JUDGMENT OF THE COURT (Grand Chamber)

19 December 2019 (*)

(Reference for a preliminary ruling — Articles 56 and 57 TFEU — Freedom to provide services — Directive 96/71/EC — Applicability — Article 1(3)(a) — Posting of workers in the framework of the provision of services — Provision of services on board international trains — National rules imposing administrative obligations in relation to the posting of workers)

In Case C-16/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 15 December 2017, received at the Court on 9 January 2018, in the proceedings

Michael Dobersberger

v

Magistrat der Stadt Wien,

THE COURT (Grand Chamber),

Composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan, M. Safjan and S. Rodin, Presidents of Chambers, L. Bay Larsen (Rapporteur), T. von Danwitz, C. Toader, D. Šváby, C. Vajda, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 12 March 2019,

after considering the observations submitted on behalf of

– Mr Dobersberger, by A. Werner, Rechtsanwältin,

– the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

– the German Government, initially by T. Henze and D. Klebs, and subsequently by D. Klebs, acting as Agents,

– the French Government, by R. Coesme and E. de Moustier, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. Kellerbauer and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 57 TFEU and of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), in particular Article 1(3)(a).

2 The request has been made in proceedings between Mr Michael Dobersberger and the Magistrat der Stadt Wien (Vienna City Administration) concerning administrative penalties of a criminal nature imposed on Mr Dobersberger for a number of failures to comply with administrative obligations laid down by the provisions of Austrian social security law governing the posting of workers in the territory of that Member State.

Legal context

EU law

3 According to recital 15 of Directive 96/71, ‘ it should be laid down that, in certain clearly defined cases of assembly and/or installation of goods, the provisions on minimum rates of pay and minimum paid annual holidays do not apply’.

4 Article 1 of the Directive, headed ‘Scope’, provides as follows:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

…’

5 Article 2 of that directive, headed ‘Definitions’, is worded as follows:

‘1. For the purposes of this Directive, “posted worker” means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.'

6 Article 3 of Directive 96/71, headed 'Terms and conditions of employment', provides as follows:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) conditions of hiring-out of workers, in particular by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

…

2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1(b) and (c) shall not apply, if the period of posting does not exceed eight days.

This provision shall not apply to activities in the field of building work listed in the Annex.

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) when the length of the posting does not exceed one month.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1(3)(a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1(b) and (c) in the cases referred to in Article 1(3) (a) and (b) on the grounds that the amount of work to be done is not significant.

Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as "non-significant".

…

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

…

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;

– terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

Austrian law

7 Paragraph 7b of the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract law, BGBl., 459/1993), in the version published in BGBl. I, 152/2015 ('the AVRAG'), which was adopted for the purpose of transposing Directive 96/71 into national law, was worded as follows:

'Action against foreign employers having their headquarters in a Member State of the European Union or the European Economic Area

(1) A worker who is posted to work in Austria by an employer who has its registered office in a Member State of the European Union or of the European Economic Area other than Austria shall automatically, during the period of posting and without prejudice to the laws and regulations applicable to the employment relationship, have the right to the following:

1. at least the statutory minimum remuneration, fixed by regulation or by a collective agreement, which, in the workplace, must be paid to comparable workers by comparable employers …

…

A person having his or her registered office in a Member State of the European Union or of the European Economic Area other than Austria shall, in so far as concerns subparagraphs 3 to 5 and 8 [and] Paragraph 7d(1) … be considered to be an employer in respect of workers placed at his or her disposal who are posted to Austria for the purpose of performing work. …

…

(3) Employers within the meaning of subparagraph 1 shall be required to declare, at least 1 week before the start of the work in question, the use of workers who have been posted to work in Austria to the central coordinating office for the control of illegal employment …

(4) The declaration referred to in subparagraph 3 must be made separately for each secondment and contain the following information:

1. name, address and professional licence or purpose of the employer's business within the meaning of subparagraph 1 …

…

6. the overall period covered by the secondment, as well as the beginning and foreseeable duration of employment of the different workers in Austria, the normal working time and place conditions agreed for the different workers,

7. the amount of remuneration due to the individual workers under Austrian legal provisions and the beginning of the employment relationship with the employer,

8. the place (exact address) of employment in Austria (also other places of intervention in Austria),

9. the type of activity and use of the worker, taking into account the relevant Austrian collective contract,

…

(5) Where there is no obligation for posted workers to join social security in Austria, employers within the meaning of subparagraph 1 are required to keep available documents relating to the workers' declaration to social security (social security document E 101 pursuant to Regulation (EEC) No 1408/71 [of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971 L 149, p. 2)], social security document A1 in accordance with Regulation (EC) No 883/04 [of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1)]), as well as a copy of the declaration referred to in subparagraphs 3 and 4 at the place of performance of the work (or intervention) on the national territory or to make them directly accessible in electronic form to the services of the authority responsible for collecting the contributions …'

8 As regards the obligation to make available documents relating to salaries, Paragraph 7d of the AVRAG, which also seeks to transpose Directive 96/71 into national law, provides, inter alia, that, throughout the entire period of secondment, employers are to keep available, at the place of performance of the work, in German, the employment contract or service slip, the wage slip, proof of payment of wages or bank transfers, wage statements, time sheets, records of hours worked and documents relating to classification in the wage grid, so that it can be verified that the posted worker receives, for the duration of the employment, the wages due to him/her in accordance with the legal provisions.

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

9 Österreichische Bundesbahnen (the Austrian Federal Railways, 'the ÖBB') awarded, for the period 2012-2016, a contract for the provision of services consisting of the operation of the dining cars or the on-board services for certain of its trains to D. GmbH, a company with its registered office in Austria. However, that contract was performed by Henry am Zug Hungary Kft. ('H. Kft.'), a company governed by Hungarian law and established in Hungary, via a series of subcontracts involving H. GmbH, which also has its head office in Austria.

10 H. Kft. provided services on certain ÖBB trains linking Salzburg (Austria) or Munich (Germany) to Budapest (Hungary) as the station of departure or terminus, using workers domiciled in Hungary, most of whom were hired out to H. Kft by another Hungarian company, while the others were workers directly employed by H. Kft.

11 All the workers allocated to the provision of those services had their domicile, social insurance and centre of interests in Hungary, and they began and ended their shifts in Hungary. In Budapest, they had to receive goods, namely food and drinks stored there, and load them onto trains. They were also required to carry out checks on the condition of stock and calculate the turnover in Budapest. Thus, all the work at issue in the main proceedings, with the exception of that carried out on the trains, took place in Hungary.

12 Following an inspection carried out at Vienna Central Station (Austria), on 28 January 2016, Mr Dobersberger, the managing director of H. Kft., was found guilty, in his capacity as employer of Hungarian workers posted by that company to Austrian territory in order to carry out on-board services on certain ÖBB trains, of the fact that that company:

'(1) had not provided, in breach of Paragraph 7b(3) of the AVRAG, within a period of 1 week in advance of the commencement of work, any declaration in Austria to the competent Austrian authority

regarding the abovementioned employment of the posted workers,

(2) had not retained, in breach of Paragraph 7b(5) of the AVRAG, at the place of deployment on the national territory, the documents relating to the workers' social security registration, and

(3) had not retained, in breach of Paragraph 7d(1) of the AVRAG, at the abovementioned place of deployment, the employment contract, documents evidencing payment of wages and documents relating to the wage categories, in German.'

13 Consequently, administrative penalties of a criminal nature, for failure to comply with administrative obligations, were imposed on Mr Dobersberger.

14 He challenged those penalties before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) which dismissed his action. Mr. Dobersberger brought an appeal on a point of law against the judgment of the Verwaltungsgericht Wien (Administrative Court, Vienna) before the referring court, the Verwaltungsgerichtshof (Supreme Administrative Court).

15 The referring court considers that the settlement of the dispute before it raises questions concerning the interpretation of Directive 96/71, and more particularly of Article 1(3)(a) thereof and Articles 56 and 57 TFEU.

16 In those circumstances the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Does the scope of Directive 96/71 …, in particular Article 1(3)(a), also cover the provision of services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting (Hungary) in performance of a contract with a railway undertaking established in the host Member State (Austria) when these services are provided on international trains which also travel through the host Member State?

(2) Does Article 1(3)(a) of the Directive also cover the situation where the service-providing undertaking established in the Member State of posting provides the services mentioned in the first question not in performance of a contract with the railway undertaking established in the host Member State, which is the ultimate beneficiary of the services (recipient of the services), but rather in performance of a contract with another undertaking based in the host Member State which, in turn, is in a contractual relationship (subcontracting chain) with the railway undertaking?

(3) Does Article 1(3)(a) of the Directive also cover the situation where, to provide the services mentioned in the first question, the service-providing undertaking established in the Member State of posting does not use its own salaried workers but uses workers of another undertaking who were hired out to it back in the Member State of posting?

(4) Irrespective of the answers to the first three questions: does EU law, in particular the freedom to provide services (Articles 56 and 57 TFEU), preclude a provision of national law which also mandatorily requires undertakings which post workers to the territory of another Member State for the purpose of providing a service to comply with terms and conditions of employment within the meaning of Article 3(1) of the Directive and to comply with accompanying obligations (such as, in particular, the obligation to provide a notification regarding the cross-border posting of workers to a public authority in the host Member State and the obligation to retain documents relating to the level of remuneration and to the social security registration of these workers) in situations in which (first) the workers posted across borders form part of the mobile staff of a railway undertaking that is active on a cross-border basis or of an undertaking which provides services typical for a railway undertaking (provision of food and drink to passengers, on-board service) on that undertaking's trains which cross the borders of the Member States, and in which (secondly) the posting is based either on no service contract at all or at least on no service contract between the undertaking making the posting and the recipient of the services which is active in another Member State, because the posting undertaking's obligation to provide services

to the recipient of the services which is active in another Member State is established by way of subcontracts (a subcontracting chain), and in which (thirdly) the posted worker is not in an employment relationship with the undertaking making the posting but rather is in an employment relationship with a third-party undertaking which has hired out its workers to the undertaking making the posting back in the Member State in which the posting undertaking is established?'

Admissibility of the first three questions referred for a preliminary ruling

17 The French Government questions the admissibility of the first three questions referred for a preliminary ruling in reliance on the judgment of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408), in which the Court held that Directive 96/71 does not apply to national disputes which do not directly concern the terms and conditions of employment of posted workers but rather concern monitoring measures implemented by the national authorities in order to ensure compliance with those terms and conditions of employment. Indeed, that would appear to be the situation in the present case.

18 In that regard, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

19 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

20 As the Advocate General observed in point 17 of his Opinion, the present case does not correspond to any of the categories in which the Court may refuse to answer questions referred for a preliminary ruling. Moreover, as the German Government rightly stated at the hearing before the Court, the judgment of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408), concerned monitoring measures intended to ensure compliance with the national provisions transposing Directive 96/71, while the first three questions referred for a preliminary ruling in the present case concern the applicability of that directive to the provision of services such as those at issue in the main proceedings.

21 In that regard, it must be borne in mind that, where it is not obvious that the interpretation of an EU act bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that act to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions raised (see, to that effect, judgment of 4 July 2019, *Kirschstein*, C-393/17, EU:C:2019:563, paragraph 28).

22 It follows that the first three questions referred for a preliminary ruling are admissible.

Substance

The first three questions

23 By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it covers the provision, under a contract concluded between an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway

undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there.

24 First of all, it should be observed that free movement of services in the transport sector is governed not by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58(1) TFEU, according to which 'freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport' (judgment of 22 December 2010, *Yellow Cab Verkehrsbetrie*b, C-338/09, EU:C:2010:814, paragraph 29 and the case-law cited), that is to say Articles 90 to 100 TFEU.

25 Transport services comprise not only any physical act of moving persons or goods from one place to another by a means of transport, but also any service which, even if it is merely incidental to such an act, is inherently linked to that act (see, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraphs 46 and 47, and Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 61).

26 However, although services such as on-board services, cleaning services or the provision of food and drink on trains are incidental to the service of rail passenger transport, they are not inherently linked to that service. Such a transport service may be performed independently of those incidental services.

27 Consequently, such services, which are not covered by the provisions of the title of the TFEU relating to transport, fall within the scope of Articles 56 to 62 TFEU relating to services, with the exception of Article 58(1) TFEU and, accordingly, may, as such, be covered by Directive 96/71, which was adopted on the basis of Article 57(2) and Article 66 EC, relating to services.

28 It is, however, necessary to ascertain whether such services, where they are provided in circumstances such as those in the main proceedings, fall within the scope of application of that directive as defined in Article 1 thereof.

29 In that regard, it follows from Article 1(3)(a) of Directive 96/71, which is specifically referred to by the referring court in its first three questions, that that directive applies, inter alia, to a situation in which an undertaking established in a Member State posts, within the framework of the transnational provision of services, workers on its account and under its direction to the territory of another Member State, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, provided that an employment relationship exists between that undertaking and the employee during the period of the posting (judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189, paragraph 19).

30 According to Article 2(1) of that directive, '"posted worker" means a worker who, for a limited period, carries out his [or her] work in the territory of a Member State other than the State in which he [or she] normally works'.

31 In that regard, a worker cannot, in the light of Directive 96/71, be considered to be posted to the territory of a Member State if the performance of his or her work does not have a sufficient connection with that territory. That interpretation derives from the scheme of Directive 96/71 and, in particular, Article 3(2) thereof, read in the light of recital 15, which, in the case of the very limited provision of services in the territory to which the workers concerned are sent, states that the provisions of that directive on minimum rates of pay and minimum paid annual holidays are not applicable.

32 Moreover, the same logic underpins the optional exemptions referred to in Article 3(3) and (4) of Directive 96/71.

33 However, workers, such as those in question in the main proceedings, who carry out a significant part of their work in the Member State of establishment of the undertaking which assigned them to provide services on international trains, that is to say all activities falling within the scope of that work with the exception of the on-board service provided during the train's journey, and who begin or end their shifts

in that Member State, do not have a sufficient connection with the territory of the Member State or Member States crossed by those trains to be regarded as 'posted', within the meaning of Directive 96/71.

34 It is immaterial in this context that the provision of the services in question falls under a contract concluded between that undertaking and an undertaking which is established in the same Member State as the railway undertaking and which has, in turn, concluded a contract with the latter and that the service-providing undertaking assigns to that provision, not its own salaried workers, but workers hired out by an undertaking established in the same Member State.

35 In the light of the above considerations, the answer to the first three questions is that Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there.

The fourth question

36 By its fourth question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding national rules which, on pain of administrative penalties of a criminal nature, require an undertaking established in a Member State, which assigns its own workers or workers hired out by another undertaking established in that same Member State, to provide on-board services, cleaning or food and drink services for passengers on international trains crossing the territory of another Member State, under a contract concluded by the former undertaking with an undertaking established in that other Member State, acting as a subcontractor of a railway undertaking also established in that other Member State, to comply with the terms and conditions of employment, within the meaning of Article 3(1) of Directive 96/71, which are in force in that Member State and to make a declaration concerning the employment of those workers available to the competent authority of that Member State, within a period of at least 1 week before the commencement of the work and to retain, at the place of deployment on the territory of the same other Member State, first, documents relating to the workers' affiliation to the social security scheme of the first Member State and, secondly, the employment contracts, documents evidencing payment of wages and documents relating to the wage categories, in the language of the other Member State.

37 In that regard, it follows from paragraph 35 of the present judgment that Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it does not cover services such as those described in the preceding paragraph.

38 In those circumstances, and since, as is apparent from the order for reference, the national legislation referred to in that fourth question has the specific objective of transposing that directive and laying down a series of accompanying obligations in order to monitor compliance with its provisions, in particular as regards minimum wages, there is no need to answer that question.

Costs

39 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 (Grand Chamber) hereby rules:

Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of

services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there.

[Signatures]

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* Language of the case: German.