including these three:

- The Court questioned whether the requirement of logistic dock workers to have a 'safety certificate' is proportionate as such safety certificate must be reapplied for each time a new employment contract is concluded (and dock workers usually work with short-term employment contracts).
- The Court questioned whether the Administrative Commission (responsible for recognising dock workers), which is composed of employer and employee representatives, is suitable to recognise dock workers (since recognition is meant to guarantee the safety in the port areas).
- The Court criticised the fact that there is no reasonable period of time within which the Administrative Commission must make its decision to recognise, or not recognise, the dock workers. This increases the risk of arbitrary rejection.

However, the ruling leaves it up to the Council of State to decide on the necessity and proportionality of the Royal Decree of 10 July 2016.

If the Council of State annuls the Royal Decree (or certain provisions thereof), the government and the social partners will have to work out a new recognition procedure that meets the objections of the Court. The Council of State's final decision is still pending.

Comment from other jurisdiction

Germany (Pia Schweers, Luther Rechtsanwaltsgesellschaft mbH): The decision of the ECJ of 11 February 2021 in *Katoen Natie Bulk Terminals NV e.a.* (Joined Cases C-407/19 and C-471/19), which was issued in connection with the Belgian case here, has also attracted attention in Germany. After the judgment of the ECJ, the German Bundestag, specifically the Department for Europe, examined the extent to which the judgment affects the organization of dock workers in Germany (https://www.bundestag.de/resource/blob/865388/f010172b59b6b98b9c11856d81455245/PE-6-046-21-pdf-data.pdf).

In Germany, there is a special law on the organization of dock workers, the *Gesamthafenbetriebs-Gesetz* ('GhfBetrG'). The GHfBetrG offers port operations the possibility of establishing an overall port operation, a so-called *Gesamthaftenbetrieb*. If an employee does not belong to an individual port operation, a special employer is available in the form of the *Gesamthaftenbetrieb*. From the *Gesamthaftenbetrieb*, the employees are then assigned to the individual port operations. This organi-

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zation is intended to ensure that dock workers have a place to work.

In its evaluation, the Department for Europe came to the conclusion that the judgment of the ECJ has no impact on the GHfBetrG. This is especially the case in regard to the fact that the GHfBertG does not stipulate that dock workers must be recognized according to certain conditions and modalities, as required by the Belgian Port Labour Act. Therefore the freedom of establishment and service of companies from other Member States is not affected because their employees do not have to be recognized under special rules. The Department was therefore of the opinion that the statements of the ECJ judgment cannot be transferred to the GHfBetrG. Moreover the Department for Europe did not decide whether conclusions can be drawn from the judgment as to the compatibility of the GHfBertG with the freedoms of the EU in general. A conclusive examination was not possible, as it depended on the specific individual case.

It appears that the facts of the Belgian decision may also concern other Member States. However, a direct transfer to the regulations on dock workers in Germany fails due to differentiating regulations.

Subject:Free Movement, Work and Residence Permit
Parties: Middlegate Europe NV – v – Belgian Council of Ministers ('*Ministerraad*') (intervening parties Katoen Natie Bulk Terminals NV and General Services Antwerp NV)
Court: Constitutional Court
Date: 25 November 2021
Case number: 168/2021
Internet publication: https://www.const-court.be/public/n/2021/2021-168n.pdf

doi: 10.5553/EELC/187791072022007001009