Provisional text

OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA delivered on 28 May 2020(1)

Case C-620/18

Hungary

v

European Parliament, Council of the European Union

(Action for annulment — Directive (EU) 2018/957 — Directive (EU) 96/71 — Posting of workers in the framework of the provision of services — Provisions relating to working conditions and the protection of workers' health and safety — Inappropriate legal basis — Misuse of powers — Discriminatory, unnecessary or disproportionate restrictions — Infringement of the principle of freedom to provide services — Remuneration of posted workers — Workers on long-term postings — Infringement of Regulation (EC) No 593/2008 on the law applicable to contractual obligations — Infringement of the principles of legal certainty and legislative clarity — Collective action by workers — Transport by road)

1. Hungary claims, principally, that the Court of Justice should annul Directive (EU) 2018/957 (2) amending Directive 96/71/EC (3) concerning the posting of workers in the framework of the provision of services. In the alternative, Hungary seeks the annulment of a number of provisions of Directive 2018/957.

I. Legal framework

A. Directive 96/71

2. Directive 96/71 was adopted on the basis of Articles 57(2) and 66 of the EC Treaty (now Articles 53(1) TFEU and 62 TFEU).

3. In accordance with Article 3(1) of Directive 96/71, the aim of that directive was to guarantee workers posted to the territory of the Member States the terms and conditions of employment covering the matters laid down therein which, in the Member State where the work was carried out, were laid down by law, regulation or administrative provision, or by collective agreements or arbitration awards which had been declared universally applicable.

4. The matters covered by Directive 96/71 included, in Article 3(1)(c) thereof, minimum rates of pay, including overtime rates.

B. **Directive 2018/957**

5. Directive 2018/957 has as its legal basis Articles 53(1) TFEU and 62 TFEU.

6. Article 1(1)(b) of Directive 2018/957 inserts the following paragraphs into Article 1 of Directive 96/71:

‘1. This Directive shall ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of workers’ health and safety that must be respected.

1a. This Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice.’

7. Article 1(2)(a) of Directive 2018/957 amends Article 3(1) of Directive 96/71, which is replaced by the following wording:

‘1. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual leave;

(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers 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;

(h) the conditions of workers’ accommodation where provided by the employer to workers away from their regular place of work;

(i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work.

For the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.

…'

8. Article 1(2)(b) of Directive 2018/957 inserts a paragraph 1a into Article 3 of Directive 96/71, which is worded as follows:

'1a. Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8.

The first subparagraph of this paragraph shall not apply to the following matters:

(a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;

(b) supplementary occupational retirement pension schemes.

Where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months.

Where an undertaking as referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned.

The concept of "the same task at the same place" referred to in the fourth subparagraph of this paragraph shall be determined taking into consideration, inter alia, the nature of

the service to be provided, the work to be performed and the address(es) of the workplace.'

9. In accordance with Article 1(2)(c) of Directive 2018/957, Article 3(7) of Directive 96/71 now reads:

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

Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.'

10. Under Article 3(3) of Directive 2018/957:

'This Directive shall apply to the road transport sector from the date of application of a legislative act amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU [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 ("the IMI Regulation") (OJ 2014 L 159, p. 11)] for posting drivers in the road transport sector.'

II. Procedure before the Court of Justice and forms of order sought

11. The Hungarian Government claims that the Court should annul Directive 2018/957 in its entirety. In the alternative, the Hungarian Government limits the form of order sought to the annulment of:

- the provisions of Article 1(2)(a) of Directive 2018/957 laying down point (c) and the third subparagraph of the new Article 3(1) of Directive 96/71;
- the provisions of Article 1(2)(b) of Directive 2018/957 inserting paragraph 1a into Article 3 of Directive 96/71;
- Article 1(2)(c) of Directive 2018/957;
- Article 3(3) of Directive 2018/957.

12. The Hungarian Government further claims that the European Parliament and the Council of the European Union should be ordered to pay the costs.

13. The European Parliament and the Council contend that the Court should dismiss the action and order Hungary to pay the costs.

14. Germany, France, the Netherlands and the Commission were granted leave to intervene in the proceedings in support of the forms of order sought by the Parliament and the Council. All of them lodged written observations, although the Netherlands simply endorsed the arguments of the Council and of the European Parliament.

15. In accordance with the third paragraph of Article 16 of the Statute of the Court of Justice, the Hungarian Government requested that the case be decided by the Grand Chamber.

16. The Council, the Parliament, the Commission and the Hungarian, German, French and Netherlands Governments took part in the hearing, which was held on 3 March 2020.

III. **Preliminary considerations**

17. The posting of workers (4) in the framework of the transnational provision of services between Member States has always been a sensitive issue within the European Union. Despite its relatively limited economic significance, (5) the legal rules governing the posting of workers have led to disagreements because those rules combine two conflicting perspectives:

- on the one hand, the perspective of the freedom to provide services in the internal market. In line with that freedom, restrictions which preclude an undertaking from a Member State with low labour costs from posting its workers to provide services in another Member State with higher labour costs must be removed. The States of origin of such undertakings emphasise the need to facilitate the freedom to provide services. They maintain, therefore, that workers on temporary postings should remain subject to the legislation of the State of origin and that the fewest possible provisions of the State of destination should apply to such workers;

- on the other hand, the perspective of the protection of the working and social conditions of workers who are on temporary postings. States of destination seek to make those workers subject to the same employment provisions as all the other workers who work in their territory (receiving the same pay for the same work in that State). This prevents undertakings which post workers from competing unfairly with those established in the territory of the State of destination and avoids so-called social dumping, while guaranteeing better protection of posted workers.

18. The difficulties in regulating the transnational posting of workers are derived, in essence, from the fact that the European Union does not have the power to harmonise working conditions. That power lies with the Member States, which is reflected in the considerable differences between working conditions and pay conditions in each one. (6)

19. In addition to being subject to the employment provisions of the States concerned and to the EU provisions relating to the freedom to provide services, the transnational posting of workers is subject to the EU rules on private international law (concerning the law applicable to contractual obligations), the social security provisions of the European Union and the Member States concerned and tax provisions. The fact that the transnational posting of workers is subject to multiple provisions makes it far more difficult to regulate.

A. Case-law of the Court of Justice on the posting of workers in the framework of the transnational provision of services

20. Before the harmonisation of laws in this area, the Court was required to rule on which law should be applied to posted workers. (7) The mere imposition by the State of destination of its employment provisions would hamper the provision of services by undertakings from other States wishing to use such workers.

21. The approach adopted by the Court in relation to national measures in this area has been that traditionally used in relation to the freedom to provide services. First, the Court determines whether the national measure impedes the transnational provision of services using posted staff and, if so, it uses the proportionality test to assess whether the measure is justified by an overriding requirement, in other words, by a public-interest ground deserving of protection.

22. According to settled case-law, Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, 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 advantageous the activities of a provider of services established in another Member State. (8)

23. The Court regarded as restrictive (i) national measures requiring employers to pay, in the host Member State, the employer's share of social security contributions in respect of posted workers, (9) or (ii) those requiring the payment of contributions in respect of 'loyalty stamps' and 'bad weather stamps' when employers paid similar contributions in their State of origin. (10)

24. The Court also held that a national provision which lays down, in the framework of the posting of workers, the obligation to draw up and keep company and employment documents in the host Member State may give rise to additional expenses and administrative and economic burdens for undertakings established in another Member State and, therefore, constitutes a restriction on freedom to provide services. (11)

25. Restrictive national measures may be justified, however, where they meet overriding requirements relating to the public interest, provided that: (a) that interest is not safeguarded by the rules to which the provider of such a service is subject in the

Member State in which he or she is established, and (b) those rules are appropriate for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (in other words, the rules must be proportionate). (12)

26. Overriding reasons relating to the public interest accepted by the Court as the basis for the application of employment measures of the State of destination to posted workers include: (a) the protection of workers; (13) (b) the 'social security of workers'; (14) (c) the 'social protection of workers in the construction industry'; (15) (d) the prevention of unfair competition on the part of undertakings paying their posted workers at a rate less than the minimum rate of pay, given that that objective encompasses the goal of protecting workers through the fight against social dumping; (16) and (e) the fight against fraud.

27. The Court held in the judgment in *Seco and Desquenne & Giral* (17) that, in the absence of harmonisation, Member States can, for example, require those who employ posted workers for the provision of services to pay those workers the minimum salary applicable in the host Member State, including where those workers are employed only temporarily in the territory of the host Member State and regardless of the country in which the employer is established. Member States may also require compliance with those employment provisions. (18)

28. The adoption of Directive 96/71 reduced, but did not completely eliminate, the number of cases in which the Court verified the compatibility with Article 56 TFEU of national measures restricting the posting of workers.

29. Since Directive 96/71 did not include provisions for enforcing compliance with its substantive provisions, the Court continued to use Article 56 TFEU to adjudicate on national restrictions imposed in that area. That situation changed with the entry into force of Directive 2014/67.

30. In particular, the ancillary national administrative rules designed to enable monitoring of compliance with the terms and conditions of employment applicable to posted workers have continued to be reviewed under Article 56 TFEU: (19)

- According to the judgment in *Čepelnik*, Article 56 TFEU precludes the competent authorities of the host State from ordering a commissioning party established in that Member State to suspend payments to his contractor established in another Member State (of origin), or even to pay a security in an amount equivalent to the price still owed for the works in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the host Member State. (20)

- The Court held likewise in the judgment in *Maksimovic and Others*. (21)

- As regards the posting of workers who are third-country nationals by a service provider established in a Member State, the Court has held that making the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction within the meaning of Article 56 TFEU. (22) The same occurs where an employer is required to obtain work permits in order to

post its workers who are nationals of third countries and who have been residing and working lawfully in that other Member State. (23)

B. Harmonisation of laws by directives

1. *Directive 96/71 and amendments of that directive prior to 2018*

31. In the light of uncertainties concerning which provisions of national employment law could be imposed on undertakings which posted their workers, the Member States urged the EU legislature to harmonise those laws.

32. Directive 96/71 governs three types of posting: (a) the direct provision of services by an undertaking in the framework of a contract for services; (24) (b) the posting of workers in the context of an establishment or an undertaking belonging to the same group ('intra-group posting'); and (c) posting involving the placement of a worker by a temporary employment agency established in another Member State.

33. Directive 96/71 was aimed at promoting the transnational provision of services through the creation of a climate of fair competition and measures guaranteeing respect for the rights of posted workers.

34. Its objective was, therefore, to address the terms and conditions of employment applicable to an employment relationship conducted in a transnational context. To that end, the directive sought to coordinate the provisions of the Member States 'in order to lay down a nucleus of *mandatory rules for minimum protection* to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided'. (25)

35. Those aims are reflected in the first subparagraph of Article 3(1) of Directive 96/71:

- First, the directive is intended to ensure fair competition between national undertakings and those providing transnational services: the latter must guarantee their workers, in respect of a limited list of matters, the terms and conditions of employment laid down in the host Member State.

- Secondly, it aims to ensure that the rules of the host Member State for minimum protection as regards the terms and conditions of employment relating to the matters mentioned will be applied to posted workers while they work on a temporary basis in the territory of that host Member State. (26)

36. The implementation of Directive 96/71 was difficult from the outset due to the lack of clarity and the vagueness of some of its terms and conditions of application. (27)

37. The Court sought to clarify a number of the most important concepts in that regard:

- As regards 'minimum rates of pay', the definition of the components of that term depends on the law of the Member State concerned, subject to the sole condition that that definition (which may be derived from statute or from the applicable national collective agreements, or

from the interpretation of these by national courts) must not impede the freedom to provide services between Member States.

- The Court was required to identify on a case-by-case basis which elements should (or should not) constitute those minimum rates of pay, notably in the judgments in *Commission* v *Germany*, *Isbir* and *Sähköalojen ammattiliitto*. (28)

38. The judgment in *Laval un Partneri* was particularly important because: (a) it stated that Member States have a duty to grant posted workers the minimum level of protection laid down in their national law, and (b) it held that without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable, the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71. (29)

39. Moreover, in that judgment the Court held that Article 3 of Directive 96/71 (together with Article 56 TFEU) must be interpreted as precluding a trade union from attempting, by means of collective action in the form of a blockade of sites, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive. (30)

40. The judgment in *Laval un Partneri* was preceded by the judgment in *International Transport Workers' Federation and Finnish Seamen's Union* (31) and followed by the judgments in *Rüffert* and *Commission* v *Luxembourg*, (32) which found that certain measures to protect workers which restricted freedom to provide services or freedom of establishment were unjustified.

41. Trades unions regarded that case-law as unfavourable to posted workers' interests (33) and criticised it because it appeared to convert Directive 96/71 into the upper limit for rights which the host Member State could grant posted workers and impose on the undertakings which deployed them. (34) It is unsurprising that it led to the call for Directive 96/71 to be amended. (35)

42. In addition, there was the effect of the enlargements of the European Union in 2004 and 2007, that is, the arrival of new Member States with significant potential to export posted workers. The 2008 financial crisis also had an effect on the application of Directive 96/71, by encouraging the transnational posting of workers and contributing to the development of fraudulent practices (fictitious companies or letterbox companies, bogus self-employment) (36) to avoid the 'minimum' protection it provided for posted workers.

43. The first step in the reform process was the adoption of Directive 2014/67, which aimed to ensure compliance with Directive 96/71 by providing for new, enhanced mechanisms for combating and penalising any abuse, circumvention or fraud in situations involving the transnational posting of workers. (37)

44. Directive 2014/67 also contains provisions to improve administrative cooperation between the national authorities with competence in matters related to the posting of workers. The directive governs the control measures to be applied by the Member States when they monitor compliance with the working conditions of posted workers. The directive further provides that appropriate and effective checks and monitoring mechanisms must be put in place, and that there must be inspections by national authorities in order to monitor compliance with Directive 96/71.

2. ***Directive 2018/957***

45. The Member States had until 18 June 2016 to transpose Directive 2014/67 into national law. (38) Before that period expired, the Commission presented a proposal, on 18 March 2016, to amend Directive 96/71. (39)

46. The process of implementing that proposal highlighted the conflict between Member States *exporting* posted workers and those *receiving* such workers:

- Germany, Austria, Belgium, France, Luxembourg, the Netherlands and Sweden expressed, in a joint letter, their support for modernising Directive 96/71 with a view to establishing the principle of 'equal pay for equal work in the same place'. They proposed the amendment of the provisions of Directive 96/71 on the working and social conditions applicable to posted workers, principally in relation to pay; the establishment of a maximum duration for postings, in particular with a view to harmonising the provisions with the EU Regulation on the coordination of social security systems; and the clarification of the conditions applicable to the road transport sector.

- On the other hand, Bulgaria, the Czech Republic, Slovakia, Estonia, Hungary, Latvia, Lithuania, Poland and Romania maintained, in a joint letter, that a review of Directive 96/71 was premature and that it should be postponed until after the transposition period for Directive 2014/67 had elapsed and its effects had been assessed in detail. Those Member States expressed their concern that the principle of 'equal pay for equal work in the same place' might create obstacles in the single market since pay rate differences constitute one legitimate element of competitive advantage for service providers. Furthermore, they took the position that posted workers should remain under the legislation of the Member State of origin for social security purposes, and that the relationship between the posting of workers and the coordination of social security systems should not be reviewed.

47. Within the period stipulated by Article 6 of Protocol No 2, 14 national parliaments sent reasoned opinions to the Commission in which they stated that the proposal of 8 March 2016 was not compatible with the principle of subsidiarity. This meant that they

activated the procedure under Article 7(2) of Protocol No 2 to the Treaty, on the application of the principles of subsidiarity and proportionality.

48. The Commission's proposal had as its legal basis the provisions relating to the internal market, in particular, Articles 53(1) TFEU and 62 TFEU. After examining its substance, the Commission concluded that the revision of Directive 96/71 complied with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal was not required. (40)

49. Following complex negotiations within the Council and the European Parliament, (41) the revision of Directive 96/71 was approved on 28 June 2018 by the adoption of Directive 2018/957, Article 3 of which lays down a period for transposition ending on 30 July 2020; the application of Directive 2018/957 to road transport services is dependent on the adoption of a specific legislative act.

50. Poland and Hungary voted against the adoption of Directive 2018/957 while Croatia, Lithuania, Latvia and the United Kingdom abstained.

51. Lastly, it is important to note that the amendment of Directive 96/71 through the adoption of Directive 2018/957 was accompanied by a proposal for the amendment of Regulation (EC) No 883/2004 (42) and for the establishment of a European Labour Authority, (43) with the aim of assisting the Member States and the Commission in the effective application and enforcement of EU law related to labour mobility (including Directive 96/71) and the coordination of social security systems within the European Union.

IV. First plea in law: error in the choice of legal basis for Directive 2018/957

A. Arguments

52. The Hungarian Government submits that Articles 53(1) TFEU and 62 TFEU, which provide for the approximation of laws in relation to the freedom to provide services, are not an appropriate legal basis for the adoption of Directive 2018/957. Taking into account its purpose and its content, that directive applies only, or principally, to the protection of workers, meaning that the EU legislature ought, for the purpose of adopting the directive, have taken Article 153 TFEU as the legal basis or, at least, as the principal legal basis in relation to social policy.

53. In the Hungarian Government's submission, Directive 2018/957 does not eliminate restrictions on the freedom to provide services and instead creates obstacles for undertakings which provide transnational services through the posting of workers because it establishes measures for the protection of posted workers. Its primary purpose is the equal treatment of workers, in particular, the expansion of equal pay (equal pay for equal work in the same place).

54. When workers are posted in the framework of the transnational provision of services for a period of more than 12 months (or, exceptionally, 18 months), the directive provides that the same terms and conditions of employment must apply to those workers

as apply to workers from the host country. As regards shorter periods, the Hungarian Government submits that the directive strengthens the *hard core* of the mandatory provisions which guarantee a minimum level of protection for those workers during their posting to the host State.

55. The Hungarian Government submits that Directive 2018/957 should not have the same legal basis as Directive 96/71: the subject matter of the 2018 directive is confined to the protection of posted workers and it does not include provisions aimed at liberalisation of the provision of services.

56. The Hungarian Government also relies on the case-law concerning the primacy of the most specific legal basis. When Directive 96/71 was adopted, the general basis of the approximation of laws in relation to freedom to provide services was used because no other, more specific basis existed. By the time Directive 2018/957 was adopted, that more specific basis did exist (Article 153 TFEU) and that is the basis which the EU legislature ought to have used.

57. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the legal basis for Directive 2018/957 (Articles 53(1) TFEU and 62 TFEU) is correct.

B. **Assessment**

58. The case-law of the Court of Justice on the choice of legal basis was summarised in the judgment in *Czech Republic* v *Parliament and Council*, (44) in the terms reproduced below.

- ‘The choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure. If examination of the measure concerned reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component’. (45)

- ‘Moreover … to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the purpose of those rules’. (46)

- ‘In the case of an act amending existing rules, it is important to take into account also, for the purposes of identifying its legal basis, the existing rules which it amends and, in particular, their objective and content.’ (47)

- It is also settled case-law that, once a harmonising provision has been adopted, ‘the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty’. (48)

59. Consequently, in accordance with that case-law, I shall now go on to examine whether the amendment of Directive 96/71 comes within the discretion of the EU

institutions, for which purpose it is necessary: (i) to identify the main objective of Directive 2018/957; (ii) to examine the content of the directive; (49) and (iii) to analyse the context in which the directive was adopted.

1. ***Objective of Directive 2018/957***

60. In order to identify the *main objective* of Directive 2018/957, it is essential to bear in mind its preamble and the provisions it contains, as a whole. (50)

61. The recitals of Directive 2018/957 emphasise that its aim is to strike a — not always straightforward — balance between two interests that do not necessarily coincide: (51)

- on the one hand, the guarantee that undertakings from Member States are able to carry out the transnational provision of services (52) by moving workers from their State of establishment, without unjustified restrictions, so that they can exploit their competitive advantage in the event that they have lower wage costs;

- on the other hand, the protection of the rights of posted workers, (53) whose employment position in the State of destination must resemble that of workers from that State.

62. There are constant references to that balance (between the interests of undertakings providing services and the social protection of posted workers) in the preamble to Directive 2018/957. (54) For example, recital 10, after stating that 'ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties', goes on to counterbalance that by stating that 'the rules ensuring such protection for workers cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services'.

63. A proper balance between those two interests must also ensure fair competition between undertakings which post workers and those established in the State of destination.

64. It is true that a large number of the recitals of Directive 2018/957 relate in particular to the protection of posted workers. The reason for those repeated references is because the intention in 2018 was indeed to amend Directive 96/71 in order to alter the balance struck in that directive and provide more protection for posted workers. The EU legislature considered that that amendment was essential in the light of the development of the EU employment markets following consecutive enlargements and as a result of the 2008 financial crisis.

2. ***Content of Directive 2018/957***

65. The content of Directive 2018/957 is consistent with the objectives set out in its recitals. The new version of Article 1(1) of Directive 96/71 puts greater emphasis on the protection of the rights of posted workers, whereas its predecessor put greater emphasis on the undertakings which employ such workers.

66. The changes which Directive 2018/957 introduces into Directive 96/71 are, I repeat, aimed at improving the working conditions of posted workers and aligning them with those of workers from the host State. In that connection:

- The maximum length of a posting is set at one year (or, exceptionally, 18 months). If that period is exceeded, a posted worker becomes a *long-term worker*, (55) who, in principle, is covered by the same working conditions as workers from the host State.

- In respect of workers posted for less than a year (or, exceptionally, 18 months), the number of matters covered by the requirement that such workers must be treated equally to national workers has been increased. (56) In particular, the words 'minimum rates of pay' have been replaced by 'remuneration'.

- The working conditions of workers posted by placement agencies or temporary employment undertakings have been improved. Now, Member States must ensure (it used to be optional) that such entities guarantee those workers the working conditions which apply, under Article 5 of Directive 2008/104/EC, (57) to workers placed by temporary employment undertakings established in the host Member State.

67. In addition to those amendments, Directive 2018/957 includes other amendments relating to monitoring, control and enforcement of the application of Directive 96/71, brought about by the adoption of Directive 2014/67.

68. Consequently, considered as a whole, the content of Directive 2018/957 is intended to increase the protection of posted workers' rights, albeit still in the framework of the transnational provision of services by an undertaking.

3. ***Context in which Directive 2018/957 was adopted***

69. As I have already explained, the origins of Directive 96/71 are complex. That directive was intended to promote and facilitate the cross-border provision of services, protect posted workers and guarantee fair competition between undertakings of the Member State of origin and undertakings of the Member States of destination.

70. The status quo achieved in 1996 was altered as a result of the enlargements of the European Union in 2004 and 2007, as explained above. (58) The transnational posting of workers increased as a result of that factor, and also the 2008 financial crisis.

71. In those circumstances, and also owing to the lack of clarity of a number of its terms, the political institutions of the European Union believed that it was essential to amend Directive 96/71; this was carried out in two stages: (a) Directive 2014/67, which, without amending Directive 96/71, established mechanisms for improving its application in view of the emergence of numerous cases of fraudulent transnational postings of workers, and (b) the adoption of Directive 2018/957, which introduces the amendments described above.

72. The difficulties experienced by the Commission, the Council and the European Parliament in bringing about that amendment, to which I have already referred, revealed a strong clash of interests between undertakings' Member States of origin and host States.

This action for annulment and the action brought by Poland (Case C-626/18) against Directive 2018/957 make clear the extent of the differences between Member States.

4. ***My view on the legal basis***

73. Having examined the aim, the content and the context of Directive 2018/957, it is necessary to determine whether the legal basis used for its adoption (Articles 53(1) TFEU and 62 TFEU) is correct, as the European Parliament, the Council, the Commission and the German, French and Netherlands Governments maintain, or whether, on the contrary, that directive ought to have been adopted with Article 153 TFEU as its legal basis, as Hungary contends.

74. I agree with Hungary that the objectives and the content of Directive 2018/957 are aimed primarily at protecting posted workers' rights. However, that does not support the conclusion that the roots of the directive must necessarily lie in Article 153 TFEU.

75. It should be recalled, first, that Directive 2018/957 effects an important but limited amendment of Directive 96/71. According to the case-law of the Court, an act amending another earlier act will normally have the same legal basis, (59) which, to my mind, is logical. That is why it is possible for Articles 53(1) TFEU and 62 TFEU to be the appropriate legal basis for Directive 2018/957, as they were previously for Directive 96/71, which Directive 2018/957 amends.

76. Directive 2018/957 has adapted the legislative solution provided by Directive 96/71 to reflect the phenomenon of the (increasing) transnational posting of workers, in order to facilitate the freedom to provide services by undertakings which rely on that type of movement of labour.

77. That adaptation, I repeat, was required because of the development of EU employment markets and was directed towards enhanced protection of the working conditions of posted workers. It is possible that, in some instances, it will entail a correlative reduction in the competitiveness of undertakings where they provide services in other Member States using this method, but that is the (legitimate) option sought by the EU legislature.

78. As I observed in my examination of the case-law of the Court on this subject, when the EU legislature enacts a harmonising provision, it cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty. (60)

79. That is exactly what occurred with the adoption of Directive 2018/957. The EU legislature inserted amendments into Directive 96/17 to adapt the balance of interests reflected therein to the new situation created by the transnational movement of workers. The interests in question remain the same but the focus and the balance between them have shifted towards greater protection of the employment rights of those workers. That rebalancing does not justify a change of legal basis with respect to Directive 96/71.

80. Hungary refers to the case-law of the Court on the choice of the most specific legal basis where a number of legal bases for the adoption of an EU legislative act exist. (61) In Hungary's submission, Article 153 TFEU is more specific than Articles 53(1) TFEU and 62 TFEU for the purposes of the adoption of Directive 2018/957, because it is aimed at the protection of workers' rights and not at the removal of obstacles to the free movement of services.

81. I do not agree with that reasoning. Article 153(2) TFEU contains two different legal bases:

- point (a) provides for the adoption of measures designed to encourage cooperation between Member States in social matters, excluding any type of harmonisation;
- point (b) provides for the possibility of adopting, in relation to certain social matters, 'minimum requirements for gradual implementation', having regard to the conditions obtaining in each Member State.

82. Neither of those two legal bases is an appropriate foundation for Directive 2018/957. As regards workers posted in the framework of the transnational provision of services, it is necessary to establish, as that directive does, the legislation which will apply to those workers during their posting in the host Member State. For that purpose, the cooperation between Member States provided for in Article 153(2)(a) is insufficient, especially in view of the fact that the interests of the host Member State and the Member State of origin may not coincide, as the present dispute makes clear.

83. Moreover, the identification of which legislation will govern the employment relationship (as regards some of its aspects) during the posting to the host State does not require the drafting of EU provisions providing for minimum harmonisation, as referred to in Article 153(2)(b) TFEU. Since exhaustive harmonisation of all working conditions in the EU is not possible, differences between the employment legislation of the State of origin and that of the host State will continue to exist.

84. On that basis, Directive 2018/957 merely stipulates which provisions of the host State are applicable to posted workers during the period in which the undertakings in which they are employed are engaged in the transnational provision of services. Construed in that way, it resembles a *conflict rule*, in accordance with which the applicable legislation is identified in order to facilitate the freedom to provide services while also safeguarding appropriate social protection for posted workers. The legal bases laid down in Article 153(2) TFEU do not cover, and are not intended for, such situations.

85. Accordingly, Article 153 TFEU is not a *more specific* legal basis than Articles 53(1) TFEU and 62 TFEU, in so far as is relevant here. The latter two articles were the legal basis for the adoption of Directive 96/71 and must perform the same function with regard to its amendment, which is undertaken by Directive 2018/957. Since that directive reflects an adjustment of the balance of interests struck by the EU legislature

in 1996, its legal basis is the same as that of Directive 96/71, albeit taking into account the changes experienced since then in relation to transnational movements of workers.

V. Second plea in law: infringement of Article 153(5) TFEU

A. Arguments

86. The Hungarian Government submits that Directive 2018/957 infringes Article 153(5) TFEU, in that the latter excludes the EU's legislative power in relation to pay in the context of employment relationships.

87. In the Hungarian Government's submission, in establishing that the remuneration of workers must conform to the legislation in force in the host Member State, the EU legislature has adopted a directive which relates, in essence, to the remuneration of the employment relationship. The EU legislature selected the legal bases referred to in Directive 2018/957 because it saw that, in the absence of EU competence, that was the only way to regulate the issue of remuneration, which is one of the essential elements of that directive. The Hungarian Government contends that the EU legislature thereby misused its powers.

88. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the second plea in law is unfounded.

B. Assessment

89. My view on the first plea in law makes it unnecessary for me to state my position on the second plea in law. I shall, therefore, deal with it only in the alternative.

90. According to the Court of Justice, since Article 153(5) TFEU (formerly Article 137(5) EC) constitutes an exception to the provisions of Article 153(1) to (4) TFEU, it must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to detract from the aims pursued by Article 151 TFEU.

91. The exception relating to 'pay' (the term used in Article 153(5) TFEU) is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at national level and is within the competence of the Member States in that area. As EU law currently stands, pay has been excluded from harmonisation (under Article 151 TFEU et seq., relating to the EU's social policy). (62)

92. That exception concerns measures which would amount to direct interference by the EU legislature in the determination of pay. That would be the case if there were an attempt to standardise, in whole or in part, the constituent elements of pay or the level of pay in the Member States.

93. The exception cannot, however, be extended to any aspect involving *any sort of link* with pay. That interpretation would deprive other areas referred to in Article 153(1) TFEU of their substance. (63)

94. Directive 2018/957 simply coordinates application and identifies which employment legislation (that of the host State or that of the State of origin) applies to

posted workers. It does not, under any circumstances, set the level of wages to be paid, which, I repeat, comes within the competence of the host State and the State of origin, each in their respective territories.

95. The exception laid down in Article 153(5) TFEU cannot be relied on against, and cannot preclude the adoption of, Directive 2018/957. That is borne out by recital 17 of that directive, (64) which confirms that Member States have exclusive competence in relation to pay.

96. On the same lines, the third subparagraph of the *new* Article 3(1) of Directive 96/71 explicitly provides that '… the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted …'

97. Directive 2018/957 qualifies the earlier wording of Directive 96/71, which referred to 'minimum rates of pay', and makes it clearer. The Court had already pointed out that the second subparagraph of Article 3(1) of Directive 96/71:

'- … expressly refers, for the purposes of that directive, to the national law or practice of the Member State to whose territory the worker is posted to determine the minimum rates of pay referred to in the first subparagraph of Article 3(1).

- In that context, it must be noted that Directive 96/71 does not itself provide any substantive definition of the minimum wage. The task of defining what are the constituent elements of the minimum wage, for the application of that directive, therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States.' (65)

98. It is possible to apply those considerations to the amendment of Directive 96/71. Accordingly, the assertion that, from a substantive perspective, Directive 2018/957 harmonises the pay of posted workers can be rejected, from which it follows that that directive does not infringe Article 153(5) TFEU.

99. The Hungarian Government submits that the EU legislature misused its powers when it chose the legal bases for Directive 2018/957, a view which I do not share for the reasons stated above. Moreover, the Hungarian Government has not pleaded that point as a specific ground of invalidity, arguing that the EU legislature infringed Article 153(5) TFEU, without determining whether its conduct undermined the special legislative procedure referred to in the third subparagraph of Article 153(2) TFEU. (66)

100. The second plea for annulment must, therefore, be rejected.

VI. Third plea in law: infringement of Article 56 TFEU

101. The Hungarian Government contends that Directive 2018/957 is contrary to Article 56 TFEU, which enshrines the freedom to provide services. In its submission, the obligations and restrictions imposed by that directive on undertakings established in a

Member State which post workers to another Member State in the framework of the provision of services are discriminatory, unnecessary and disproportionate with regard to the objective they seek to achieve. In addition, the provisions concerning transport infringe Article 58(1) TFEU.

102. The Hungarian Government's complaints focus on three elements of Directive 2018/957, namely:

- Article 1(2)(a), which replaces the term 'minimum rates of pay' with the term 'remuneration' in point (c) of the first subparagraph of Article 3(1) of Directive 96/71;
- Article 1(2)(b), which adds paragraph 1a to Article 3 of Directive 96/71, providing for the terms and conditions of employment of the host State to be applied, almost in their entirety, to workers posted for more than 12 months; and
- Article 3(3), which refers to the road transport sector.

103. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the third plea in law is unfounded.

A. Preliminary consideration: Article 56 TFEU and directives harmonising the rules applicable to posted workers

104. Before I proceed to examine this plea in law, I shall make a preliminary point concerning the application of Article 56 TFEU to Directive 2018/957.

105. As the European Parliament states, the application of Article 56 TFEU to an EU harmonising provision differs from the way that article is used to review national measures restricting the fundamental freedom to provide services.

106. The prohibition on restrictions of the freedom to provide services applies not only to national measures but also to measures emanating from the EU institutions. (67) It should be borne in mind that the EU legislature adopts harmonising provisions specifically in order to facilitate the freedom to provide services while also ensuring protection for fundamental social interests which may be affected. (68)

107. The case-law of the Court on *national measures* restricting the movement of workers posted in the framework of the transnational provision of services cannot readily be applied to *EU measures* which are aimed at harmonising that phenomenon, such as Directive 2018/957.

108. As I have already observed, in Directive 96/71, the EU legislature combined, in terms which are not disputed, three objectives that are difficult to reconcile: promoting and facilitating the cross-border provision of services, protecting posted workers and guaranteeing fair competition between foreign and local competitors. In order to adapt the directive to the changes which had arisen, the EU legislature had to adjust that balance by means of Directive 2018/957, which focuses on one of those objectives (improving the protection of posted workers' rights).

109. The review of the validity of a harmonising directive which the Court may conduct in an action for annulment entails an assessment of whether there is compliance with the principle of proportionality but does not permit the replacement of the political choices underlying its content. As a general principle of EU law, the principle of proportionality 'requires that the means employed by EU law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them'. (69)

110. It should be recalled that, with regard to judicial review of compliance with those conditions, the Court has set down the following criteria:

- '… in the exercise of the powers conferred on it the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'. (70)
- '… the EU legislature's broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts'. (71)
- '… the EU legislature must base its choice on objective criteria and examine whether the aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators'. (72)
- 'Furthermore, even judicial review of limited scope requires that the EU institutions that have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended'. (73)

111. In the light of those criteria, the EU legislature has broad discretion in complex areas like the regulation of the transnational posting of workers. What needs to be established is whether it used that discretion in a way that was *manifestly* inappropriate when it adjusted the balance of interests struck in Directive 96/71, by introducing the amendments laid down in Directive 2018/957.

B. First part of the third plea in law: sufficient protection of posted workers under the provisions of the Member State of origin of the undertaking providing the service

1. *Arguments*

112. The Hungarian Government contends that Directive 2018/957 infringes Article 56 TFEU because, by providing for the application of the working conditions of the host

State to posted workers, it disregards the use of the principle of mutual recognition. In the Hungarian Government's submission, the protection of the rights of those workers is sufficiently guaranteed by the legislation of the State of origin. It runs counter to the principle of mutual recognition and creates an obstacle to the freedom to provide services to make posted workers subject to the legislation of the host State. (74) Directive 2006/123/EC (75) also lays down the obligation to recognise the working conditions laid down by another Member State in accordance with EU law.

113. The Hungarian Government argues, in particular, that placing posted workers and local workers from the host State on an equal footing as regards pay and placing workers on long-term postings on an almost totally equal footing with workers from the host State calls in question the capacity of the minimum wage of the host State to guarantee an adequate livelihood for posted workers and restricts the comparative advantage of certain 'new Member States' with lower wage costs. Moreover, the Commission failed to provide, in its impact assessment, information justifying the need for the amendments introduced by Directive 2018/957.

114. Lastly, the Hungarian Government draws attention to the difference between the application of the employment provisions of the host State, required by Directive 2018/957, and the social security rules applicable to posted workers, governed by Regulation (EC) No 883/2004. (76) That regulation provides that posted workers are subject to and covered by the social security provisions of the State of origin because they are the most appropriate for ensuring the protection of their rights

115. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the first part of the third plea in law is unfounded.

2. ***Assessment***

116. In my view, there are a number of reasons which preclude the arguments put forward by the Hungarian Government.

117. First, it is not possible to rely on Directive 2006/123 in order to apply the provisions of the State of origin to posted workers. That directive does not concern the labour law (77) or the national social security legislation of the Member States. (78) Furthermore, Article 3(1)(a) of Directive 2006/123 provides that Directive 96/71 takes precedence over Directive 2006/123 in the event of a conflict with a provision 'governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions'. (79)

118. Secondly, the initial case-law of the Court on the compatibility of national measures restricting the posting of workers with Article 56 TFEU did take into account the conditions for the protection of those workers in their undertaking's State of origin. (80) That same approach was maintained in the case-law handed down following the adoption of Directive 96/71, as regards restrictions not falling within that directive's scope. (81) The Court does not take into account the provisions of the State of origin in the context

of the application of Article 3 of Directive 96/71 to workers' terms and conditions of employment since that would deprive the directive of its effectiveness. (82)

119. Thirdly, the impact assessment drawn up by the Commission (83) contained sufficient information and evidence to support the legislative proposal which led to the adoption of Directive 2018/957. As the Commission itself admits, the data on transnational movements of workers were not completely accurate since they came from information provided by national social security bodies following the issue of form A1. The wage gap between some countries and others was appraised by the Commission using approximate data.

120. However, the case-law of the Court grants the EU legislature broad discretion for the purpose of examining the basic facts required for the adoption of a legislative act. The judicial review of that assessment must be limited. (84) The Commission's impact assessment provided sufficient information to justify the adoption of Directive 2018/957. That information was not challenged during the legislative process and it served as a basis for the Commission to examine a number of options and to choose, with good reason, the option which entailed enhanced protection for workers.

121. Fourthly, I do not believe it is appropriate to apply the social security rules covering posted workers (Regulation No 883/2004) to their working conditions.

122. The strategy of the EU rules coordinating national social security systems is, as the Council argues, designed for the relationship between a person with rights and obligations and the welfare state. Thus, Article 11(1) of Regulation No 883/2004 lays down as the guiding principle that persons are subject to the legislation of a single Member State only, which is usually that of the place of actual work, in accordance with the principle *lex loci laboris.*

123. However, there are exceptions to that general principle. These include maintenance of the exclusive link between the worker and the social security system of the State of origin (in other words, the State where the employer undertaking normally operates) if that worker is posted by an undertaking for a limited period of time, up to a maximum of 24 months, to another Member State, provided that the conditions laid down in Article 12 of Regulation No 883/2004 are met. (85)

124. That exception cannot be applied to the working conditions of posted workers because this concerns a legal relationship between a weaker party (the employed person) and another party with more power (the employer undertaking). Better protection of the former requires the employment provisions of the State of origin to be applied in conjunction with those of the host State.

125. Directive 96/71 reflects that underlying principle, since it guarantees posted workers the application of the hard core of the host State's working conditions (extended under Directive 2018/957), while enabling other aspects of the employment relationship to

continue to be governed by the law of a posted worker's State of origin. To that extent, it complies with the Rome I Regulation, (86) to which I shall refer below.

126. In short, the approach in Regulation No 883/2004 in respect of social security for posted workers (such workers being subject to the provisions of the State of origin) cannot be applied to posted workers' working conditions, to which the legislation of the host State must apply in part, together with that of the State of origin. (87)

127. Lastly, it is not for the Court to substitute its own assessment for that of the EU legislature. As I have already noted, it only is for the Court to ascertain whether the EU legislature clearly exceeded its broad discretion with regard to the complex assessments and evaluations it was required to conduct

128. It does not appear to me that in this case the EU legislature opted for measures that are 'manifestly inappropriate' having regard to the objective pursued. (88) To that extent, the EU legislature did not exceed its broad discretion when it amended the earlier rules in a complex area like the transnational posting of workers.

C. Second part of the third plea in law: infringement of the principle of non-discrimination

1. *Arguments*

129. The Hungarian Government submits that Directive 2018/957 infringes the principle of non-discrimination, which prohibits the application of different rules to comparable situations or the same rule to different situations. (89)

130. First, replacement of the obligation to pay posted workers the minimum rate of pay, to ensure that such workers are paid the same as local workers, leads to discrimination against service providers which post workers, as compared to local undertakings. The discrimination lies in the fact that undertakings from the host State are required only to pay their employees the minimum rates of pay laid down by national law, whereas undertakings from other Member States which post workers must pay those workers wages which are determined according to national practice and which, in the Hungarian Government's submission, are automatically higher than the minimum rate of pay.

131. Secondly, the Hungarian Government argues that the application of the same rules to workers on long-term postings and local workers, pursuant to Article 3(1a) of Directive 96/71, is incompatible with the principle of non-discrimination because the two categories of worker are not in comparable situations.

132. The Hungarian Government further submits that the obligation of undertakings which post workers to pay those workers travel, board and lodging expenses also infringes the principle of non-discrimination (new Article 3(7) of Directive 96/71).

133. The Commission, the Council, the European Parliament and the Governments of the Member States intervening in the proceedings contend that the second part of the third plea in law is unfounded.

2. ***Assessment***

134. Directive 96/71, as amended by Directive 2018/957, does not treat the situations of posted workers and local workers from the host State identically en bloc.

135. Thus, Article 3(1) provides a limited list of the matters in relation to which the legislation of the host State applies to posted workers, in order to guarantee equality of treatment with local workers. (90) Equality of treatment between posted workers and local workers is not required as regards other matters.

136. Replacement of the term 'minimum rates of pay' by the term 'remuneration', to which I shall refer below, does not create the discrimination alleged by Hungary against undertakings which post workers.

137. In accordance with the new version of the third subparagraph of Article 3(1), 'the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered *mandatory* (91) by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.'

138. Accordingly, undertakings which post workers are required to pay them only remuneration which includes the minimum wage plus any other element that is mandatory in the host State. The elements of remuneration thus defined are also applicable to local workers, in view of their mandatory nature under the domestic law of the host State, and must be paid by undertakings established in that State, without any difference in treatment. Naturally, Directive 2018/957 does not specify which elements of remuneration are mandatory, a question which is settled by the law of the host State.

139. It can be inferred from the Commission's impact assessment that Directive 2018/957 refrained from requiring *total parity* between the remuneration of posted workers and local workers. (92)

140. As regards the alleged discrimination resulting from application of the same rules to workers on long-term postings and local workers, I shall merely point out that Article 3(1a) of Directive 96/71 does not provide for the same treatment for both types of worker. That provision *brings* the rules applicable to workers on long-term postings *closer* to those applicable to local workers but it *does not place* those workers on an *equal* footing because their situations are different.

141. Furthermore, I cannot find any discrimination in the obligation of undertakings which post workers to pay them travel, board and lodging expenses. These are expenses incurred as a result of the posting itself, which the employer must pay the worker in accordance with the national law or practice applicable to the employment relationship, namely, the law or practice of the country of origin. The associated provision of the directive indicates which national law should apply to the reimbursement of expenses

incurred on account of the posting, and Member States are free to lay down provisions governing those expenses in their national legal systems. (93) I do not see what type of discrimination that rule could create.

D. Third part of the third plea in law: infringement of the principle of proportionality

1. *Arguments*

142. The Hungarian Government submits that Directive 2018/957 makes difficult and impedes the transnational provision of services through the posting of workers in the internal market because it merely increases protection for posted workers. Accordingly, it is not appropriate for meeting the aims it pursues and it infringes the principle of proportionality.

143. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the third part of the third plea in law is unfounded.

2. *Assessment*

144. The principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives. (94)

145. Where the EU institutions are required to make choices of a technical nature and to undertake complex forecasts and assessments, they have a broad discretion. The Court confines itself to examining whether the EU legislature has *manifestly* exceeded that broad discretion by choosing measures that are clearly inappropriate or disproportionate in relation to the aim pursued. (95)

146. I agree with the Council and the Parliament that the EU legislature complied with the requirements of the principle of proportionality when it adopted Directive 2018/957.

147. To avoid repetition, I shall examine the Hungarian Government's arguments relating to the disproportionality of the provisions concerning workers on long-term postings in the fourth part of the present plea in law.

148. As regards payment of posted workers, the impact assessment published by the Commission justified the replacement by Directive 2018/957 of the term 'minimum rates of pay' with the term 'remuneration' on the grounds of the difficulties resulting from the use of the former term when applying Directive 96/71.

149. With a view to rectifying that situation, the Commission studied the possible solutions and their economic consequences. It chose the solution it regarded as the most suitable, which was to undertake a limited amendment of Directive 96/71, which was given material expression by the adoption of Directive 2018/957, and to rule out the publication of an interpretative communication or the non-amendment of Directive 96/71. (96)

150. To my mind, that approach does not infringe the principle of proportionality and does not establish a restriction that is incompatible with Article 56 TFEU. A number of arguments support that view.

151. First, the term ‘minimum rates of pay’ had created practical difficulties, (97) as demonstrated by the case-law of the Court, in particular its judgment in *Sähköalojen ammattiliitto*. (98) That judgment allowed a broad interpretation which included:

- the possibility of calculating the minimum wage for hourly work or for piecework based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements in the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify;
- a daily allowance on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the host Member State;
- compensation for daily travelling time, paid to workers on condition that their daily journey to and from their place of work is of more than one hour’s duration;
- holiday pay which the posted worker must receive for the minimum paid annual holidays.

152. The EU legislature took those interpretative difficulties, and the broad interpretation advocated by the Court of Justice, into account when it adopted Directive 2018/957 and included the term ‘remuneration’ in Article 3(1) and (7) of Directive 91/76.

153. That amendment also makes it possible to limit the practice of undertakings which, when they post workers, may have been inclined to pay them the minimum salary regardless of their category, their duties, their professional qualifications and their length of service, thereby creating a pay gap with regard to local workers in a like situation. (99)

154. At the hearing, the Commission reiterated what was already stated in its impact assessment: the identification of ‘minimum rates of pay’ in Directive 96/71 with the statutory minimum wage laid down by the national legislation of the host State had created, in practice, a wage gap between local workers and posted workers, particularly in sectors like construction.

155. Secondly, it is for the national law or practice of the host Member State to establish minimum rates of pay for the purposes of the second subparagraph of Article 3(1) of Directive 96/71. (100) The method of calculating those rates and the criteria used in that regard are also a matter for the host Member State. (101) National laws and practices concerning the calculation of the minimum wage vary widely (and are not always transparent) in the Member States of the European Union, which hinders the posting of workers under working conditions which are fair and comparable to those of local workers. (102)

156. In its impact assessment, the Commission explained that the concept of *remuneration* enabled those imbalances to be corrected and the protection of posted

workers to be improved, creating fairer competition conditions between local undertakings and undertakings which post workers to provide services, particularly in labour-intensive sectors. (103)

157. It follows from the foregoing that the EU legislature complied with the requirements of the principle of proportionality without *manifestly* exceeding its broad discretion in such a technical and complex area as the present when it chose a suitable measure (insertion of the term 'remuneration') for the attainment of the aims pursued. That measure in itself enables the enhanced protection of posted workers and guarantees conditions of fair competition between local undertakings and undertakings which post their workers.

E. Fourth part of the third plea in law: infringement of the freedom to provide services generated by the rules governing workers on long-term postings

1. *Arguments*

158. The Hungarian Government submits that the special rules for long-term posted workers (the new Article 3(1a) of Directive 96/71) are incompatible with Article 56 TFEU.

159. In the Hungarian Government's submission, those rules disproportionately and unjustifiably restrict the activities of undertakings which post workers in the framework of the transnational provision of services, in that they amend the law applicable to workers on long-term postings and apply to such workers all the working conditions of the host Member State. This also blurs the boundaries between the freedom to provide services and the free movement of workers.

160. The EU institutions and the Governments of the intervening Member States contend that the new rules for workers on long-term postings are justified, comply with the principle of proportionality and do not conflict with Article 56 TFEU.

2. *Assessment*

161. The new category of workers on long-term postings differs from that of 'ordinary' posted workers. The differentiating criterion is the actual duration of the posting: if it exceeds 12 (exceptionally, 18) months, this converts an *ordinary* posted worker into a *long-term* posted worker.

162. Once that period has elapsed, the posted worker concerned (who is now a long-term posted worker) is covered by different legal rules: in addition to the working conditions referred to in Article 3(1), the rules of the Member State where he or she carries out his or her work also apply to that worker.

163. As is apparent from recital 9 thereof, (104) Directive 2018/957 does not, however, treat workers on long-term postings completely identically to local workers (national workers or workers from other Member States who have exercised freedom of movement).

164. Long-term posted workers retain a legal situation anchored (covered) by the freedom to provide services, as recital 10 of Directive 2018/957 states. (105)

165. Contrary to the argument put forward by the Hungarian Government, the new Article 3(1a) of Directive 2018/957 does not create full parity between workers on long-term postings and local workers, because:

- in accordance with that provision, 'the first subparagraph of this paragraph shall not apply to the following matters: (a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses; (b) supplementary occupational retirement pension schemes';

- pursuant to Article 3(1a), 'all the … terms and conditions of employment [of] the Member State where the work is carried out' are to apply to long-term posted workers 'irrespective of which law applies to the employment relationship'. As the European Parliament states in its observations, this means that there is no amendment of the private international law underlying the legal relationships of that category of posted worker; (106)

- the treatment of workers on long-term postings in the same way as local workers occurs in respect of 'all the … terms and conditions of employment [of] the Member State where the work is carried out'. Such terms and conditions must be taken to mean 'working conditions and the protection of workers' health and safety', which are the terms and conditions governed by Directive 96/71, in accordance with its new Article 1(1). The differences in respect of matters like social security and taxation therefore remain in place.

166. In my estimation, the rules governing this new category of long-term posted worker are justified and involve restrictions that are proportionate to the freedom to provide services, which are compatible with Article 56 TFEU.

167. The establishment of a 12-month (exceptionally, 18-month) period removes the uncertainty present in the original version of Directive 96/71, Article 2(1) of which regarded as a posted worker a worker who carried out his or her work in a country other than his or her State of origin 'for a limited period'. The new rule, I stress, dispels that uncertainty by clarifying that a worker whose posting continues for longer than 12 (or 18) months is to be treated as a long-term posted worker.

168. The status of long-term posted worker also appears to me to be reasonable, given that it is consistent with the situation of workers who will reside in the host State for a long period of time, with the result that their participation in the labour market of that State is greater. It is logical (and proportionate) that, in those circumstances, a greater number of employment provisions of the State of destination should apply to them while they also retain their link with the State of origin of the undertaking by which they are employed.

169. That amendment is accompanied, in the third subparagraph of the new Article 3(1a), by the following clarification: 'Where an undertaking as referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same

place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned.' Without prejudice to the fact that, in practice, that provision may create some difficulties, I believe that, generally speaking, it is appropriate for the purpose of preventing circumvention and abuse of the directive by the replacement of some posted workers with others in the same posts.

F. Fifth part of the third plea in law: infringement of Article 58(1) TFEU

1. *Arguments*

170. The Hungarian Government submits that Article 3(3) of Directive 2018/957 infringes Article 58(1) TFEU, since it extends to the transport sector the application of the provisions of Directive 96/71 on the posting of workers.

171. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the fifth part of the third plea in law is ineffective or unfounded.

2. *Assessment*

172. Free movement of services in the transport sector is not governed by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58(1) TFEU. Pursuant to that provision, 'freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport', (107) that is, by Articles 90 TFEU to 100 TFEU.

173. Although the legal basis for Directive 96/71 consists solely in the provisions on freedom to provide services (Articles 53(1) TFEU and 62 TFEU), not those relating to the common transport policy (Article 91 TFEU), it is possible to argue that that directive applies to transport services. (108)

174. Directive 96/71 excludes from its scope 'merchant navy undertakings as regards seagoing personnel', (109) from which it can be inferred that the legislature intended that it should apply to the other services in the transport sector. That is confirmed by the reference in Directive 2014/67 to 'mobile workers in the transport sector' (110) and the references to the application of Directive 96/71 to cabotage operations, in other EU legislative acts. (111)

175. In accordance with Article 3(3) of Directive 2018/957, that directive is to apply 'to the road transport sector from the date of application of a legislative act amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector'.

176. As recital 15 (112) of Directive 2018/957 confirms, the amendments that that directive makes to Directive 96/71 will apply to the road transport sector only in the future and not unconditionally, but rather when a legislative act is adopted which amends

Directive 2006/22 and which includes specific rules with respect to Directives 96/71 and 2014/67.

177. That being so, the new Article 3(3) of Directive 2018/957 does not, in fact, contain any substantive rules governing the posting of workers in the transport sector and nor does it amend in any way the rules for the application of Directive 96/71 to that sector. (113)

178. It will be the new legislative act, which the Commission has already proposed, (114) which will include those rules. There is nothing to preclude that act from also having Article 91 TFEU as its legal basis.

179. In short, I do not perceive any infringement of Article 58(1) TFEU by Article 3(3) of Directive 2018/957.

180. In accordance with the foregoing arguments, I propose that the third plea for annulment should be rejected in its entirety.

VII. **Fourth plea in law: infringement of Article 56 TFEU through the exclusion of collective action by workers from the scope of Directive 96/71**

A. **Arguments**

181. The Hungarian Government submits that Article 1(1a), which Directive 2018/957 inserted into Directive 96/71, infringes Article 56 TFEU because it excludes from the scope of that directive the exercise of the right to strike and other actions covered by specific industrial relations systems in the Member States and also the exercise of the right to negotiate, conclude and enforce collective agreements and to take collective action.

182. That exclusion runs counter to the *Laval un Partneri* case-law and permits the exercise of the right to strike and to negotiate collectively in accordance with national law and independently of the requirements of EU law. To that extent, it facilitates the restriction of the freedom to provide services by undertakings from other Member States through the posting of workers.

183. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the fourth plea in law is unfounded.

B. **Assessment**

184. The new Article 1(1a) clarifies the scope of Directive 96/71. Although, in general, that directive lays down ‘mandatory provisions regarding working conditions and the protection of workers’ health and safety’, paragraph 1a excludes from its scope, inter alia, ‘the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice.’

185. Directive 2018/957 does not insert anything new into Directive 96/71 in respect of collective action. Recital 22 of Directive 96/71 explicitly states that that directive 'is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions'.

186. In my view, the Hungarian Government's reading of that provision is based on a misinterpretation. The non-application of Directive 96/71 to the right of workers to take collective action does not mean that the exercise of that right is not subject to the other provisions of national and EU law. Article 1(1a) begins by stating that 'this Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including …'

187. Accordingly, in the context of the posting of workers, that provision does not preclude the application of Article 28 of the Charter or the earlier case-law of the Court on the exercise of collective rights of workers and their effects on the freedom to provide services.

188. Accordingly, I do not consider that the new Article 1(1a) of Directive 96/71 restricts freedom to provide services and I propose that the present plea for annulment should be rejected.

VIII. **Fifth plea in law: infringement of the principle of legal certainty as a result of the incompatibility of Directive 2018/957 with Regulation No 593/2008 (Rome I)**

A. **Arguments**

189. The fifth plea in law actually contains two distinct and substantially unconnected parts.

- On the one hand, the Hungarian Government maintains that Directive 2018/957 infringes Regulation (EC) No 593/2008 and the principles of legal certainty and legislative clarity, in that it alters the application of that regulation without amending its wording, which creates considerable legal uncertainty as to the correct application of the regulation.

- On the other hand, the Hungarian Government argues that the lack of definition of the concept of 'remuneration' creates uncertainty, thereby infringing the principles of legislative clarity and, consequently, of legal certainty.

190. The Commission, the Council, the European Parliament and the Governments of the intervening Member States contend that the fifth plea in law is unfounded.

B. **Assessment of the first part of the fifth plea in law: relationship between Directive 2018/957 and Regulation No 593/2008 (Rome I)**

191. Article 8(1) of the Rome I Regulation lays down in general terms the conflict rule applicable to individual employment contracts, which is the law chosen by the parties (subject to the conditions set out in that provision). To the extent that that choice has not been made, 'the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the

contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country' (paragraph 2).

192. Article 23 of the Rome I Regulation lays down an exception to the application of its conflict-of-law rules: where provisions of EU law lay down rules on the law applicable to contractual obligations in relation to certain matters, those rules take precedence. (115)

193. Thus, the general provisions of the Rome I Regulation on the choice of law yield to the special rules included in that respect in specific provisions of EU law. (116)

194. Contrary to the Hungarian Government's submission, I believe that Article 3(1) of Directive 96/71 (concerning ordinary posted workers) and the new Article 3(1a) (concerning workers on long-term postings) are *special rules* on conflict of laws, (117) which must be applied in conjunction with those of the Rome I Regulation. (118)

195. Those two provisions of Directive 96/71, alongside the law applicable in accordance with the usual conflict rules, require the following provisions of the law of the host State to be applied:

- as regards ordinary posted workers, the provisions concerning the conditions (relating to employment and the protection of workers' health and safety) set out in the exhaustive list in Article 3(1);
- as regards long-term posted workers, in addition to the above conditions, the other conditions of the host State apply to them as set out above (Article 3(1a)).

196. As the Council asserts in its observations, the drafting process for the Rome I Regulation proves that Article 23 of that regulation covers the exception provided for in Directive 96/71, because the Commission's proposal included an annex of special rules contained in other provisions of EU law, including those of Directive 96/71. (119)

197. That assertion is confirmed by recital 11 of Directive 96/71, in so far as it states that the Convention (replaced by the Rome I Regulation) 'does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts'.

198. That can also be inferred from recital 40 of the Rome I Regulation, according to which '… this Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters'.

199. Contrary to Hungary's submission, the principle of legal certainty does not, therefore, require that the amendment of Directive 96/71, effected by Directive 2018/957, be accompanied by an amendment of the Rome I Regulation.

200. Article 23 of that regulation permits the coexistence of the special rules laid down in Directive 96/71 and the general rules laid down in Article 8 of the regulation, in respect

of posted workers' contracts. There is sufficient clarity, predictability and precision in the relationship between both types of rule and, accordingly, compliance with the principle of legal certainty. (120)

201. That statement is not contradicted, as Hungary asserts, because the new Article 3(1a), third subparagraph, of Directive 96/71 lays down an anti-fraud rule for situations involving the replacement of a posted worker by another posted worker, to which I have referred above. (121) In that situation, the contract of each worker involved in the replacement of the posted worker may be subject to the law of a different country and that provision simply adds a fraud-prevention condition to the relationship between Directive 96/71 and the Rome I Regulation.

C. Assessment of the second part of the fifth plea in law: the lack of definition of the term 'remuneration' inserted by Directive 2018/957

202. In the Hungarian Government's submission, the lack of definition and the obscurity of the new term 'remuneration', replacing the previous term 'minimum rates of pay', is incompatible with the legislative clarity required by the principle of legal certainty.

203. This part of the fifth plea for annulment overlaps with the second plea in law, which I have proposed should be rejected.

204. It is somewhat paradoxical that the Hungarian Government does not put forward this same objection (lack of legal certainty) in relation to the previous term used in Directive 96/71, (122) the interpretation of which had given rise to certain difficulties, and does so instead in relation to a provision which is aimed at overcoming those difficulties of interpretation.

205. It is equally paradoxical that a provision of secondary legislation should be accused of jeopardising legal certainty when the concept complained about is also used in Article 153(5) TFEU.

206. The term *remuneration* in the new Article 3(1), third subparagraph, of Directive 96/71 is related to its definition under the national law or practice of the Member State to whose territory the worker concerned is posted. As regards its subject matter, the term covers all the constituent parts which are mandatory under national laws, regulations and administrative provisions or under collective agreements or arbitration awards which, in that Member State, have been declared to be generally applicable, or applicable in any other way, in accordance with paragraph 8.

207. Recital 17 of Directive 2018/957 recalls that the setting of rules on remuneration is a matter for the Member States alone. The latter, or the social partners, are also responsible for setting wages. That is confirmed by Article 153(5) TFEU, which excludes pay from the harmonising powers of the EU institutions in matters relating to social policy.

208. Accordingly, the differences between the rules applicable to the wages of posted workers are unavoidable until such time as the European Union has harmonising powers

in that regard. As I have explained, the same occurred in relation to the term ‘minimum rates of pay’ used in the original version of Directive 96/71, which required clarification by the Court.

209. The term ‘remuneration’, like most terms used in this field, requires interpretation to define its limits. However, that feature, which is common to many other similar terms, does not support the argument, put forward by the Hungarian Government, that the term inserted by Directive 2018/957 lacks definition to the extent that it infringes the principle of legal certainty.

210. It should also be recalled that, in order to alleviate the problems which posted workers and their undertakings may face, the new Article 3(1), subparagraphs 4 and 5, of Directive 96/71 imposes a duty of transparency on Member States, pursuant to which they must provide on a website relevant, accurate and up-to-date information concerning, inter alia, ‘the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article’.

IX. **Conclusion**

211. In the light of the foregoing considerations, I propose that the Court should:

(1) Dismiss in its entirety the action brought by Hungary.

(2) Order Hungary to bear its own costs in addition to those of the European Parliament and the Council of the European Union.

(3) Order the European Commission and the French, German and Netherlands Governments to bear their own costs.

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1 Original language: Spanish.

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2 Directive of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16; ‘Directive 2018/957’).

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3 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; ‘Directive 96/71’).

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4 Pursuant to Article 2 of Directive 96/71, ‘“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’.

According to the case-law of the Court, 'workers are posted through their hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, when three conditions are satisfied. First, the hiring-out of manpower is a service provided for remuneration in respect of which the worker remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. Secondly, that hiring out is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services. Thirdly, in the context of such hiring-out, the employee carries out his tasks under the control and direction of the user undertaking' (judgments of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 27, and of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405, paragraph 33 and the case-law cited).

5 According to the latest available statistics, there were 2.8 million transnational postings of workers in 2017, with an average duration of less than 4 months per posting, which, added together, comes to only 0.2% of total employment in the European Union. See De Wispelaere, F. and Pacolet, J., *Posting of workers Report on A1 Portable Documents issued in 2017*, HIVA-KU Leuven, October 2018, p. 9, https://www.etk.fi/wp-content/uploads/Komissio-tilastoraportti-Posting-of-workers-2017.pdf. However, the statistics reveal that, between 2010 and 2017, the number of posted workers increased by 83%. The distribution of those workers by economic sector is as follows: construction (46.5%), other services (26.7%), industry (25.9%) and agriculture (0.9%).

6 The general trend is that Member States with lower labour costs *export* posted workers while States with better working conditions receive those workers. See the data of Bradley, H., Tugran, T., Markowska, A. and Fries-Tersch, E. *2018 Annual Report on intra-EU Labor Mobility*, 2019, https://op.europa.eu/en/publication-detail/-/publication/2c170ce2-4c55-11e9-a8ed-01aa75ed71a1/language-en/format-PDF. It emerges from that report that Poland, Hungary and Lithuania are *exporting* countries and Germany, France and the Netherlands are *receiving* countries.

7 See, for example, judgments of 17 December 1981, *Webb* (279/80, EU:C:1981:314); of 3 February 1982, *Seco and Desquenne & Giral* (62/81 and 63/81, EU:C:1982:34; 'judgment in *Seco and Desquenne & Giral*'); and of 27 March 1990, *Rush Portuguesa* (C-113/89, EU:C:1990:142).

8 Judgments of 28 March 1996, *Guiot* (C-272/94, EU:C:1996:147, 'judgment in *Guiot*', paragraph 10); of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, 'judgment in *Arblade and Others*', paragraph 33); and of 15 March 2001, *Mazzoleni and ISA* (C-165/98, EU:C:2001:162, 'judgment in *Mazzoleni and ISA*', paragraph 22). More recently, see judgments of 12 September 2019, *Maksimovic and Others* (C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, 'judgment in *Maksimovic and Others*', paragraphs 30 and 31), and of 13 November 2018 *Čepelnik* (C-33/17, EU:C:2018:896; 'judgment in *Čepelnik*', paragraphs 37 and 38).

9 Judgment in *Seco and Desquenne & Giral*.

10 Judgment in *Guiot*.

11 Judgment in *Arblade and Others*, paragraphs 58 and 59, and *Maksimovic and Others*, paragraph 31.

12 Judgment in *Arblade and Others*, paragraphs 34 and 35; judgment of 24 January 2002, *Portugaia Construções* (C-164/99, EU:C:2002:40, 'judgment in *Portugaia Construções'*, paragraph 19); and judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraph 37).

13 Judgment in *Arblade and Others*, paragraph 80. See, by way of example, judgment in *Mazzoleni and ISA*, paragraph 27; judgment of 25 October 2001, *Finalarte and Others* (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraph 33); judgment in *Portugaia Construções*, paragraph 20; and judgment of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, 'judgment in *Wolff & Muller*', paragraph 35).

14 See judgment in *Seco and Desquenne & Giral*, paragraph 10.

15 See judgments in *Guiot*, paragraph 15, and in *Arblade and Others*, paragraph 51.

16 Judgment in *Wolff & Müller*, paragraphs 35, 36 and 41.

17 Paragraph 14.

18 Judgment of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408, 'judgment in *De Clercq and Others*', paragraph 66 and the case-law cited).

19 Judgments in *Maksimovic and Others*, paragraph 26, and *De Clercq and Others*, paragraph 47.

20 Paragraph 50.

21 Paragraph 50.

22 Judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 44 and the case-law cited).

23 Judgment of 21 October 2004, *Commission* v *Luxembourg* (C-445/03, EU:C:2004:655, paragraph 24).

24 This is the most frequent situation: an undertaking established in a Member State posts workers, on its account and under its direction, to the territory of another Member State to carry out the transnational provision of services. A contract is 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. See judgments of 3 April 2008, *Rüffert* (C-346/06, EU:C:2008:189, 'judgment in *Rüffert*', paragraph 19), and of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110; 'judgment in *Dobersberger'*, paragraph 29).

25 Recital 13. Italics added.

26 Judgments of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, 'judgment in *Sähköalojen ammattiliitto*', paragraph 28), and of 8 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, 'judgment in *Laval un Partneri*', paragraphs 74 and 76).

27 I refer in that connection to Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould, Feliciano Iudicone, Fondazione Giacomo, Posting of Workers Directive — current situation and challenges, European Parliament, 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.pdf; and Fotonopoulou Basurko,O., 'Reflexiones en torno a la noción de habitualidad vs. temporalidad en las normas de derecho internacional privado del trabajo europeas', in Fotonopoulou Basurko, O., (ed.), *El desplazamiento de trabajadores en el marco de la Unión europea: presente y futuro*, Atelier, Barcelona, 2018, pp. 258 to 262.

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28 Judgments of 14 April 2005, *Commission* v *Germany* (C-341/02, EU:C:2005:220, paragraphs 25 to 43); of 7 November 2013 *Isbir* (C-522/12, EU:C:2013:711, judgment in *Isbir*', paragraphs 39 to 45); and judgment in *Sähköalojen ammattiliitto*, paragraphs 38 to 70.

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29 Judgment in *Laval un Partneri*, particularly paragraphs 80 and 81.

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30 Ibid., paragraph 111.

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31 Judgment of 11 December 2007 (C-438/05, EU:C:2007:772).

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32 Judgment of 19 June 2008 (C-319/06, EU:C:2008:350).

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33 The judgment of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraph 66), brought with it a certain change of direction, since it found that 'Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers'.

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34 Kilpatrick, C., 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', *European Law Review*, No 6, 2009, p. 848; Rocca, M., *Posting of Workers and Collective Labour Law: There and Back*

Again. Between Internal Markets and Fundamental Rights, Intersentia, Antwerp, 2015, pp. 181 to 204.

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35 See the analysis by Van Nuffel, P. and Afanasjeva, S., 'The Posting Workers Directive revised: enhancing the protection of workers in the cross-border provision of services', *European Papers*, 2018, No 3, pp. 1411 to 1413.

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36 Perdisini, M. and Pallini, M., *Exploring the fraudulent contracting of work in the European Unio*n, 2016, Eurofound, pp. 9 to 18.

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37 Directive 2014/67 addressed the problems created by so-called 'letterbox companies' and enhanced the Member States' capacity to monitor working conditions and ensure compliance with the applicable provisions. The directive lists, inter alia, the criteria for confirming the existence of a genuine connection between the employer and the Member State of establishment, which also apply to the determination of whether a person satisfies the definition of posted worker.

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38 See Marchal Escalona, N., 'El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado', *Revista de Derecho Comunitario Europeo*, 2019, No 1, pp. 91 to 95.

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39 COM(2016) 128 final of 18 March 2016, proposal for a Directive of the European Parliament and of the Council amending Directive 96/71.

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40 COM(2016) 505 final of 20 July 2016, Communication from the Commission to the European Parliament, the Council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2.

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41 See the analysis by Van Nuffel, P. and Afanasjeva, S., 'The Posting Workers Directive revised: enhancing the protection of workers in the cross-border provision of services', *European Papers*, 2018, No 3, pp. 1414 to 1416.

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42 COM(2016) 815 final of 13 December 2016, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

43 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (OJ 2019 L 186, p. 21).

44 Judgment of 3 December 2019 (C-482/17, EU:C:2019:1035, 'judgment in *Czech Republic* v *Parliament and Council*').

45 Ibid., paragraph 31.

46 Ibid., paragraph 32.

47 Ibid., paragraph 42.

48 Ibid., paragraph 38.

49 Judgment of 21 June 2018, *Poland* v *Parliament and Council* (C-5/16, EU:C:2018:483, paragraph 49).

50 Judgment of 27 January 2000, *DIR International Film and Others* v *Commission* (C-164/98 P, EU:C:2000:48, paragraph 26).

51 See, in that connection, recital 1: '… to guarantee a level playing field for businesses and respect for the rights of workers'. Recital 4 also refers to that duality: Directive 2018/957 seeks to review whether Directive 96/71 'still strikes the right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other.'

52 Recital 2 reads: 'The freedom to provide services includes the right of undertakings to provide services in the territory of another Member State and to post their own workers temporarily to the territory of that Member State for that purpose'.

53 Recital 3 reasserts the objective of social justice and social protection, which is intended to protect posted workers. Recitals 5 to 9 also refer to the protection of posted workers.

54 That is reiterated in recital 24: ‘This Directive establishes a balanced framework with regard to the freedom to provide services and the protection of posted workers, which is non-discriminatory, transparent and proportionate while respecting the diversity of national industrial relations. This Directive does not prevent the application of terms and conditions of employment which are more favourable to posted workers.’

55 Term used by Marchal Escalona, N., ‘El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado’, *Revista de Derecho Comunitario Europeo*, 2019, No 1, pp. 96 to 98.

56 These include, in point (h), ‘the conditions of workers’ accommodation where provided by the employer to workers away from their regular place of work’ and, in point (i) ‘allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons’.

57 Directive of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

58 Points 41 to 44 of this Opinion.

59 Judgment in *Czech Republic* v *Parliament*, paragraph 42.

60 Ibid., paragraphs 38 and 39.

61 Judgment of 12 February 2015, *Parliament* v *Council* (C-48/14, EU:C:2015:91, paragraph 36 and the case-law cited).

62 Judgments of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 123 and 124), and of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraphs 39 and 40).

63 Judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 33); of 15 April

2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 125); and of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 41).

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64 'It is within Member States' competence to set rules on remuneration in accordance with national law and/or practice. The setting of wages is a matter for the Member States and the social partners alone. Particular care should be taken not to undermine national systems of wage setting or the freedom of the parties involved'.

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65 Judgment in *Isbir*, paragraphs 36 and 37.

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66 A measure is vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the FEU Treaty for dealing with the circumstances of the case (judgments of 5 May 2015, *Spain* v *Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 56, and of 16 April 2013, *Spain and Italy* v *Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33).

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67 Judgments of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 39); of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 50); and of 18 September 2003, *Bosal* (C-168/01, EU:C:2003:479, paragraphs 25 and 26). See, by analogy, in relation to the free movement of goods, judgments of 25 June 1997, *Kieffer and Thill* (C-114/96, EU:C:1997:316, paragraph 27), and of 12 July 2012, *Association Kokopelli* (C-59/11, EU:C:2012:447, paragraph 80).

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68 Judgment of 13 May 1997, *Germany* v *Parliament and Council* (C-233/94, EU:C:1997:231, paragraph 17): '… the Member States may, in certain circumstances, adopt or maintain measures constituting an obstacle to free movement. Article 57(2) of the Treaty authorises the Community to eliminate obstacles of that kind in particular by coordinating the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. Since coordinating measures are concerned, the Community is to have regard to the public interest aims of the various Member States and to adopt a level of protection for that interest which seems acceptable in the Community'.

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69 Judgment in *Czech Republic* v *Parliament and Council*, paragraph 76.

70 Ibid., paragraph 77 and the case-law cited.

71 Ibid., paragraph 78 and the case-law cited.

72 Ibid., paragraph 79 and the case-law cited. Under Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the TEU and the TFEU, draft legislative acts must take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved.

73 Ibid., paragraph 81 and the case-law cited.

74 Judgment of 9 August 1994, *Vander Elst* (C-43/93, EU:C:1994:310), states at paragraph 16 that, '… as one of the fundamental principles of the Treaty, freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established …'

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

76 Regulation 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 amended by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1) and by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4).

77 Under Article 1(6), 'labour law' means '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'.

78 Judgment in *Čepelnik*, paragraphs 29 to 36.

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79 Recital 86 of Directive 2006/123 also confirms that that general harmonising provision concerning the marketing of services in the internal market does not apply to terms and conditions of employment which, pursuant to Directive 96/71, apply to workers posted to provide a service in the territory of another Member State.

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80 Judgment in *Arblade and Others*, paragraph 34.

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81 Judgment in *De Clercq and Others*, paragraphs 45 to 47, and judgment of 7 October 2010, *Santos Palhota and Others* (C-515/08, EU:C:2010:589, paragraphs 25 to 27 and 45).

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82 Judgment in *Laval un Partneri*, paragraph 80.

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83 SWD(2016) 52 final, 8.3.2016, Commission Staff Working Document. Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

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84 Judgment in *Czech Republic and Parliament* v *Council*, paragraph 77.

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85 The exception is founded on the desire to promote, as far as possible, the freedom to provide services and to avoid unnecessary and costly administrative and other types of complications which are not in the interests of workers, undertakings or social security administrations.

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86 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

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87 The sole exception to that rule is laid down in Article 3(7) of Directive 96/71, pursuant to which the employment legislation of the host State does not prevent the application of terms and conditions of employment which are more favourable to workers. This means that a posted worker may continue to be covered by the labour law and working conditions of the country of origin if these are more favourable than those of the host State. In those circumstances, the host State must

acknowledge the validity of the application of the legislation of the State of origin and not impose additional obstacles on the posting of workers for the purpose of the transnational provision of services.

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88 Judgment in *Czech Republic* v *Parliament* v *Council*, paragraph 77.

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89 Judgment of 22 March 2007, *Talotta* (C-383/05, EU:C:2007:181, paragraph 18, and judgment in *Laval un Partneri*, paragraph 115).

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90 These comprise a nucleus of mandatory rules for minimum protection applicable to matters in respect of which the host Member State may require its domestic law to be observed (judgment in *Laval un Partneri*, paragraph 59, and judgment of 19 June 2008, *Commission* v *Luxembourg*, C-319/06, EU:C:2008:350, paragraph 26).

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91 The italics are mine.

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92 Section 4.5.2 of document SWD(2016) 52 final of 8 March 2016.

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93 See recital 19 in the preamble to Directive 2018/957.

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94 Judgments of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 51); of 12 July 2012, *Association Kokopelli* (C-59/11, EU:C:2012:447, paragraph 38); and of 16 June 2015 *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67).

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95 Judgment in *Czech Republic* v *Parliament and Council*, paragraph 78, and judgment of 8 July 2010, *Afton Chemical* (C-343/09, EU:C:2010:419, paragraph 46).

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96 Document SWD(2016) 52 final of 8 March 2016, p. 23 et seq.

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97 The French Government emphasised those practical difficulties at the hearing, stating that in France there was a distinction between the minimum wage (SMIC) and 'minimum rates of pay' for the purposes of Directive 96/71. In addition to the minimum wage, the latter include bonuses for night work and for dangerous work which must also be paid to posted workers.

98 Paragraphs 38 to 70.

99 Document SWD(2016) 52 final of 8 March 2016, pp. 10 and 11.

100 'The task of defining what are the constituent elements of the minimum wage, for the application of that directive, is a matter for the law of the Member State of the posting, but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States'. Judgments in *Sähköalojen ammattiliitto*, paragraph 34, and *Isbir*, paragraph 37.

101 Judgment in *Sähköalojen ammattiliitto*, paragraph 39.

102 See Fondazione Giacomo Brodolini (FGB), *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 97/71/EC in a selected number of Member States and sectors*, Final report, November 2015; Schiek, Oliver, Forde, Alberti, *EU Social and Labour Rights and EU Internal Market Law*, Study for the EMPL Committee, European Parliament, September 2015 (http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU%282015%29563457_EN.pdf).

103 Document SWD(2016) 52 final of 8 March 2016, pp. 11 to 14.

104 'Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out. That period should be extended where the service provider submits a motivated notification.'

105 ‘Ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties. However, the rules ensuring such protection for workers cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services, including in cases where a posting exceeds 12 or, where applicable, 18 months. Any provision applicable to posted workers in the context of a posting exceeding 12 or, where applicable, 18 months must thus be compatible with that freedom. In accordance with settled case-law, restrictions to the freedom to provide services are permissible only if they are justified by overriding reasons in the public interest and if they are proportionate and necessary’.

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106 The Commission proposed the change of legal rules for individual employment contracts in the case of workers on long-term postings, recommending that the labour law of the host State should apply to them. See Article 2a of the Commission’s proposal COM(2016) 128, and the Impact Assessment SWD(2016) 52 final, p. 25.

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107 Judgment in *Dobersberger*, paragraph 24, and judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:814, paragraph 29).

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108 Opinion of Advocate General Szpunar of 29 July 2019 in *Dobersberger* (C-16/18, EU:C:2019:638, point 36).

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109 See Article 1(2) of Directive 96/71.

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110 See Article 9(1)(b) of Directive 2014/67. The joint declaration annexed to the minutes of the Council’s ‘Employment and Social Affairs’ sitting of 24 September 1996 (document 10048/96 add. 1 of 20 September 1996, annex C.1) states that mobile workers in the rail, land, air and river transport sectors are excluded from the scope of Directive 96/71 only where there is no transnational provision of services involving the posting of workers.

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111 Recital 11 of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72) and recital 17 of Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009

on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88).

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112 ‘Because of the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport also reinforcing the combating of fraud and abuse’.

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113 The application of Directive 96/71 to posted workers in the road transport sector is the subject of examination in Case C-815/18, *Federatie Nederlandse Vakbeweging*, pending before the Grand Chamber.

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114 COM(2017) 278 final of 31 May 2017, Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22 as regards enforcement requirements and laying down specific rules with respect to Directive 96/71 and Directive 2014/67 for posting drivers in the road transport sector.

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115 In accordance with Article 23 of the Rome I Regulation, ‘… this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations’.

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116 See the analysis by Van Hoek, A., ‘Re-embedding the transnational employment relationship: a tale about the limitations of (EU) law?’, *Common Market Law Review*, 2018, No 3, pp. 455 to 460.

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117 See the Opinion of Advocate General Wahl in *Sähköalojen ammattiliitto* (C-396/13, EU:C:2014:2236, points 47 to 53).

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118 In fact, Directive 96/71 does not supplant the Rome I Regulation but rather requires that the two texts should be coordinated. In accordance with Article 3(1) and (1a), ‘Member States shall ensure, irrespective of which law applies to the employment relationship …’ that a number of terms and conditions of employment of the host country are applicable. That means that the law applicable to the employment contract is to be determined under Article 8 of the Rome I Regulation but that its effects are limited, since Article 3(1) and (1a) of Directive 96/71 requires

that certain terms and conditions of employment laid down by provisions of the host State are applicable to the employment contract in any event.

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119 See document COM(2005) 650 final of 15 December 2005, p. 24.

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120 According to settled case-law, the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgment of 5 May 2015, *Spain* v *Council*, C-147/13, EU:C:2015:299, paragraph 79).

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121 'Where an undertaking … replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned'.

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122 That point was made at the hearing.