ECLI:EU:C:2020:1001

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

8 December 2020 (*)

(Action for annulment – Directive (EU) 2018/957 – Freedom to provide services – Posting of workers – Terms and conditions of employment – Remuneration – Duration of posting – Determination of the legal basis – Articles 53 and 62 TFEU – Amendment of an existing directive – Article 9 TFEU – Misuse of powers – Principle of non-discrimination – Necessity – Principle of proportionality – Extent of the principle of freedom to provide services – Road transport – Article 58 TFEU – Regulation (EC) No 593/2008 – Scope – Principles of legal certainty and legislative clarity)

In Case C-620/18,

ACTION for annulment under Article 263 TFEU, brought on 2 October 2018,

Hungary, represented by M.Z. Fehér, G. Tornyai, and M.M Tátrai, acting as Agents,

applicant,

v

European Parliament, represented by M. Martínez Iglesias, L. Visaggio and A. Tamás, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented by J. Möller and S. Eisenberg, acting as Agents,

French Republic, represented by E. de Moustier, A.-L. Desjonquères, C. Mosser and R. Coesme, acting as Agents,

Kingdom of the Netherlands, represented by M.K. Bulterman, C. Schillemans and J. Langer, acting as Agents,

European Commission, represented by L. Havas, M. Kellerbauer, B.-R. Killmann and A. Szmytkowska, acting as Agents,

interveners,

Council of the European Union, represented initially by A. Norberg, M. Bencze and E. Ambrosini, then by A. Norberg, E. Ambrosini, A. Sikora-Kalėda and Zs. Bodnár, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented by J. Möller and S. Eisenberg, acting as Agents,

French Republic, represented by E. de Moustier, A.-L. Desjonquères, C. Mosser and R. Coesme, acting as Agents,

Kingdom of the Netherlands, represented by M.K. Bulterman, C. Schillemans and J. Langer, acting as Agents,

Kingdom of Sweden, represented by C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

European Commission, represented by L. Havas, M. Kellerbauer, B.-R. Killmann and A. Szmytkowska, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras (Rapporteur), E. Regan, M. Ilešič and N. Wahl, Presidents of Chambers, E. Juhász, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 3 March 2020,

after hearing the Opinion of the Advocate General at the sitting on 28 May 2020,

gives the following

Judgment

1 By its application, Hungary asks the Court, principally, to annul Directive (EU) 2018/957 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, and corrigendum, OJ 2019 L 91, p. 77) (‘the contested directive’) and, in the alternative, to annul a number of provisions of that directive.

Legal context

The FEU Treaty

2 Article 9 TFEU is worded as follows:

'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'

3 Article 53 TFEU provides:

'1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council [of the European Union] shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of 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.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.'

4 Article 58(1) TFEU states:

'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.'

5 Article 62 TFEU provides:

'The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.'

6 Article 153 TFEU provides:

'1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

…

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

…

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.'

The legislation relating to posted workers

Directive 96/71/EC

7 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) was adopted on the basis of Article 57(2) and Article 66 EC (now Article 53(1) and Article 62 TFEU respectively).

8 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 specified 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.

9 One of the matters affected by Directive 96/71, mentioned in Article 3(1)(c) of that directive, was minimum rates of pay, including overtime rates.

The contested directive

10 The contested directive was adopted on the basis of Article 53(1) TFEU and Article 62 TFEU.

11 Recitals 1, 4, 6 and 9 to 11 of the contested directive state:

‘(1) The freedom of movement for workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation and enforcement of those principles are further developed by the Union and aim to guarantee a level playing field for businesses and respect for the rights of workers.

…

(4) More than 20 years after its adoption, it has become necessary to assess 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. To ensure that the rules are applied uniformly and to bring about genuine social convergence, alongside the revision of Directive 96/71 …, priority should be given to the implementation and enforcement of Directive 2014/67/EU of the European Parliament and of the Council [of 15 May 2014 on the enforcement of Directive 96/71 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)].

…

(6) The principle of equal treatment and the prohibition of any discrimination on grounds of nationality have been enshrined in Union law since the founding Treaties. The principle of equal pay has been implemented through secondary law not only between women and men, but also between workers with fixed term contracts and comparable permanent workers, between part-time and full-time workers and between temporary agency workers and comparable workers of the user undertaking. Those principles include the prohibition of any measures which directly or indirectly discriminate on grounds of nationality. In applying those principles, the relevant case-law of the Court of Justice of the European Union is to be taken into consideration.

…

(9) 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.

(10) 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.

(11) Where a posting exceeds 12 or, where applicable, 18 months, the additional set of terms and conditions of employment to be guaranteed by the undertaking posting workers to the territory of another Member State should also cover workers who are posted to replace other posted workers performing the same task at the same place, to ensure that such replacements are not used to circumvent the otherwise applicable rules.'

12 Recitals 16 to 19 of that directive are worded as follows:

'(16) In a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof.

(17) 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.

(18) When comparing the remuneration paid to a posted worker and the remuneration due in accordance with the national law and/or practice of the host Member State, the gross amount of remuneration should be taken into account. The total gross amounts of remuneration should be compared, rather than the individual constituent elements of remuneration which are rendered mandatory as provided for by this Directive. Nevertheless, in order to ensure transparency and to assist the competent authorities and bodies in carrying out checks and controls it is necessary that the constituent elements of remuneration can be identified in enough detail according to the national law and/or practice of the Member State from which the worker was posted. Unless the allowances specific to the posting concern expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, they should be considered to be part of the remuneration and should be taken into account for the purposes of comparing the total gross amounts of remuneration.

(19) Allowances specific to posting often serve several purposes. Insofar as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging, they should not be considered to be part of remuneration. It is for Member States, in accordance with their national law and/or practice, to set rules with regard to the reimbursement of such expenditure. The employer should reimburse posted workers for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.'

13 Recital 24 of that directive states:

'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.'

14 Article 1(1)(b) of the contested directive inserts paragraphs -1 and -1a in Article 1 of Directive 96/71:

'-1. [Directive 96/71] 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. [Directive 96/71] 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.'

15 Article 1(2)(a) of the contested directive amends point (c) of the first subparagraph of Article 3(1) of Directive 96/71, adds points (h) and (i) to that subparagraph, and inserts a third subparagraph in Article 3(1), as follows:

'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:

…

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

…

(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.

…

For the purposes of [Directive 96/71], 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.'

16 Article 1(2)(b) of the contested directive inserts in Article 3 of Directive 96/71 a paragraph 1a, which is worded as follows:

'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.'

17 Under Article 1(2)(c) of the contested directive, Article 3(7) of Directive 96/71 is to be worded as follows:

'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 (i) 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.'

18 Article 3(3) of the contested directive provides:

‘This Directive shall apply to the road transport sector from the date of application of a legislative act amending Directive 2006/22/EC [of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC (OJ 2006 L 102, p. 35)] 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.’

The legislation relating to the law applicable to contractual obligations

19 Recital 40 of 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) (‘the “Rome I” Regulation’) states:

‘A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. 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.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. …’

20 Article 8 of that regulation, headed ‘Individual employment contracts’, provides:

‘1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, 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.

…’

21 Article 23 of that regulation, headed ‘Relationship with other provisions of [EU] law’, provides:

‘With the exception of Article 7, this Regulation shall not prejudice the application of provisions of [EU] law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.’

Forms of order sought and procedure before the Court of Justice

22 Hungary contends that the Court should:

– principally, annul the contested directive;

– in the alternative:

– annul the provision of Article 1(2)(a) of the contested directive which establishes the wording of the new point (c) of the first subparagraph of Article 3(1), and the new third subparagraph of Article 3(1) of Directive 96/71;

– annul Article 1(2)(b) of the contested directive, which establishes the wording of Article 3(1a) of Directive 96/71;

– annul Article 1(2)(c) of the contested directive;

– annul Article 3(3) of the contested directive; and

– order the Parliament and the Council to pay the costs.

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

24 In accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, Hungary has requested that the Court assign the case to the Grand Chamber.

25 By decision of the President of the Court of 21 February 2019, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

26 By decision of the President of the Court of 27 March 2019, the Kingdom of Sweden was granted leave to intervene in support of the form of order sought by the Council.

The action

27 In support of its action, Hungary relies on five pleas in law: respectively, the choice of an incorrect legal basis for the adoption of the contested directive; disregard of Article 153(5) TFEU and misuse of powers; an infringement of Article 56 TFEU; a further infringement of Article 56 TFEU in that the contested directive precludes the effective implementation of the freedom to provide services; and disregard of the ‘Rome I’ Regulation and the principles of legal certainty and legislative clarity.

The first plea in law: the choice of an incorrect legal basis for the adoption of the contested directive

Arguments of the parties

28 Hungary claims that the EU legislature, in relying on Article 53(1) and Article 62 TFEU, did not choose the correct legal basis for the adoption of the contested directive. Taking into account its purpose and its content, that directive’s only or principal aim is the protection of workers and it is not concerned with removing obstacles to the freedom to provide services.

29 Hungary considers, in that regard, that the legal basis relating to the freedom to provide services does not extend to the objectives of protection of workers and to the acts that can be adopted in that field, which are the subject of Article 153 TFEU.

30 The fundamental objective of the contested directive is to ensure that workers have the right to equality of treatment, in particular by extending the principle that workers have the right to equal remuneration to include workers who provide cross-border services when posted. Such posted workers are to have the right to the full remuneration provided for by the law of the host Member State.

31 However, Hungary claims that, taking into consideration its protectionist effect, the contested directive is incompatible with the objectives of increasing EU competitiveness and with the cohesion and solidarity of the Member States.

32 Further, Hungary states that the Council has failed to specify which provisions of that directive were essential to ensure genuine development of the freedom to provide services by means of the protection of workers and the prevention of unfair competition.

33 Hungary infers accordingly from an examination of the content of that directive that it contains nothing capable of justifying the choice of legal basis made by the EU legislature.

34 Hungary considers that the same would be true if the content and objectives of the contested directive were examined as one with the act that it amends, since the contested directive has defined the objective of Directive 96/71 in such a way that that objective relates exclusively to guaranteeing the protection of posted workers.

35 Hungary is of the view that the need to place the amendments in their context and to examine a legislative act as a whole does not mean that the legal basis of the amending act should be established by taking account exclusively of the objectives and content of the amended act.

36 Hungary concludes that the legal basis must be determined, primarily, having regard to the objective and content of the provisions of the amending act, and that Article 153(2)(b) TFEU could have constituted an appropriate legal basis, since the contested directive legislates on issues that fall within the scope of that provision more specifically than within the scope of Articles 53 and 62 TFEU.

37 The Parliament and the Council, supported by the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission, do not accept Hungary's arguments.

Findings of the Court

38 As a preliminary point, it must, first, be recalled that 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 the content of the 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 (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 31 and the case-law cited).

39 It must also be observed that, in order 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 objective pursued by those rules (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 32).

40 Accordingly, with respect to legislation which, like the contested directive, amends existing legislation, it is important also to take into account, for the purposes of identifying its legal basis, the existing legislation that it amends and in particular, its objective and content (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 42).

41 Further, where a legislative act has already coordinated the legislation of the Member States in a given EU policy area, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge, having regard to its task of safeguarding the general interests recognised by the FEU Treaty and of taking into account the overarching objectives of the European Union laid down in Article 9 of that Treaty, including the requirements pertaining to the promotion of a high level of employment and the guarantee of adequate social protection (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 78).

42 Indeed, in such a situation, the EU legislature can properly carry out its task of safeguarding those general interests and those overarching objectives of the European Union recognised by the Treaty only if it is open to it to adapt the relevant EU legislation to take account of such changes or advances (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 39 and the case-law cited).

43 Second, it must be observed that if the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision (judgment of 12 February 2015, *Parliament* v *Council*, C-48/14, EU:C:2015:91, paragraph 36 and the case-law cited).

44 Third, it is clear from reading Article 53(1) and Article 62 TFEU together that the EU legislature is competent to adopt directives whose objectives include, inter alia, the coordination of the provisions of the Member States laid down by law, regulation or administrative action that relate to the taking-up and pursuit of service provision activities, in order to make it easier to take up those activities and to pursue them.

45 Those provisions consequently empower the EU legislature to coordinate national rules which may, by reason of their heterogeneity, impede the freedom to provide services between Member States.

46 It cannot however be concluded from the above that, when coordinating such rules, the EU legislature is not also bound to ensure respect for the general interest, pursued by the various Member States, and the objectives, laid down in Article 9 TFEU, that the Union must take into account in the definition and implementation of all its policies and measures, including the requirements mentioned in paragraph 41 of the present judgment.

47 Accordingly, provided that the conditions governing recourse to Article 53(1) TFEU, read together with Article 62 TFEU, as a legal basis are satisfied, the EU legislature cannot be prevented from relying on that legal basis by reason of the fact that it has also taken account of those

requirements (see, to that effect, judgments of 13 May 1997, *Germany* v *Parliament and Council*, C-233/94, EU:C:1997:231, paragraph 17, and of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 60 and the case-law cited).

48 It follows that the coordination measures adopted by the EU legislature, on the basis of Article 53(1) TFEU, read together with Article 62 TFEU, must not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 60 and the case-law cited).

49 In this instance, it must be observed that, since the contested directive amends certain provisions of Directive 96/71 or inserts new provisions into that directive, Directive 96/71 is part of the legal context of the contested directive, as attested by, in particular, recitals 1 and 4 of the contested directive, the first of which states that the Union is further developing the fundamental principles of the internal market, namely freedom of movement for workers, freedom of establishment and freedom to provide services, the aim being to guarantee a level playing field for businesses and respect for the rights of workers, and the second of which states that, more than 20 years after its adoption, it is necessary to assess whether Directive 96/71 still strikes the right balance between, on the one hand, the need to promote the freedom to provide services and to ensure a level playing field, and, on the other, the need to protect the rights of posted workers.

50 In the first place, with respect to its objective, the aim of the contested directive, viewed together with the directive that it amends, is to establish a balance between two interests, namely, on the one hand, ensuring that the undertakings of all Member States have the opportunity to supply services within the internal market by posting workers from the Member State where those undertakings are established to the Member State where they effectively provide their services and, on the other, protecting the rights of posted workers.

51 To that end, the EU legislature endeavoured, when adopting the contested directive, to ensure the freedom to provide services on a fair basis, that is, within a framework of rules guaranteeing competition that would not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers, that protection constituting, moreover, as attested by recital 10 of that directive, a means 'to safeguard the freedom to provide … services on a fair basis'.

52 For that purpose, that directive seeks to ensure that the terms and conditions of employment of posted workers are as close as possible to those of workers employed by businesses established in the host Member State and thereby to ensure increased protection of workers posted to that Member State.

53 In the second place, with respect to its content, the contested directive seeks, in particular, by means of the provisions criticised by Hungary, to ensure that greater account is taken of the protection of posted workers, though always in a way that is consistent with the objective of ensuring that the freedom to provide services in the host Member State can be exercised fairly.

54 Following that logic, first, Article 1(1) of that directive amends Article 1 of Directive 96/71, by inserting, in the first place, a paragraph -1 which alters the objective of that article so as to ensure the protection of posted workers during their posting, and, in the second place, a paragraph -

1a which specifies that Directive 96/71 is not in any way to affect the exercise of fundamental rights as recognised in the Member States and at Union level.

55 Second, Article 1(2)(a) of the contested directive makes changes to Article 3(1) of Directive 96/71, referring to equality of treatment as the basis for the guarantee that must be given to posted workers in relation to terms and conditions of employment. Article 1(2)(a) extends the list of matters affected by that guarantee to, on the one hand, the conditions of workers' accommodation where provided by the employer to workers who are away from their regular place of work and, on the other hand, allowances and reimbursement of expenditure to cover travel, board and lodging expenses for workers who are away from home for professional reasons. Further, in point (c) of the first subparagraph of Article 3(1) of Directive 96/71 as amended by the contested directive ('the amended Directive 96/71'), the concept of 'remuneration' replaces that of 'minimum rates of pay'.

56 Third, the contested directive introduces a progressive application of the terms and conditions of employment of the host Member State, by imposing, by means of the insertion of an Article 3(1a) in Directive 96/71, an application of almost all those terms and conditions where the effective duration of posting exceeds, as a general rule, 12 months.

57 It follows from the foregoing that, contrary to the arguments presented by Hungary, the contested directive is such as to develop the freedom to provide services on a fair basis, which is the main objective pursued by that directive, since it ensures that the terms and conditions of employment of posted workers are as close as possible to those of workers employed by undertakings established in the host Member State, by providing that those posted workers have the benefit of terms and conditions of employment in that Member State that offer greater protection than those provided for by Directive 96/71.

58 In the third place, while the aim of Directive 96/71, as stated in recital 1 thereof, is the abolition as between the Member States of obstacles to the free movement of persons and services, recital 5 of that directive states that the promotion of transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.

59 It is from that perspective that recitals 13 and 14 of that directive declare that the legislation of the Member States is to be coordinated in order to establish a 'hard core' of essential rules for minimum protection that must be observed in the host Member State by employers who post workers to that State.

60 It follows that, upon its adoption, Directive 96/71, while pursuing the objective of enhancing the freedom to provide transnational services, already took into consideration the need to ensure that competition should not be based on the application, in one and the same Member State, of terms and conditions of employment at a substantially different level, depending on whether or not the employer is established in that Member State, and thereby the protection of posted workers. In particular, Article 3 of that directive set out the terms and conditions of employment in the host Member State that had to be guaranteed to posted workers in the territory of that Member State by employers who posted them to that State in order to provide services there.

61 Further, it must be recalled that, as stated in paragraphs 41 and 42 of the present judgment, the EU legislature when it adopts a legislative act cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge, having regard to its task of safeguarding the general interests recognised by the FEU Treaty.

62 It must be observed, in relation to the wider legal background against which the contested directive was adopted, that the internal market has significantly changed since the entry into force of Directive 96/71, not least due to the successive enlargements of the European Union, in the years 2004, 2007 and 2013, the effect of which was to bring into that market the undertakings of Member States where, in general, terms and conditions of employment that diverged greatly from those prevailing in the other Member States were applicable.

63 In addition, as observed by the Parliament, the Commission found, in its working document SWD(2016) 52 final of 8 March 2016, entitled 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71' ('the impact assessment'), that Directive 96/71 had given rise to an un-level playing field as between undertakings established in a host Member State and undertakings posting workers to that Member State, and a segmentation of the labour market, because of a structural differentiation of rules on wages applicable to their respective workers.

64 Thus, in the light of the objective that was pursued by Directive 96/71, namely to ensure the freedom to provide transnational services within the internal market in conditions of fair competition and to guarantee respect for the rights of workers, the EU legislature could, taking into consideration the change in circumstances and advances in knowledge mentioned in paragraphs 62 and 63 of the present judgment, when adopting the contested directive, rely on the same legal basis as that used for the adoption of Directive 96/71. In order best to achieve that objective, where the circumstances had changed, the EU legislature could take the view that it was necessary to adjust the balance at the heart of Directive 96/71 by strengthening the rights of posted workers in the host Member State in order that competition between undertakings posting workers to that Member State and undertakings established in that State should develop on a more level playing field.

65 It must be added that, contrary to what is argued by Hungary, Article 153 TFEU does not constitute a more specific legal basis, on which the contested directive could have been adopted. That is because Article 153 concerns solely the protection of workers and not the freedom to provide services within the European Union.

66 It is true that Article 153(2) TFEU contains two distinct legal bases in subparagraphs (a) and (b). Neither of them, however, can serve as the legal basis of the contested directive.

67 Article 153(2)(a) TFEU does no more than provide for the adoption of measures designed to encourage cooperation between the Member States in social matters, which does not correspond either to the objective of the contested directive, namely to establish the freedom to provide services on a fair basis, or to its content, which consists of measures to coordinate the rules of the Member States on terms and conditions of employment.

68 As regards Article 153(2)(b) TFEU, while that provision permits the Union to adopt harmonisation measures in certain fields falling within the scope of Union social policy, it is clear that the contested directive does not in any way constitute a harmonisation directive, since it does no more than prescribe as obligatory certain rules of the host Member State in the event of a posting of workers by undertakings established in another Member State, while respecting, as is stated in recital 24 of the contested directive, the diversity of national industrial relations.

69 Consequently, Article 153 TFEU could not constitute the legal basis of the contested directive.

70 It follows from the foregoing that the first plea in law must be rejected.

The second plea in law: disregard of Article 153(5) TFEU and misuse of powers

Arguments of the parties

71 In the opinion of Hungary, the contested directive is contrary to Article 153(5) TFEU, which excludes the regulation of pay in employment relationships from the competence of the EU legislature.

72 Hungary considers that, by amending point (c) of the first subparagraph of Article 3(1) of Directive 96/71, the contested directive directly determines the pay of workers who are posted in connection with the provision of transnational services.

73 In that regard, Hungary relies on case-law of the Court (judgments of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraphs 40 and 46, and of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 123), and states that the rationale of the exception in relation to pay laid down in Article 153(5) TFEU is that setting the level of pay is an element of the freedom of contract of employers and employees at national level and of the competence of the Member States in that field.

74 Hungary considers that the contested directive imposes the application of mandatory rules under the law or national practices of the host Member State with respect to the entirety, excepting only supplementary occupational retirement pension schemes, of the terms and conditions of employment linked to pay, which includes the determination of the amount of that pay. That directive accordingly entails direct interference of EU law in the determination of pay.

75 Hungary concludes that the choice of an inappropriate legal basis is a means of concealing the misuse of powers committed by the Union in adopting the contested directive.

76 The Parliament and the Council, supported by the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission, do not accept Hungary's arguments.

Findings of the Court

77 The second plea in law can be broken down into two parts: (i) the contested directive is contrary to Article 153(5) TFEU, which excludes the regulation of pay in employment relationships from the competence of the EU legislature, and (ii) by adopting that directive, the EU legislature misused its powers.

78 As regards the first part of this plea in law, it must at the outset be recalled that, as is clear from paragraph 69 of the present judgment, Article 153 TFEU could not constitute the legal basis of the contested directive.

79 That directive does no more than coordinate the legislation of the Member States in the event of posting of workers, by imposing an obligation on undertakings which post workers to a Member State other than that in which they are established to ensure that those workers enjoy some of, or almost all, the terms and conditions of employment prescribed by the mandatory rules of that Member State, including those rules concerning the remuneration to be paid to posted workers.

80 Since Article 153(5) TFEU provides for an exception to the competences that the Union derives from the initial paragraphs of Article 153, which cannot serve as the legal basis for the

contested directive and are not, therefore, applicable, Article 153(5) cannot affect the validity of that directive.

81 The first part of the second plea in law must, therefore, be rejected.

82 As regards the second part of this plea in law, it must be recalled that a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least primarily, for purposes 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 (judgment of 5 May 2015, *Spain* v *Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 56).

83 According to Hungary, the EU legislature misused its powers by choosing an inappropriate legal basis, namely Article 53(1) and Article 62 TFEU, in order to conceal its interference in the determination of pay, contrary to Article 153(5) TFEU.

84 It is, however, clear from the examination of the first plea in law of this action that the contested directive was, correctly, adopted on the legal basis of Article 53(1) and Article 62 TFEU, and from the examination of the first part of this second plea in law that, accordingly, the adoption of that directive was not contrary to Article 153(5) TFEU.

85 Consequently, the second part of the second plea in law must be rejected, as must, therefore, the second plea in law as a whole.

The third plea in law: infringement of Article 56 TFEU

Arguments of the parties

86 By its third plea in law, Hungary claims that the contested directive is contrary to Article 56 TFEU. The third plea in law may be broken down into five parts.

87 In the first part, Hungary relies on Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) to claim that the EU legislation relating to the freedom to provide services gives effect to the fundamental principle that every Member State must recognise the terms and conditions of employment applied in conformity with EU law by another Member State, and that the protection of the rights of posted workers is sufficiently guaranteed by the legislation of the State of origin.

88 Hungary considers that Directive 96/71, prior to its amendment by the contested directive, offered adequate protection to posted workers by requiring, with respect to pay, payment of the minimum wage of the host Member State. Hungary notes that, by requiring the payment of remuneration as provided for by that Member State, the contested directive calls into question the suitability of the minimum wage of such a State to guarantee the objective of the protection of workers, in other words to cover the cost of living in that State.

89 Hungary states that that amendment is also not in the interest of the freedom to provide services, that it constitutes rather a direct interference in economic relationships and that it nullifies the lawful competitive advantage of certain easily identifiable Member States in which the level of pay is lower, the EU legislature having thus introduced a measure the effect of which is to distort competition.

90 Further, Hungary states that the Commission, in the impact assessment, failed to produce any statistical data that could demonstrate that the protection of workers made it necessary to amend Directive 96/71 with respect to the remuneration applicable to posted workers.

91 Last, Hungary draws an analogy with the legislation on the coordination of social security systems, where the level of protection offered to posted workers by the Member State of origin is considered to be appropriate and the situation of the posted worker is to be examined individually according to a number of criteria, the objective being to avoid overlapping national rights.

92 In the second part, Hungary argues that the rule in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71, which substitutes the concept of 'remuneration' for that of minimum rates of pay, is contrary to the objective of ensuring equal treatment of workers of the host Member State and of workers who are posted to that Member State, since that rule requires undertakings established in a Member State to pay, to the employees that they post to another Member State, remuneration determined according to the practice of the latter State, the application of which is not mandatory for the undertakings of that Member State, those undertakings being in general bound solely by the requirement to pay the minimum wage. It follows that the minimum rates of pay in the host Member State are considered to be sufficient for the workers of that Member State, but not considered sufficient for posted workers.

93 Hungary considers, also, that the obligation to reimburse travel, board and lodging expenses, imposed in Article 3(7) of the amended Directive 96/71 on undertakings which post workers to another Member State, is contrary to the principle of equal treatment.

94 Last, Hungary states that the fields of social security and taxation of workers, in which some Member States reputedly have a comparative competitive advantage, are within the exclusive competence of the Member States, and that the EU legislature, when adopting the contested directive, failed to examine whether the differences that exist in those fields offered such an advantage.

95 In the third part, Hungary claims, in the first place, that the contested directive is not appropriate for achieving the objective that it pursues, namely to ensure a more level playing field for service providers established in different Member States. In that regard, Hungary challenges the wording of recital 16 of that directive which states, in essence, that undertakings compete on the basis of factors other than costs, which would mean that the price of the service would play no role in the consumer's choice.

96 In the second place, Hungary considers that the Commission could not, while failing to undertake any other examination of the terms and conditions of employment or of the situation of posted workers, deduce from data in the impact assessment, that the number of posted workers increased by 44.4% between 2010 and 2014, that the protection of those workers was not adequate.

97 In the third place, Hungary considers that, having regard to the fact that a supply of services within the framework of posting workers is temporary, the provisions of the contested directive go beyond what is necessary to achieve the objective of protection of posted workers. In that regard, Hungary states that a distinction should be made between the situation of a worker who makes use of his or her freedom of movement and that of a worker who temporarily supplies services in the host Member State within the framework of a posting, in that the former works on behalf of and under the control of an employer of that Member State, whereas the latter is not genuinely integrated into either the society or labour market of the host Member State.

98 In the fourth part of this plea in law, Hungary considers that the rules relating to postings of long duration, laid down in Article 3(1a) of the amended Directive 96/71, constitute a disproportionate restriction on the freedom to provide services, by requiring that almost all the employment law of the host Member State should be applicable, which is not justified by the protection of the interests of the posted workers.

99 Hungary states that workers who are posted for more than 12 months, as referred to in Article 3(1a) of the amended Directive 96/71, are not, having regard to their integration into the society and labour market of the host Member State, in a situation that is comparable to that of the workers of that Member State.

100 At most, it is the economic links with the host Member State of an undertaking which posts workers there that can be seen to be strengthened.

101 Further, according to Hungary, it cannot be supposed that a rule which ensures that a worker posted for more than 12 months to a host Member State has the benefit of the law applicable in that Member State is always more advantageous for that worker. There is, moreover, no provision in the FEU Treaty that makes it possible to determine, in an abstract manner, for how long or how often a service must be supplied in another Member State before it can no longer be considered to constitute a provision of 'services' within the meaning of the FEU Treaty.

102 In the fifth part of this plea in law, Hungary considers that, by causing the amended Directive 96/71 to be applicable to the road transport sector following the adoption of a specific legislative act, Article 3(3) of the contested directive is contrary to Article 58 TFEU, which provides that the freedom to provide services in the field of transport is to be governed by the provisions of the title of the FEU Treaty relating to transport.

103 The Parliament and the Council, supported by the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission, do not accept Hungary's arguments.

Findings of the Court

– *Preliminary observations*

104 In the first place, it should be recalled that the Court has held that the prohibition on restrictions on freedom to provide services applies not only to national measures, but also to measures adopted by the European Union institutions (judgment of 26 October 2010, *Schmelz*, C-97/09, EU:C:2010:632, paragraph 50 and the case-law cited).

105 However, and as is clear from paragraph 48 of the present judgment, in relation to the free movement of goods, persons, services and capital the measures adopted by the EU legislature, whether measures for the harmonisation of legislation of the Member States or measures for the coordination of that legislation, not only have the objective of facilitating the exercise of one of those freedoms, but also seek to ensure, when necessary, the protection of other fundamental interests recognised by the Union which may be affected by that freedom.

106 That is the case, in particular, where, by means of coordination measures seeking to facilitate the freedom to provide services, the EU legislature takes account of the general interest pursued by the various Member States and adopts a level of protection for that interest which seems acceptable

in the European Union (see, by analogy, judgment of 13 May 1997, *Germany* v *Parliament and Council*, C-233/94, EU:C:1997:231, paragraph 17).

107 As was stated in paragraph 51 of the present judgment, the EU legislature endeavoured, in adopting the contested directive, to ensure the freedom to provide services on a fair basis, that is, within a framework of rules guaranteeing competition that should not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers, that protection constituting, moreover, as attested by recital 10 of that directive, a means 'to safeguard the freedom to provide … services on a fair basis'.

108 In the second place, when an action is brought before the Courts of the European Union for the annulment of a legislative act that seeks to coordinate the legislation of the Member States in relation to terms and conditions of employment, such as the contested directive, those courts must be satisfied solely, with regard to the substantive legality of that act, that it does not infringe the EU and FEU Treaties or the general principles of EU law and that it is not vitiated by a misuse of powers.

109 Both the principle of equal treatment and the principle of proportionality, which are relied on by Hungary in this plea in law, are such general principles.

110 On the one hand, in accordance with settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 164 and the case-law cited).

111 On the other hand, the principle of proportionality requires that measures implemented through provisions of EU law should be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not go beyond what is necessary to achieve them (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 76 and the case-law cited).

112 With regard to judicial review of compliance with those conditions, the Court has recognised that, 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 institutions are seeking to pursue (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 77 and the case-law cited).

113 It cannot be disputed that the legislation, at EU level, relating to the posting of workers in the framework of the provision of services falls within such an area.

114 Further, 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 (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 78 and the case-law cited).

115 However, even where it has broad discretion, 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. Under Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty, 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 (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 79 and the case-law cited).

116 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 those 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 (judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 81 and the case-law cited).

117 Those considerations must guide the Court in its examination of the various parts of the third plea in law.

– *The first part of the third plea in law: the claim that the protection of the rights of posted workers is sufficiently guaranteed*

118 In essence, Hungary considers that the EU legislation relating to the freedom to provide services gives effect to the fundamental principle that every Member State must recognise the conditions of employment applied in conformity with EU law by another Member State, and that that is a sufficient guarantee of the protection of the rights of posted workers.

119 First, while Hungary refers, in support of its arguments, to Directive 2006/123, suffice it to state, in any event and in accordance with paragraph 108 of the present judgment, that the substantive legality of an EU act cannot be examined in the light of another EU act of the same status in the hierarchy of legal rules, unless the former has been adopted pursuant to the latter or unless it is expressly provided, in one of those two acts, that one take precedence over the other. That does not apply to the contested directive. Moreover, as is stated in Article 1(6) of Directive 2006/123, that directive 'does not affect labour law, that is any legal or contractual provision concerning employment conditions [and] working conditions'.

120 Likewise, as regards the analogy drawn by Hungary with the legislation on the coordination of social security systems, namely Regulation (EC) No 883/2004 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), suffice it to state that the contested directive was not adopted pursuant to Regulation No 883/2004 and that neither of those two acts expressly provides that that regulation is to take precedence over that directive.

121 Second, the argument that Directive 96/71, before its amendment by the contested directive, offered adequate protection to posted workers by requiring, in relation to remuneration, payment of the minimum wage of the host Member State is not capable of calling into question the legality of the contested directive.

122 In that regard, the EU legislature took the view, when adopting that directive, that it was necessary to provide greater protection to workers in order to maintain the provision of services on a fair basis as between undertakings established in the host Member State and undertakings that post workers to that State.

123 To that end, point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71 is intended, more specifically, to ensure greater protection of posted workers, by guaranteeing that, on the basis of equal treatment, they will be entitled to all the constituent elements of remuneration rendered mandatory in the host Member State, so that those workers should receive remuneration based on the same binding rules as are applicable to the workers employed by undertakings established in the host Member State.

124 The choice that has been made to grant such increased protection cannot, as claimed by Hungary, call into question the suitability of the minimum wage in the host Member State to ensure the objective of protection of workers, but is, on the contrary, within the broad discretion of the EU legislature emphasised in paragraphs 112 and 113 of the present judgment.

125 Third, Hungary argues that the contested directive is not in the interests of the principle of the freedom to provide services, but rather nullifies the lawful competitive advantage of some Member States in terms of costs and therefore constitutes a measure which has the effect of distorting competition.

126 However, as was stated in paragraphs 51 and 107 of the present judgment, the EU legislature endeavoured, in adopting the contested directive, to ensure the freedom to provide services on a fair basis, that is, within a framework of rules guaranteeing competition that should not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers, that protection constituting, moreover, as attested by recital 10 of that directive, a means 'to safeguard the freedom to provide … services on a fair basis'.

127 It follows that the contested directive, by guaranteeing increased protection of posted workers, seeks to ensure the realisation of the freedom to provide services in the European Union in the framework of competition which does not depend on excessive differences in the terms and conditions of employment to which the undertakings of various Member States are subject within one and the same Member State.

128 To that extent, in order to achieve the objective mentioned, the contested directive undertakes a re-balancing of the factors affecting whether the undertakings established in the various Member States may compete with one another, but does not however remove any competitive advantage which the service providers in some Member States may have enjoyed, since, contrary to what is claimed by Hungary, that directive has in no way the effect of eliminating all competition based on costs. The directive provides that posted workers are to be entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration rendered mandatory in that Member State. That directive does not therefore have any effect on the other cost components of the undertakings which post such workers, such as the productivity or efficiency of those workers, mentioned in recital 16 of that directive. Contrary to what is claimed by Hungary, that directive does not therefore create any distortion of competition.

129 Further, it must be stated that the aim of the contested directive is both, in accordance with recital 16 thereof, to create a 'truly integrated and competitive internal market', and also, according

to recital 4 thereof, to bring about, by means of the uniform application of rules on terms and conditions of employment, 'genuine social convergence'.

130 Consequently, the first part of the third plea in law must be rejected.

– *The second part of the third plea in law: breach of the principle of equal treatment*

131 In the first place, as regards the argument that the rule in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71 requires undertakings which post workers to another Member State to pay them remuneration that is determined in accordance with the practices of that State, practices that are not applicable as binding rules on the undertakings of that Member State, it is apparent that that argument is misconceived.

132 Indeed, it is very clear from the wording of the third subparagraph of Article 3(1) of the amended Directive 96/71, which sets out the general conditions for the application of Article 3(1), that the 'concept of remuneration [referred to in point (c) of the first subparagraph of Article 3(1) of that directive] 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'.

133 Consequently, both the workers employed by the undertakings established in the host Member State and the workers posted to that Member State are subject to the same rules with respect to remuneration, namely those which have been rendered mandatory in that Member State.

134 In the second place, as regards Hungary's argument that Article 3(7) of the amended Directive 96/71 is contrary to the principle of equality, in that it imposes an obligation on undertakings which post workers to another Member State to reimburse expenditure on travel, board and lodging, that argument rests on a misinterpretation of that provision. As contended by the Council, it is not the purpose of the second sentence of the second subparagraph of Article 3(7) to create such an obligation. As is clear in particular from recital 19 of the contested directive and from the qualification in that sentence made by the reference to point (i) of the first subparagraph of Article 3(1) of that directive, that sentence does no more than provide that such reimbursement, which is not part of remuneration, is to be governed by national law or practice applicable to the employment relationship.

135 Further, that provision concerns the particular situation in which posted workers find themselves, since they are obliged, in order to fulfil the professional obligations that they owe to their employer, to travel from their Member State of origin to another Member State. The workers employed by an undertaking established in such a Member State are not in the same situation since they carry out their work on behalf of that undertaking in the same Member State. It follows that that provision cannot, in any event, be considered to be contrary to the principle of equal treatment.

136 Consequently, the second part of the third plea in law must be rejected.

– *The third part of the third plea in law: infringement of the principle of proportionality*

137 As is clear from the case-law cited in paragraph 111 of the present judgment, the principle of proportionality, which is one of the general principles of EU law, requires that measures

implemented through provisions of EU law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary to achieve them.

138 In the first place, as regards whether the contested directive is appropriate to attain the objective of ensuring a more level playing field as between undertakings which post workers to the host Member State and undertakings of that Member State, the conclusions that Hungary draws from recital 16 of that directive are misconceived.

139 First, that recital reflects an objective to be achieved by the Union, namely that of creating a 'truly integrated and competitive internal market', in that the uniform application of rules on terms and conditions of employment is intended, according to recital 4 of that directive, to bring about 'genuine social convergence'.

140 Second, recital 16 of that directive does not state that competition on the basis of differences in costs between EU undertakings is neither possible nor desirable. On the contrary, by mentioning factors such as productivity and efficiency, that recital underlines the factors of production that naturally give rise to such differences in costs.

141 In reality, in the case of the cross-border provision of services, the only differences in costs between EU undertakings which are nullified by the contested directive are those which derive from terms and conditions of employment listed in Article 3(1) of the amended Directive 96/71, which are mandatory under the rules, broadly understood, of the host Member State.

142 In the second place, Hungary challenges the data relied on by the EU legislature to support its position that the protection, by Directive 96/71, of posted workers was no longer appropriate.

143 In that regard, the impact assessment drew attention, in particular, to two circumstances which could reasonably have led the EU legislature to consider that the concept of 'minimum rates of pay' in the host Member State, specified in Article 3(1)(c) of Directive 96/71, which were to be guaranteed in order to protect posted workers, was no longer apt to ensure such protection.

144 First, the interpretation of the concept of 'minimum rates of pay' had given rise to difficulties in a number of Member States, that being reflected in several references for a preliminary ruling being made to the Court, which adopted a broad interpretation of that concept in the judgment of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, paragraphs 38 to 70), to include a number of elements in addition to the minimum wage prescribed by the legislation of the host Member State. The Court held that that concept covered the method of calculating the wage, according to hourly work or piecework, based on the classification of workers into pay groups as provided for by the collective agreements in force in that Member State, a daily allowance, compensation for travelling time, and holiday pay.

145 Accordingly, it was consequently found, in the impact assessment, that the concept of 'minimum rates of pay', as interpreted by the Court, was significantly at odds with the widespread practice of undertakings posting workers to another Member State within the framework of the provision of services, that practice being to pay to those workers only the minimum wage provided for by the legislation or the collective agreements of the host Member State.

146 Second, it is clear from the impact assessment that, in the course of 2014, substantial differences in remuneration had come to light, in several host Member States, between workers employed by undertakings established in those Member States and the workers who were posted to those States.

147 In the third place, the Court must reject Hungary's argument that, having regard to the fact that a provision of services carried out within the framework of a posting of workers is temporary, the provisions of the contested directive, since their effect is to ensure posted workers equal treatment with workers employed by undertakings established in the host Member State, go beyond what is necessary to achieve the objective of protection of those posted workers.

148 Contrary to what is claimed by Hungary, neither the substitution of the concept of 'remuneration' for that of 'minimum rates of pay' in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71, nor the application to posted workers of terms and conditions of employment of the host Member State with respect to reimbursement of expenditure to cover travel, board and lodging expenses for workers who are away from home for professional reasons, have the consequence that those workers are placed in a situation that is identical to or analogous to the situation of workers who are employed by undertakings established in the host Member State.

149 Those amendments do not entail the application of all the terms and conditions of employment of the host Member State, since only some of those terms and conditions are, in any event, applicable to those workers under Article 3(1) of the amended Directive 96/71.

150 Having regard to the considerations set out in paragraphs 62 and 144 to 146 of the present judgment, Hungary has failed to demonstrate that the amendments made by the contested directive to the first subparagraph of Article 3(1) of Directive 96/71 went beyond what was necessary to achieve the objectives of the contested directive, namely to ensure the freedom to provide services on a fair basis and to offer greater protection to posted workers.

151 Consequently, the third part of the third plea must be rejected.

– *The fourth part of the third plea in law: the claim that the rules concerning posting of workers for more than 12 months undermine the principle of freedom to provide services*

152 Hungary considers the application of the employment law of the host Member State almost in its entirety to workers who are posted for a period, as a general rule, of more than 12 months is not justified by the protection of the interests of those workers and is neither necessary nor proportionate.

153 Further, Hungary claims that the contested directive disregards the principle of equal treatment in holding, first, that workers who are posted for more than 12 months, as specified in Article 3(1a) of the amended Directive 96/71, are in a situation comparable to that of workers employed by undertakings established in the host Member State and, second, that undertakings which post workers for such a period of time are in a situation that is comparable to that of undertakings established in that State.

154 Article 3(1a) of the amended Directive 96/71 provides that, where a worker is posted for more than 12 months to the host Member State, or more than 18 months if the service provider submits a motivated notification, that Member State is to guarantee, on the basis of equality of treatment, in addition to the terms and conditions of employment referred to in Article 3(1) of that directive, all the applicable terms and conditions of employment which are laid down in that State by law, regulation or administrative provision and/or by collective agreements or by arbitration awards declared to be universally applicable. Excluded from the scope of Article 3(1a) of the amended Directive 96/71 are only, on the one hand, the procedures, formalities and conditions

governing the conclusion and termination of employment contracts, including non-competition clauses, and, on the other, supplementary occupational retirement pension schemes.

155 Having regard to the broad discretion enjoyed by the EU legislature, mentioned in paragraphs 112 and 113 of the present judgment, no manifest error was committed by the EU legislature in taking the view that the consequence of a posting for such a long period should be that the personal situation of posted workers concerned should to an appreciable degree more closely resemble that of workers employed by undertakings established in the host Member State, and justified those workers who are posted for a long period being entitled to almost all the terms and conditions of employment applicable in the latter Member State.

156 Such rules in relation to a posting for a long period appear necessary, appropriate and proportionate, in order to ensure greater protection in relation to terms and conditions of employment for workers posted for a long period to a host Member State, while distinguishing the situation of those workers from that of workers who have exercised their right to freedom of movement or, more generally, that of workers who reside in that Member State and are employed by undertakings that are established there.

157 Consequently, the fourth part of the third plea in law must be rejected.

– *The fifth part of the third plea in law: disregard of Article 58 TFEU*

158 Hungary considers that, in making the amended Directive 96/71 applicable to the road transport sector as from the adoption of a specific legislative act, Article 3(3) of the contested directive is in breach of Article 58 TFEU.

159 Under Article 58 TFEU, the freedom to provide services, in relation to transport, is governed by the provisions of the title of the FEU Treaty devoted to transport, namely Articles 90 to 100 TFEU.

160 It follows that a service in the field of transport, within the meaning of Article 58(1) TFEU, is excluded from the scope of Article 56 TFEU (judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 48).

161 However, Article 3(3) of the contested directive is confined to providing that that directive is to apply to the road transport sector from the date of application of a legislative act amending Directive 2006/22, which had as its legal basis Article 71(1) EC, one of the provisions in the title of the EC Treaty relating to transport, which corresponds to Article 91 TFEU.

162 It follows that Article 3(3) of the contested directive did not seek to regulate the freedom to provide services in the field of transport and cannot, therefore, be contrary to Article 58 TFEU.

163 Consequently, the fifth part of the third plea in law, and thereby that plea in law as a whole, must be rejected.

The fourth plea in law: infringement of Article 56 TFEU in that the contested directive precludes the effective implementation of the freedom to provide services

Arguments of the parties

164 Hungary claims that the contested directive is contrary to Article 56 TFEU and to the judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809), in that it provides that the exercise of the right to strike or the right to take other collective action may impede the effective implementation of the freedom to provide services.

165 According to Hungary, that is the effect of Article 1(1)(b) of that directive, which states that Directive 96/71 is not in any way to affect, inter alia, the right to strike or the right to take other action covered by the specific industrial relations systems in the Member States.

166 The Parliament and the Council, supported by the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission, do not accept Hungary's arguments.

Findings of the Court

167 In essence, Hungary considers that Article 1(1)(b) of the contested directive calls into question the case-law of the Court, deriving from the judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809), by excluding from the scope of Article 56 TFEU the exercise of the right to strike or the right to take other collective action.

168 However, while that provision states that the amended Directive 96/71 'shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level', it is in no way a consequence of that provision that the exercise of those rights is not subject to EU law. On the contrary, since that provision refers to fundamental rights as recognised at Union level, it means that the exercise by workers of their rights of collective action, in the context of a posting of workers subject to the provisions of the amended Directive 96/71, must be assessed in the light of EU law, as it has been interpreted by the Court.

169 Accordingly, the fourth plea in law must be rejected.

The fifth plea in law: disregard of the 'Rome I' Regulation and of the principles of legal certainty and legislative clarity

Arguments of the parties

170 Hungary claims that Article 3(1a) of the amended Directive 96/71 is not compatible with the 'Rome I' Regulation, the aim of which is to ensure the freedom of the contracting parties as regards the choice of law applicable to their relationship, in that that article provides that, where a posting is for a long period, the application to posted workers of the obligations imposed by the legislation of the host Member State is mandatory, irrespective of which law applies to the employment relationship.

171 According to Hungary, the 'Rome I' Regulation takes no account of the duration of the work performed abroad in order to determine which law is applicable, but is based solely on whether the employee must, after the completion of his or her work abroad, resume his or her work in his or her country of origin.

172 Further, Hungary considers that Article 3(1a) of the amended Directive 96/71 cannot be described as a conflict-of-law rule, since it is stated in that provision that it is to be applicable irrespective of which law applies to the employment relationship.

173 Hungary claims, also, that the rule that, for the purposes of the application of Article 3(1a) of the amended Directive 96/71, the duration of posting is to be the cumulative period of posting of each of a number of successively posted workers, as laid down in the fourth subparagraph of that provision, is not compatible with the 'Rome I' Regulation, which defines the applicable law and individual rights with respect to each individual employment contract.

174 Last, Hungary considers that the concept of 'remuneration', in the contested directive, is contrary to the principles of legislative clarity and legal certainty, in that it refers to the national law and/or practice of the host Member State.

175 The Parliament and the Council, supported by the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission, do not accept Hungary's arguments.

Findings of the Court

176 In the first part of this plea, Hungary claims that Article 3(1a) of the amended Directive 96/71 is contrary to Article 8 of the 'Rome I' Regulation, which enshrines the autonomy of the parties with respect to determining the law applicable to an employment contract, and that the rule that the duration of posting is to be the cumulative period of posting of each of a number of successively posted workers is not compatible with that regulation. In the second part of that plea, Hungary considers that the concept of 'remuneration', introduced by the contested directive, is contrary to the principles of legal certainty and legislative clarity.

177 In the first place, it must be observed that Article 8(1) of the 'Rome I' Regulation establishes a general conflict-of-law rule that is applicable to employment contracts, the designated law being the law chosen by the parties to such a contract, and that Article 8(2) of that regulation provides that, where such a choice has not been made, the individual employment contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work, that country not being deemed to have changed if the employee is temporarily employed in another country.

178 However, Article 23 of the 'Rome I' Regulation provides for the possibility of derogation from the conflict-of-law rules established by that regulation, where provisions of EU law lay down rules on the law applicable to contractual obligations in certain areas, while recital 40 of that regulation states that the 'Rome I' Regulation does not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of EU law with regard to particular matters.

179 Given both their nature and their content, both Article 3(1) of the amended Directive 96/71, with respect to posted workers, and Article 3(1a) of that directive, with respect to workers who are posted for a period that, in general, exceeds 12 months, constitute special conflict-of-law rules, within the meaning of Article 23 of the 'Rome I' Regulation.

180 Further, as observed by the Advocate General, in point 196 of his Opinion, the drafting process of the 'Rome I' Regulation demonstrates that Article 23 of that regulation covers the special conflict-of-law rule previously laid down in Article 3(1) of Directive 96/71, since, in the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) (COM(2005) 650 final) of 15 December 2005, the Commission had annexed a list of special conflict-of-law rules established by other provisions of EU law, which mentions that directive.

181 Last, the existence, in Article 3(1a) of the amended Directive 96/71, of a rule that is designed to prevent fraud in a situation where a posted worker is replaced by another posted worker, performing the same task at the same place, cannot call into question the conclusion reached in paragraph 179 of the present judgment, since, in the context of the conflict-of-law rule constituted by that provision, it was open to the EU legislature to enact a rule intended to prevent circumvention of the obligation imposed by it.

182 Consequently, the first part of the fifth plea in law must be rejected.

183 In the second place, it is plain from the wording and from the structure of the amended Directive 96/71 that the concept of 'remuneration', used in point (c) of the first subparagraph of Article 3(1) of that directive, refers to the law or practice of the Member States that is rendered mandatory with respect to that concept and that, with the exception of what is specified in the second subparagraph of Article 3(7) of that directive, point (c) of the first subparagraph of Article 3(1) does not define what is covered by that concept.

184 In that regard, the third subparagraph of Article 3(1) of the amended Directive 96/71 does no more than state that the concept of remuneration is to 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 of that article.

185 As is apparent, in essence, from recital 17 of the contested directive, while the setting of the rules relating to remuneration is as a general rule within the competence of the Member States, they are nonetheless bound to act in that area with due regard to EU law.

186 In those circumstances, and also taking into account the broad discretion mentioned in paragraphs 112 and 113 of the present judgment, if the complaint is made that the EU legislature disregarded the principles of legal certainty and legislative clarity, on the ground that, in a directive for the coordination of the legislation and practice of the Member States in relation to terms and conditions of employment, the EU legislature referred to the concept of 'remuneration' as determined by the national law or practice of the Member States, that complaint cannot be sustained.

187 Consequently, the second part of the fifth plea in law, and thereby the fifth plea in law in its entirety, must be rejected.

188 In the light of all the foregoing, the action must be dismissed, there being no need to give a ruling on the alternative heads of claim, seeking the annulment of certain provisions of the contested directive, which are based on the same pleas in law as support the principal heads of claim.

Costs

189 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have applied for costs to be awarded against Hungary, and the latter has been unsuccessful, it must be ordered to pay the costs.

190 In accordance with Article 140(1) of those rules, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the European Commission shall bear their own costs as parties who intervened in the proceedings.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**

2. **Orders Hungary to bears its own costs and to pay the costs incurred by the European Parliament and the Council of the European Union;**

3. **Orders the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the European Commission to bear their own costs.**

[Signatures]

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* Language of the case: Hungarian.