ECLI:EU:C:2020:976

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

1 December 2020 (*)

(Reference for a preliminary ruling – Directive 96/71/EC – Article 1(1) and (3) and Article 2(1) – Posting of workers in the framework of the provision of services – Drivers working in international road transport – Scope – Concept of 'posted worker' – Cabotage operations – Article 3(1), (3) and (8) – Article 56 TFEU – Freedom to provide services – Collective agreements declared universally applicable)

In Case C-815/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court, Netherlands), made by decision of 14 December 2018, received at the Court on 21 December 2018, in the proceedings

Federatie Nederlandse Vakbeweging

v

Van den Bosch Transporten BV,

Van den Bosch Transporte GmbH,

Silo-Tank Kft,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.–C. Bonichot, A. Arabadjiev, E. Regan, L. Bay Larsen (Rapporteur) and N. Piçarra, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and P.G. Xuereb, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 January 2020,

after considering the observations submitted on behalf of:

– the Federatie Nederlandse Vakbeweging, by J.H. Mastenbroek, advocaat,

– Van den Bosch Transporten BV, Van den Bosch Transporte GmbH and Silo-Tank Kft, by R.A.A. Duk and F.M. Dekker, advocaten,

– the Netherlands Government, by J. Langer and M.K. Bulterman, acting as Agents,

– the German Government, by J. Möller, acting as Agent,

– the French Government, by A.-L. Desjonquères, C. Mosser, R. Coesme and A. Ferrand, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, M.M. Tátrai and Zs. Wagner, acting as Agents,

– the Polish Government, by B. Majczyna, D. Lutostańska and A. Siwek-Ślusarek, acting as Agents,

– the European Commission, by W. Mölls, B.-R. Killmann and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU and Article 1(1) and (3), Article 2(1), Article 3(1) and the first subparagraph of Article 3(8) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The request has been made in proceedings between the Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions; ‘the FNV’), on the one hand, and Van den Bosch Transporten BV, Van den Bosch Transporte GmbH and Silo-Tank Kft, on the other hand, concerning the application of the Collectieve arbeidsovereenkomst Goederenderenvoer (Collective Labour Agreement applicable to the goods transport sector; ‘the “Goods Transport” CLA’) to drivers coming from Germany and Hungary under charter contracts for international transport operations.

Legal context

Directive 96/71

3 Recitals 4 and 5 of Directive 96/71 state:

‘(4) Whereas the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that

undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract;

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.'

4 Article 1 of that directive, entitled 'Scope', provides:

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

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

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

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

or

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

or

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

[…]'

5 Article 2 of that directive, entitled 'Definition', is worded as follows:

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

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

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

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and

conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

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

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

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

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

(e) health, safety and hygiene at work;

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

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

[…]

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

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

[…]

8. “Collective agreements or arbitration awards which have been declared universally applicable” means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

– collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

– collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

[…]

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

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

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

Directive 2014/67/EU

7 Article 9(1) 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) provides:

'Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive [96/71], provided that these are justified and proportionate in accordance with Union law.

For these purposes Member States may in particular impose the following measures:

[…]

(b) an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document within the meaning of Council Directive 91/533/EEC [of 14 October 1991 on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32)], including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;

[…]'

Directive (EU) 2020/1057

8 Recital 7 of Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71 and Directive 2014/67 for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 (OJ 2020 L 249, p. 49), states:

'… The provisions on the posting of workers, in Directive [96/71] […], apply to the road transport sector […]'

Regulation (EC) No 1072/2009

9 Recital 17 of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72) states that the provisions of Directive 96/71 apply to transport undertakings performing a cabotage operation.

10 Under the heading 'Definitions', Article 2 of that regulation provides:

'For the purposes of this Regulation:

[…]

3. "host Member State" means a Member State in which a haulier operates other than the haulier's Member State of establishment;

[…]

6. "cabotage operations" means national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with this Regulation;

[…]'

11 According to the first subparagraph of Article 8(2) of that Regulation, that article being entitled 'General principle':

'Once the goods carried in the course of an incoming international carriage have been delivered, hauliers referred to in paragraph 1 shall be permitted to carry out, with the same vehicle, or, in the case of a coupled combination, the motor vehicle of that same vehicle, up to three cabotage operations following the international carriage from another Member State or from a third country to the host Member State. The last unloading in the course of a cabotage operation before leaving the host Member State shall take place within 7 days from the last unloading in the host Member State in the course of the incoming international carriage.'

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

12 Van den Bosch Transporten is a transport undertaking with offices in Erp (Netherlands). Van den Bosch Transporten, Van den Bosch Transporte, a company established under German law, and

Silo-Tank, a company established under Hungarian law, are sister companies owned by the same group. All three companies have the same director and the same shareholder.

13 Van den Bosch Transporten is a member of the Vereniging Goederenvervoer Nederland (Netherlands Association for Goods Transport). That association and the FNV entered into the 'Goods Transport' CLA, which took effect on 1 January 2012 and expired on 31 December 2013. It has not been declared universally applicable. The Collectieve arbeidsovereenkomst Beroepsgoederenvervoer over de weg en verhuur van mobiele kranen (Collective Labour Agreement for Professional Goods Transport by Road and Mobile Crane Rental; 'the "Professional Goods Transport" CLA), by contrast, was declared universally applicable from 31 January 2013 until 31 December 2013. The besluit van de Minister van Sociale Zaken en Werkgelegenheid (decree of the Minister for Social Affairs and Labour) of 25 January 2013 (Stcrt. 2013, No 2496) however exempted undertakings covered by the 'Goods Transport' CLA from the 'Professional Goods Transport' CLA. That exemption applied inter alia to Van den Bosch Transporten.

14 Under the heading 'Charter provision', Article 44 of the 'Goods Transport' CLA, the wording of which was almost identical to that of Article 73 of the 'Professional Goods Transport' CLA, stated:

'1. In subcontracts which are performed in or from their company established in the Netherlands by independent contractors acting as employers, employers must stipulate that the basic working conditions of [this collective labour agreement] will be granted to the workers of those independent contractors, where that stems from Directive 96/71[…], and that is the case even if the parties have chosen to apply to the contract a law other than that of the Netherlands.

2. Employers must inform the workers referred to in paragraph 1 of the working conditions that apply to them.

[…]'

15 Van den Bosch Transporten had concluded with Van den Bosch Transporte and Silo-Tank charter contracts for international transport operations.

16 Workers coming from Germany and Hungary, linked respectively to Van den Bosch Transporte and Silo-Tank by an employment contract, worked as drivers under those charter contracts. As a rule, at the material time in the main proceedings, the charter operations started in Erp and the journeys ended there. However, most of the transport operations carried out under the charter contracts at issue took place outside the territory of the Kingdom of the Netherlands.

17 The basic conditions of employment, stipulated as such in the 'Goods Transport' CLA, were not applied to drivers coming from Germany and Hungary.

18 The FNV brought an action against Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank, seeking an order requiring those companies to comply with the 'Goods Transport' CLA, in particular Article 44 thereof. According to the FNV, when Van den Bosch Transporten used drivers coming from Germany and Hungary, it had to apply to them, pursuant to that provision, the basic conditions of employment under that collective agreement, in their capacity as posted workers within the meaning of Directive 96/71.

19 By interim judgment delivered at first instance, it was held that the basic conditions of employment under the 'Goods Transport' CLA should indeed be applied to the drivers coming from Germany and Hungary used by Van den Bosch Transporten.

20 The appeal court set aside that interim judgment and referred the case back to the first court. It nevertheless rejected the argument put forward by Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank that Article 44 of the 'Goods Transport' CLA should be declared null and void, on the ground that the resulting obligation on them constituted an unjustified obstacle to the freedom to provide services guaranteed in Article 56 TFEU. In support of that decision, the appeal court held, in essence, that, although that collective agreement had not been declared universally applicable, the undertakings covered by it were exempt from the 'Professional Goods Transport' CLA, which is itself universally applicable and Article 73 of which is, in essence, identical to Article 44 of the 'Goods Transport' CLA and the content of which, as to the remainder, is practically identical to that of the latter collective labour agreement. Thus, in particular as regards the obligation that must also apply to subcontractors, the 'Goods Transport' CLA has the same effect as the 'Professional Goods Transport' CLA, the period of validity of those two agreements expiring, moreover, on the same date. From a substantive point of view, therefore, the 'Goods Transport' CLA should be treated in the same way as if it had indeed been declared universally applicable, in relation both to contractors in the sector concerned established in the Kingdom of the Netherlands and to all foreign charterers.

21 According to the appeal court, it follows that Article 44 of the 'Goods Transport' CLA cannot be considered to be an unjustified obstacle to the freedom to provide services within the meaning of Article 56 TFEU.

22 Moreover, the appeal court took the view that in order for subcontractors to be required, under Article 44 of the 'Goods Transport' CLA, to grant workers the conditions of employment provided for by that collective agreement, the subcontracts in question must be covered by Directive 96/71. In that regard, Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank submitted before that court that the expression 'post […] to the territory of a Member State', within the meaning of Article 1(1) and (3) of Directive 96/71, must be interpreted literally, whereas, according to the FNV, that expression must be construed broadly as also covering the situation where the posting occurs 'to or from the territory of a Member State'. In such a situation, it is immaterial in which Member States the driver concerned actually performs his or her successive tasks in the course of the charter operation.

23 The appeal court took the view that a literal interpretation of Article 1(1) and (3) of Directive 96/71 should prevail, with the result that charter operations such as those at issue in the present case fell outside the scope of that directive, as only charter operations carried out, at least primarily, 'in the territory' of another Member State are covered.

24 The FNV brought an appeal before the referring court, the Hoge Raad der Nederlanden (Supreme Court, Netherlands), against that decision of the appeal court, in so far as it is based on a literal interpretation of Article 1(1) and (3) of Directive 96/71. Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank submitted a cross-appeal, in so far as the appeal court decided that Article 44 of the 'Goods Transport' CLA cannot be considered to be an unjustified obstacle to the freedom to provide services.

25 The referring court states that the main appeal raises, inter alia, the question of the interpretation of the expression 'to the territory of a Member State' for the purposes of Article 1(1) and (3) and Article 2(1) of Directive 96/71 in the case of international road transport operations,

such as those carried on by Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank. That interpretation is decisive for the purpose of ascertaining whether drivers operating in international road transport, such as those at issue in the present case, fall within the scope of Directive 96/71. To that end, it is appropriate, at the outset, to enquire whether Directive 96/71 applies to international road transport.

26 According to the referring court, moreover, the main appeal raises the question of whether the fact that the undertakings posting the workers concerned are affiliated, in this case within a group, to the company to which those workers are posted is relevant for the purpose of interpreting the abovementioned provisions of Directive 96/71.

27 In addition, in that appeal, it is argued, in the alternative, that the appeal court failed to have regard to the fact that some of the journeys made by Van den Bosch Transporte and Silo-Tank for Van den Bosch Transporten took place entirely within the territory of the Kingdom of the Netherlands in the context of cabotage operations. The question therefore arises as to whether such transport operations fall within the scope of Directive 96/71.

28 Finally, the referring court states that the cross-appeal was brought in case that court should uphold, in whole or in part, the main appeal. The ground of appeal put forward in support of the cross-appeal also raises questions of interpretation requiring questions to be referred to the Court for a preliminary ruling.

29 In those circumstances the Hoge Raad der Nederlanden (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Directive 96/71[…] be interpreted as meaning that it also applies to a worker who works as a driver in international road transport and thus carries out his or her work in more than one Member State?

2. (a) If the answer to Question 1 is in the affirmative, what criterion or considerations should be used to determine whether a worker working as a driver in international road transport is posted “to the territory of a Member State” as referred to in Article 1(1) and (3) of [Directive 96/71], and whether that worker “for a limited period, carries out his [or her] work in the territory of a Member State other than the State in which he [or she] normally works” as referred to in Article 2(1) of [Directive 96/71]?

(b) When answering Question 2(a), should any significance be attached to the fact that the undertaking posting the worker referred to in Question 2(a) is affiliated – for example, in a group of companies – to the undertaking to which that worker is posted and, if so, what should that significance be?

(c) If the work undertaken by the worker referred to in Question 2(a) relates partly to cabotage transport – that is to say to transport carried out exclusively in the territory of a Member State other than that in which that worker [normally] works – will that worker then in any case for that part of his or her work, be considered to be working temporarily in the territory of the first Member State? If so, does a lower limit apply in that regard, for example, in the form of a minimum period per month in which that cabotage transport takes place?

3. (a) If the answer to Question 1 is in the affirmative, how should the term “collective agreements […] which have been declared universally applicable”, as referred to in Article 3(1) and the first subparagraph of Article 3(8) of [Directive 96/71], be interpreted? Is that an autonomous

concept of EU law and is it therefore sufficient that the conditions laid down in the first subparagraph of Article 3(8) of [Directive 96/71] have for practical purposes been met, or do those provisions also require that the collective labour agreement was declared universally applicable on the basis of national law?

(b) If a collective labour agreement cannot be regarded as a universally applicable collective labour agreement within the meaning of Article 3(1) and the first subparagraph of Article 3(8) of [Directive 96/71], does Article 56 TFEU preclude an undertaking which is established in a Member State and which posts a worker to the territory of another Member State from being obliged by contractual means to comply with the provisions of such a collective labour agreement which is in force in the latter Member State?'

Consideration of the questions referred

The first question

30 By Question 1, the referring court asks, in essence, whether Directive 96/71 must be interpreted as applying to the transnational provision of services in the road transport sector.

31 As is apparent from Article 1(1) and (3) of Directive 96/71, read in the light of recital 4 thereof, that directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services which may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract, post workers to the territory of a Member State.

32 Article 1(2) of Directive 96/71 excludes from the scope of that directive only the provision of services involving merchant navy seagoing personnel.

33 It follows that, with the exception of the latter provision of services, the directive applies, as a rule, to any transnational provision of services involving the posting of workers, irrespective of the economic sector to which that provision of services relates, including, therefore, in the road transport sector.

34 That interpretation is supported by Article 2(1) of Directive 96/71, as that provision defines the concept of 'posted worker', within the meaning of that directive, as covering 'a worker' who, for a limited period, carries out work in the territory of a Member State other than the State in which he or she normally works, without that provision making reference to any restriction as to the worker's sector of activity.

35 The applicability of Directive 96/71 to the road transport sector is expressly confirmed by other acts of EU law, such as Directive 2014/67, Article 9(1)(b) of which identifies, among the administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out, inter alia, in Directive 96/71, measures specifically aimed at 'mobile workers in the transport sector' and Directive 2020/1057, recital 7 of which states that the provisions on the posting of workers in Directive 96/71 'apply to the road transport sector'.

36 In their observations, Van den Bosch Transporten, Van den Bosch Transporte and Silo-Tank as well as the Hungarian and Polish Governments contend, however, that the provisions that established the freedom to provide services and served as the basis for the adoption of Directive

96/71 exclude the carriage of goods by road from the scope of that directive. Consequently, Article 1(1) of Directive 96/71, according to which that directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, should be interpreted as covering the 'provision of services' within the meaning of Article 56 TFEU, which does not include freedom to provide services in the field of transport, since that freedom is specifically governed by the provisions of the Title of the FEU Treaty relating to transport, namely Articles 90 to 100 thereof.

37 In that regard, it should be borne in mind that it is true that free movement of services in the transport sector is governed not by Article 56 TFEU, which concerns freedom to provide services in general, but by the provisions of the Title of the FEU Treaty relating to transport, to which Article 58(1) TFEU refers (see, to that effect, judgment of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraph 24 and the case-law cited).

38 It must be noted, however, that, as stated in paragraph 33 above, Directive 96/71 is of general application. Furthermore, as is apparent from recital 1 thereof, that directive seeks to abolish, as between Member States, obstacles to the free movement of persons and services and, as stated in recital 5 thereof, the need to promote the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.

39 Unlike, for instance, Regulation No 1072/2009, which, for the purposes of the principle of 'Community licence' enshrined in Articles 3 and 4 thereof, includes a set of 'common rules applicable to international transport to or from the territory of a Member State, or passing across the territory of one or more Member States' as well as 'conditions under which non-resident carriers may operate transport services within a Member State', within the meaning of Article 91(1)(a) and (b) TFEU (see, to that effect, Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 208), Directive 96/71 does not seek to introduce a common transport policy for the purposes of Article 91 TFEU. Nor does it include 'measures to improve transport safety' or 'appropriate provisions' in the field of transport, within the meaning of Article 91(1)(c) and (d) TFEU.

40 It follows from the foregoing that the fact that Directive 96/71 is based on provisions of the EC Treaty relating to the freedom to provide services without its legal basis including, in addition, provisions relating to transport cannot exclude from its scope the transnational provision of services in the sector of road transport activities, in particular, goods transport.

41 In the light of all of the foregoing, the answer to Question 1 is that Directive 96/71 must be interpreted as applying to the transnational provision of services in the road transport sector.

The second question

Question 2(a)

42 By Question 2(a), the referring court asks, in essence, under which conditions a worker working as a driver in international road transport under a charter contract between the undertaking which employs that worker, established in one Member State, and an undertaking operating in another Member State is considered to be a worker posted to the territory of a Member State, for the purposes of Article 1(1) and (3) and Article 2(1) of Directive 96/71.

43 As recalled in paragraph 31 above, it follows from Article 1(1) and (3) of Directive 96/71, read in the light of recital 4 thereof, that that directive applies to undertakings established in a

Member State which, in the framework of the transnational provision of services which may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract, post workers to the territory of a Member State.

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

45 A worker cannot, in the light of Directive 96/71, be considered to be posted to the territory of a Member State unless the performance of his or her work has a sufficient connection with that territory (see, to that effect, judgment of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraph 31), which presupposes that an overall assessment of all the factors that characterise the activity of the worker concerned is carried out.

46 In that regard, it is important to note that the existence of such a connection with the territory concerned may become apparent inter alia from the characteristics of the provision of services to which the worker in question has been assigned. The nature of the activities carried out by that worker in the territory of the Member State concerned also constitutes a relevant factor for the purposes of determining whether such a connection exists.

47 As regards mobile workers such as drivers working in international road transport, the degree of connection between the activities carried out by such a worker, in the framework of the provision of the transport service to which that worker has been assigned, and the territory of each Member State concerned is also relevant for those purposes.

48 The same is true of the proportion represented by those activities in the entire service provision in question. In that regard, operations involving loading or unloading goods, maintenance or cleaning of transport vehicles are relevant provided that they are actually carried out by the driver concerned, and not by third parties.

49 By contrast, a worker who provides very limited services in the territory of the Member State to which that worker is sent cannot be regarded as 'posted' within the meaning of Directive 96/71 (see, to that effect, judgment of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraph 31). This applies to a driver who, in the course of goods transport by road, merely transits through the territory of a Member State. The same would also be true of a driver carrying out only cross-border transport operations from the Member State where the transport undertaking is established to the territory of another Member State or vice versa.

50 Moreover, the fact that a driver working in international road transport, who has been hired out by an undertaking established in one Member State to an undertaking established in another Member State, receives the instructions related to his or her tasks, starts or finishes them at the place of business of that second undertaking is not sufficient in itself to consider that that driver has been 'posted' to the territory of that other Member State, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.

51 In the light of all of the foregoing, the answer to Question 2(a) is that Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that a worker working as a driver in the international road transport sector under a charter contract between the undertaking which employs that worker, established in one Member State, and an undertaking located in a Member

State other than that in which the person concerned normally works is a worker posted to the territory of a Member State for the purposes of those provisions, where the performance of that person's work has a sufficient connection with that territory for the limited period at issue. The existence of such a connection is determined in the context of an overall assessment of factors such as the nature of the activities carried out by the worker concerned in that territory, the degree of connection between the worker's activities and the territory of each Member State in which the worker operates, and the proportion represented by those activities in the entire transport service.

52 The fact that a driver working in international road transport, who has been hired out by an undertaking established in one Member State to an undertaking established in another Member State, receives the instructions related to his or her tasks, starts or finishes them at the place of business of that second undertaking is not sufficient in itself to consider that that driver has been posted to the territory of that other Member State for the purposes of Directive 96/71, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.

Question 2(b)

53 By Question 2(b), the referring court asks, in essence, whether Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that the existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers is relevant in order to determine whether there has been a posting of workers.

54 In that regard, it is appropriate to note that, admittedly, under Article 1(3)(b) of that directive, the directive applies to the posting of workers to an establishment or an undertaking owned by the group in the territory of a Member State, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting.

55 Although Directive 96/71 thus expressly covers postings within a group of undertakings, the fact remains, however, that, as is apparent from paragraph 51 above, status as a posted worker is determined according to whether there is a sufficient connection between the performance of that person's work and the territory of a Member State other than the State in which the worker normally works.

56 The existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers does not, as such, determine the degree of connection with the territory of a Member State to which the worker concerned is sent and, therefore, does not determine whether the connection between that worker's performance of his or her work and that territory is sufficient in order to establish whether there has been a posting under Directive 96/71.

57 Consequently, the answer to Question 2(b) is that Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that the existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers is not, as such, relevant in order to determine whether there has been a posting of workers.

Question 2(c)

58 By Question 2(c), the referring court asks, in essence, whether Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that a worker working as a driver in the road transport sector, who, under a charter contract between the undertaking which employs that driver, established in one Member State, and an undertaking located in another Member State,

carries out cabotage operations in the territory of a Member State other than the Member State in which he or she normally works, may be regarded as being posted to the territory of the Member State in which those operations are carried out and, if so, whether there is, in that regard, a minimum threshold regarding the length of those operations.

59 In that regard, it should be noted at the outset that Directive 96/71 must be read in conjunction with Regulation No 1072/2009, recital 17 of which states that that directive applies to transport undertakings performing a cabotage operation.

60 Under Article 2(3) and (6) of Regulation No 1072/2009, cabotage operations are defined as national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with that regulation, a host Member State being the Member State in which a haulier operates other than the haulier's Member State of establishment.

61 As regards the conditions under which non-resident hauliers may carry out cabotage operations in a host Member State, Article 8(2) of Regulation No 1072/2009 provides that those hauliers are permitted to carry out, in the host Member State, up to three cabotage operations following the international carriage to that State, within seven days from the last unloading that took place in that State in the course of the incoming international carriage.

62 It follows from the three preceding paragraphs that cabotage operations take place entirely within the territory of the host Member State, which permits the inference that the driver's performance of his or her work in the course of such operations has a sufficient connection with that territory.

63 It follows that a driver carrying out such transport operations must, as a rule, be regarded as being posted to the territory of the host Member State for the purposes of Article 2(1) of Directive 96/71.

64 As regards the duration of such cabotage operations, although that duration is not capable, as such, of calling into question the existence of a sufficient connection between the performance of the work of the driver carrying out those operations and the territory of the host Member State, that finding is, however, without prejudice to the application of Article 3(3) of Directive 96/71.

65 Consequently, the answer to Question 2(c) is that Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that a worker working as a driver in the road transport sector, who, under a charter contract between the undertaking which employs that worker, established in one Member State, and an undertaking located in another Member State, carries out cabotage operations in the territory of a Member State other than the Member State in which he or she normally works, must, as a rule, be regarded as being posted to the territory of the Member State in which those operations are carried out. The duration of cabotage operations is irrelevant when determining whether there has been such a posting, without prejudice to the possible application of Article 3(3) of that directive.

The third question

Question 3(a)

66 By Question 3(a), the referring court asks, in essence, whether Article 3(1) and (8) of Directive 96/71 is to be interpreted as meaning that the question of whether a collective agreement

has been declared universally applicable must be assessed by reference to the applicable national law.

67 It should be borne in mind that, according to the second indent of Article 3(1) of Directive 96/71, Member States are to ensure that undertakings posting workers guarantee workers posted to their territory the terms and conditions of employment which, in the Member State where the work is carried out, are laid down, inter alia, by collective agreements which have been declared universally applicable, within the meaning of Article 3(8), in so far as they concern the construction activities referred to in the annex to that directive. Under the second indent of Article 3(10) of that directive, Member States may apply to national undertakings and to the undertakings of other Member States, on a basis of equality of treatment, terms and conditions of employment laid down, inter alia, in collective agreements referred to in Article 3(8), concerning activities other than those in the construction sector.

68 Under Article 3(8) of Directive 96/71, 'collective agreements […] which have been declared universally applicable' means collective agreements which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

69 In that regard, as the Advocate General observed, in essence, in point 129 of his Opinion, while it is true that Article 3(1) of Directive 96/71 does not expressly refer to national law, the fact remains that it does so implicitly, since that provision requires the collective labour agreement at issue to have been declared universally applicable. Such a declaration can be made only in accordance with the law of the Member State concerned.

70 That finding is confirmed by the wording of the second subparagraph of Article 3(8) of that directive. By providing that, in the absence of a system for declaring collective agreements to be of universal application, Member States may base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory, the EU legislature necessarily referred to a national system.

71 In the present case, it is apparent from the order for reference that undertakings operating in the goods transport sector are covered by the 'Goods Transport' CLA. Admittedly, this collective agreement has not, as such, been declared universally applicable. That being said, compliance with that agreement was a precondition for exemption from the 'Professional Goods Transport' CLA which, for its part, had been declared universally applicable. In addition, the content of the provisions of those two collective agreements was practically identical. It is thus apparent that compliance with those provisions was required of all undertakings operating in the goods transport sector.

72 It follows from the foregoing that the answer to Question 3(a) is that Article 3(1) and (8) of Directive 96/71 must be interpreted as meaning that the question of whether a collective agreement has been declared universally applicable must be assessed by reference to the applicable national law. A collective labour agreement which has not been declared universally applicable, but compliance with which is a precondition, for undertakings covered by it, for exemption from another collective labour agreement which, for its part, has been declared universally applicable and the provisions of which are essentially identical to those of that other collective labour agreement, falls within the definition referred to in Article 3(1) and (8) of Directive 96/71.

Question 3(b)

73 In view of the answer to Question 3(a), there is no need to answer Question 3(b).

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as applying to the transnational provision of services in the road transport sector.**

2. **Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that a worker working as a driver in the international road transport sector under a charter contract between the undertaking which employs that worker, established in one Member State, and an undertaking located in a Member State other than that in which the person concerned normally works is a worker posted to the territory of a Member State for the purposes of those provisions, where the performance of that person's work has a sufficient connection with that territory for the limited period at issue. The existence of such a connection is determined in the context of an overall assessment of factors such as the nature of the activities carried out by the worker concerned in that territory, the degree of connection between the worker's activities and the territory of each Member State in which the worker operates, and the proportion represented by those activities in the entire transport service.**

The fact that a driver working in international road transport, who has been hired out by an undertaking established in one Member State to an undertaking established in another Member State, receives the instructions related to his or her tasks, starts or finishes them at the place of business of that second undertaking is not sufficient in itself to consider that that driver has been posted to the territory of that other Member State for the purposes of Directive 96/71, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.

3. **Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that the existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers is not, as such, relevant in order to determine whether there has been a posting of workers.**

4. **Article 1(1) and (3) and Article 2(1) of Directive 96/71 must be interpreted as meaning that a worker working as a driver in the road transport sector, who, under a charter contract between the undertaking which employs that worker, established in one Member State, and an undertaking located in another Member State, carries out cabotage operations in the territory of a Member State other than the Member State in which he or she normally works, must, as a rule, be regarded as being posted to the territory of the Member State in which those operations are carried out. The duration of cabotage operations is irrelevant when determining whether there has been such a posting, without prejudice to the possible application of Article 3(3) of that directive.**

5. **Article 3(1) and (8) of Directive 96/71 must be interpreted as meaning that the question of whether a collective agreement has been declared universally applicable must be assessed by reference to the applicable national law. A collective labour agreement which has not been declared universally applicable, but compliance with which is a precondition, for undertakings covered by it, for exemption from another collective labour agreement which, for its part, has been declared universally applicable and the provisions of which are essentially identical to those of that other collective labour agreement, falls within the definition referred to in Article 3(1) and (8) of Directive 96/71.**

[Signatures]

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* Language of the case: Dutch.