ECLI:EU:C:2020:1000

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 – Principle of non-discrimination – Necessity – Principle of proportionality – Regulation (EC) No 593/2008 – Scope – Road transport – Article 58 TFEU)

In Case C-626/18,

ACTION for annulment under Article 263 TFEU, brought on 3 October 2018,

Republic of Poland, represented by B. Majczyna and D. Lutostańska, acting as Agents,

applicant,

v

European Parliament, represented initially by M. Martínez Iglesias, K. Wójcik, A. Pospíšilová Padowska and L. Visaggio, then by M. Martínez Iglesias, K. Wójcik, L. Visaggio and A. Tamás, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented initially by J. Möller and T. Henze, and subsequently by J. Möller, acting as Agents,

French Republic, represented by E. de Moustier, A.-L. Desjonquères 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 M. Kellerbauer, B.-R. Killmann and A. Szmytkowska, acting as Agents,

interveners,

Council of the European Union, represented initially by E. Ambrosini, K. Adamczyk Delamarre and A. Norberg, then by E. Ambrosini, A. Sikora-Kalėda, Zs. Bodnar and A. Norberg, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented initially by J. Möller and T. Henze, and subsequently by J. Möller, acting as Agents,

French Republic, represented by E. de Moustier, A.-L. Desjonquères 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 initially by C. Meyer-Seitz, A. Falk, H. Shev, J. Lundberg and H. Eklinder, then by C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

European Commission, represented by 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, the Republic of Poland asks the Court, principally, to annul Article 1(2)(a) and (2)(b) and Article 3(3) of 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 that directive in its entirety.

I. Legal context

A. 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.'

B. The legislation relating to posted workers

1. *Directive 96/71/EC*

6 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).

7 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.

8 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.

2. ***The contested directive***

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

10 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.'

11 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.'

12 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.’

13 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.’

14 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.'

15 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.'

16 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.'

17 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.'

C. **The legislation relating to the law applicable to contractual obligations**

18 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 [EU] 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. …'

19 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.

…'

20 Article 9 of that regulation provides:

'1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic

organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.'

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.'

II. **Forms of order sought and procedure before the Court of Justice**

22 The Republic of Poland claims that the Court should:

– principally:

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

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

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

– in the alternative, annul 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 the Republic of Poland to pay the costs.

24 By decision of the President of the Court of 2 April 2019, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the European Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

25 By decision of the President of the Court of 2 April 2019, the Kingdom of Sweden was granted leave to intervene in support of the form of order sought by the Council.

III. **The action**

26 The Republic of Poland submits, principally, heads of claim directed against a number of specific provisions of the contested directive and, in the alternative, heads of claim whereby it seeks the annulment of that directive in its entirety.

27 The Parliament considers that the principal heads of claim submitted are not admissible, since the contested provisions cannot be dissociated from the other provisions of the contested directive.

A. **The admissibility of the principal heads of claim**

28 It must be recalled that partial annulment of an EU act is possible only if the elements for which annulment is sought may be severed from the remainder of the act. In that regard, the Court has repeatedly held that the requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (judgments of 12 November 2015, *United Kingdom* v *Parliament and Council*, C-121/14, EU:C:2015:749, paragraph 20, and of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 36).

29 Consequently, review of whether elements of an EU act are severable requires consideration of the scope of those elements in order to assess whether their annulment would alter the spirit and substance of the act (judgments of 12 November 2015, *United Kingdom* v *Parliament and Council*, C-121/14, EU:C:2015:749, paragraph 21, and of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 37).

30 Further, the question whether partial annulment would alter the substance of the EU act is an objective criterion, and not a subjective criterion linked to the political intention of the institution which adopted the act at issue (judgments of 30 March 2006, *Spain* v *Council*, C-36/04, EU:C:2006:209, paragraph 14, and of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraph 121).

31 Both Article 1(2)(a) and Article 1(2)(b) of the contested directive amend Directive 96/71, first, by substituting the concept of ‘remuneration’ for that of ‘minimum rates of pay’ in point (c) of the first subparagraph of Article 3(1) of Directive 96/71, and, second, by inserting in that directive Article 3(1a), which establishes specific rules for postings for a period that, as a general rule, exceeds 12 months.

32 The two new rules that those provisions of the contested directive introduce entail significant changes to the rules applicable to posted workers that had been established by Directive 96/71. Those changes, which alter the balance of interests that had been initially adopted, are the main changes to those rules.

33 Annulment of the abovementioned provisions of the contested directive would therefore impinge on the very substance of that directive, since those provisions can be regarded as the core of the new rules concerning posting established by the EU legislature (see, by analogy, judgment of 30 March 2006, *Spain* v *Council*, C-36/04, EU:C:2006:209, paragraph 16).

34 Consequently, the principal heads of claim, seeking the annulment of Article 1(2)(a) and Article 1(2)(b) of the contested directive, are not admissible, since those provisions cannot be severed from the other provisions of that directive.

35 However, since Article 3(3) of the contested directive, against which the principal heads of claim are also directed, does no more than state that that directive is to apply to the transport sector

from the date of publication of a specific legislative act, annulment of that provision would not damage the substance of that directive.

36 Since the third plea in law in support of this action, which concerns specifically that provision, is relevant both to the principal heads of claim and to the alternative heads of claim, that plea will be addressed in the course of the examination of the latter heads of claim.

B. **The alternative heads of claim**

37 In support of its heads of claim, the Republic of Poland relies on three pleas in law: respectively, an infringement of Article 56 TFEU by Article 1(2)(a) and (b) of the contested directive, the choice of an incorrect legal basis in the adoption of that directive, and the wrongful inclusion of the road transport sector within the scope of that directive.

38 The Court will examine, in the first place, the second plea in law, since that plea concerns the choice of the legal basis of the contested directive and is therefore a matter to be addressed prior to the examination of the pleas directed against the substance of that directive, in the second place, the first plea in law, and, last, the third plea in law.

1. ***The second plea in law: choice of an incorrect legal basis for the adoption of the contested directive***

(a) ***Arguments of the parties***

39 The Republic of Poland challenges the recourse to Article 53(1) and Article 62 TFEU as the legal basis of the contested directive, on the ground that that directive, unlike Directive 96/71, creates restrictions on the freedom of undertakings which post workers to provide services.

40 In that regard, the Republic of Poland argues that the main objective of the contested directive is to protect posted workers and that the basis of that directive ought, therefore, to have been the relevant social policy provisions of the FEU Treaty.

41 Further, the Republic of Poland claims that the objective of Article 1(2)(a) and (b) of the contested directive is not to make it easier to take up a self-employed activity, which is, on the contrary, weakened by those provisions. The substitution of the concept of ‘remuneration’ for that of ‘minimum rates of pay’ and the new rules applicable to workers posted for a period that exceeds 12 months are unjustified and disproportionate restrictions on freedom to provide services. There is a contradiction, therefore, in having recourse to the legal basis applicable to the harmonisation of that freedom.

42 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 the arguments of the Republic of Poland.

(b) ***Findings of the Court***

43 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).

44 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).

45 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).

46 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).

47 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).

48 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).

49 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.

50 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.

51 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 for 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 46 of the present judgment.

52 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).

53 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).

54 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.

55 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 the posted workers.

56 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’.

57 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.

58 In the second place, with respect to its content, the contested directive seeks, in particular, by means of the provisions criticised by the Republic of Poland, 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.

59 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.

60 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'.

61 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.

62 It follows from the foregoing that, contrary to the arguments presented by the Republic of Poland, 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.

63 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.

64 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.

65 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 State by employers who posted them to that Member State in order to provide services there.

66 Further, it must be recalled that, as stated in paragraphs 46 and 47 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.

67 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.

68 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.

69 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 67 and 68 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.

70 In those circumstances, the arguments of the Republic of Poland that the relevant social policy provisions of the FEU Treaty would constitute the appropriate legal basis of the contested directive cannot be other than rejected.

71 Consequently, the second plea in law must be rejected.

2. *The first plea in law: infringement of Article 56 TFEU by Article 1(2)(a) and (b) of the contested directive*

(a) *Arguments of the parties*

72 By its first plea in law, the Republic of Poland claims that the contested directive creates restrictions on freedom to provide services that are contrary to Article 56 TFEU, in that it imposes, in Directive 96/71, on Member States the obligation to ensure that posted workers are entitled to, first, remuneration compatible with the law or practice of the host Member State and, second, all the terms and conditions of employment compatible with that law or practice, provided that, in essence, the actual duration of the posting of a worker exceeds 12 months.

73 In the first part of the first plea in law, the Republic of Poland considers, in the first place, that the substitution, in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71, of the concept of 'remuneration' for that of 'minimum rates of pay' constitutes a

discriminatory restriction on freedom to provide services, since it imposes on a service provider employing posted workers an additional financial and administrative burden.

74 The Republic of Poland states that, thereby, the effect of that provision of the amended Directive 96/71 is to remove the competitive advantage of service providers established in other Member States that derives from rates of remuneration that are lower than those in the host Member State.

75 In the second place, the Republic of Poland is of the view, first, that the freedom to provide services guaranteed in Article 56 TFEU rests not on the principle of equal treatment, but on the prohibition of discrimination, and, second, that foreign service providers are in a situation that is different from and more difficult than that of the service providers established in the host Member State, primarily because they must comply with the rules of their Member State of origin and the rules of that host Member State.

76 Further, posted workers are in a situation that differs from that of workers of the host Member State, in that their stay in that Member State is temporary and they are not integrated into the labour market of that State, since they retain the centre of their interests in their country of residence. Accordingly, the remuneration paid to those workers ought to enable them to cover the cost of living in that country.

77 In the third place, the Republic of Poland considers that the changes made by the contested directive cannot be considered to be justified by overriding reasons in the general interest or to be proportionate, when the objectives of protection of workers and prevention of unfair competition had been taken into account in Directive 96/71.

78 The Republic of Poland states that, as indicated in recital 16 of the contested directive and in certain passages of the impact assessment, the EU legislature is holding that the benefit of a competitive advantage by reason of lower labour costs now constitutes in itself, without more, unfair competition, although it has not previously been characterised as such.

79 In that regard, the Republic of Poland states that there can be no question of an unfair competitive advantage where a service provider is obliged to pay to the workers whom it posts to a Member State wages that comply with the rules in force in that Member State.

80 In the second part of the first plea in law, the Republic of Poland considers that, by providing for an enhanced level of protection for workers posted to the host Member State for a period that exceeds 12 months, Article 3(1a) of the amended Directive 96/71 introduces a restriction on freedom to provide services which is neither justified nor proportionate.

81 That provision results in additional financial and administrative burdens for the service provider established in a Member State other than the host Member State and is contrary to the principle of legal certainty, given the ambiguity that arises because of the failure of the EU legislature to set out the rules of the host Member State that are applicable pursuant to that provision.

82 The Republic of Poland considers that the principle of equal treatment is applicable with respect to persons who make use of freedom of movement, namely those who are permanently employed in the host Member State, but that it is not possible to apply the same reasoning with respect to workers posted for a period that exceeds 12 months to that Member State, and states that posted workers, for their part, are not integrated into the labour market of the host Member State.

83 The Republic of Poland considers that Article 3(1a) of the amended Directive 96/71 fails to have regard for Article 9 of the 'Rome I' Regulation and that that directive does not constitute a *lex specialis*, within the meaning of Article 23 of that regulation.

84 The Republic of Poland is of the opinion that the approach adopted in Article 3(1a) of the amended Directive 96/71 is disproportionate, given the fact that, on the one hand, terms and conditions of employment have very largely already been harmonised within the Union, and the interests of workers are consequently sufficiently protected by the law of the Member State of origin and, on the other, the mechanism for the replacement of the posted worker, which is to be taken into account in order to calculate the period of 12 months after which almost all terms and conditions of employment are applicable, has no connection with the situation of a posted worker.

85 Last, the Republic of Poland states that the adding together of periods of posting, which can be spread over a large number of years, is not subject to any time limit.

86 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 the arguments that are submitted by Republic of Poland to support the two parts of the first plea in law.

(b) ***Findings of the Court***

(1) *Preliminary observations*

87 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).

88 However, and as is clear from paragraph 53 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.

89 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).

90 As was stated in paragraph 56 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'.

91 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.

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

93 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).

94 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 (see 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).

95 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).

96 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.

97 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).

98 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).

99 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).

100 Those considerations must guide the Court in its examination of the two parts of the first plea in law.

(2) *The first part of the first plea in law: the existence of a discriminatory restriction on freedom to provide services*

101 In the first place, the Republic of Poland considers that the substitution, in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71, of the concept of 'remuneration' for that of 'minimum rates of pay' constitutes a discriminatory restriction on freedom to provide services, since that provision imposes on service providers who employ posted workers an additional financial and administrative burden, the effect of which is to remove the competitive advantage of service providers who are established in Member States where rates of remuneration are lower.

102 Having regard to the very nature of the amended Directive 96/71, namely the fact that it is an instrument for the coordination of the law of the Member States on terms and conditions of employment, that entails that the service providers who post workers to a Member State other than that in which they are established are subject, not only to the rules of their Member State of origin, but also to those of the Member State that hosts those workers.

103 If those service providers are liable to bear an additional financial and administrative burden, that burden is the consequence of the objectives pursued in the amendment of Directive 96/71, since that directive, as an instrument for the coordination of the law of the Member States on terms and conditions of employment, entailed, moreover, even before that amendment, that service providers posting workers were subject concurrently to the rules of their Member State of origin and of the host Member State.

104 However, as has been stated, in paragraphs 56 and 90 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'.

105 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.

106 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 Republic of Poland, 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.

107 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'.

108 It follows from all the foregoing that, in order to achieve the objectives referred to in paragraph 104 of the present judgment, the EU legislature could, without creating any unjustified difference in treatment between service providers depending on the Member State in which they are established, consider that the concept of 'remuneration' was more appropriate than that of 'minimum rates of pay', adopted by Directive 96/71.

109 In the second place, the Republic of Poland is of the opinion, first, that the freedom to provide services guaranteed in Article 56 TFEU rests not on the principle of equal treatment, but on the prohibition of discrimination.

110 Accordingly, the Republic of Poland claims, in essence, that the contested directive is vitiated by the fact that it requires posted workers and workers employed by undertakings established in the host Member State to be treated equally. However, it is clear that that directive does not entail such equality of treatment of those two categories of workers.

111 In that regard, 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.

112 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.

113 Having regard to the considerations set out in paragraph 67 of the present judgment, the Republic of Poland 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.

114 The Republic of Poland argues, second, that the service providers established in another Member State are in a situation that is different from and more difficult than that of service providers established in the host Member State, the main reason being that they must comply with both the rules of their Member State of origin and those of the host Member State.

115 The contested directive does not have the effect, with respect to service providers, any more than it does with respect to posted workers, that service providers established in Member States other than the host Member State are placed in a situation that is comparable to that of service providers established in the host Member State, since the former have to apply to the workers whom they employ in the host Member State only some of the terms and conditions of employment to which the latter are subject.

116 Further, as has been stated, in paragraphs 102 and 103 of the present judgment, the amended Directive 96/71 entails, by reason of its very nature as an instrument for the coordination of the law of the Member States on terms and conditions of employment, that service providers who post workers to a Member State other than that in which they are established are subject not only to the rules of their Member State of origin but also to those of the Member State that hosts those workers.

117 As regards the extent to which the situation of posted workers is said to be characterised by the fact that their stay in the host Member State is temporary and that they are not integrated into the labour market of that State, it is true that those workers carry out their tasks, for a certain period, in a Member State other than that in which they habitually reside.

118 Consequently, the EU legislature could reasonably consider it to be appropriate that, for that period, the remuneration to be received by those workers should, as provided in point (c) of the first subparagraph of Article 3(1) of the amended Directive 96/71, be the remuneration determined by the mandatory legal provisions of the host Member State, in order to enable them to meet the cost of living in that Member State and not, contrary to what is claimed by the Republic of Poland, remuneration to enable them to meet the cost of living in the country where they habitually reside.

119 In the third place, the Republic of Poland considers that the changes made by the contested directive cannot be considered to be justified by overriding reasons in the general interest or to be proportionate, since the objectives of protection of workers and prevention of unfair competition had been taken into account in Directive 96/71.

120 That argument is based on the belief that, by means of the contested directive, the EU legislature was taking the position that the benefit of a competitive advantage resulting from labour costs lower than those current in the host Member State constitutes unfair competition.

121 In fact, although the contested directive extends the scope of the terms and conditions of employment applicable to workers posted to a Member State other than that in which they are habitually employed, that directive does not, actually, have the effect of proscribing any competition based on costs, in particular competition resulting from differences in the productivity or efficiency of those workers, mentioned in recital 16 of that directive.

122 Further, nowhere in the contested directive is the competition that might be based on such differences described as ‘unfair’. The objective of that directive is the preservation of the freedom to provide services on a fair basis while ensuring the protection of posted workers, by means, inter alia, of the application to posted workers of all the constituent elements of remuneration rendered mandatory by the rules of the host Member State.

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

(3) *The second part of the first plea in law: an unjustified and disproportionate restriction on the freedom to provide services introduced in Article 3(1a) of the amended Directive 96/71*

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

125 Having regard to the broad discretion enjoyed by the EU legislature, mentioned in paragraphs 95 and 96 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 the 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.

126 Second, as regards the argument that the effect of Article 3(1a) of the amended Directive 96/71 is that additional financial and administrative burdens are imposed on service providers established in a Member State other than the host Member State, it is already clear from paragraph 102 of the present judgment that, having regard to the very nature of the amended Directive 96/71, namely the fact that it is an instrument for the coordination of the law of the Member States on terms and conditions of employment, that entails that the service providers who post workers for a period that exceeds 12 months to a Member State other than that in which they are established are subject, not only to the rules of their Member State of origin, but also to those of the Member State that hosts those workers.

127 As stated in paragraph 103 of the present judgment, in response to the first part of the first plea in law, if those service providers are liable to bear an additional financial and administrative burden, that burden is the consequence of the objectives pursued in the amendment of Directive 96/71, since that directive, as an instrument for the coordination of the law of the Member States on terms and conditions of employment, entailed, moreover, even before that amendment, that service providers posting workers were subject concurrently to the rules of their Member State of origin and of the host Member State.

128 Third, with respect to the argument concerning the breach of the principle of legal certainty, given the ambiguity arising because of the failure to specify the rules of the host Member State that are applicable pursuant to Article 3(1a) of the amended Directive 96/71, it is clear that that provision allows of no ambiguity, since it requires the application, in the case of posting of a worker for a period of more than 12 months, of all the terms and conditions of employment in the host Member State, with the exception of those that it expressly excludes.

129 Further, the fourth subparagraph of Article 3(1) of the amended Directive 96/71 provides that the Member States are to publish on the single official national website, referred to in Article 5 of Directive 2014/67, in accordance with national law and/or practice, information on the terms and conditions of employment, including all the terms and conditions of employment in accordance with Article 3(1a) of the amended Directive 96/71.

130 Fourth, the Republic of Poland refers to Article 9 of the 'Rome I' Regulation and considers that the contested directive does not constitute a *lex specialis*, within the meaning of Article 23 of that regulation.

131 On that point, 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.

132 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.

133 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.

134 Further, 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.

135 Last, while the Republic of Poland considers that Article 3(1a) of the amended Directive 96/71 does not comply with Article 9 of the 'Rome I' Regulation, suffice it to state that the latter article, which must be interpreted strictly, refers to 'overriding mandatory provisions of the law' of the Member States, namely mandatory provisions respect for which is regarded as crucial by a country for safeguarding its public interests (judgment of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 41 and 44). There is nothing in the documents submitted to the Court to indicate that Article 3(1a) of the amended Directive 96/71 is contrary to such overriding mandatory provisions of law.

136 Fifth, the Republic of Poland criticises the mechanism laid down in the fourth subparagraph of Article 3(1a) of the amended Directive 96/71, which provides that, where an undertaking replaces a posted worker with another posted worker performing the same task at the same place, the duration of the posting is, for the purposes of Article 3(1a), to be the cumulative duration of the posting periods of the individual posted workers concerned. The Republic of Poland also challenges the fact that that provision sets no limit in time on the accumulation of posting periods.

137 By establishing the mechanism laid down in the fourth subparagraph of Article 3(1a) of the amended Directive 96/71, the EU legislature made use of the broad discretion that it enjoyed in order to ensure that the rules introduced, where workers are posted for a period that exceeds 12

months, should not be capable of being circumvented by economic operators, as the Parliament and the Council have explained and as is stated in recital 11 of the contested directive.

138 In the light of the scope of that provision, the fact that the mechanism for the adding together of periods of postings of different workers cumulatively takes account of the work undertaken and not the situation of those workers cannot have any effect on the lawfulness of that provision, while the Republic of Poland has failed, in that regard, to specify which provision of the FEU Treaty or which general principle of EU law has thereby been infringed. Further, the absence of a limit in time on the adding together of posting periods does not undermine the principle of legal certainty, since that same provision sets out clearly and precisely the prohibition that it imposes.

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

3. *The third plea in law: the wrongful inclusion of the road transport sector within the scope of the contested directive*

(a) *Arguments of the parties*

140 The Republic of Poland claims that the application of the contested directive to the road transport sector is wrong, where, under Article 58 TFEU, 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, so that Article 56 TFEU is not applicable to such services.

141 The Republic of Poland refers to the Commission's interpretation that it follows from the wording of the proposal for a directive that led to Directive 96/71 that the field of transport is excluded from the scope of the provisions applicable to the posting of workers.

142 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 the arguments of the Republic of Poland.

(b) *Findings of the Court*

143 The Republic of Poland 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.

144 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.

145 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).

146 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.

147 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.

148 Accordingly, the third plea in law must be rejected, as must, thereby, the alternative heads of claim.

IV Costs

149 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 the Republic of Poland, and the latter has been unsuccessful, it must be ordered to pay the costs.

150 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 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 the Republic of Poland to pay, in addition to its own costs, 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: Polish.