OPINION OF ADVOCATE GENERAL
BOT
delivered on 20 September 2007 [1](1)

Case C-346/06

Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG
v
Land Niedersachsen

(Reference for a preliminary ruling from the Oberlandesgericht Celle (Germany))

(Directive 96/71/EC – Posting of workers in the framework of the provision of services – Collective agreements – Minimum wage – Article 49 EC – Restriction on the freedom to provide services – Procedures for the award of public works contracts – Protection of workers and prevention of social dumping)

1. This reference for a preliminary ruling will allow the Court to build on its existing case-law on the posting of workers in the framework of the provision of services.

2. The question raised by the court making the reference once again calls on the Court to strike a balance between the freedom to provide services, on the one hand, and the overriding requirements of the protection of workers and the prevention of social dumping, on the other.

3. More precisely, the Oberlandesgericht (Higher Regional Court), Celle (Germany), essentially asks the Court to rule whether Community law must be interpreted as precluding national legislation on the award of public contracts that requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be of universal application.

4. That question has been raised in the course of a dispute between Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of the company Objekt und Bauregie GmbH & Co. KG, defendant in the main proceedings, and Land Niedersachsen, applicant and respondent (‘the applicant’) in the main proceedings, regarding the termination of a works contract between the company and Land Niedersachsen in the context of a public works contract.

5. In this Opinion, I shall show why, in my view, neither 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 (2) nor Article 49 EC must be interpreted as precluding a national measure such as the one at issue in the main proceedings.

I – Legal framework

A – *Community law*

6. The first paragraph of Article 49 EC lays down that restrictions on the freedom to provide services within the Community are prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

7. Directive 96/71 aims to promote the freedom to provide services between Member States while ensuring fair competition between undertakings providing services and guaranteeing respect for the rights of workers. (3)

8. Article 1 of that directive, headed 'Scope', is worded 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.

…

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

…'

9. As evidenced by the sixth recital in the preamble to the directive, the Community legislature set out from the finding that, in transnational situations, the employment relationships of posted workers raise problems with regard to the legislation applicable to them.

10. In this regard, the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, (4) lays down general criteria for determining the law applicable to the employment relationship. (5) For example, Article 3 of the Convention provides that, as a general rule, the parties are free to choose the applicable law. In the absence of choice, the contract of employment is governed, under Article 6(2) of the Convention, by the law of the country in which the employee habitually carries out his work, even if he is temporarily employed in another country.

11. In addition, Article 7 of the Rome Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted. These mandatory rules, which are also known in French as 'lois d'application immédiate' or 'lois de police' that obtain at the place where the work is carried out, are not defined in the Rome Convention.

12. In this context, the contribution of Directive 96/71 is to designate at Community level a number of mandatory rules in transnational posting situations. (6) It is also an expression of the principle of precedence of Community law laid down in Article 20 of the Rome Convention, according to which the Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are contained in Community acts or in national laws harmonised in implementation of such acts. (7)

13. In order to reconcile the different objectives it pursues, Directive 96/71 thus coordinates the laws of the Member States 'in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided'. (8)

14. According to the 17th recital in the preamble to the directive, ‘the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers’.

15. These principles are described in detail in Article 3 of that directive, headed ‘Terms and conditions of employment’, which is worded as follows:

‘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: [(9)]

…

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

…

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.

…

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

…

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.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

– are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

– are required to fulfil such obligations with the same effects.

…’

16. Finally, as regards the Community rules on public works contracts, I would point out that at the time of the events that gave rise to the dispute in the main proceedings Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (10) was applicable. (11)

17. Although the purpose of Directive 93/37 is not to organise the execution of contracts, (12) it is nevertheless appropriate to cite Article 23 of that directive, which relates to the information on the working conditions to be respected during the performance of a public contract. That article reads as follows:

‘1. The contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract.

2. The contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work is to be carried out. This shall be without prejudice to the application of the provisions of Article 30(4) concerning the examination of abnormally low tenders.’

B – *National law*

1. Determination of the minimum wage in the construction industry

18. In Germany, the minimum wage in the construction industry is set by collective bargaining.

19. In this Member State, collective agreements are usually concluded between trade unions and employers’ organisations. For a particular industry, they may cover part or all of the territory of the Federal Republic of Germany.

20. The construction industry is governed by a collective agreement of 4 July 2002 laying down a general framework for the construction industry (Bundesrahmentarifvertrag für das Baugewerbe). This collective agreement, which is applicable throughout the Federal Republic of Germany, does not, however, contain rules on minimum rates of pay.

21. These rules are set out in a collective agreement providing for a minimum wage in the construction industry within the Federal Republic of Germany (Tarifvertrag zur Regelung der Mindestlöhne im Baugewerbe im Gebiet der Bundesrepublik Deutschland; the ‘TV Mindestlohn’) and in specific collective agreements.

a) The TV Mindestlohn

22. At the federal level, the TV Mindestlohn, which applies to undertakings covered by the collective agreement laying down a general framework for the construction industry, sets the level of the minimum wage for two categories according to the employee’s level of qualification, and at different levels for ‘old’ and ‘new’ *Länder*. It provides that the minimum wage consists of the hourly pay provided for by that agreement and the bonus for the construction industry, which together make up the total hourly pay under the agreement. It also indicates that the right to higher wages under other collective agreements or special agreements is not affected by the provision laying down the total hourly pay under the agreement for categories 1 and 2.

23. The provisions of the TV Mindestlohn were declared to be of universal application by a regulation on working conditions mandatorily applicable in the construction industry (Verordnung über zwingende Arbeitsbedingungen im Baugewerbe).

24. It should be noted that under German law a declaration of universal application means that the collective agreement in question is applicable to all employers and employees in the industry concerned in a defined territory. It therefore extends the scope of such an agreement to employers and employees not belonging to the contracting trade union organisations. The Federal Ministry of Employment may make such a declaration of universal application either under Paragraph 1(3a) of the German Law on the Posting of Workers (Arbeitnehmer-Entsendegesetz) (13) of 26 February 1996 for sectors governed by that law, or under Article 5 of the Law on Collective Agreements (Tarifvertragsgesetz).

25. The TV Mindestlohn is applicable for a limited period. According to the information at my disposal, it appears that the TV Mindestlohn which was applicable at the time of the facts of the dispute in the main proceedings is that of 29 October 2003, which was in force from 1 November 2003 to 31 August 2005. This collective agreement was declared to be of universal application by a regulation of 13 December 2003. (14)

b) The specific collective agreements

26. Most of these specific collective agreements (Entgelttarifverträge) have limited territorial scope. Moreover, they are not normally declared to be universally applicable, which means that they are not all mandatorily applicable to all employees in the industry concerned.

27. According to the written reply from Land Niedersachsen to a question from the Court, the relevant collective agreement in the present case is the collective agreement on wages and professional training allowances (Tarifvertrag zur Regelung der Löhne und Ausbildungsvergütungen) of 4 July 2003, in the version resulting from the amending collective agreement of 29 October 2003. This collective agreement has not been declared to be universally applicable.

28. It is evident from the file that the wage levels set in these specific collective agreements are, in practice, well above the minimum wages required throughout Germany under the TV Mindestlohn. Moreover, the wage scale set out in those agreements is more detailed than that contained in the TV Mindestlohn and sets different wage levels for different groups of activities.

2. The AEntG

29. In Germany, Directive 96/71 was incorporated into national law by the AEntG. Paragraph 1(1) of that law provides, inter alia, that the legal rules resulting from a collective agreement governing the construction industry which is declared to be universally applicable, which relate to minimum pay, shall also apply to an employment relationship linking an employer established outside Germany and his employee working within the territory covered by that collective agreement. Hence, such an employer must, as a minimum, grant to his posted employee the working conditions established in that collective agreement.

3. The Law of Land Niedersachsen on the award of public contracts

30. The Law of Land Niedersachsen on the Award of Public Contracts (Niedersächsisches Landesvergabegesetz; the ‘Landesvergabegesetz’) lays down rules for the award of public contracts with a value of EUR 10 000 or more. Its statement of reasons proclaims:

‘The Law counteracts distortions of competition which arise in the field of construction and public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided.’

31. Under Paragraph 3(1) of the Landesvergabegesetz, contracts for building services are awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed.

32. Paragraph 4(1) of that law provides, inter alia, that in so far as services are assigned to subcontractors, the contractor must also undertake to impose on the subcontractors the obligations applicable to him under the said Law and to monitor compliance with these obligations by the subcontractors.

33. Under Paragraph 7(1) of the Landesvergabegesetz, the public contracting authority is entitled to carry out checks to verify compliance with the conditions laid down for the award of contracts. To this end, it may view the wage statements of contractors and subcontractors and the documents concerning the payment of taxes and contributions and the contracts for works concluded between contractor and subcontractor.

34. Paragraph 8 of the Law, which relates to sanctions, reads as follows:

‘(1) In order to ensure compliance with the obligations under Paragraphs 3, 4 and 7(2), public contracting authorities shall agree with the contractor for each case of culpable non-fulfilment a contractual penalty of 1%, and in the case of several cases of non-fulfilment a contractual penalty of up to 10%, of the contract value. The contractor shall be obliged to pay a contractual penalty under the first sentence also in the event that there is non-fulfilment on the part of a subcontractor used by it or a subcontractor used by that subcontractor, unless the contractor was not aware or could not have been aware of the non-fulfilment. Where the penalty imposed is disproportionately high, the contracting authority may reduce it to the appropriate amount at the request of the contractor.

(2) The public contracting authorities shall agree with the contractor that failure to satisfy the requirements referred to in Paragraph 3 by the contractor or his subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) will entitle the contracting authority to terminate the contract without notice.

(3) Where an undertaking is proved to have failed to fulfil its obligations under this law as a result, at least, of gross negligence or on a repeated basis, the public contracting authorities may exclude it from the award of public contracts within their field of competence for a period of up to one year.

…’

II – The dispute in the main proceedings and the question referred for a preliminary ruling

35. It is apparent from the order for reference that in the autumn of 2003 Land Niedersachsen, following a public invitation to tender, awarded the defendant a contract for the structural work in the building of Göttingen-Rosdorf prison. The amount of the contract was EUR 8 493 331, plus VAT. The contract contained an ‘Agreement on compliance with the provisions of the collective agreement when performing building services’ stipulating in particular the following undertakings made by the defendant:

‘My/our tender is based on the following agreement:

As regards Paragraph 3 of the [Landesvergabegesetz] (Declaration regarding payment of the collectively agreed wage):

In the event that I am awarded a contract, I hereby undertake to pay the workers employed in my undertaking, in managing the work connected with the commissioned services, at least the remuneration prescribed by the collective agreement at the place where these services are performed, as set out in the list of representative collective agreements referred to under No 01 “Construction industry” …

I hereby undertake to impose on the subcontractors the obligations laid down in Paragraphs 3, 4 and 7(2) of the [Landesvergabegesetz] applicable to me and to monitor compliance with these obligations by the subcontractors.

…

I hereby agree that failure to satisfy the requirements referred to in Paragraph 3 of the [Landesvergabegesetz] by me or my subcontractors and any non-fulfilment stemming from gross negligence or repeated non-fulfilment of the obligations laid down in Paragraphs 4 and 7(2) of the [said Law] shall entitle the contracting authority to terminate the contract without notice.'

36. The defendant used the firm PKZ Pracownie Konserwacji Zabytków sp. zoo ('PKZ') from Tarnów (Poland) which has a branch in Wedemark (Germany) as a subcontractor.

37. During the summer of 2004, the firm PKZ came under suspicion of having employed Polish workers on the site at a wage below that stipulated in the applicable collective agreement. After investigations had commenced, both the defendant and Land Niedersachsen terminated the contract for work concluded between them. Land Niedersachsen based the termination inter alia on the fact that the defendant had failed to fulfil its contractual obligation to comply with the collective agreements. A punishment order, which contained the accusation that the 53 employees engaged on the building site had been paid only 46.57% of the statutory minimum wage, was issued to the persons primarily responsible at PKZ.

38. Land Niedersachsen applied for application of the penalty clause, maintaining that the breaches by the subcontractor must have been known to the defendant and that the payment of wages at below the collectively agreed rate constituted a separate infringement for each employee, with the result that a penalty of 10% of the contract value was appropriate.

39. At first instance, the Landgericht Hannover (Regional Court, Hanover) considered that this action was well founded in part. It found that the defendant's claim based on the contract for works had been extinguished by offsetting owing to application of the contractual penalty in the amount of EUR 84 934.31, that is to say 1% of the amount of the contract, and dismissed the remainder of the action.

40. The case went to appeal before the Oberlandesgericht Celle, which explains in its order for reference that resolution of the dispute in the main proceedings turns on whether the Chamber should not apply the Landesvergabegesetz, in particular Paragraph 8(1) thereof, on the ground that it is incompatible with the freedom to provide services laid down in Article 49 EC.

41. The court of reference observes in this regard that the commitment to comply with the collective agreements, which construction companies of other Member States must make under the Landesvergabegesetz, obliges them to adapt the wages they pay to their workers to the normally higher level of remuneration in force at the place where the work is carried out in Germany. As a result, they lose the competitive advantage which they enjoy by reason of their lower wage costs. Consequently, according to the court of reference, the obligation to pay the collectively agreed wage constitutes an impediment to market access for persons or undertakings from other Member States.

42. Furthermore, the court of reference expresses doubt as to whether the obligation to pay the collectively agreed wage is justified by overriding reasons of public interest.

43. It finds in favour of the view that the obligation to pay the collectively agreed wage cannot be considered to meet overriding requirements relating to the public interest. To the extent that it contributes to protecting German building undertakings from competition from other Member States, in the view of the court of reference such an obligation serves an economic purpose, which according to the case-law of the Court cannot constitute an overriding requirement relating to the public interest justifying a restriction on the freedom to provide services.

44. The court of reference further considers that the case-law of the Court of Justice on minimum wages does not apply in the dispute in the main proceedings since the wages and salaries stipulated in the collective agreements, which are required to be paid at the place where the work is carried out, are

much higher than the minimum wage applicable on the territory of the Federal Republic of Germany under the AEntG. It deduces that the obligation to comply with these collective agreements exceeds what is necessary to protect workers. It considers that what is necessary to protect workers is defined by the mandatory minimum wage, which must be applied on the territory of the Federal Republic of Germany under the AEntG. Finally, the court of reference adds that, as far as foreign workers are concerned, the obligation to pay the collectively agreed wage does not bring about actual equality with German workers but instead prevents them from being employed in Germany because their employer is unable to exploit his advantage in terms of labour costs.

45. Taking the view that resolution of the dispute in the main proceedings required an interpretation of Article 49 EC by the Court of Justice, the Oberlandesgericht Celle decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?’

III – Analysis

46. By this question, the court of reference essentially asks whether the Treaty rules on the freedom to provide services must be interpreted as precluding national legislation, such as the Landesvergabegesetz, that requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be of universal application.

47. Land Niedersachsen, the German and Danish Governments, Ireland and the Cypriot, Austrian, Finnish and Norwegian Governments consider essentially that Article 49 EC does not preclude a measure such as the one at issue in the main proceedings. In so far as the measure constitutes a restriction on the freedom to provide services, it is justified inter alia by the objective of worker protection and proportionate to achievement of that objective.

48. The Belgian Government considers that such a restriction may be justified, first where the workers do not enjoy a comparable level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the host State confers a genuine benefit on them, significantly adding to their social protection, and secondly where the application of those rules is proportionate to the public interest objective pursued. According to that government, it is for the court of reference to make that assessment, taking into account all the circumstances of the dispute before it.

49. Some of these governments also examine the question from the point of view of Directive 96/71 and are of the opinion that the directive does not preclude the measure at issue in the main proceedings.

50. The Polish Government, by contrast, takes the view that Directive 96/71 does not justify making the award of a contract subject to the service provider’s paying posted workers wages above the minimum rate mentioned in Article 3(1)(c) of that directive. That government points out that it is evident from the order for reference that the levels of remuneration laid down in the collective agreements in force at the place where the services are performed are significantly higher than the minimum defined in the AEntG.

51. In the alternative, the Polish Government maintains that the measure at issue in the main proceedings infringes Article 49 EC. According to that government, it constitutes an unjustified obstacle to the freedom to provide services. It shares the view of the court of reference that the purpose of the Landesvergabegesetz is to shield German building undertakings from competition from other Member States, thereby de facto achieving an economic purpose which, according to the case-law of the Court, cannot justify a restriction on a fundamental freedom. According to the Polish Government,

such provisions go beyond what is necessary to combat unfair competition, that objective being adequately attained by the setting of a minimum rate of pay in the AEntG.

52. The Commission of the European Communities considers that the dispute in the main proceedings falls within the scope of Directive 96/71 and that the question referred for a preliminary ruling should therefore be examined first and foremost in the light of that directive. It states that the aim of that directive is to strike a balance between the freedom to provide services and the protection of posted workers. In order to achieve that objective, the Community legislature established, in Article 3 of Directive 96/71, a detailed framework with which the Member States must comply.

53. Since the Federal Republic of Germany has a system for declaring collective agreements to be of universal application, according to the Commission only the first subparagraph of Article 3(8) of the directive is relevant. Under that provision, read in conjunction with the second indent of Article 3(1) of the directive, minimum wages should be set for workers posted to Germany only under collective agreements that have been declared to be of universal application, in other words agreements that must be complied with by all undertakings in the industry or profession concerned and within the territorial scope of such agreements.

54. For that reason, the Commission considers that, in so far as the Landesvergabegesetz requires compliance with a level of remuneration laid down in a collective agreement that has not been declared to be universally applicable, that law must be considered incompatible with Directive 96/71. It would thus fall outside the scope of the guarantees that Community law provides with regard to the minimum remuneration of posted workers and which are harmonised by that directive.

55. The Commission adds that the Law of a *Land* which has the purpose of imposing more demanding terms and conditions of employment solely for posted workers employed in the framework of public contracts, in other words in only one area of economic life, cannot in any event serve an overriding public interest within the meaning of Article 49 EC nor be an appropriate way of pursuing such an interest.

56. At the hearing, the French Government essentially endorsed the position held by the Commission by maintaining that Article 49 EC and Directive 96/71 do not prevent a Member State from applying to posted workers the minimum wage laid down in a national or local collective agreement, but on condition that the agreement in question has been declared to be universally applicable to undertakings in the industry or territory concerned.

57. In the light of these observations, it should first be noted that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer in its question. (15)

58. With regard first to Directive 93/37, I have indicated above that that directive does not regulate the performance of public contracts. The undertaking that contractors must make under Paragraphs 3(1) and 4(1) of the Landesvergabegesetz to pay their employees at least the remuneration prescribed by the collective agreement in force at the place where the services in question are performed and to impose the same obligation on their subcontractors constitutes, in my view, a contract performance condition. (16)

59. I note, however, that Article 23 of the directive in question is not without interest in the present case because it expresses the notion that the performance of the work following the award of a public contract must comply with the employment protection provisions and the working conditions in force in the place where the work is to be carried out.

60. I shall not, however, go further in interpreting Directive 93/37, because that directive is of no assistance with regard to the central issue raised by the question from the court of reference, namely determination of the employment conditions which may, in compliance with Community law, be imposed for the performance of a public contract in a situation where workers are posted in the framework of the provision of services.

61. Turning now to Directive 96/71, I am of the opinion that the facts in the dispute in the main proceedings, as described in the order for reference, must be held to fall within the scope of that directive, since they correspond to the situation described in Article 1(3)(a) of that directive.

62. To be more precise, we have here a case in which an undertaking established in a Member State, namely PKZ established in Poland, has posted Polish workers, for its account and under its direction, on the territory of another Member State, in the event the Federal Republic of Germany, in the framework of a subcontracting contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, that is to say the defendant in the main proceedings.

63. Moreover, it is common ground that the facts in the dispute in the main proceedings occurred after the expiry of the period for Member States to transpose Directive 96/71, that is to say after 16 December 1999.

64. It is true that the purpose of the Landesvergabegesetz is not specifically to govern the posting of workers in the framework of the provision of services but rather, in more general terms, the award of public contracts in Land Niedersachsen. Nevertheless, in so far as the Law lays down conditions for the performance of works contracts – in this instance the payment of a minimum wage – which must be applied to the workers employed by the contractor and/or by any subcontractor, including workers posted in the framework of the provision of services, which is the case in the main proceedings, it is necessary to examine the Law in the light of secondary Community law on the posting of workers in the framework of the provision of services.

65. I shall therefore begin by examining whether Directive 96/71 must be interpreted as precluding national legislation, such as the Landesvergabegesetz, which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, where the collective agreement to which the legislation in question refers is not declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of that directive.

A – *The interpretation of Directive 96/71*

66. In my opinion, Directive 96/71 cannot be interpreted as precluding a measure such as that at issue in the main proceedings. In order to be convinced of this view, it is necessary to describe the system established by this directive. I shall then examine, in the light of the system described in that way, the arrangements under German law for determining minimum rates of pay in the construction industry.

67. As I have already indicated above, Directive 96/71 is designed to coordinate the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided.

68. In adopting that directive, the Community legislature not only appropriated the case-law established over time by the Court on the posting of workers in the framework of the provision of services but also clarified and strengthened it.

69. Since its judgment in *Seco and Desquenne & Giral*, (17) the Court has taken the view that, as a general rule, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. (18) This case-law of the Court is reiterated in the 12th recital in the preamble to Directive 96/71.

70. The first contribution of this directive is to make mandatory what until then had been only an option for Member States. The directive thus requires the Member States to apply to undertakings

established in another Member State which post workers to their territory in the framework of the transnational provision of services a number of national rules setting terms and conditions of employment covering certain matters.

71. Another contribution of Directive 96/71 is to give substance to the 'nucleus' of protective rules, the application of which the Community legislature wished to guarantee for the benefit of posted workers.

72. Hence, Article 3(1) of the directive lays down the national rules establishing terms and conditions of employment which *cannot be denied* to posted workers in the Member State in which the service is performed.

73. As the Court has recently indicated, the directive establishes 'a list of national rules that a Member State must apply to undertakings established abroad which post workers on that Member State's territory in the framework of the provision of transnational services'. (19) In that sense, they are mandatory protective rules.

74. The listing of these rules by the Community legislature strengthens legal certainty, in that the provider of services established in another Member State is now certain that he will be required to apply a minimum and clearly identifiable basic set of rules on terms and conditions of employment in force in the State where the services are provided. As a corollary, workers posted to a Member State will be able to demand the application of these rules, the mandatory nature of which stems directly from Directive 96/71.

75. These mandatory terms of employment include minimum rates of pay, whether set by law, regulation or administrative provision or, in the case of building work, by collective agreements or arbitration awards which have been declared universally applicable within the meaning of Article 3(8) of the directive.

76. This category of terms of employment has special features by comparison with the other matters mentioned in Article 3(1) of Directive 96/71, such as maximum work periods and minimum rest periods, health, safety and hygiene at work, and the minimum length of paid annual holidays. Community actions have been developed for the other terms of employment referred to, and in particular it has been possible to harmonise national legislation by means of directives setting minimum requirements. (20) The situation is different with regard to minimum rates of pay, for which no Community measure of this kind yet exists. (21)

77. Although it cannot be said that Community law entirely neglects the question of remuneration, it must therefore be admitted that it does not yet cover the determination of the amount or level of remuneration. (22)

78. The last subparagraph of Article 3(1) of Directive 96/71 testifies to the special nature of minimum rates of pay where it lays down that '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'.

79. Moreover, the application of the 'nucleus' of protective rules mentioned in Article 3(1) of that directive must, in my opinion, be understood to constitute a minimum guarantee for posted workers, who are thus assured that they will at the very least enjoy the benefit of these national rules, which have become mandatory.

80. This other characteristic of the system established by the directive in question is expressed in the very concept of 'a nucleus of mandatory rules for minimum protection' referred to in the 13th recital in the preamble to Directive 96/71.

81. In addition, I would remind the Court that the 17th recital in the preamble to that directive provides that 'the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers'. The first subparagraph of Article 3(7) of the directive translates this intention of the Community

legislature by stating that '[p]aragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers'.

82. In my view, there are two aspects to this last provision. First, it means that the mandatory nature of the protective rules in force in the State where the services are performed may be eclipsed by application of the rules in force in the State in which the provider is established if those rules provide for terms and conditions of employment that are more favourable to the posted workers.

83. Secondly, and it is this aspect that is relevant in the present case, Article 3(7) of Directive 96/71 also, in my view, permits the Member State where the services are performed to improve, for the matters referred to in Article 3(1) of the directive, the level of social protection which it wishes to guarantee to workers employed in its territory and which it can therefore apply to workers posted there. Hence, in principle, this provision authorises the implementation of enhanced national protection. (23)

84. It must be pointed out, however, that the implementation of such enhanced national protection must be in accordance with what is permitted under Article 49 EC. (24)

85. If we compare the arrangements under German law for determining minimum rates of pay in the construction industry with the system established by Directive 96/71, as I have just described it, we can draw the following conclusions.

86. I note first that under German law there is a system for declaring collective agreements to be universally applicable. The German arrangements for determining minimum rates of pay in the construction industry must therefore be assessed against the yardstick of Article 3(1) of Directive 96/71, and not in the light of the provisions of the second subparagraph of Article 3(8) of that directive, which caters for the absence of a system for declaring collective agreements to be of universal application.

87. In accordance with Article 3(1) of the directive, Paragraph 1(1) of the AEntG provides inter alia that the legal rules resulting from a collective agreement governing the construction industry which is declared to be universally applicable, which relate to minimum pay, shall also apply to an employment relationship linking an employer established outside Germany and his employee working within the territory covered by that agreement. Hence, such an employer must, as a minimum, grant to his posted employee the working conditions established in that collective agreement.

88. I then wish to remind the Court that the TV Mindestlohn applicable at the time of the facts in the main proceedings, which was declared to be of universal application and covers the territory of the Federal Republic of Germany, sets the level of the minimum wage in the construction industry for two categories according to the employee's level of qualification, and at different levels for 'old' and 'new' *Länder*.

89. This collective agreement, which has been declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of Directive 96/71, thus forms part of the 'nucleus' of protective rules as defined in Article 3(1) of that directive.

90. At the same time, it must be pointed out that the said collective agreement also indicates that the right to higher wages under other collective agreements or special agreements is not affected by the agreement's provision laying down the total hourly pay for the two categories mentioned above. As authorised by Article 3(7) of the directive in question, the TV Mindestlohn therefore expressly reserves the possibility of applying terms of employment that are more favourable to workers.

91. To be precise, the arrangements under German law for determining minimum rates of pay in the construction industry are also based, as a complement to the TV Mindestlohn, on specific collective agreements, most of which have limited territorial scope and are not normally declared to be universally applicable, thus placing them outside the 'nucleus' of minimum rules of protection as defined in Article 3(1) of Directive 96/71.

92. Does that mean, as the Commission maintains, that undertakings posting workers in the framework of the transnational provision of services cannot be required to comply with such specific

collective agreements that have not been declared to be of universal application within the meaning of the first subparagraph of Article 3(8) of the directive in question?

93. I do not think so.

94. I consider that, since the wage levels set in these specific collective agreements are, in practice, well above the minimum rates of pay required on the territory of the Federal Republic of Germany under the TV Mindestlohn, such agreements constitute the implementation of enhanced national protection. As I have previously demonstrated, such enhanced national protection is authorised under Article 3(7) of Directive 96/71.

95. Hence, a national measure, such as the one at issue in the main proceedings, which makes such collective agreements mandatory for posted workers as well, is, in my view, consistent with this directive in that it implements the option open to the Member States under Article 3(7) of the directive in question.

96. Moreover, the fact that a collective agreement that has been declared to be of universal application, such as the TV Mindestlohn, itself generally refers to other collective agreements or special agreements granting the right to higher wages is, in my opinion, consistent with Directive 96/71.

97. The German arrangements for determining minimum rates of pay in the construction industry therefore appear to me to constitute a coherent system that is compatible with Directive 96/71.

98. I therefore take the view that Directive 96/71 must be interpreted as not precluding national legislation, such as the Landesvergabegesetz, which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, even where the collective agreement to which the legislation in question refers is not declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of that directive.

99. We must now ascertain whether Article 49 EC must be interpreted as precluding national legislation of the kind involved in the dispute in the main proceedings.

B – *The interpretation of Article 49 EC*

100. It is settled case-law that Article 49 EC requires not only the elimination of all discrimination against service providers established in another Member State on the ground of their nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services. (25)

101. It has to be stated in this regard that the Court has already ruled that the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens. (26)

102. In the present case, there is barely any doubt, in my view, that a restriction on the freedom to provide services exists.

103. By requiring undertakings performing public works contracts and, indirectly, their subcontractors to pay workers at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, Paragraphs 3(1) and 4(1) of the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host State.

104. However, it must be noted that the provisions in question of the Landesvergabegesetz apply without distinction to national providers of services and to those of other Member States. In other words, the obligation to pay the minimum wage laid down in the collective agreement in force in the place where the services are performed applies both to service providers established in Germany and to those established in another Member State.

105. According to equally settled case-law of the Court, such legislation, that is applicable without distinction, may be justified under Article 49 EC where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. (27)

106. Overriding reasons relating to the public interest which have been recognised by the Court include the protection of workers. (28)

107. In the name of that overriding reason, the Court has already held that Community law does not preclude Member States from applying their legislation, *or collective labour agreements entered into by both sides of industry*, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means when it emerges that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established. (29)

108. The Court has also ruled that the objective of preventing unfair competition by undertakings paying their workers less than the minimum wage may also be taken into consideration as an overriding requirement capable of justifying a restriction on the freedom to provide services. (30) It has also indicated that there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. (31)

109. In developing this reasoning, the Court recently established an explicit link between its settled case-law recognising the Member States' right to extend their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory, and the justification based on the 'prevention of social dumping'. (32)

110. I have indicated above that the court of reference has doubts as to whether the obligation imposed by the Landesvergabegesetz on contractors and, indirectly, on their subcontractors to comply with the collective agreement in force in the place where the services are performed is justified by overriding reasons of public interest.

111. I remind the Court that, according to the court of reference, the main purpose of the legislation at issue is to protect German building undertakings from competition from other Member States. Such an economic objective cannot constitute an overriding requirement relating to the public interest justifying a restriction on the freedom to provide services.

112. Moreover, the court of reference considers that the obligation to comply, at the place where the services are provided, with a collective agreement laying down minimum rates of pay higher than those applicable on the territory of the Federal Republic of Germany under the AEntG exceeds what is necessary to protect workers. It considers that what is necessary to protect workers is defined by the mandatory minimum wage, which must be applied on the territory of the Federal Republic of Germany under the AEntG.

113. I do not agree with this analysis proposed by the court of reference, which in essence is supported by the Polish Government.

114. I consider, by contrast, that the disputed provisions of the Landesvergabegesetz are appropriate for securing the attainment of the objectives of protecting workers and preventing social dumping and do not go beyond what is necessary in order to attain them.

115. It is true that, according to settled case-law, measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of national businesses. (33) However, the Court considers at the same time that whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive. (34) It is for the national court, which enquires as to the true objective pursued by the legislature, to determine whether, viewed objectively, the rules in question ensure the protection of posted workers (35) or, more generally, the prevention of social dumping.

116. Hence, in regard to the national court's observation that the main objective of the legislation at issue in the main proceedings is to protect German construction undertakings from competition from other Member States, it is for that court to verify whether, on an objective view, that legislation secures the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. (36)

117. In order to determine the existence of such a benefit that confers real additional protection on posted workers, (37) the court of reference must assess whether the wage protection these workers already enjoy under the legislation and/or collective agreements in force in the State in which the provider of services is established is equivalent or essentially comparable. In making that assessment, it is the gross amount of wages that must be taken into account. (38)

118. In this regard, it is evident from the order for reference that PKZ is accused of having paid the 53 employees engaged on the building site only 46.57% of the applicable minimum wage. In those circumstances, it appears to be established that compliance with the Landesvergabegesetz would have given these workers genuine additional protection by ensuring that they received a wage that was significantly higher than the wage they would normally be paid in the State in which their employer is established. This law therefore appears to me to ensure the protection of the posted workers.

119. In my view, the Law in question is also an appropriate means of preventing social dumping, in that one of its main aims is to harmonise the terms on which service providers, whether they are established in Germany or not, must pay their workers in the framework of the performance of a public contract. It thus ensures that local workers and posted workers on the same site will be paid equally.

120. The fact that Land Niedersachsen chose to take a specific collective agreement rather than the TV Mindestlohn as the benchmark in its Law on the Award of Public Contracts, with the result that the minimum wage to be paid by contractors and their subcontractors at the place where the services are performed is higher than that normally applicable in the construction industry on the territory of the Federal Republic of Germany, is not, in my view, of itself open to challenge under Community law.

121. First, it is difficult to deny that the guarantee of higher wages for posted workers is an appropriate means of protecting them. (39) Secondly, and on a more general level, it must not be overlooked that the first paragraph of Article 136 EC lays down that '[t]he Community and the Member States, having in mind fundamental social rights …, shall have as their objectives … improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, [and] dialogue between management and labour'.

122. Moreover, the disputed provisions of the Landesvergabegesetz do not, in my opinion, go beyond what is necessary in order to attain the objectives of worker protection and the prevention of social dumping.

123. The purpose of these provisions is to make it mandatory for service providers involved in the performance of a public contract to pay the rates of remuneration applicable under the specific collective agreement in force at the place where the services are performed. To that end, they provide first that contracts for building services are awarded only to undertakings which undertake in writing to pay their employees, when performing those services, the minimum remuneration prescribed by the collective agreement in force at the place where those services are performed and also undertake to impose the same obligation on their subcontractors. Secondly, breach of that obligation gives rise to graduated sanctions, which may range from the application of a contractual penalty to termination of the contract.

124. In my view, the objectives of worker protection and the prevention of social dumping could not be achieved as effectively by means of less binding rules with a less restrictive effect on the freedom to provide services.

125. In addition, as Ireland indicated in its written observations, (40) there is nothing to indicate that, taking account of relevant indicators such as the cost of living index, the minimum rates of pay required under the specific collective agreement to which the Landesvergabegesetz refers are disproportionate by comparison with the rates set by the TV Mindestlohn.

126. The above analysis cannot, in my view, be brought into question by the Commission's argument that the Law of a *Land* which has the purpose of imposing more demanding terms and conditions of employment solely for posted workers employed in the framework of public contracts, in other words in only one area of economic life, cannot serve an overriding public interest within the meaning of Article 49 EC nor be an appropriate way of pursuing such an interest.

127. As it stated at the hearing, the Commission alleges that the Landesvergabegesetz creates discrimination between workers in the construction industry, depending on whether the prime contractor is public or private. Furthermore, according to the Commission, if the objective of Land Niedersachsen is truly to protect workers, it should extend this type of measure to all workers in the industry.

128. I cannot endorse that line of argument, for the following reasons.

129. First, it was confirmed at the hearing that, unless it is granted delegated powers, Land Niedersachsen does not have competence to declare a collective agreement to be universally applicable. By adopting the disputed provisions of the Landesvergabegesetz, Land Niedersachsen therefore sought to give mandatory force in a field within its competence, namely public procurement, to the collective agreement applicable at the place where the services are performed, regardless of whether it had been declared to be universally applicable.

130. Secondly, the argument that there is therefore discrimination between workers in the construction industry according to whether the prime contractor is public or private is not, in my opinion, relevant from the point of view of Community law.

131. As I have already indicated, the important point is that the Landesvergabegesetz must comply with the principle of non-discrimination on the basis of nationality, and thus make service providers subject to the same obligation to pay the minimum wages applicable at the place where the services are performed, whether they be established in Germany or in another Member State. Put another way, in my view it is crucial that, in the framework of the performance of the same public contract, local workers and posted workers be paid at the same rate. It is here, to my mind, that we must apply the yardstick that will enable us to detect possible discrimination in breach of Community law.

132. Thirdly, while it is true that the aim of public procurement is above all to meet an identified administrative need for works, services or supplies, the award of public contracts also authorises the attainment of other public interest requirements, such as environmental policy or, as in the present case, social objectives. (41)

133. The possibility of integrating social requirements into public procurement contracts has already been recognised by the Court (42) and is now enshrined in Directive 2004/18. Article 26 of that directive, headed 'Conditions for performance of contracts', reads as follows:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.' (43)

134. Since the contract performance condition relating to the minimum remuneration of workers laid down in the disputed provisions of the Landesvergabegesetz complies with the principle of non-

discrimination on the basis of nationality, and since it complies with the principle of transparency, it must, in my opinion, be considered to be consistent with Community law.

135. As regards the principle of transparency, it is important, in my view, that the collective agreements to be complied with are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for the employer to determine the obligations with which he is required to comply. (44) It is for the court of reference to determine whether that criterion is met in the present case. (45)

IV – Conclusion

136. In the light of all the foregoing considerations, I propose that the Court should give the following answer to the question referred by the Oberlandesgericht Celle:

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 and Article 49 EC must be interpreted as not precluding national legislation, such as the Landesvergabegesetz of Land Niedersachsen, on the award of public contracts which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, if the collective agreement to which the legislation in question refers is not declared to be universally applicable.

It is for the court of reference to verify whether that legislation confers a genuine benefit on posted workers, which significantly augments their social protection, and whether, in the application of that legislation, the principle of transparency of the conditions for the performance of public contracts is respected.

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1 – Original language: French.

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2 – OJ 1997 L 18, p. 1.

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3 – Fifth recital.

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4 – OJ 1980 L 266, p. 1; ‘the Rome Convention’.

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5 – See the seventh to tenth recitals in the preamble to Directive 96/71.

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6 – See the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 July 2003 on the implementation of Directive 96/71 in the Member States (COM(2003) 458 final, point 2.3.1.1).

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7 – Eleventh recital.

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8 – Thirteenth recital.

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9 – ‘[A]ll building work relating to the construction, repair, upkeep, alteration or demolition of buildings’.

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10 – OJ 1993 L 199, p. 54. Directive as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/37'). This directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), for which the implementation period expired on 31 January 2006.

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11 – It is evident from the order for reference that the value of the public contract at issue in the main proceedings is EUR 8 493 331 before value added tax ('before VAT'), in other words above the threshold for the application of Directive 93/37, which corresponds to the ecu equivalent of 5 million special drawing rights (SDRs), or EUR 6 242 028 (see in this regard 'Values of thresholds under the directives on public procurement applicable from 1 January 2002' (OJ 2001 C 332, p. 21)).

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12 – See to that effect the interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM(2001) 566 final, p. 16, point 1.6).

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13 – BGBl. 1996 I, p. 227; the 'AEntG'.

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14 – *Bundesanzeiger* No 242 of 30 December 2003, p. 26093. The collective agreement in question has now been replaced by the TV Mindestlohn of 29 July 2005, which is applicable from 1 September 2005 to 31 August 2008 and was declared to be of universal application by a regulation of 29 August 2005 (*Bundesanzeiger* No 164 of 31 August 2005, p. 13199).

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15 – See in particular Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24.

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16 – See in this respect the interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, which states that 'contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract' and by means of which tenderers 'undertake, when submitting their bids, to meet such conditions if the contract is awarded to them' (p. 17). In order to be compatible with Article 49 EC, such contract conditions must comply with the principle of non-discrimination on grounds of nationality and with the principle of transparency, as we shall see below.

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17 – Joined Cases 62/81 and 63/81 [1982] ECR 223.

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18 – Paragraph 14.

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19 – Case C-490/04 *Commission* v *Germany* [2007] ECR I-0000, paragraph 17. In the same judgment, the Court also indicates that 'Directive 96/71 did not harmonise the material content of those national rules [and that that] content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law, including therefore … Article 49 EC' (paragraph 19).

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20 – See in particular Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). Under Article 15 of that directive, headed 'More favourable provisions', the directive 'shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers'.

21 – See Rodière, P., *Droit social de l'Union européenne*, LGDJ, Second edition, Paris, 2002, p. 551.

22 – Ibid., pp. 55 and 56. The author nevertheless states that this issue is not immune to possible wage negotiations at European level. Moreover, he notes that, leaving aside the strict determination of the amount or level of wages, 'the principle of wage equality between men and women may have a general impact on the mechanisms for remunerating workers' and that 'other Community regulations may have an effect in the wage field, for example with regard to the organisation of working time'.

23 – The expression used by Moizard, N., *Droit du travail communautaire et protection nationale renforcée – L'exemple du droit du travail français*, Presses universitaires d'Aix-Marseille, Aix-en-Provence, 2000 (see in particular pp. 94 to 96). According to the author, the terms and conditions of employment in the matters referred to in Directive 96/71 are 'minimum domestic rules, with a basis in State or contractual provisions, which under the directive the Member States must ensure are observed as a minimum in the situation of the temporary posting of workers' (p. 95). This idea is also expressed in the 34th recital in the preamble to Directive 2004/18, according to which Directive 96/71 'lays down the minimum conditions which must be observed by the host country in respect of … posted workers'.

24 – I share, in this regard, the analysis put forward by Advocate General Mengozzi in the Opinion he delivered on 23 May 2007 in Case C-341/05 *Laval un Partneri* (pending before the Court), in which he stated that 'although Directive 96/71 accepts that the Member States may apply to a service provider of a Member State that posts workers temporarily to the territory of another Member State terms and conditions of employment that are more favourable for the workers than those referred to in particular in Article 3(1) of [that directive], the granting of that option must nevertheless respect the freedom to provide services guaranteed by Article 49 EC (point 151). Moreover, in its interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into such contracts, the Commission accepts that in both national and cross-border situations 'provisions more favourable to workers may … also be applied (and must then also be complied with), provided that they are compatible with Community law' (p. 21, point 3.2).

25 – See in particular Case C-490/04 *Commission* v *Germany*, paragraph 63 and the case-law cited.

26 – See in particular *Wolff & Müller*, paragraph 32 and the case-law cited.

27 – See in particular Case C-490/04 *Commission* v *Germany*, paragraphs 64 and 65 and the case-law cited.

28 – See in particular *Wolff & Müller*, paragraph 35 and the case-law cited. In order to recognise that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules constitute an overriding requirement, the Court adduced 'conditions specific to that sector' (Case C-272/94 *Guiot and Climatec* [1996] ECR I-1905, paragraph 16, and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 51).

29 – See in particular Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 29 and the case-law cited, and Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, paragraph 47.

30 – *Wolff & Müller*, paragraph 41.

31 – Ibid., paragraph 42. The Court is referring here to the fifth recital in the preamble to Directive 96/71, which, in the view of the Court, demonstrates that these two objectives can be pursued simultaneously.

32 – Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 61. See, with regard to the evolution of this case-law, Mischo, J., 'Libre circulation des services et dumping social', *Le droit à la mesure de l'Homme*, in Mélanges en l'honneur de Philippe Léger, Pedone, Paris, 2006, p. 435.

33 – Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 39, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 26.

34 – *Portugaia Construções*, paragraph 27 and the case-law cited.

35 – Ibid., paragraph 28 and the case-law cited.

36 – See *Wolff & Müller*, paragraph 38.

37 – *Finalarte and Others*, paragraph 45.

38 – Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 29.

39 – As the German Government indicates in paragraph 63 of its written observations, apart from the fact that specific collective agreements provide for higher minimum rates of pay, it is also interesting to note that the objective of worker protection also lies in the fact that such agreements allow more differentiated and appropriate remuneration according to the work performed. I would remind the Court that the wage scale in such agreements is more detailed than that in the TV Mindestlohn and sets different wage levels for different groups of activities.

40 – Paragraph 26.

41 – See to that effect Martinez, V., 'Les péripéties du critère social dans l'attribution des marchés publics', *Contrats publics*, in Mélanges en l'honneur du professeur Michel Guibal, Volume II, Presses de la faculté de droit de Montpellier, 2006, pp. 251 and 252. In particular, the author expresses the notion that public procurement may be a means of combating unemployment and exclusion, in which case it is used as a 'buttress for generating employment'.

42 – Case 31/87 *Beentjes* [1988] ECR 4635 and Case C-225/98 *Commission* v *France* [2000] ECR I-7445. With regard to this case-law and its assimilation into French law, see Pongérard-Payet, H., 'Critères sociaux et écologiques des marchés publics: droits communautaire et interne entre guerre et paix', *Europe*, No 10, October 2004, Étude 10.

43 – Let us also quote the 33rd recital in the preamble to that directive, which states that '[c]ontract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents'. In *Beentjes*, the Court had already ruled that in order to meet the directive's aim of ensuring the development of effective competition in the award of public contracts, 'the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts' (paragraph 21).

44 – See to that effect, with regard to criminal prosecutions, *Arblade and Others*, paragraph 43.

45 – I remind the Court in this regard that the undertaking made by the contractor refers to the ‘remuneration prescribed by the collective agreement at the place where these services are performed, as set out in the list of representative collective agreements referred to under No 01 “Construction industry”’.