OPINION OF ADVOCATE GENERAL
WAHL
delivered on 8 May 2018(1)

Case C-33/17

Čepelnik d.o.o.
v
Michael Vavti

(Request for a preliminary ruling from the Bezirksgericht Bleiburg/Okrajno sodišče Pliberk (District Court, Bleiburg) (Austria))

(Freedom to provide services — National legislation requiring a recipient of services to provide security in order to secure a fine that might be imposed on a service provider established in another Member State — Articles 16 and 19 of Directive 2006/123/EC — Labour law exception — Justification — Article 56 TFEU — Proportionality — Right of defence — Right to an effective judicial remedy — Directive 2014/67/EU)

1. In the present case — a preliminary reference from the Bezirksgericht Bleiburg/Okrajno sodišče Pliberk (District Court, Bleiburg, Austria) — the Court is asked to rule on whether EU law precludes a Member State from requiring a recipient of services provided by workers posted by an undertaking established in another Member State to provide security and suspend payments to that undertaking. According to the relevant provisions of national law, the outstanding fee for such services must be paid to the authorities of the host Member State to secure the payment of a fine that could possibly, in the future, be incurred by the provider for breaching certain provisions of the national labour legislation.

2. In order to determine whether the national measure at issue is contrary to EU law, the Court will have to examine the interaction between the EU rules on freedom to provide services laid down in Article 56 TFEU, Directive 2006/123/EC (2) and Directive 2014/67/EU (3) on the one hand, and national rules that the relevant Member State claims are part of its labour legislation, on the other.

I. Legal framework

A. EU law

3. Article 1(6) (‘Subject matter’) of the Services Directive provides:

‘This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects [EU] law. Equally, this Directive does not affect the social security legislation of the Member States.’

4. Article 3(3) (‘Relationship with other provisions of [EU] law’) of the same directive states:

‘Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.’

5. Article 16 (‘Freedom to provide services’) provides:

‘1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of [EU] law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

…'

6. Article 17 of the Services Directive provides a list of 'Additional derogations from the freedom to provide services'. In accordance with point 2 of that list, 'Article 16 shall not apply to … matters covered by Directive 96/71/EC'.

7. Section 2 of Chapter IV of the Services Directive concerns the 'Rights of recipients of services'. Under the terms of Article 19:

'Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;

(b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.

...'

B. Austrian law

8. Paragraph 7m of the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting the law on employment contracts) of 1993 (BGBl. 459/1993, 'the AVRAG') provides as follows:

'1. In the event of reasonable suspicion of an administrative offence under Paragraphs 7b(8), 7i or 7k(4), and in the event that, owing to certain circumstances, it

must be assumed that prosecution or enforcement of the penalties will be impossible or substantially more difficult for reasons relating to the person of the employer (contractor) or the company providing labour, the organs of the tax authorities, in combination with investigations under Paragraph 7f and the Fund for Paid Holidays and Dismissals of Building Workers, may in writing require the employer, in the event of the provision of labour, not to pay the price of the work still due or the remuneration for the provision of the work still due or part thereof (suspension of payments) … The bodies of the tax authorities and the Fund for Paid Holidays and Dismissals for construction workers may impose suspension of payments only where a provisional security under Paragraph 7l could not be fixed or collected.

...

3. In the event of a reasonable suspicion of an administrative offence under Paragraphs 7b(8), 7i or 7k(4), and in the event that, owing to certain circumstances, it must be assumed that prosecution or enforcement of the penalties will be impossible or substantially more difficult on grounds relating to the person of the employer (contractor) or the company providing labour, the regional administrative authority may by decision require the client or employer, in the event of the provision of labour to the employer, to pay the price of the work still due or the remuneration for the provision still due or part thereof as security within a reasonable period of time ...

...

5. The payment under subparagraph 3 shall have the effect of relieving the client or employer of his debt to the contractor or company providing labour.

...'

9. Subparagraphs 3 and 8 of Paragraph 7b of the AVRAG provide:

'3. Employers within the meaning of paragraph 1 must declare the employment of workers who are placed at their disposal in Austria for the purpose of carrying out work there not later than one week before the start of the work at the Central Office for the Control of Unlawful Employment in accordance with the Employment of Foreign Nationals Act (Ausländerbeschäftigungsgesetz) and the [AVRAG] of the Federal Finance Minister …

...

8. Whoever, as an employer within the meaning of paragraph 1

1. fails to make, or fails to make, in good time or completely, in breach of paragraph 3, the initial declaration or the declaration relating to ex-post changes (declaration of amendment) ...

...

commits an administrative offence and must be fined by the regional administrative authority for each worker concerned from EUR 500 to 5 000, and in the event of a second or subsequent offence from EUR 1 000 to 10 000. ...'

10. Paragraph 7i(4) of the AVRAG reads as follows:

‘Whoever

1. as an employer within the meaning of Paragraphs 7, 7a(1), or 7b(1) and (9), does not make wage documentation available in breach of Paragraph 7d.

...

commits an administrative offence and must be fined by the regional administrative authority for each employee concerned from EUR 1 000 to 10 000, in the event of a repeat offence of EUR 2 000 to 20 000 and if more than three workers are involved, for each worker from EUR 2 000 to 20 000, in the event of a repeat offence of EUR 4 000 to 50 000.’

11. The provisions of Paragraphs 7b(3), 7b(8), 7i(4) and 7m of the AVRAG portray the legal situation pertaining until 31 December 2016. On 1 January 2017 they were replaced by Paragraphs 19, 26, 27, 28 and 34 of the Lohn- und Sozialdumpingbekämpfungsgesetz (Law to combat wage and social dumping), the content of which is identical.

II. Facts, procedure and the questions referred

12. The present case arose in a dispute between Čepelnik d.o.o. (‘Čepelnik’) and Mr Michael Vavti relating to the payment of the outstanding balance for construction services.

13. Čepelnik is a limited liability company established in Slovenia. It provided Mr Vavti with services in the construction sector for a value of EUR 12 200. The services were performed on a house owned by Mr Vavti, situated in Austria near the border with Slovenia, through the posting of workers. Mr Vavti made an advance payment to Čepelnik of EUR 7 000.

14. On 16 March 2016 the Austrian Finance Police carried out an inspection at the building site, and charged Čepelnik with two administrative offences. Firstly, for two posted workers, Čepelnik had failed to give correct notice of the commencement of work under Paragraph 7b(8)(1) in conjunction with Paragraph 7b(3) of the AVRAG. Secondly, Čepelnik had not made wage documents for four posted workers available in German, contravening Paragraph 7i(4)(1) in conjunction with the first two sentences of Paragraph 7d(1) of the AVRAG.

15. Immediately following the inspection, the Finance Police required Mr Vavti to suspend payments and applied to the competent administrative authority, the Bezirksmannschaft Völkermarkt (District Administrative Authority of Völkermarkt, ‘the BHM Völkermarkt’, Austria) for an order that he provide security. That security was intended to secure the payment of any fine that might be ordered in proceedings to be instituted against Čepelnik under the AVRAG on the basis of the outcome of the inspection. In accordance with Paragraph 7m(4) of the AVRAG, the Finance Police applied for the security to be set at an amount equal to the outstanding balance, namely, EUR 5 200. By decision of 17 March 2016, the BHM Völkermarkt ordered the requested

security to be provided, on the ground that 'on the basis of the place of [establishment] of … the service provider, which is in Slovenia, … it can be presumed that prosecution and enforcement would be very difficult if not impossible'. Mr Vavti did not bring an appeal against that decision and lodged the security on 20 April 2016.

16. Proceedings were opened against Čepelnik in respect of the alleged administrative offences. By judgment of 11 October 2016 Čepelnik was fined EUR 1 000, for having allegedly contravened Paragraph 7b(8)(1) of the AVRAG by not registering two of the workers with the competent body in Austria before they began work on the building site. By judgment of 12 October 2016 Čepelnik was also fined EUR 8 000 for having allegedly contravened Paragraph 7i(4)(1) of the AVRAG by failing to make the necessary wage documents for four employees available in German. Čepelnik brought appeals against those judgments on 2 November 2016. The referring court adds that the appeals were still pending at the time the request for a preliminary ruling was made.

17. Upon completion of the work, Čepelnik billed Mr Vavti EUR 5 000 to settle the outstanding balance. The latter refused payment, claiming to have paid the outstanding balance to the BHM Völkermarkt, in accordance with the administrative decision of that authority. He argued that, in line with Paragraph 7m(5) of the AVRAG, the payment of the security to the administrative authority extinguished his debt to Čepelnik. The latter then brought proceedings against Mr Vavti in order to recover the outstanding balance before the Bezirksgericht Bleiburg/Okrajno sodišče Pliberk (District Court, Bleiburg).

18. Entertaining doubts as to the correct interpretation of some provisions of EU law and as to the compatibility of the national rules at issue with those provisions, the referring court decided to stay the proceedings and to refer the following questions to the Court:

'Are Article 56 TFEU and [Directive 2014/67] to be interpreted as meaning that they prohibit a Member State from ordering a person in that State who has commissioned work to suspend payments and provide security in a sum equal to the amount outstanding, if the suspension of payments and the provision of the security serve solely to secure a possible fine, to be imposed only subsequently in separate proceedings against a service provider established in another Member State?

If that question is answered in the negative:

(a) Are Article 56 TFEU and [Directive 2014/67] to be interpreted as meaning that they prohibit a Member State from ordering a customer who has commissioned work in that State to suspend payments and provide security equal to the amount outstanding, if the service provider established in another Member State on whom a fine is to be imposed is given no legal remedy against the decision ordering the provision of security in proceedings relating to the security itself, and if the customer's appeal against that decision has no suspensory effect?

(b) Are Article 56 TFEU and [Directive 2014/67] to be interpreted as meaning that they prohibit a Member State from ordering a customer who has commissioned work in that State to suspend payments and provide security equal to the amount outstanding solely because the service provider is established in another Member State?

(c) Are Article 56 TFEU and [Directive 2014/67] to be interpreted as meaning that they prohibit a Member State from ordering a customer who has commissioned work in that State to suspend payments and provide security equal to the amount outstanding, even though that sum is not yet due and the final amount has not yet been determined on account of counterclaims and rights of retention?'

19. Written observations have been submitted by Čepelnik, the Czech, Hungarian, Slovak, Slovene, Austrian and Polish Governments and the Commission. By letter of 15 December 2017, the Court, under Article 61(1) of its Rules of Procedure, invited the parties and the interested persons referred to in Article 23 of the Statute of the Court of Justice to answer in writing the following questions before the hearing:

'(1) Is [the Services Directive] applicable to decisions such as those at issue in the main proceedings? In this respect, the attention of the interested parties is drawn to Article 1(6) of that directive.

(2) If so, should [the Services Directive] be interpreted as precluding decisions such as those at issue in the main proceedings?'

20. Čepelnik, the Czech, French, Slovak, Slovene and Austrian Governments and the Commission answered the questions in writing. Čepelnik, the Czech, Hungarian, Slovene and Austrian Governments and the Commission also presented oral argument at the hearing on 26 January 2018.

III. Analysis

21. By its questions, the referring court essentially asks the Court whether EU law precludes a Member State from ordering a recipient of services to suspend payments and provide security equal to the sum outstanding ('the measure at issue') for a service provided, through posted workers, by a provider established in another Member State, when the measure at issue serves to secure the payment of a possible fine, which may subsequently be imposed on the provider by the host Member State, for a breach of the latter's labour legislation.

22. In particular, the referring court asks whether EU law precludes the measure at issue when the service provider has no legal remedy against such a measure, and/or the measure is imposed solely because that provider is established in another Member State, and/or the measure is imposed even though the sum to be paid under the contract is not yet due in its entirety, and the outstanding amount of that fee has not yet been determined on account of counterclaims and rights of retention.

23. Before dealing with the substance of the case, however, it is necessary, first, to address the procedural objection raised by the Austrian Government and, then, to briefly outline the salient features of the measure at issue in order to determine the provisions of EU law applicable in this context.

A. Jurisdiction of the Court

24. In its observations, the Austrian Government objects to the jurisdiction of the Court, on the ground that an answer to the questions referred is unnecessary for the

resolution of the dispute in the main proceedings. That government argues that, since the decision adopting the measure at issue is of an administrative character, its validity can be reviewed by an administrative court alone. The referring court is not an administrative court, however, and is seised only of a civil law dispute between Čepelnik and Mr Vavti. That court thus lacks jurisdiction to annul or amend that decision.

25. Nevertheless, according to settled case-law, questions on the interpretation of EU law referred by a national court 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 sought is unrelated 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. (4)

26. In that respect, it follows from the information provided by the referring court that there is a clear link between the administrative decision imposing the measure at issue on Mr Vavti, on the one hand, and the civil proceedings for recovery of the outstanding balance brought by Čepelnik against Mr Vavti, on the other. The referring court points out that, in accordance with Paragraph 7m(5) of the AVRAG, the payment of the security to the administrative authority extinguished Mr Vavti's debt to Čepelnik. Therefore, questions concerning the lawfulness of the security do not seem irrelevant for the referring court's ability to adjudicate in the main proceedings.

27. The Court has, accordingly, jurisdiction to answer the questions referred.

B. The measure at issue

28. By its questions, the referring court seeks to determine the compatibility with EU law of a national measure such as that at issue. In its request for a preliminary ruling, the national court refers, in particular, to Article 56 TFEU and to the provisions of Directive 2014/67. In addition, certain parties that submitted observations in these proceedings also argued that the Services Directive is applicable in the case at hand — which prompted the Court to ask the parties specifically to take a position to that effect in writing.

29. Accordingly, it first of all must be determined what EU law provisions are applicable to the main proceedings, in the light of the specific characteristics of the measure at issue.

30. That measure consists of a decision adopted by the authorities ordering a recipient of services to suspend payments and provide security, by reason of a possible failure, by the service provider, to fulfil obligations stemming from the national labour legislation. The part of the contractual fee that is still owed by the recipient to the provider when the measure at issue is adopted must be paid to the administration, which retains it in order to secure the payment of penalties that *may* subsequently be imposed upon that provider. Indeed, when the measure is adopted, no penalty has as yet been imposed upon the provider.

31. At this juncture, I must point out that it cannot definitely be determined whether the measure at issue is (directly or indirectly) discriminatory. In that regard, the Austrian Government maintains that Paragraph 7m of the AVRAG is, on the face of it, a non-

discriminatory provision, for it is applicable both to service providers established in Austria and to service providers established in other Member States.

32. However, I find no support for that argument in the case file. Indeed, the administrative offences that, under Paragraph 7m of the AVRAG, may trigger the adoption of the measure at issue (the offences provided for in Paragraphs 7b(8), 7i and 7k(4), of the same law) are all concerned with situations related to the posting of workers. The measure at issue thus seems designed to target foreign service providers only.

33. Asked at the hearing whether, in Austrian law, a similar measure was applicable also with regard to purely internal situations or for offences that are more commonly committed by domestic service providers, the Austrian Government first answered in the affirmative. Yet, when asked to be more specific and give concrete examples, that government struggled to indicate the relevant legal provisions or to mention cases in which a similar measure was applied in a situation where there was no cross-border element. Personally, I have not found any provision of the AVRAG, as in force at the material time, which provided for an equivalent measure in cases of breaches of rules other than those referred to in Paragraph 7m thereof. In this context, it could be asked whether there was truly any need of such a far reaching provision when the situation is purely internal.

34. At any rate, if not directly discriminatory, the measure at issue appears to be at least indirectly discriminatory. Indeed, the referring court points out that, in the case at hand, the condition for its application was considered fulfilled for the simple reason that the service provider was a Slovenian undertaking. If that is so, that provision is applied de facto discriminatorily: foreign service providers and local service providers are treated differently only by reason of their place of establishment. However, at the hearing the Austrian Government argued that, in the case at hand, Paragraph 7m of the AVRAG may simply have been misapplied. In its view, the fact that a service provider is established abroad should not be determinative for the adoption of the measure at issue.

35. In that light, and despite the reservations I still have on this point, I shall proceed with the legal analysis on the assumption that the measure at issue is not discriminatory.

36. In any event, as the referring court correctly points out, regardless of whether or not it is discriminatory, such a measure is, by its very nature, capable of, on the one hand, discouraging Austrian customers from obtaining services from providers established abroad and, on the other hand, discouraging providers established in other Member States from offering, on a temporary basis, their services in Austria.

37. On the first point, a measure such as that at issue may obviously produce a number of adverse effects on customers who decide to procure services from foreign providers. In particular, once the measure at issue is adopted, the customer has to pay the outstanding balance in advance to the administration, instead of being able to wait until completion of the service by the provider. Moreover, the customer loses the possibility of retaining part of the balance due, as compensation in case of defective or late completion of the works, or of damage done in the course of the works. The customer also exposes himself to the risk that, when the provider becomes aware of the application of the measure, the works could be halted or delayed.

38. On the second point, the measure at issue makes it less attractive for undertakings established abroad to provide, on a temporary basis, their services in Austria. Indeed, it is enough that the Austrian authorities harbour a 'reasonable suspicion' that a provider has committed an offence under certain provisions of the AVRAG for him to lose the right to claim from his customer the outstanding balance for the service provided. The measure at issue may thus, at the very least, expose service providers to increased risks of delays in the payment of amounts that, more often than not, constitute a significant part of the overall fee agreed. The measure at issue may also produce certain unfavourable financial consequences, even when no offence has been committed, because the security remains for the whole duration of the procedure for the imposition of the penalty (which can last for several years) in the Austrian administration's account where — if my understanding is correct — it generates no interest.

39. Against that background, it seems clear that, in principle, a measure such as that at issue falls within the scope of the Treaty rules on freedom to provide services. In addition, the Services Directive at first sight also seems pertinent: that instrument introduced a general legal framework aimed at removing, inter alia, barriers to the free movement of services between Member States. (5)

40. Conversely, other legal instruments also referred to by the referring court or by some of the parties that submitted observations do not seem to me to be relevant or applicable. To begin with, although the dispute at issue in the main proceedings arose in a situation of posting of workers, no provision of Directive 96/71/EC on the posting of workers (6) is directly relevant. That directive seeks to coordinate the substantive national rules on the terms and conditions of employment of posted workers, independently of the ancillary administrative rules designed to enable the monitoring of the compliance with those terms and conditions. Those measures may, consequently, be freely determined by the Member States, in compliance with the Treaty and the general principles of EU law. (7)

41. Next, Directive 2014/67 on the enforcement of the Posted Workers Directive — that would have, in principle, been relevant because of its subject matter (8) — is not applicable *ratione temporis* to the dispute at issue. (9) Indeed, whereas the transposition period of the directive expired only on 18 June 2016, the facts at issue in the main proceedings took place in March 2016. As far as I understand, Austria considers Directive 2014/67 to have been transposed by means of the Law to combat wage and social dumping of 13 June 2016, which entered into force on 1 January 2017, for it is that law that was notified to the Commission as transposition measure of the directive.

42. Therefore, the key issue in this context is to determine whether the compatibility with EU law of a measure such as that at issue must be examined under the Treaty provisions on the internal market or in the light of the provisions of the Services Directive.

C. Article 56 TFEU or the Services Directive?

43. Starting with *Rina Services*, (10) the Court has consistently applied the rules laid down in the Services Directive as the legal framework for determining the compatibility of national measures with the free movement of services where those measures fell within the scope *ratione materiae* of that legal instrument, without examining the measures in the light of Articles 49 and/or 56 TFEU.

44. At this point, the key question is, accordingly, whether or not a measure such as that at issue falls within the ambit of the Services Directive.

45. The Services Directive applies, in principle, to all types of service activities, (11) and with regard to all types of national measures that may restrict the free movement of services, (12) save for the activities and the types of national measure that are explicitly excluded from its scope. (13) Notably, construction services — which is the activity at issue in the main proceedings — are expressly referred to in recital 33 of the Services Directive in the list of examples of activities covered by that directive.

46. The Services Directive also lists, in Article 1, certain fields which it 'does not deal' with or which it 'does not affect'.

47. By reference to the latter provision, the Austrian Government argued that the Services Directive is not applicable to the main proceedings: the measure at issue is part of its domestic labour legislation which, pursuant to Article 1(6) of the directive, falls outside the directive's scope.

48. It must thus be examined whether this argument can be upheld. To that end, it seems useful to explain what is, to my mind, the meaning of Article 1(6) of the Services Directive.

1. The labour law exception

49. Pursuant to Article 1(6), the Services Directive 'does not affect *labour law*, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects [EU] law'. (14) That provision must be read in the light of recital 14 of the directive, which states: 'this Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with [EU] law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect [EU] law'.

50. Importantly, those provisions do not state that the field of labour law is, as a whole, excluded from the scope of the Services Directive. Indeed, as mentioned, fields of law (for example, taxation) or economic activities (such as healthcare services) that fall, in their entirety, outside the ambit covered by the directive are listed in Article 2, which is in fact entitled '*scope*', and which expressly states that the provisions of the Services Directive '*shall not apply*' to the fields and activities listed therein. (15)

51. Article 1 of the Services Directive, on the other hand, concerns the '*subject matter*' of the directive and, inter alia, sets out fields of law that are '*not affected*' by that instrument. That requirement must, to my mind, be understood as meaning that the provisions of the Services Directive are to be interpreted and applied in a manner which does not limit the rights, freedoms or powers enjoyed either by individuals (for example the exercise of fundamental rights) or by the Member States (for example, to define what

they consider services of general economic interest, to regulate the fields of criminal law or labour law) referred to in Article 1 thereof. (16)

52. It follows, in fact, from the legislative history of the Services Directive that the EU legislature intended to prevent that instrument leading to regulatory competition, inciting a race to the bottom as regards social and labour standards. (17) Thus, put simply, the Services Directive does not preclude Member States from applying their labour rules to situations that, had those rules not existed, would otherwise have been caught by that instrument.

53. The directive, however, subjects that power to compliance with one condition. As expressly indicated in both Article 1(6) and recital 14 of the Services Directive, the fact that the Directive does not affect the labour law of the Member States is recognised only insofar as the relevant national legislation 'respects [EU] law'. Thus, far from giving Member States *carte blanche* to apply their labour law regardless of the possible impact on the internal market, the Services Directive provides for a limited exception only. Other principles and rules that concern the internal market — whether included in acts of primary law or in other acts of secondary law — remain applicable to a Member State's labour law.

54. That said, the next question to explore is whether a measure such as that at issue falls within the 'labour law' exception in the Services Directive.

2. The nature of the measure at issue

55. At this juncture, I must point out that, to my mind, the concept of 'labour law' cannot but be a Union concept. Otherwise, the reach of the directive would vary across Member States, depending on the formal definition of labour law adopted by each one of them.

56. That position is also borne out by a textual element. Article 1(6) of the Services Directive includes an explanation of what that concept encompasses: 'any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers'. As recital 14 makes clear, employment and working conditions include matters such as 'maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay'. The same recital also explains that the terms 'relationship between employers and workers' are meant to cover the 'relations between social partners', which include matters such as 'the right to negotiate and conclude collective agreements, the right to strike and to take industrial action'.

57. The wording of Article 1(6) of the Services Directive, especially when read in the different language versions of the directive, (18) also suggests that the list of aspects included therein is exhaustive.That is all the more appropriate, in my view, because the definition included in Article 1(6) and recital 14 appears sufficiently broad to cover most, if not all, aspects which are typically understood as constituting labour law at EU or international level. (19)

58. From that, however, it does not follow — as argued by certain parties that submitted observations in the present proceedings — that only the *substantive* rules of

labour law (understood as the rules laying down rights and obligations) are covered by that concept. I take the view that the concept of 'labour law' must also encompass the rules relating to *penalties* and *procedures* that are *specific* to that field. A Member State's power to apply its labour law to situations that would, in principle, be governed by the Services Directive must necessarily include the power to apply rules whose specific aim is to render compliance with the substantive labour rules effective, verifiable and enforceable.

59. However, that does not seem to me to be the case of Paragraph 7m of the AVRAG, even if the AVRAG is, generally, an instrument that forms part of Austria's labour legislation.

60. In my view, the measure at issue cannot be considered to fall within the 'labour law' exception in the Services Directive. The measure provided therein is imposed even though no infringement of the labour legislation has yet been ascertained and, more importantly, is imposed not on the perpetrator of the alleged infringement, but on his contractual partner. The legal position of the latter, whom the measure at issue affects directly and immediately, is normally not governed by the rules of labour law since, at least as regards that situation, he is neither an employer nor an employee. In addition, the sums collected through the measure at issue are not used for the protection of workers or for any other social objective.

61. As many of the parties submitting observations in the present proceedings pointed out, the statutory objective of the measure at issue is rather to secure, to the benefit of the treasury, the execution of penalties that the public authorities may in the future impose upon a service provider. In imposing that measure, the Austrian authorities make use of their police and administrative powers. As mentioned above, the effects of the measure, far from merely inciting service providers to abide by the domestic labour legislation, go far beyond that, by actually discouraging the cross-border supply of services.

62. Such a measure cannot, therefore, be considered part of a Member State's 'labour law' for the purposes of the Services Directive. This conclusion seems to me confirmed, indirectly, by the Court's findings in *De Clercq* in which the Court held that the concept of 'terms and conditions of employment' of posted workers for the purposes of Directive 96/71 could not be extended to cover also administrative rules intended to enable the authorities to verify compliance with the provisions on terms and conditions of employment of posted workers. (20)

63. In the light of the above, I shall examine the compatibility of a measure such as that at issue mainly on the basis of the provisions of the Services Directive. Nevertheless, should the Court disagree with me on the applicability of that directive in the main proceedings, I shall subsequently examine the measure at issue under Article 56 TFEU too.

D. Compatibility of the measure at issue with EU law

1. Articles 16 and 19 of the Services Directive

64. Articles 16 and 19 of the Services Directive are included in Chapter IV of the directive, which is entitled 'Free movement of services'. Article 16 lays down the main

principles on this matter and focuses, more particularly, on the restrictions that may affect service providers, whereas Article 19 concerns the restrictions that may affect recipients of services.

65. I consider both provisions to be applicable with regard to the measure at issue. As explained in points 36 to 38 above, such a measure appears, by its very nature, capable of, on the one hand, discouraging Austrian customers from obtaining services from providers established abroad and, on the other hand, discouraging providers established in other Member States from offering, on a temporary basis, their services in Austria.

66. Accordingly, the measure at issue constitutes a *restriction* that is in principle prohibited by Articles 16 and 19 of the Services Directive. The next question to ask is whether such a measure can, nonetheless, be justified. In order to address that issue, it seems to me necessary to elucidate the meaning and scope of Articles 16 and 19 of the Services Directive. I shall start by examining the former which will, in turn, lead me to examine the latter.

(a) The proper construction of Articles 16 and 19

67. Article 16 is probably the most controversial provision contained in the Services Directive, and certainly one whose meaning is particularly opaque. (21) This is mainly due to the fact that, in its final form, Article 16 has significantly amended the provision that was originally included in the Commission's first proposal. The 2004 proposal, (22) in fact, included in draft Article 16 the 'country of origin principle' and a list of derogations. However, the inclusion of that principle in the draft directive sparked a debate throughout Europe, and was criticised, by some interest groups, for allegedly 'opening the door' to social dumping. (23) For that reason, the Commission's amended proposal, tabled in 2006, (24) did away with the country of origin principle and largely re-drafted Article 16.

68. Article 16 of the Services Directive, in its final form, raises a number of issues of interpretation. For the purposes of the present proceedings, however, there is only one issue that ought to be addressed: whether a measure that is caught by Article 16 may be justified and, if so, on what grounds and under what conditions.

69. In that regard, it must be pointed out that Article 16(1) of the Services Directive lays down the general principles on freedom to provide services, fleshing out and building upon the fundamental rule enshrined in Article 56 TFEU. In particular, it requires Member States to respect the right of providers to supply services in a Member State other than that in which they are established. The host Member State is, accordingly, to ensure free access to and free exercise of a service activity within its territory. Only national requirements that respect the principles of non-discrimination, necessity and proportionality may be justified.

70. In turn, Article 16(3) of the Services Directive limits the grounds of justification to four only: those referred to in Article 52 TFEU and the protection of the environment. That paragraph also includes an exception for 'national rules on employment conditions', in application of the more general exception provided for in Article 1(6) of the Services Directive.

71. A thorny issue is whether Article 16(2) of the Services Directive contains a 'blacklist' of national requirements — meaning that those requirements can never be justified — or merely lists examples of *particularly suspect* requirements that, nonetheless, may in exceptional circumstances still be justified, when the conditions set out in Article 16(1) and (3) are satisfied. (25) Two Advocates General have, in past cases, taken different views on that point (26) and also legal scholarship appears divided. (27)

72. That is understandable. There are indeed arguments in support of both readings of the provision.

73. On the one hand, the structure of Article 16 of the Services Directive would rather suggest that the requirements referred to in paragraph 2 thereof may not be prohibited per se. Indeed, it may appear an odd choice by the legislature to include a blacklist in a specific paragraph (paragraph 2) that is in between two paragraphs (paragraphs 1 and 3) that lay down the conditions in which national requirements may be justified. One would have rather expected to find such a list either at the beginning or at the end of Article 16 or, even better, in a distinct and specific provision. That is indeed the case for national requirements that affect the freedom of establishment; they are dealt with in two distinct provisions: those 'blacklisted' in Article 14, and those subject to an evaluation mechanism and a justification rule in Article 15. Nor does Article 16(2) explicitly state that it applies 'by derogation' to what is provided for in the previous paragraph.

74. On the other hand, however, the odd structure of Article 16 of the Services Directive may be explained by its (already mentioned) troubled drafting history. (28) More importantly, I see more persuasive arguments to support the view that the requirements referred to in paragraph 2 thereof are per se prohibited. To begin with, the wording of Article 16(2) is very clear in stating 'Member States *may not* restrict the freedom to provide services in the case of a provider established in another Member State by imposing *any of* the following requirements …'. (29) Article 16(2) thus echoes the wording of Article 14 of the same directive, for which the Court has found that 'no justification can be given'. (30)

75. In addition, had the legislature intended merely to list examples of national requirements that, just like those caught by the general rules laid down in paragraphs 1 and 3 of Article 16, are in principle prohibited but may be justified, it would probably have introduced in the '*chapeau*' of Article 16(2) of the Services Directive terms such as 'in particular' or 'inter alia', as it did in other provisions of the same directive. (31) Accordingly, the 'closed' nature of the list set out in Article 16(2) suggests an enumeration of non-justifiable requirements, which are thus different from those subject to the (general) rules of paragraphs 1 and 3.

76. Furthermore, the requirements listed in Article 16(2) of the Services Directive seem inspired by the Court's case-law in which they were found to be particularly harmful to the freedom to provide services. (32) It is, indeed, not easy to envisage situations in which a Member State could validly claim that it had to apply those types of requirement.

77. Finally, and importantly, the requirements that, under Article 16(2) of the Services Directive, may not be imposed include, in letter (g), 'restrictions on the freedom to provide the services referred to in Article 19' of the same directive. The latter provision, as mentioned in point 64 above, concerns national requirements that restrict the right of

recipients to receive services from suppliers established abroad. It seems to me that the reasoning followed by the Court in *Rina Services* in holding that the requirements listed in Article 14 of the Services Directive may on no account be justified has to apply also with regard to Article 19 of the same directive. Indeed, like the former, the latter provision too is entitled 'prohibited restrictions' and contains no wording to that effect that it is open to the Member States to justify those restrictions. (33)

78. Admittedly, Article 19 of the Services Directive lists only two categories of requirements and clearly qualifies that list as non-exhaustive. The open nature of that provision could thus be regarded as being indicative of the fact that the restrictions referred to are not per se prohibited. However, that consideration is not, in my view, enough to call into question the fact that Article 19 is intended to prohibit outright any restriction imposed by a Member State on service recipients. It must be borne in mind that it is only rarely that Member State legislation restricts domestic customers' ability to receive services from providers established abroad. Therefore, the scope of Article 19 is rather limited.

79. Accordingly, if Article 19 of the Services Directive constitutes a blacklist, Article 16(2) of the same directive, which expressly refers to it, must be a provision of the same nature.

80. In the light of the above, I take the view that national measures restricting the rights of service providers may, in principle, be justified only on the grounds and under the conditions set out in Article 16(1) and (3) of the Services Directive, or 'saved' by the derogations provided for in Articles 17 and 18 of the same directive. (34) However, national measures corresponding to those listed in Article 16(2) of the Services Directive can be introduced or maintained only if covered by Articles 17 and 18 of that directive. Conversely, pursuant to Article 19 of the Services Directive, national measures that restrict the rights of recipients of services may not, in principle, be justified.

(b) Conclusions

81. In the light of the above, I take the view that a measure such as that at issue is incompatible with Articles 16 and 19 of the Services Directive.

82. Indeed, for the reasons explained in points 36 and 37 above, the measure at issue also constitutes a restriction on the recipient of services and, consequently, is caught by the prohibitions laid down in Article 16(2)(g) and Article 19 of the Services Directive. However, I have also explained that, with regard to the requirements referred to in those provisions, no justification is in principle permissible.

83. On the basis of the above, I conclude that the answer to the questions referred should be that Articles 16 and 19 of the Services Directive preclude a Member State from ordering a recipient of services to suspend payments and to provide security equal to the amount outstanding for a service provided, through posted workers, by a provider established in another Member State, where the measure at issue serves to secure the payment of a possible fine, which may subsequently be imposed on the provider by the host Member State, for a breach of the latter's labour legislation.

2. Article 56 TFEU

84. In my view, the answer to the questions referred would be no different even if the Court were to consider the provisions of the Services Directive inapplicable to the main proceedings and, as a consequence, to examine the compatibility with Article 56 TFEU of a measure such as that at issue.

(a) Existence of a restriction

85. According to settled case-law, Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services established in another Member State, but also the abolition of any restriction on the freedom to provide services, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where it lawfully provides similar services. (35)

86. As explained in points 36 to 38 above, the measure at issue is capable of restricting the rights service providers and recipients of services derive from Article 56 TFEU.

87. It thus remains to be assessed whether the restriction may be *justified.*

(b) Possible justification

88. In that regard, it must be borne in mind that, since the freedom to provide services is one of the fundamental principles of the Union, a restriction of that freedom is warranted only if it pursues a legitimate objective compatible with the Treaties and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it. (36)

89. In that respect, I would first point out that the aim of enabling the national authorities to verify and enforce compliance with national labour legislation enacted to protect workers and avoid unfair competition and social dumping — which is the justification invoked by the Austrian Government — constitutes an *overriding reason* of public interest that may justify a restriction to the freedom to provide services. (37)

90. As regards how suitable a measure such as that at issue is for securing the attainment of that aim, I would observe the following. It is true that, in making it more difficult for entrepreneurs to escape the payment of the penalties that may be imposed on them for a breach of certain labour rules, the measure at issue may promote compliance with those rules.

91. However, it may be doubted whether the measure at issue *genuinely* and *coherently* pursues the objective invoked by the Austrian Government. Indeed, the measure at issue is imposed to secure the payment of penalties for breaches that may well be purely formal and the harmful consequences of which may be rather limited, whereas it is not applicable (if my understanding is correct) with respect to breaches of the labour legislation that have more serious consequences for workers: for example, failure to respect the rights to sick or maternity leave, paid annual holidays, minimum rest periods or rates of pay, or to meet the required health, safety and hygiene standards in the working place.

92. Nevertheless, regardless of that aspect, I am of the view that the measure at issue is in any event not proportionate, as it *goes beyond* what is necessary to attain the stated objective. There are several reasons for my view.

(c) Proportionality

93. First, it should be borne in mind that, according to settled case-law, where a Member State relies on overriding requirements in the public interest in order to justify rules liable to obstruct the exercise of freedom to provide services, such justification must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter. Thus the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court. (38)

94. In the present case, I believe that two provisions of the Charter are especially relevant: Article 47 ('Right to an effective remedy and to a fair trial') and Article 48 ('Presumption of innocence and right of defence'). The measure at issue appears problematic in the light of both.

95. On the one hand, pursuant to Article 48 of the Charter, when the national authorities act in the field of EU law, the addressee of an adverse decision must be given the possibility of submitting his observations before the decision is adopted, so as to enable the competent administrative authority effectively to take into account all relevant information. The addressee must be able, in particular, to correct any error committed by the authority, or submit information that may plead in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content. That right must be guaranteed even where the applicable domestic legislation does not expressly provide for any specific procedural requirement to that effect. (39)

96. In the case at hand, the formal addressee of the measure at issue was Mr Vavti. However, it is undeniable that the measure also affected Čepelnik's legal position both directly and immediately, by severely restricting the rights it derived from the contract with Mr Vavti. That notwithstanding, Čepelnik was never heard prior to the adoption of the measure at issue.

97. On the other hand, the measure at issue appears also to fall foul of the requirements stemming from Article 47 of the Charter, pursuant to which any decision taken by the administrative authorities must be challengeable before a court that can review the questions of fact and law invoked by the applicant. In particular, any individual must have the right to institute proceedings before national courts to challenge the legality of any decision or other national measure relative to the application to him of the EU rules. (40)

98. In that respect, I observe that it is unclear whether an undertaking that finds itself in Čepelnik's position has the right to introduce, before an Austrian court, an action for annulment of the measure at issue. The order for reference suggests that that is not possible, a view supported also by Čepelnik, whereas the Austrian Government argues that it is. (41) The situation is thus ambiguous at best. At any rate, I cannot see how the right to an effective remedy could be meaningfully exercised where — as happened in the case of Čepelnik — the service provider is not even promptly informed by the Austrian administration of the adoption of the measure at issue.

99. Nor, obviously, is it satisfactory that the measure at issue could be challenged by the recipient of services. Indeed, since the provision of security extinguishes his debt towards the service provider, a customer might often have no interest in bringing proceedings, which would also cost him money, time and energy.

100. Second, it must be emphasised that, according to the referring court, the measure at issue was imposed only on the basis of the fact that Čepelnik was not established in Austria and, consequently, the administration assumed that the penalty it might in the future impose on that undertaking would be impossible or excessively difficult to enforce.

101. Therefore — at least in the case at hand — the default position taken by the Austrian authorities was that the mere fact that an undertaking is established abroad justifies the adoption of the measure at issue. Yet, I do not see how the adoption of a restrictive measure on *a general and precautionary basis* against (potentially) any service provider not established in Austria could be justified. (42) Its automatic and unconditional application does not allow adequate account to be taken of the individual circumstances of each provider, despite the obvious fact that not all providers registered abroad are in a similar situation. In particular, it cannot be presumed that all of them might try to profit from the administrative hurdles stemming from the cross-border enforcement of the penalty in order to escape it. (43) There will certainly be foreign undertakings that, because of their size, reputation, financial situation and, not least, customer-base in Austria, will prefer to pay any penalty imposed on them rather than trying to circumvent Austrian law. It cannot possibly be for the service provider to disprove the assumption made by the national authorities, especially because he is not even informed about the adoption of the measure at issue and, in any case, it is not at all clear if and when he could appear before the administrative authorities and/or the domestic court having jurisdiction in that matter.

102. Nor could it be presumed that, should the need to enforce the penalty cross-border arise, the Slovenian authorities would not be willing to provide the necessary assistance to their Austrian colleagues.

103. That is even more the case if one considers that barely three months after the application of the measure at issue in the main proceedings the period for transposition of Directive 2014/67 was set to expire and the administrative offences for which Čepelnik was fined appear to fall under the material scope of that directive. Indeed, under Article 9(1) of Directive 2014/67, the administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in that directive and in Directive 96/71 that Member States are allowed to impose — provided that they are justified and proportionate in accordance with EU law — include the requirements for the service provider to declare the commencement of the service provision, and to keep payslips in one of the official languages of the host Member State, or in other languages accepted by the host Member State.

104. Accordingly, the Austrian authorities would have soon been able to make use of the procedures and mechanisms provided for in Directive 2014/67 to enforce a penalty that — it may, again, be worth stressing — at the time the security was provided had not yet been imposed. In particular, Articles 13 to 19 of Directive 2014/67 (Chapter VI on the ‘cross-border enforcement of financial administrative penalties and/or fines’) require Member States to assist each other in enforcing the national rules adopted in application

of the directive, which implies an obligation mutually to recognise fines and mutually to assist in recovering administrative penalties and/or fines. Those articles also lay down some specific provisions to that end.

105. Furthermore, it should be emphasised that the measure at issue was *maintained* even after the period for transposition for Directive 2014/67 had expired and Austria had notified the Commission of the transposition of that directive.

106. This makes it unnecessary, in my opinion, to determine whether the procedures laid down in Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (44) could be applicable to the case at hand, as argued by certain parties that submitted observations in the present proceedings. It seems to me that the Court does not have adequate information on this matter. In particular, it is not clear whether the decision by which the Austrian administration imposes financial penalties for breaches of the AVRAG such as those Čepelnik is accused of is adopted by one of the authorities referred to in Article 1(a) of Framework Decision 2005/214.

107. Third and finally, I observe that the penalties the collection of which the measure at issue is meant to secure are particularly severe, especially for breaches that appear rather formal (such as the mere failure to provide wage documents in the language of the host Member State (45)). This is also evidenced by the fact that — as the referring court indicates — the penalty that Čepelnik may face could be as high as EUR 90 000. That is a very significant amount, in the light of Čepelnik's size and turnover and of the total value of the works carried out by that firm in Austria.

108. In that regard, it should be borne in mind that, according to settled case-law, in the absence of common rules governing a specific matter, the Member States remain competent to impose penalties for breach of obligations stemming from domestic legislation. However, the Member States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the freedoms enshrined in the Treaties. (46)

109. In the case at hand, the combination of hefty penalties with a security such as that at issue appears to prejudice substantially the enjoyment of the freedom to provide services guaranteed by the Treaties. In particular, taken together, those measures alter, to a significant degree, the delicate balance between different (and at times competing) interests pursued by Directive 96/71: to promote the transnational provision of services while ensuring fair competition and guaranteeing respect for the rights of workers in both the host and home Member State. (47)

110. In the light of the above, I take the view that a measure such as that at issue constitutes a restriction under Article 56 TFEU that cannot be justified, since it goes beyond what is necessary to achieve the aim pursued by the national legislation.

IV. Conclusion

111. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Bezirksgericht Bleiburg/Okrajno sodišče Pliberk (District Court, Bleiburg, Austria) as follows:

Articles 16 and 19 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market preclude a Member State from ordering a recipient of services to suspend payments and provide security equal to the sum outstanding for a service provided, through posted workers, by a provider established in another Member State, when the measure at issue serves to secure the payment of a possible fine, which may subsequently be imposed on the provider by the host Member State, for a breach of the latter's labour legislation.

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1 Original language: English.

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2 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive') (OJ 2006 L 376, p. 36).

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3 Directive 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 (OJ 2014 L 159, p. 11).

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4 See, inter alia, judgment of 6 September 2016, Petruhhin, C-182/15, EU:C:2016:630, paragraph 20 and the case-law cited.

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5 See especially recitals 5 to 7 of the Services Directive.

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6 Directive 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).

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7 See judgment of 3 December 2014, De Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and Others, C-315/13, EU:C:2014:2408, paragraph 47 and the case-law cited.

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8 That directive establishes, in accordance with its Article 1(1), ‘a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of [the Posted Workers Directive], including measures to prevent and sanction any abuse and circumvention of the applicable rules’. The objective pursued is to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers.

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9 See also, to that effect, judgment of 3 December 2014, De Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and Others, C-315/13, EU:C:2014:2408, paragraphs 49 to 51. On the other hand, the provisions of Directive 2014/67 will be applicable with regard to the enforcement of the amount of the penalty which exceeds the amount covered by the measure at issue.

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10 Judgment of 16 June 2015, Rina Services and Others, C-593/13, EU:C:2015:399, paragraph 23 et seq. See also, to that effect, judgments of 30 January 2018, X and VisserX and Visser, C-360/15 and C-31/16, EU:C:2018:44, paragraph 137, and of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 118.

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11 See especially Article 2(1) and Article 4, point 1, of the Services Directive.

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12 See, in particular, Article 4, point 7, of the Services Directive.

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13 See, respectively, Article 2(2) and (3) of the Services Directive.

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14 Emphasis added.

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15 Emphasis added.

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16 This reading is borne out by the fact that Article 1(7) states that the directive ‘does not affect the exercise of fundamental rights’. Nevertheless, it is stating the obvious to say that the rights conferred by the Services Directive may have an effect on the exercise of certain

fundamental rights (especially those of an economic character) recognised under national and EU law.

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17 Recital 58 of the Commission's initial proposal for a directive (COM(2004) 2 final/3, in legal literature often referred to as the 'Bolkestein' draft) merely read that the 'Directive does not aim to address issues of labour law as such'. Some stakeholders however argued that such a provision might undermine social protection standards and the fundamental rights to collective action and bargaining. To answer those concerns, the Commission's amended proposal for a directive (COM(2006) 160 final, in legal literature often referred to as the 'McCreevy draft') amongst others introduced, in Article 1(6), the current exception. That draft provision was subsequently adopted as such in the Services Directive. For a discussion, see Flower, J., 'Negotiating European Legislation: The Services Directive', *Cambridge Yearbook of European Legal Studies*, vol. 9, Hart Publishing, 2007, pp. 217 to 238.

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18 For example: 'labour law, *that is*' (English version), 'das Arbeitsrecht, d.h.' (German version); 'droit du travail, *à savoir*' (French Version); 'legislazione del lavoro, *segnatamente*' (Italian version); 'Derecho laboral, *es decir*' (Spanish version); 'het arbeidsrecht …, *dat wil zeggen*' (Dutch version); 'legislação laboral, *ou seja*' (Portuguese version); 'työoikeuteen, *toisin sanoen*' (Finnish version) and 'arbetsrätten, *dvs.*' (Swedish version). Emphasis added.

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19 See, for example, Articles 27 to 33 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 151 to 160 TFEU. See also the Community Charter of the Fundamental Social Rights of Workers (adopted at the meeting of the Council held in Strasbourg on 9 December 1989) and the Council of Europe's European Social Charter (signed in Turin on 18 October 1961). More recently, see the principles of the European Pillar of Social Rights (Interinstitutional proclamation by the Commission, the Council and the Parliament at the Social Summit for Fair Jobs and Growth on 17 November 2017 in Gothenburg).

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20 Judgment of 3 December 2014, De Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and OthersDe Clercq and Others, C-315/13, EU:C:2014:2408, paragraphs 42 to 48.

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21 Cf. Barnard, C., 'Unravelling the services Directive', *Common Market Law Review*, vol. 45, 2008, pp. 323 to 394, at 360.

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22 Cited supra, footnote 17.

23 See, for example, Craufurd Smith, R., ‘Old wine in new bottles? From the “country of origin principle” to “freedom to provide services” in the European Community Directive on services in the internal market’, *Mitchell Working Paper Series*, 2007, p. 2.

24 Cited supra, footnote 17.

25 The issue arose also in a previous case but the Court did not need to take a position on it: see judgment of 23 February 2016, Commission v HungaryCommission v HungaryCommission v Hungary, C-179/14, EU:C:2016:108, paragraph 116.

26 Cf. Opinion of Advocate General Cruz Villalón in Rina Services and Rina, C-593/13, EU:C:2015:159, point 34 et seq., with Opinion of Advocate General Bot in Commission v HungaryCommission v HungaryCommission v Hungary, C-179/14, EU:C:2015:619, point 153 et seq.

27 Cf. Barnard, C., op. cit., footnote 21, pp. 364 and 365, with the works cited in footnote 57 of the Opinion of Advocate General Bot in Commission v HungaryCommission v HungaryCommission v Hungary, C-179/14, EU:C:2015:619.

28 See above, point 67 of this Opinion.

29 Emphasis added. Although the provision is not always identically worded in the various language versions of the directive, I found no version that suggests a less stringent approach on this matter.

30 Judgment of 16 June 2015, Rina Services and Others, C-593/13, EU:C:2015:399, paragraph 28.

31 See, for example, Articles 17 and 19. For completeness, I must point out that the Italian version of Article 16(2) does include, before the list of prohibited requirements, the term ‘*in particolare*’; a term which, however, I did not find in any of the other versions of the directive that I checked.

32 See Opinion of Advocate General Bot in Commission v HungaryCommission v HungaryCommission v Hungary, C-179/14, EU:C:2015:619, points 153 and 154 and the case-law cited.

33 Judgment of 16 June 2015, Rina Services and Others, C-593/13, EU:C:2015:399, paragraph 30.

34 Those provisions concern, respectively ‘Additional derogations from the freedom to provide services’ (such as, for example, services of general economic interest which are provided in another Member State, inter alia, in the postal, electricity, water distribution and treatment of waste sectors) and ‘Case-by-case derogations’ (as regards measures relating to the safety of services).

35 See, inter alia, judgments of 18 July 2013, *Citroën Belux*, C-265/12, EU:C:2013:498, paragraph 35, and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 35.

36 See, inter alia, judgment of 18 December 2007, Laval un PartneriLaval un Partneri, C-341/05, EU:C:2007:809, paragraph 101 and the case-law cited.

37 See, to that effect, judgments of 12 October 2004, Wolff & Müller, C-60/03, EU:C:2004:610, paragraphs 35 and 41, and of 19 December 2012, Commission v BelgiumCommission v BelgiumCommission v Belgium, C-577/10, EU:C:2012:814, paragraph 45.

38 See, among others, judgment of 30 April 2014, Pfleger and OthersPfleger and OthersPfleger and OthersPfleger and Others, C-390/12, EU:C:2014:281, paragraph 35 and the case-law cited.

39 See especially judgment of 19 February 2009, Kamino International LogisticsKamino International Logistics, C-376/07, EU:C:2009:105, paragraphs 37 to 39.

40 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited.

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41 I note that the Austrian Government could, in support of its argument, cite only one case where an appeal court had granted the quality of party to the procedure to the service provider, overturning the first instance court's decision which had denied it. Čepelnik has, however, cited another case where a similar position was rejected by another appeal court, and a case (still pending) where the Austrian administration has argued that the service provider has no right to challenge a measure such as that at issue. More tellingly, Čepelnik has informed the court that, in its own case, the domestic court having jurisdiction has, despite the time lapsed, not yet taken a decision on whether that undertaking has standing to bring proceedings against the measure at issue.

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42 See, by analogy, judgment of 9 November 2006, Commission v BelgiumCommission v BelgiumCommission v Belgium, C-433/04, EU:C:2006:702, paragraphs 35 to 38.

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43 See, to that effect, judgments of 11 March 2004, de Lasteyrie du Saillantde Lasteyrie du Saillantde Lasteyrie du Saillantde Lasteyrie du Saillant, C-9/02, EU:C:2004:138, paragraphs 51 and 52; of 7 September 2017, Eqiom and EnkaEqiom and Enka, C-6/16, EU:C:2017:641, paragraph 31; and of 20 December 2017, Deister Holding and Juhler HoldingDeister Holding and Juhler HoldingDeister Holding and Juhler HoldingDeister Holding and Juhler Holding, C-504/16 and C-613/16, EU:C:2017:1009, paragraph 61.

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44 OJ 2005 L 76, p. 16.

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45 According to the referring court, the missing wage documents were presented soon after the inspection by the supervisory body.

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46 To that effect, see, inter alia, judgments of 29 February 1996, *Skanavi and Chryssanthakopoulos*, C-193/94, EU:C:1996:70, paragraph 36, and of 7 July 1976, Watson and BelmannWatson and Belmann, 118/75, EU:C:1976:106, paragraph 21.

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47 See, in particular, recital 5 of Directive 96/71.