

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 29 July 2019⁽¹⁾

Case C-16/18

Michael Dobersberger
joined parties:
Magistrat der Stadt Wien

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Request for a preliminary ruling — Provision of catering services on board of international trains — Directive 96/71/EC — Scope — Freedom to provide services — Article 56 TFEU)

I. Introduction

1. In her novel ‘Murder on the Orient Express’, published in 1934, Agatha Christie did not broach the issue of the exact place where the murder had been committed. All that is known is that it took place on a train, the Orient Express, on its Simplon-route, which crosses several countries on its journey from Istanbul to Calais, at some point before or after the train was stopped in then-Yugoslavia. The reader is, however, left in the dark as to the question in which country it occurred. This question, which would have been of crucial importance for subsequent criminal proceedings, in order to determine which national criminal law is applicable, was clearly not within the remit of Hercule Poirot’s investigation. And indeed, for the pace and thrill of the story, it was surely negligible. For Agatha Christie, geography did not matter.

2. The question which is at the heart of the present request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) is less intriguing, but more important for the functioning of the internal market and the freedom to provide services: are the provisions of the ‘Posted-Workers-Directive’, that is to say Directive 96/71/EC ⁽²⁾, applicable to a situation in which an international train crosses Austria on its way from Budapest to Munich, the consequence being that, just as on the Orient Express, every border crossing would have legal implications? Perhaps not for the definition of murder, but definitely for the application of labour and labour-related criminal law.

3. In this Opinion I shall argue that a situation such as that of the main proceedings does not fall within the scope of Directive 96/71. In the present case, too, geography does not matter.

II. Legal framework

A. EU law

4. Article 1 of Directive 96/71, headed 'Scope', provides as follows:

'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.

4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.'

5. Pursuant to Article 2 of Directive 96/71, bearing the title 'Definition':

'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, headed 'Terms and conditions of employment', stipulates, in paragraph 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, insofar 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.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.'

B. Austrian law

7. Article 7b of the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract law), (3) in the version applicable to the dispute in the main proceedings ('the AVRAG'), deals with the rights of employees against foreign employers based in a Member State of the European Union or the European Economic Area. In essence, it provides that a worker who is posted to work in Austria by an employer who has his registered office in a Member State of the European Union or of the European Economic Area other than Austria is automatically to have the right, during the period of posting and without prejudice to the laws and regulations applicable to the employment relationship, to at least the statutory minimum remuneration, fixed by regulation or by a collective agreement, which, in the workplace, must be paid to comparable workers by comparable employers. Moreover, a person having his registered office in a Member State of the European Union or of the European Economic Area other than Austria is to be considered to be an employer in respect of workers placed at his disposal who are posted to Austria for the purpose of performing work. Employers are required to declare, at least one week before the start of the work in question, the use of workers who have been posted to work in Austria. Such a declaration is to be made separately for each secondment and is to contain the following information: (i) name, address and professional licence or purpose of the employer's business; (ii) the overall period covered by the secondment, as well as the beginning and foreseeable duration of employment of the different workers in Austria, the normal working time and place conditions agreed for the different workers; (iii) the amount of remuneration due to the individual workers under Austrian legal provisions and the beginning of the employment relationship with the employer; (iv) the place (exact address) of employment in Austria (also other places of intervention in Austria); and (v) the type of activity and use of the worker, taking into account the relevant Austrian collective contract. Where there is no obligation for posted workers to join social security in Austria, employers are required to keep available documents relating to the workers' declaration to social security (social security document E 101 pursuant to Regulation (EEC) No 1408/71, (4) social security document A1 in accordance with Regulation (EC) No 883/04), (5) as well as a copy of the declaration of posting at the place of performance of the work (or intervention) on the national territory or to make them directly accessible in electronic form to the services of the authority responsible for collecting the contributions.

8. With regard to the obligation to make wage documents available, Article 7d of the AVRAG provides, in particular, that, throughout the period of secondment, employers are required to keep the employment contract or service slip, the wage slip, available at the place of performance of the work in German, proof of payment of wages or bank transfers, wage statements, time sheets, records of hours worked and documents relating to classification in the wage grid, so that it can be verified that the posted worker receives, for the duration of the employment, the wages due to him/her in accordance with the legal provisions.

III. Facts, procedure and questions referred

9. From 2012 to 2016, Henry am Zug Hungary Kft. ('Henry am Zug'), established in Budapest (Hungary), posted workers with Hungarian citizenship, who were in most cases hired out to it by another Hungarian undertaking, to Austria in order to carry out work (on-board service, preparation and sale of food and drinks) in trains of the Österreichische Bundesbahnen (the Austrian Federal Railways, 'the ÖBB').

10. By way of the contested sentences in criminal administrative proceedings, Mr Dobersberger, the appellant on a point of law, as managing director of Henry am Zug, was found guilty on the basis of the fact that, on 28 January 2016, Henry am Zug, in its capacity as employer within the meaning of Article 7b of the AVRAG, during a check at Vienna Central Station (Austria), and contrary to this provision, (i) had not provided any notification to the competent Austrian authority regarding the aforementioned employment of the posted workers by a time one week in advance of the commencement of work in Austria, (ii) had not retained at the place of deployment within Austria documents relating to the workers' social security registration, and (iii) had not retained at the aforementioned place of deployment the employment contracts, documents evidencing the payment of wages and documents relating to the wage categories, in German.

11. The contract to provide the aforementioned services had been awarded by the ÖBB to D. GmbH (an undertaking established in Austria) and had been passed on by D. to Henry am Zug by way of subcontracts or a subcontracting chain (via a further company established in Austria). Henry am Zug provided the services with the Hungarian workers in ÖBB trains travelling to Salzburg or Munich, each of which had their starting or terminating station in Budapest and stopped at Vienna Central Station.

12. The Verwaltungsgerichtshof (Supreme Administrative Court) considers that the success of the appeal on a point of law hinges on the interpretation of the provisions of Directive 96/71 and of Article 56 TFEU. By order of 15 December 2017, received at the Court on 9 January 2018, it referred the following questions for a preliminary ruling:

- '(1) Does the scope of Directive 96/71, in particular Article 1(3)(a), also cover the provision of services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting (Hungary) in performance of a contract with a railway undertaking established in the host Member State (Austria) when these services are provided on international trains which also travel through the host Member State?
- (2) Does Article 1(3)(a) of the Directive also cover the situation where the service-providing undertaking established in the Member State of posting provides the services mentioned in Question 1 not in performance of a contract with the railway undertaking established in the host Member State, which is the ultimate beneficiary of the services (recipient of the services), but rather in performance of a contract with another undertaking based in the host Member State which, in turn, is in a contractual relationship (subcontracting chain) with the railway undertaking?
- (3) Does Article 1(3)(a) of the Directive also cover the situation where, to provide the services mentioned in Question 1, the service-providing undertaking established in the Member State of posting does not use its own workers but uses workers of another undertaking which were hired out to it back in the Member State of posting?
- (4) Irrespective of the answers to Questions 1 to 3: Does EU law, in particular the freedom to provide services (Articles 56 and 57 TFEU), preclude a provision of national law which also mandatorily requires undertakings which post workers to the territory of another Member State for the purpose of providing a service to comply with terms and conditions of employment within the meaning of Article 3(1) of the Directive and to comply with accompanying obligations (such as, in particular, the obligation to provide a notification regarding the cross-border posting of workers to a public authority in the host Member State and the obligation to retain documents relating to the level of remuneration and to the social security registration of these workers) in situations in which (firstly) the workers posted across borders form part of the mobile staff of a railway undertaking that is active on a cross-border basis or of an undertaking which provides services typical for a railway undertaking (provision of food and drink to passengers, on-board service) on that undertaking's trains which cross the borders of the Member States, and in which (secondly) the posting is based either on no service contract at all or at least on no service contract between the undertaking making the posting and the recipient of the services which is active in another Member State, because the posting undertaking's obligation to provide services to the recipient of the services which is active in another Member State is established by way of

subcontracts (a subcontracting chain), and in which (thirdly) the posted worker is not in an employment relationship with the undertaking making the posting but rather is in an employment relationship with a third-party undertaking which has hired out its workers to the undertaking making the posting back in the Member State in which the posting undertaking is established?’

13. Written observations were lodged by Mr Dobersberger, the Austrian, Czech, German, French, Hungarian, and Polish Governments and the European Commission. Those parties, with the exception of the French and Polish Governments, were represented at the hearing that was held on 12 March 2019.

IV. Assessment

14. This case raises issues on Directive 96/71, which are of a fundamental nature: to what extent does the directive apply to an undertaking in a situation where the posted worker fulfils his duties on a train which departs from and arrives back at the country of origin, a train which the worker, figuratively speaking, never leaves?

A. Admissibility of questions

15. The French Government disputes the admissibility of the first three questions referred to us for a preliminary ruling, arguing essentially that Directive 96/71 does not govern the control measures implemented by national authorities to ensure compliance with working and employment conditions. It refers in this connection to the judgment in *De Clercq and Others*. (6)

16. As a rule, references for a preliminary ruling are admissible and it is only in rare and extreme cases that the Court refuses to give an answer to them. (7) Such references enjoy a presumption of relevance. (8) In what the Court itself describes as ‘exceptional circumstances’ (9) the Court has thus declined to answer questions in hypothetical cases, when the questions raised were not relevant to the resolution of the dispute, where the questions were not articulated sufficiently clearly or where the facts were insufficiently clear. (10)

17. The case at issue does not fall under any of these categories. Besides, as the German Government rightly stressed during the hearing, *De Clercq and Others* (11) was about monitoring measures whereas Questions 1 to 3 in the present proceedings address the wider issue of the applicability of Directive 96/71 to a situation such as the one in the main proceedings.

18. All questions posed by the referring court are therefore admissible.

B. Directive 96/71 and the freedom to provide services

19. Before addressing the four questions of the referring court, I deem it helpful to recall, by way of preliminary remarks, some of the essential characteristics of Directive 96/71, from which I will draw upon in the analysis that follows.

20. There is an underlying tension between the internal market freedoms, in particular, the freedom to provide services pursuant to Article 56 TFEU, and Directive 96/71 which, while seemingly settled by the Court in its case-law and the legislature, nevertheless presents a certain friction.

1. Objectives

21. The internal market, which constitutes – depending on one’s perspective – the means or the end of the process of European integration, is so fundamental to the Union’s legal order that it is taken as a given and constitutes no less than the central organisational principle of the Treaties. (12) As a rule, economic operators produce either on the basis of harmonised standards (13) or, in the absence of such standards, according to their local standards. In this second instance, a country-of-origin logic applies in that it is enough, as a rule, for an economic operator to comply with the local regulations. This enables economic operators to compete on a level playing field throughout the internal market.

22. The logic pursued by Directive 96/71 is, in essence, a wholly different one, as this directive seeks to mitigate some of the (normal) consequences of the application of the freedom to provide services: as regards certain aspects of labour law, it is not the country of origin but the country of destination principle which applies. This results in a natural legal tension between Article 56 TFEU (14) and Directive 96/71.

23. To the extent that the directive's recitals point to a threefold objective, which is the promotion of the transnational provision of services, (15) in a climate of fair competition, (16) and guaranteeing respect for the rights of workers, (17) it should be noted that these three are, as a matter of fact, diametrically opposed. (18) Guaranteeing respect for the rights of workers does not foster the transnational provision of services, but restricts it and in this context constitutes a ground of justification (i.e. an overriding reason relating to the public interest) for doing so.

24. As a consequence, I believe it is more coherent to consider Directive 96/71 as a measure which seeks to reconcile the opposing objectives of the freedom to provide services and the protection of the rights of workers.

25. But *which* workers are we talking about? The workers of the country of origin of the service provider who are *sent* to the country of destination in which the service is provided or the workers of the country of destination? Taking the directive at face value, it is surely those of the country of origin. (19) The underlying rationale of any form of posting is thus the following: a worker should not suffer, on a personal basis, any income or other labour-related loss vis-à-vis the local worker. The cost of living may be higher than that in the Member State of posting. That is why the country-of-destination principle applies in order to mitigate any possible discrimination.

26. Let us now take a step back and, for a minute, imagine that we are in the absence of harmonisation, that is to say that there is no Directive 96/71 and that a Member State (A) wants to subject to its labour laws workers of another Member State (B) posted in the context of the freedom to provide services to that Member State (A). Surely, this would constitute a restriction to the freedom to provide services. How could this restriction be justified? By invoking the rights of the workers of Member State (B)?

27. In such a situation, one could argue that it would be difficult to conceive that the overriding reason relating to the protection of workers of Member State (B) could be invoked by Member State (A). One could legitimately ask the question whether it is really for Member State (A) – in the context of posting as part of the freedom to provide services of the employer – to know what is best for the workers of Member State (B). Such an approach might appear patronising, if not overbearing. Besides, there is the delicate question of competence: one may argue that, as a matter of principle, a Member State (A) should only be able to protect workers habitually employed in that very Member State, whereas those employed in another Member State (B) and – in the context of the exercise of the freedom to provide services of their employer – posted to Member State (A) should not normally be those whom that Member State can protect. (20)

28. I would, however, argue that such concerns can be dispelled and that there is, moreover, long-standing case-law to the effect that a Member State can restrict the freedom to provide services in order to protect workers of the posting Member State. Indeed, the Court has held, concerning situations both prior to and following the implementation deadline of Directive 96/71, (21) that the 'protection of workers', (22) the 'general interest in providing workers with social security' (23) or the 'social protection of workers in the construction industry' (24) can justify restrictions to the fundamental freedoms, implying that it is workers of the Member State of origin/posting and not those of the host Member State who are at stake.

29. A paradigm-shift occurred in *Laval un Partneri*, (25) when the Court held that 'the protection of the workers of the *host State* against possible *social dumping* may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty'. (26) Apart from the fact that the Court did not further define or specify what is understood by 'social dumping', this case is noteworthy for three reasons. First, as regards the substance, the Court, with the notion of 'social

dumping’, introduces a new overriding reason relating to the public interest into its case-law. This is, of course, in principle, perfectly possible, as the overriding interests are not exhaustively enumerated and the Court is free to find new ones, in keeping pace with societal developments. Secondly, this newly-found overriding reason relating to the public interest is economic in nature, placing it at odds with the Court’s long-standing case-law that aims of a purely economic nature cannot constitute grounds of public interest, capable of justifying a restriction to a fundamental freedom. (27) Indeed, the prevention of ‘social dumping’ is more akin to the economic ground of justification of maintaining industrial peace – which has not been recognised by the Court as an overriding reason relating to the public interest. (28) Thirdly, as regards methodology, the Court did not explicitly state that ‘social dumping’ was henceforth to constitute a new overriding reason relating to the public interest. Rather, the Court inferred this new overriding reason relating to the *host* Member State from the existing case-law on the protection of workers of the *posting* Member State. However, ‘social dumping’ and the protection of workers of the posting Member State are two completely different matters.

30. I should like to stress that I fully understand and support the need to protect workers in the context of the freedom to provide services and would not call this into question in any way. By contrast, the notion of ‘social dumping’ ought to be handled with care and interpreted in a narrow manner. In an internal market which is characterised by the free flow of goods, services and factors of production, there is the inherent danger that ‘social dumping’ becomes more of a political term, rather than a legal one, a political term typically resorted to in economies with a well-developed infrastructure. Indeed, there is the danger that, in a one-sided manner, primarily the perspective of the host (Member) State is taken into account. (29) To put it bluntly, what is ‘social dumping’ for some is, quite simply, ‘employment’ for others.

31. If the concept of ‘social dumping’ is thus too broadly applied, this would amount to nothing less than the protection of domestic industry against cheaper competition from another Member State, a protection which normally cannot be maintained under Union law. (30) As the term ‘dumping’ implies, there must be a negative intention to eliminate competition – and not just to benefit from better conditions. However, the need to prevent ‘social dumping’ cannot be invoked against a service provider who simply turns the possibilities offered by the internal market to his economic advantage – and that of his client, the recipient of the services. (31) After all, the internal market is underpinned by the principle of comparative advantage. (32)

32. Coming back to Directive 96/71, if its purported objective is to protect posted workers, i.e. workers of the Member State of origin, I would contend that this is only part of the truth, for the directive also sets out to prevent ‘social dumping’.

2. *Legal basis and services in the field of transport*

33. Pursuant to Article 58(1) TFEU, freedom to provide services in the field of transport is governed by the provisions of the (Treaty) Title relating to transport, that is to say Part Three, Title VI, of the FEU Treaty. (33) Here, the standard legal basis for implementing the Union’s transport policy, which includes the freedom to provide services in the field of transport, is Article 91 TFEU. (34) I have pointed out elsewhere that the legal consequence of Article 58(1) TFEU is that the Treaty does not have direct effect when it comes to the provision of services in the field of transport, (35) which is a far-reaching legal consequence, for it deprives economic operators of the right to invoke Article 56 TFEU et seq. before national courts. (36) The application of the principles governing the freedom to provide services must therefore be achieved, according to the FEU Treaty, by introducing a common transport policy. (37) Once adopted, harmonisation measures are of course interpreted in the light of Article 56 TFEU. (38)

34. Against this background, I would have thought that harmonising services in the field of transport, even if as part of a wider harmonisation measure, would have to be based on Article 91 TFEU.

35. Yet, Directive 96/71 is based merely on Articles 53(1) and 62 TFEU and not, in addition, on Article 91 TFEU. The same goes for Directive 2014/67/EU. (39) The logical conclusion would be that these Directives do not harmonise services in the field of transport. Incidentally, Directive 2006/123,

the so-called ‘Services Directive’, which has the same legal bases as Directives 96/71 and 2014/67, specifically excludes services in the field of transport. (40) I would submit that this is so for the reason just stated: Articles 53(1) and 62 TFEU simply do not appear to cover services in the field of transport.

36. The EU legislature appears to be of a different view, however. For a start, Directive 96/71 excludes *expressis verbis* ‘merchant navy undertakings as regards seagoing personnel’ from the scope of the directive. (41) I will come back to this provision below, but I can state here already that if merchant navy undertakings are excluded, then, at least in principle, other services in the field of transport are meant to be included by the legislature. In a similar vein, Directive 2014/67 refers, as a matter of course, to ‘mobile workers in the transport sector’. (42)

37. Be that as it may, while one can only speculate why Article 91 TFEU was not included as a legal basis for the adoption of Directive 96/71, (43) services in the field of transport are commonly not considered to fall outside the scope of Directive 96/71. I do not intend to challenge it in this Opinion. (44) It does indeed appear to be received legal wisdom that services in the field of transport are, in principle, covered by the directive.

3. *In casu: services in the field of transport?*

38. As regards the specific services in question, I would nevertheless at this stage already like to examine whether or not they constitute ‘services in the field of transport’.

39. As I have already outlined above, pursuant to Article 58(1) TFEU, freedom to provide services in the field of transport is governed by the provisions of the (Treaty) Title relating to transport, that is to say Part Three, Title VI, of the FEU Treaty. (45)

40. Clearly, catering and cleaning services on a train do not constitute *transport services* in the sense of conveying people or objects from A to B. (46) However, the Court has stated that ‘services in the field of transport’ cover ‘not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel, but also any service inherently linked to such an act’. (47) In this vein, the Court has, for instance, qualified roadworthiness tests as ‘services in the field of transport’, (48) given that they ‘take place as a pre-condition, indispensable to the exercise of the main activity of transport’. (49)

41. I understand the Court’s case-law to imply that services that by their very nature constitute a (factual or legal) *conditio sine qua non* for the activity of transport are regarded as services in the field of transport.

42. This cannot be said of the services in question. The services at issue which are provided as on-board services are independent of the act of transport. People eat and drink anywhere — including on trains. Places must be kept clean — including trains. Serving food and beverages and cleaning trains is completely ancillary to the transport service. Or, to put it bluntly, drinks need not be served on a train and a train need not be cleaned in order for the transport to take place. If anything, it is the other way round. In conclusion, the mere fact that food and drinks are served *on* a means of transport and that that means of transport is cleaned does not imply that we are in the presence of a ‘service in the field of transport’.

C. *On the scope of Directive 96/71 – First question*

43. By its first question, the referring court wishes to know whether the scope of Directive 96/71, in particular Article 1(3)(a), covers services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting in performance of a contract with a railway undertaking established in the host Member State when these services are provided on international trains which also travel through the host Member State.

44. The views of the intervening parties can be grouped into three categories.

45. According to the first thesis, defended by Mr Dobersberger, the Hungarian, Polish and Czech Governments, on-board catering or cleaning services in trains do not fall within the scope of Directive 96/71. The opposite view is advanced by the Austrian, French and German Governments. Thirdly, the Commission assumes that Directive 96/71, with the exception of its provisions on minimum wage rates and minimum paid annual leave, contained in Article 3(1)(b) and (c) of that directive, is applicable to the provision of services such as those at issue in the main proceedings.

46. Article 1(1) of Directive 96/71 stipulates that it applies 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. Article 1(3)(a) of Directive 96/71 adds that the directive applies to the extent that the undertakings referred to in paragraph 1 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.

47. The crucial issue of the first question is whether workers are posted ‘to the territory’ of a Member State, that is to say to the territory of the Republic of Austria.

48. The wording of Article 1 of Directive 96/71 is, I would submit, inconclusive for the problem at hand. Certainly, the workers in question, while crossing Austria, are, legally and physically, in the territory of that Member State and, in principle, subject to that Member State’s jurisdiction. However, since they primarily physically stay on the train and return to their Member State of origin, I have difficulty in assuming that they are genuinely posted ‘to the territory’ of Austria. If anything, they are posted ‘to the territory’ of the train which, as it happens, passes through Austria.

49. In accordance with the settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation. (50)

50. The argument has been made, notably by the Austrian Government, that the services at issue in the main proceedings fall within the scope of Directive 96/71 because, pursuant to Article 1(2), the directive does not apply to merchant navy undertakings as regards seagoing personnel. Insofar as Directive 96/71 specifically removes this specific sector of activity from its scope, *a contrario* it must apply to all others.

51. I could only follow such a line of argumentation if the legislative history of Article 1(2) of Directive 96/71 shed any light on the matter. Alas, this is not the case, the legislative history, too, being inconclusive on this point.

52. Indeed, Article 1(2) of Directive 96/71, which neither figured in the Commission’s initial proposal (51) nor in the Parliament’s Opinion on first reading, was added by the Council in its Common Position (52) to the amended Commission proposal (53) and remained with the Council’s proposed wording until the adoption of the directive. There is no discernible evidence that this exception was to be exhaustive in the sense that it would pre-empt other possible exceptions. (54)

53. Mr Dobersberger contends that his point of view, according to which the present case is located outside the scope of Directive 96/71, is confirmed by the derogation provided for in the addendum to the minutes of the 1948th Council meeting held in Brussels on 24 September 1996 (9916/96 ADD 1). According to this addendum, a worker who is normally employed in the territory of two or more Member States and who forms part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water would not fall within the scope of Article 1(3)(a) of Directive 96/71. In such a case, there would be no secondment. Mr Dobersberger believes that that exception can only be understood to mean that not only the staff of a transport undertaking but also the staff of a service undertaking providing various services on the same means of transport are covered by that exception and are therefore excluded from the scope of Directive 96/71.

54. It goes without saying that the minutes of a Council meeting are not of a normative nature. Nevertheless, they provide a useful indication as to the intention and the understanding of the legislature and as to the interpretation of the texts it has adopted. And in this respect, the situation is so clear to me as to deduce two things: first, it is not only merchant navy undertakings as regards seagoing personnel that can be excluded from the scope of the directive and, secondly, mobile workers as in workers carrying out their duties *on* means of transport do not quite fit within the logic of the directive.

55. Next, the Austrian Government points to Article 9(1)(b) of Directive 2014/67 which, in the context of administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in Directives 2014/67 and 96/71, allows Member States to impose the obligation to keep or make available documents for mobile workers in the transport sector. From this, the Austrian Government infers that cross-border railway traffic is not excluded from the scope of application of Directive 96/71.

56. This argument, taken on its own, fails to convince me. It does not specify in any way what is understood by a 'mobile worker in the transport sector' or how far this notion goes. This is a question of interpretation. Ergo, the fact that, with respect to mobile workers in the transport sector, certain administrative requirements may be imposed on service providers says nothing about whether a situation as specific as that of the case at issue falls within the scope of Directive 96/71 or not. In other words, whether or not the case at issue falls under Directive 96/71 is a question of interpretation, which is not resolved outright by Article 9(1)(b) of Directive 2014/67.

57. The key to understanding and answering the first question lies in the insight that the situation of 'highly mobile workers', a term employed by the Czech Government in its submissions, does not fit the logic of Directive 96/71. The situation of highly mobile workers such as those in the case at issue is noticeably different from that of other mobile workers.

58. What differentiates such highly mobile workers from other mobile workers is that their place of work is, in reality, immaterial. It does not matter whether the means of transport on which they carry out their duties happens, at a specific point in time, to be in Hungary, Austria or Germany. Put differently, the entire logic of the country of origin (or posting) and the country of destination does not apply in such a situation, as there is no country of destination: the train departs in Budapest. It comes back to Budapest. If anything, the country of destination is Hungary itself. Country of origin and destination coincide. I fail to see how the situation of the workers of the case at issue differs from those working, say, on the Budapest tram.

59. In this context, I should like to recall that pursuant to Article 2(1) of Directive 96/71, the terms 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the Member State in which he normally works.

60. During the hearing, the view was defended, notably by the Hungarian Government, that in a situation such as the one of the main proceedings, it was not even possible to determine in which Member State the worker *normally* works, given that the situation on an international train is so specific, for the reasons described above. I would, however, not make such a far-reaching assertion. In my understanding, the place of *normal* work is Hungary. It is here and from here that the workers in question start their work, load the trains, keep account of the stocks and so forth. Crucially, it is here where they have their (economic) centre of life. It is here that they pay for their accommodation and buy their groceries. They are thus uniquely subject to the cost of living in Hungary. Their temporary presence in Austria during a given working day has no bearing on their cost of living.

61. As a consequence, the whole rationale of Directive 96/71 falls flat, this directive simply should not come into play.

62. Finally, I would briefly like to address the Commission's argument, according to which the directive applies in principle, but that, because of the particularities arising from the highly mobile nature of the cross-border services at issue in the main proceedings, as well as their insufficient link with the territory of the 'host' Member State, the application of minimum wage rates and rules on the minimum duration of paid leave are not justified. The Commission infers this from Article 56 TFEU, in the light of which it would like to interpret the directive.

63. I do not agree with such an approach.

64. Given the natural tension between Article 56 TFEU and Directive 96/71 which has been described above, interpreting that directive in the light of the freedom to provide services complicates matters rather than resolves them. Taken to the extreme, such an *à la carte* application of Directive 96/71 in the light of Article 56 TFEU could lead to none of the directive's provisions being applied. This would undermine legal certainty, for the directive was adopted precisely to prescribe carefully what is and is not allowed in the context of posting workers.

65. My proposed answer to the first question is therefore that Article 1(3) of Directive 96/71 does not cover services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting in performance of a contract with a railway undertaking established in the host Member State when these services are provided on international trains which also travel through the host Member State.

D. On subcontracting chains – Second and third questions

66. Given that the provisions of Directive 96/71 do not apply in a situation such as that of the main proceedings, the second and third questions are hypothetical and do not need to be answered by the Court – unless of course the Court should reach a different conclusion as regards the first question and be of the opinion that Directive 96/71 applies to the case at issue. In such a situation, the provisions of the directive subject of the second and third questions need to be examined.

67. The second and third questions have a similar theme, since they both concern subcontracting chains and the structure of contractual relationships at the various stages of the posting of workers.

1. The second question

68. By its second question, the referring court in essence enquires whether Article 1(3)(a) of Directive 96/71 covers the situation where the service-providing undertaking established in the Member State of posting provides the services not in performance of a contract with the undertaking established in the host Member State, which is the ultimate beneficiary of the services (recipient of the services), but rather in performance of a contract with another undertaking based in the host Member State which, in turn, is in a contractual relationship (subcontracting chain) with the railway undertaking.

69. This question is to be seen against the background of the national law transposing Directive 96/71. The referring court indirectly seeks to ascertain whether the directive has been correctly implemented into Austrian law.

70. It is in particular the terms 'under a contract concluded between the undertaking making the posting and the party for whom the services are intended' which are at stake at this point.

71. In fact, as has been described above, there is no contract *between* ÖBB and Henry am Zug, but these two undertakings are instead linked by a chain of three contracts: there is a contract between ÖBB and D. (established in Austria) for on-board service, the preparation and sale of food and drinks on ÖBB's trains, which has been passed on by D. to Henry am Zug (established in Hungary) by way of subcontracts via H. (a further undertaking established in Austria).

72. The question is whether this construct of subcontracts leads to the case at issue not being covered by Article 1(3)(a) of Directive 96/71.

73. I think not.

74. According to the referring court, the undertakings involved in the subcontracting chain are all established in Austria, the country to which the workers are posted. It cannot therefore matter whether ÖBB, on whose trains the workers carry out their services, or another undertaking operating in Austria, has concluded a contract with Henry am Zug. In any event, the posting takes place under a contract

between the posting undertaking Henry am Zug and a recipient of services operating in the host Member State.

75. Whether ÖBB and Henry am Zug are directly linked by one contract or through a chain of contracts amounts to the same thing. For the purposes of Article 1(3)(a), there is a contract *between* them.

2. *The third question*

76. By its third question, the referring court in essence seeks to ascertain whether Article 1(3)(a) of Directive 96/71 also covers the situation where the service-providing undertaking established in the Member State of posting does not use its own workers but workers of another undertaking which were hired out to it back in the Member State of posting.

77. This question, too, is to be seen against the background of the national law transposing Directive 96/71. Again, the referring court indirectly seeks to ascertain whether the directive has been correctly implemented into Austrian law.

78. This time it is the interpretation of the terms ‘provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting’ in respect of which the referring court seeks clarity.

79. As has been described above, Henry am Zug in part resorts to its own workers and in part to those from another company. The referring court assumes that this is not covered by Article 1(3)(c) of Directive 96/71, for lack of a cross-border element. Indeed, this hiring out took place within Hungary. (55)

80. It is true that the wording of Article 1(3)(a) of Directive 96/71 appears clear in that in no uncertain terms (‘provided’) (56) an ‘employment relationship between the undertaking making the posting and the worker during the period of posting’ is required. This would appear to point to an interpretation under which those workers, who are not directly employed by Henry am Zug itself, would not fall under Article 1(3)(a) of Directive 96/71. (57)

81. Clear as though the wording of this provision may appear, I would, however, propose to the Court to look beyond the wording of this provision. In my view, there can be no doubt as to the applicability of Directive 96/71, and this for the following reasons.

82. Considering the content and purpose of Directive 96/71, it is irrelevant to the exercise of the freedom to provide services whether an undertaking established in one Member State itself posts workers to another Member State or whether this is done indirectly by transferring them to another undertaking. In both cases there is the provision of a cross-border service which falls within the scope of Article 56 TFEU. The scope of Directive 96/71 should therefore be interpreted as covering all temporary posting operations subject to the freedom to provide services. As has been seen above, the purported purpose of Directive 96/71 is, inter alia, to ensure a ‘fair’ balance between, on the one hand, the freedom to provide services of undertakings posting workers and, on the other hand, the social protection of posted workers. For the need to allow posted workers in the host country to benefit from a minimum set of clearly defined protection rules it is not relevant whether the posted worker is sent directly by his employer to a host country or by an undertaking to which he has been posted. (58)

83. I therefore propose to answer the third question to the effect that Article 1(3)(a) of Directive 96/71 also covers the situation where the service-providing undertaking established in the Member State of posting does not use its own workers but workers of another undertaking which were hired out to it back in the Member State of posting.

E. *On Article 56 TFEU – Fourth question*

84. By its fourth question, the referring court seeks to ascertain whether Article 56 TFEU precludes a provision of national law which also mandatorily requires undertakings which post workers to the territory of another Member State for the purpose of providing a service to comply with terms and

conditions of employment within the meaning of Article 3(1) of Directive 96/71 and to comply with accompanying obligations (such as, in particular, the obligation to provide a notification regarding the cross-border posting of workers to a public authority in the host Member State and the obligation to retain documents relating to the level of remuneration and to the social security registration of these workers) in situations in which:

- firstly, the workers posted across borders form part of the mobile staff of a railway undertaking that is active on a cross-border basis or of an undertaking which provides services typical for a railway undertaking (provision of food and drink to passengers, on-board service) on that undertaking's trains that cross the borders of the Member States;
- secondly, the posting is based either on no service contract at all or at least on no service contract between the undertaking making the posting and the recipient of the services which is active in another Member State, because the posting undertaking's obligation to provide services to the recipient of the services which is active in another Member State is established by way of subcontracts (a subcontracting chain); and
- thirdly, the posted worker is not in an employment relationship with the undertaking making the posting but rather is in an employment relationship with a third-party undertaking which has hired out its workers to the undertaking making the posting back in the Member State in which the posting undertaking is established.

85. This question has been asked 'irrespective' of the answers to the first three questions. My analysis of the first question led me to the conclusion that Directive 96/71 is not applicable in the case at issue. I shall correspondingly limit my assessment of the fourth question to the alternative of Directive 96/71 not being applicable.

86. Before I turn to the examination of Article 56 TFEU, I should like to clarify that the yardstick for scrutiny is indeed Article 56 TFEU, and not Directive 2006/123.

1. On Directive 2006/123

87. Pursuant to Article 1(6) of Directive 2006/123, that directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law that respects Union law.

88. As the Court has held, Article 1(6) of Directive 2006/123 'does not distinguish between substantive rules of labour law, on the one hand, and rules relating to the measures provided for in order to ensure compliance with those substantive rules and those intended to ensure the effectiveness of the penalties imposed in the event of non-compliance with those rules, on the other'. [\(59\)](#)

89. Against this background, there can, in my view, be no doubt that the measure in question is covered by this provision and therefore falls outside the scope of Directive 2006/123. [\(60\)](#)

2. Restriction to the freedom to provide services

90. It is well known that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against service providers, but also the abolition of any restriction, even if it applies without distinction to national service providers and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services. [\(61\)](#)

91. Requiring an undertaking to comply with the Austrian measures in question undoubtedly constitutes a restriction to the freedom to provide services under this definition. Henry am Zug's activity is in effect rendered less advantageous in relation to its activities in Hungary.

92. In this connection, it should be stressed that the Court has found the following national measures to constitute a restriction under Article 56 TFEU: national measures requiring service

providers established in other Member States to obtain work permits for deploying their workers who were nationals of non-member States and who lawfully resided and worked in that other Member State, (62) visa requirements and prior controls of third-country nationals in the context of posting (63) and, specifically, an Austrian measure making the posting of workers who are nationals of a non-Member State by an undertaking in another Member State subject to the acquisition by that undertaking of a document known as an 'EU Posting Confirmation'. (64) None of the three cited cases fell under Directive 96/71, given that the posting of third-country nationals for the purposes of providing cross-border services was not harmonised at EU level. (65)

3. *Justification?*

93. However, it constitutes equally consistent case-law that such national legislation may be justified where it meets an overriding reason (66) relating to the public interest (i.e., there is a ground for justification) and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of that objective which it pursues and does not go beyond what is necessary in order to attain it (i.e., it is proportionate). (67)

94. The overriding reasons relating to the public interest, invoked by the Republic of Austria in order to justify the restriction of wage controls and the obligation to report postings and keep social security and wage documents available, i.e. the protection of workers, (68) the prevention of unfair competition (69) and combating fraud, have as such been recognised by the Court of Justice in its case-law.

95. As is indeed clear from cases such as *Seco and Desquenne & Giral*, (70) *Rush Portuguesa*, (71) *Guiot* (72) and *Arblade and Others*, (73) in the absence of harmonisation, Member States can, for example, oblige service providers who employ workers for the purpose of providing services to pay such workers the minimum remuneration applicable in the host Member State, even if such workers carry out their activity only temporarily in the territory of the host Member State and regardless of the country in which the employer is established. (74) Member States can also enforce such rules.

96. Echoing my analysis in the context of the first question, such case-law amounts, de facto, to obliging service providers and their personnel temporarily to establish themselves in the host Member State. In doing so, the freedom to provide services along with its country-of-origin principle is restricted considerably.

97. Be that as it may, if one were to accept, as regards the case at issue, and in line with the abovementioned case-law, that there are valid overriding reasons relating to the public interest which can be invoked by the Republic of Austria, this leaves us with the question whether the measures taken are proportionate in order to fulfil the objectives pursued. The assessment of the proportionality is ultimately to be carried out by the referring court.

98. On the basis of the information available, however, the measures at issue do not appear to me to be justified under Article 56 TFEU.

99. One must distinguish here, as does the question of the referring court, between the terms and conditions of employment of the workers and the accompanying obligations.

100. As regards, first, the terms and conditions of employment, i.e., provisions relating to pay (75), holidays and so forth, these appear to me to be difficult to justify, precisely because of the missing link with the territory of Austria.

101. As a consequence, the whole rationale of the accompanying obligations falls flat and they are therefore difficult to justify. The Austrian law in question places a whole range of obligations on an employer. While I would not take issue with the requirement to keep available documents relating to a worker's declaration to social security, I would assume that the following obligations are problematic: the obligation for employers to declare, at least one week before the start of the work in question, the use of workers who have been posted to work in Austria (first obligation) and the obligation for

employers to keep (i) the employment contract or service slip and the wage slip available at the place of performance of the work and in German, (ii) the proof of payment of wages or bank transfers, wage statements, time sheets, records of hours worked and documents relating to classification in the wage grid, so that it can be verified that the posted worker receives, for the duration of the employment, the wages due to him/her in accordance with the legal provisions (second obligation).

102. As regards the first obligation, I do not see why employers should declare one week in advance who is posted and, as for the second obligation, if the workers in question can be employed under Hungarian terms and conditions, it is not for the Austrian authorities to check whether these terms and conditions have been respected.

103. As a consequence, my proposed reply to the fourth question is that Article 56 TFEU precludes a national measure such as the one at issue in the main proceedings that makes the posting of workers conditional on compliance with accompanying obligations.

V. Conclusion

104. I therefore propose that the Court's answer to the questions referred for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) should be as follows:

Article 1(3) 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 does not cover services such as the provision of food and drink to passengers, on-board service or cleaning services by the workers of a service-providing undertaking established in the Member State of posting in performance of a contract with a railway undertaking established in the host Member State when these services are provided on international trains which also travel through the host Member State.

Article 56 TFEU precludes a provision of national law which also mandatorily requires undertakings which post workers to the territory of another Member State for the purpose of providing a service to comply with terms and conditions of employment within the meaning of Article 3(1) of Directive 96/71 and to comply with accompanying obligations (such as, in particular, the obligation to provide a notification regarding the cross-border posting of workers to a public authority in the host Member State and the obligation to retain documents relating to the level of remuneration and to the social security registration of these workers) in situations in which:

- firstly, the workers posted across borders form part of the mobile staff of a railway undertaking that is active on a cross-border basis or of an undertaking which provides services typical for a railway undertaking (provision of food and drink to passengers, on-board service) on that undertaking's trains that cross the borders of the Member States;
- secondly, the posting is based either on no service contract at all or at least on no service contract between the undertaking making the posting and the recipient of the services which is active in another Member State, because the posting undertaking's obligation to provide services to the recipient of the services which is active in another Member State is established by way of subcontracts (a subcontracting chain); and
- thirdly, the posted worker is not in an employment relationship with the undertaking making the posting but rather is in an employment relationship with a third-party undertaking which has hired out its workers to the undertaking making the posting back in the Member State in which the posting undertaking is established.

¹ Original language: English.

² Directive of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

[3](#) BGBl. 459/1993.

[4](#) Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 0416).

[5](#) Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

[6](#) Judgment of 3 December 2014 (C-315/13, EU:C:2014:2408, paragraphs 42 to 48).

[7](#) See my Opinion in *AY* (C-268/17, EU:C:2018:317, point 26).

[8](#) See, by way of example, judgment of 17 April 2018, *Krüsemann and Others* (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraph 24 and the case-law cited).

[9](#) See judgment of 5 June 1997, *Celestini* (C-105/94, EU:C:1997:277, paragraph 22).

[10](#) See *ibid* and the case-law cited.

[11](#) Judgment of 3 December 2014 (C-315/13, EU:C:2014:2408, paragraphs 42 to 48).

[12](#) See also my Opinion in *Joined Cases X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 1).

[13](#) As in: normative instruments in the sense of Article 288 TFEU, adopted upon a legal basis and following a procedure provided for by the FEU Treaty.

[14](#) Or, as the case may be, the provisions of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[15](#) See recital 5 of Directive 96/71. See, moreover, judgment of the EFTA Court of 20 March 2013, *Norway v Jonsson*, E-3/12 EFTA Ct. Rep., paragraph 58: ‘Directive 96/71 *primarily* intends to protect the free movement of services rather than the protection of workers.’ Emphasis added.

[16](#) *Ibid*.

[17](#) See recitals 5 and 13 of Directive 96/71.

[18](#) See Tscherner, E. M., *Arbeitsbeziehungen und Europäische Grundfreiheiten*, Sellier European law publishers, Munich, 2012, p. 63. See also Krebber, S., ‘Die Bedeutung von Entsenderichtlinie und Arbeitnehmer-Entsendegesetz für das Arbeitskollisionsrecht’, *Praxis des Internationalen Privat- und Verfahrensrechts (IPrax)*, 2001, pp. 22-28, at pp. 23-24.

[19](#) See also in this connection Opinion of Advocate General Mengozzi in *Laval un Partneri* (C-341/05, EU:C:2007:291, point 171) and Opinion of Advocate General Trstenjak in *Commission v Luxembourg* (C-319/06, EU:C:2007:516, point 33).

[20](#) In addition to this, one should bear in mind the provisions 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’), according to which an individual employment contract is governed by the law chosen by the parties (See Article 8(1) of the Rome I Regulation) or, to the extent that there has been no such choice ‘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.’ See Article 8(2) of the Rome I Regulation. On the interplay between that regulation and Directive 96/71, see Opinion of Advocate General Wahl in *Sähköalojen ammattiliitto* (C-396/13, EU:C:2014:2236, points 50 and 51).

[21](#) Directive 96/71 had to be transposed by 16 December 1999, see Article 7(1) of the directive.

[22](#) See, by way of example, judgments of 15 March 2001, *Mazzoleni and ISA* (C-165/98, EU:C:2001:162, paragraph 27); of 25 October 2001, *Finalarte and Others* (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraph 33); of 24 January 2002, *Portugaia Construções* (C-164/99, EU:C:2002:40, paragraph 20); and of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, paragraph 35).

[23](#) See judgment of 3 February 1982, *Seco and Desquenne & Giral* (62/81 and 63/81, EU:C:1982:34, paragraph 10).

[24](#) See judgments of 28 March 1996, *Guiot* (C-272/94, EU:C:1996:147, paragraph 15), and of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraph 51).

[25](#) Judgment of 18 December 2007 (C-341/05, EU:C:2007:809).

[26](#) *Ibid.*, paragraph 103. My emphasis.

[27](#) See, by way of example, judgments of 26 April 1988, *Bond van Adverteerders and Others* (352/85, EU:C:1988:196, paragraph 34); of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 123); and of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 121).

[28](#) See judgment of 5 June 1997, *SETTG* (C-398/95, EU:C:1997:282, paragraph 23).

[29](#) On the notion of ‘social dumping’, see also Ryszka, J., *Prawa społeczne pracowników a prawa pracodawców-przedsiębiorców na rynku wewnętrznym Unii Europejskiej*, C.H. Beck, Warsaw, 2018, pp. 277-278.

[30](#) See, in this sense, *Krebber, S.*, *op. cit.*, at pp. 23-24

[31](#) In this context, it should be recalled that the Court has held, with respect to the freedom of establishment, that ‘the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment’ and that ‘the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.’ See judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 27).

[32](#) See Müller-Graff, P.-Chr., ‘Die Verfassungsziele der Europäischen Union’, point 113, in Dausen, M. A., *Handbuch des EU-Wirtschaftsrechts, Band 1, EL 31*, C.H. Beck, Munich, 2016.

[33](#) Articles 90 to 100 TFEU.

[34](#) See Müller-Graff, P.-Chr., in R. Streinz (ed.), *EUV/AEUV*, C.H. Beck, 3rd edition, Munich, 2018, Artikel 58 AEUV, point 1.

[35](#) See judgment in *Parliament v Council* *Parliament v Council* *Parliament v Council* (13/83, EU:C:1985:220, paragraphs 62 and 63).

[36](#) See my Opinion in *Joined Cases Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, point 27).

[37](#) See judgment of 7 November 1991, *Pinaud Wieger* (C-17/90, EU:C:1991:416, paragraph 7). This does not, however, preclude a direct application of the Treaty provisions on *establishment*, see judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:814, paragraph 33).

[38](#) See also Kainer, F., Persch, J., ‘Der Verkehr im Binnenmarktrecht: Sonderfall oder Dienstleistung? – Anstöße für eine Reform der Art. 90 ff. AEUV’, *Europarecht*, 2018, pp. 33-61, at p. 34.

[39](#) Directive of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC and amending Regulation (EU) No 1024/2012 (‘the IMI Regulation’) (OJ 2014 L 159, p. 11).

[40](#) See Article 2(2)(d) of Directive 2006/123.

[41](#) See Article 1(2) of Directive 96/71.

[42](#) See Article 9(1)(b) of Directive 2014/67.

[43](#) A possible explanation is that Article 75 TEC, the precursor of Article 91 TFEU, in the form applicable at the time of adoption of Directive 96/71, that is to say, pursuant to the entry into force on 1 November 1993 of the Treaty of Maastricht, was subject to the cooperation procedure of Article 189c TEC, while Article 57(2) TEC, the precursor of Article 53(1) TFEU, was subject to the co-decision procedure of Article 189b TEC. The former procedure, introduced by the Single European Act and ultimately repealed by the Treaty of Lisbon, provided for fewer rights for the European Parliament than the latter. Perhaps the legislature did not want to cumulate these two procedures for the purposes of the adoption of Directive 96/71.

[44](#) In any event, under present conditions, Articles 53(1), 62 and 91 TFEU are all governed by the ordinary legislative procedure.

[45](#) Articles 90 to 100 TFEU.

[46](#) On the notion of ‘transport’, see also my Opinion in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, point 30 et seq.)

[47](#) See judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 46), and Opinion of Advocate General Wahl in *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:351, point 28). See also judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 41) and Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, paragraph 61).

[48](#) See judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 50).

[49](#) See judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 47).

[50](#) See, by way of example, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

[51](#) Commission proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, Brussels, 1 August 1991, COM(91) 230 final.

[52](#) See Common Position (EC) No 32/96 adopted by the Council on 3 June 1996 with a view to adopting Directive 96/.../EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (OJ 1996 C 220, pp. 1, point III.2.1.b.).

[53](#) See Amended proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, Brussels, 15 June 1993, COM(93) 225 final.

[54](#) It should be added at this point that contrary to the assertions of the German government, there is no indication that the Commission intended, in its initial proposal of 1991, to exclude ‘members of the travelling personnel of an undertaking which operates international transport services for passengers or goods by rail, road, air, inland waterway or by sea’ – and that it dropped such an exclusion in its amended proposal in 1993. Indeed, that passage quoted by the German government is found in point 23 of the Explanatory Memorandum of the 1991 directive proposal. By contrast, the Explanatory Memorandum of the amended 1993 directive proposal focuses, as one does, uniquely on the changes with respect to the 1991 proposal. Since there was no corresponding change, no mention had to be made in the Explanatory Memorandum as to the situation of travelling personnel. If anything, the Commission’s view as to the travelling personnel remains valid for the draft directive, up until adoption.

[55](#) The opposite view, defended notably by the German Government, stresses that Article 1(3)(c) of Directive 96/71 refers not only to the place of establishment of an undertaking (*Hungary in the case of Henry am Zug*), but, alternatively, to the territory of operation of an undertaking (arguably – as there is a chain of

contracts – Austria in the case of Henry am Zug). Which of these two views is to be given preference needs not be decided at this stage, as this does not form part of the question of the referring court.

[56](#) The referring court speaks in this respect of a condition *sine qua non*.

[57](#) No conclusion can, in my view, be drawn from the fact that Article 1(3)(a) of Directive 96/71 uses the terms ‘contract’ and ‘employment relationship’ to the effect that an ‘employment relationship’ would not constitute a legal term. Indeed, the term ‘employment relationship’ characterises a formal legal relationship between an undertaking and a worker.

[58](#) Such an interpretation is, moreover, confirmed by judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 30 et seq.).

[59](#) See judgment of 13 November 2018, *Čepelnik* (C-33/17, EU:C:2018:896, paragraph 32).

[60](#) However, it should still be borne in mind that, Article 1(6) of Directive 2006/123, read in the light of recital 14 of that directive, as fittingly put by Advocate General Wahl in his Opinion in *Čepelnik* (C-33/17, EU:C:2018:311, points 50 and 53), does ‘not state that the field of labour law is, as a whole, excluded from the scope of the Services Directive’ and that ‘far from giving Member States *carte blanche* to apply their labour law regardless of the possible impact on the internal market, the Services Directive provides for a limited exception only’.

[61](#) This constitutes consistent case-law. See, by way of example, judgments of 17 July 2008, *Commission v France* (C-389/05, EU:C:2008:411, paragraph 57), and of 9 August 1994, *Vander Elst* (C-43/93, EU:C:1994:310, paragraph 14). The origins of the case-law can be tracked back to the judgment of 25 July 1991, *Säger* (C-76/90, EU:C:1991:331, paragraph 12), if not to judgment of 3 December 1974, *van Binsbergen* (33/74, EU:C:1974:131, paragraphs 10 and 11).

[62](#) See judgment of 21 October 2004, *Commission v Luxembourg* (C-445/03, EU:C:2004:655, paragraph 23).

[63](#) See judgment of 19 January 2006, *Commission v Germany* (C-244/04, EU:C:2006:49, paragraph 35).

[64](#) See judgment of 21 September 2006, *Commission v Austria* (C-168/04, EU:C:2006:595, paragraph 42).

[65](#) See, by way of example, judgment of 21 September 2006, *Commission v Austria* (C-168/04, EU:C:2006:595, paragraph 38).

[66](#) At times, the Court refers to overriding ‘requirements’ instead of ‘reasons’. For ease of reference, I shall refer to ‘reasons’ throughout, not least because this appears to me to be the term commonly employed nowadays, including by the EU legislature, see e.g., Article 4, point 8, of Directive 2006/123.

[67](#) See judgments of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraphs 34 and 35); of 24 January 2002, *Portugaia Construções* (C-164/99, EU:C:2002:40, paragraph 19);

and of 21 September 2006, *Commission v Austria* (C-168/04, EU:C:2006:595, paragraph 37).

[68](#) See judgment of 23 November 1999, *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraph 80).

[69](#) See judgment of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, paragraph 41).

[70](#) Judgment of 3 February 1982 (62/81 and 63/81, EU:C:1982:34, paragraph 14).

[71](#) Judgment of 27 March 1990 (C-113/89, EU:C:1990:142, paragraph 18).

[72](#) Judgment of 28 March 1996 (C-272/94, EU:C:1996:147, paragraph 15).

[73](#) Judgment of 23 November 1999 (C-369/96 and C-376/96, EU:C:1999:575, paragraph 41).

[74](#) See judgment of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408, paragraph 66 and the case-law cited).

[75](#) See Article 7b of the AVRAG.