

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 30 April 2020⁽¹⁾

Case C-815/18

Federatie Nederlandse Vakbeweging
v
**Van den Bosch Transporten BV,
Van den Bosch Transporte GmbH,
Silo-Tank kft**

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, Netherlands))

(Reference for a preliminary ruling — Directive 96/71/EC — Posting of workers in the context of the provision of services — Drivers working in international transport — Concept of posting to the territory of a Member State — Concept of collective agreements declared universally applicable)

I. Introduction

1. Van den Bosch Transporten BV (registered in the Netherlands), Van den Bosch GmbH (Germany), and Silo-Tank Kft (Hungary) are three different companies which have the same shareholder. The Dutch company concluded a number of charter contracts with both the German and Hungarian companies for international road transport of goods. The German and Hungarian companies employed drivers to carry out those contracts.

2. It would appear that those drivers started and ended their shifts in Erp, Netherlands, the seat of the Dutch company, Van den Bosch Transporten BV. The Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions; ‘the FNV’) has brought an action against all three companies, claiming that they have acted contrary to Directive 96/71/EC concerning the posting of workers in the framework of the provision of service (Posting of Workers Directive (‘PWD’)). ⁽²⁾

3. It is in this context that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) poses a number of questions to this Court, inquiring as to *how*, and also, *if at all*, the PWD is applicable to drivers in international road transport.

II. Legal Framework

4. Article 1 of the PWD defines the scope of this instrument in the following terms:

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

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

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

- (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
- (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
- (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

...’

5. Article 2 of the PWD contains the following definitions:

‘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.

...’

6. Article 3 of the PWD concerns the ‘terms and conditions of employment’:

‘1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

by law, regulation or administrative provision, and/or

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

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

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

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.

...

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

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

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

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

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

...

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

...

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

III. Facts, national proceedings and the questions referred

A. Facts and national rules applicable

7. Van den Bosch Transporten BV operates a transport undertaking from Erp, Netherlands. Two other companies, Van den Bosch GmbH (a company established under German law) and Silo-Tank Kft (a company established under Hungarian law) belong to the same group of companies. All three of these companies have the same shareholder.

8. Van den Bosch Transporten BV is a member of the Vereniging Goederenvervoer Nederland (Netherlands Association for Goods Transport). That association concluded with the FNV the collectieve arbeidsovereenkomst Goederenvervoer (the Collective Labour Agreement Goods Transport, ‘CLA GT’), which took effect as of 1 January 2012. However, the CLA GT, was *not* declared universally applicable.

9. Article 44 of the CLA GT, the so-called ‘charter provision’, states that in subcontracts which are performed in or from their company established in the Netherlands by independent contractors acting as employers, employers must stipulate that the basic working conditions of this collective labour agreement will be granted to the workers of those independent contractors, where that stems from Directive 96/71, and that is the case even if the parties have chosen to apply a law of a country other

than the Netherlands to the contract. The employer must also inform the workers concerned about the working conditions that apply to them.

10. The order for reference states that another collective labour agreement, the *collectieve arbeidsovereenkomst Beroepsgoederenvervoer over de weg en verhuur van mobiele kranen* (Collective Labour Agreement for Professional Goods Transport by Road and Mobile Crane Rental, 'CLA PGT') replicates, in Article 73, the same content found in Article 44 of the CLA GT. The CLA PGT was declared to be universally applicable from 31 January 2013 to 31 December 2013.

11. Undertakings covered by the CLA GT were granted an exemption by a ministerial decree from the application of the CLA PGT. According to the order for reference, that exemption thus applies to Van den Bosch Transporten BV.

12. The drivers from Germany and Hungary work under employment contracts concluded respectively with Van den Bosch GmbH and Silo-Tank. The conditions of employment laid down in the CLA GT were not applied to the German and Hungarian drivers.

13. Van den Bosch Transporten BV has concluded charter agreements for international transport operations with Van den Bosch GmbH and Silo-Tank.

14. According to the referring court, the relevant transport operations take place predominantly outside the territory of the Netherlands. At the request of the Court, Van den Bosch Transporten BV explained that the Hungarian and German drivers carry out trans-border transport almost exclusively. Until 2013, these drivers started and ended their 'active shifts' in Erp, Netherlands. In 2013, Van den Bosch GmbH and Silo-Tank opened 'connection points' in several Member States. Erp no longer constitutes the connection point for foreign drivers. Instead, the drivers are sent by Van den Bosch GmbH and Silo-Tank from their residence to the respective connection point. The latter companies pay for the expenses incurred.

B. National proceedings and the questions asked

15. In the main proceedings, FNV claims that the three companies should be ordered to comply with the CLA GT. In its view, the Netherlands is the place of habitual work of the drivers. Therefore, Dutch wages have to be paid to those drivers. That follows, according to the FNV, from Article 6(2)(a) of the Convention on the law applicable to contractual obligations (3) or from Article 8(2) of Regulation (EC) No 593/2008. (4) The FNV claims that by not applying the basic Dutch labour conditions, Van den Bosch GmbH and Silo-Tank are acting unlawfully towards the FNV and that Van den Bosch Transporten BV is also liable for that unlawful act.

16. The national court of first instance ruled that the conditions of the CLA GT applied to the German and Hungarian drivers.

17. However, the court of second instance allowed the appeal and annulled the first-instance decision. As regards the argument of the three respondent companies, whereby Article 44 of the CLA GT is null and void because the resulting obligation constitutes an unlawful restriction on the free movement of services under Article 56 TFEU, the court of second instance considered that, even though not declared universally applicable, the CLA GT applies to the situation at issue due to the combination of the universal applicability of the CLA PGT on the one hand (the content of which almost identical to the CLA GT), and the exemption granted to the undertakings bound by the CLA GT, on the other. It follows that the condition of universal applicability laid down in Article 3(8) of the PWD has been fulfilled and Article 44 of the CLA GT cannot be regarded as an unlawful restriction on the freedom to provide services within the meaning of Article 56 TFEU.

18. However, the second-instance court concluded in principle that, although the charter operations at issue were carried out within or from the Van den Bosch Transporten BV (that company being situated in Erp), the other condition for the applicability of Article 44 of the CLA GT was not satisfied because the situation did not fall within the scope of the PWD. That directive did not allow for a broad reading of the concept of posting which would not only cover the situation of being posted *to* the territory of a Member State, but also the situation of being posted *from* the territory of a Member State.

In the opinion of that court, the PWD covers only operations that are completely or principally carried out at national level. As that was not the situation at issue, there was no posting within the meaning of the PWD.

19. Before Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court in the present case seised by an appeal on cassation, the FNV argues essentially that the court of second instance failed to recognise that the term ‘to the territory of a Member State’ under the PWD must be interpreted as meaning ‘*to or from* the territory of a Member State’. (5) From the FNV’s perspective, the PWD therefore applies to drivers working in international road transport.

20. In the light of doubts relating to the applicability of the PWD to the situation at hand, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Directive [96/71] be interpreted as meaning that it also applies to a worker who works as a driver in international road transport and thus carries out his work in more than one Member State?
- (2)(a) If the answer to Question 1 is in the affirmative, what criterion or considerations should be used to determine whether a worker working as a driver in international road transport is posted “to the territory of a Member State” as referred to in Article 1(1) and (3) of [Directive 96/71], and whether that worker “for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works” as referred to in Article 2(1) of [Directive 96/71]?
- (2)(b) When answering question 2(a), should any significance be attached to the fact that the undertaking posting the worker referred to in question 2(a) is affiliated — for example, in a group of companies — to the undertaking to which that worker is posted and, if so, what should that significance be?
- (2)(c) If the work undertaken by the worker referred to in question 2(a) relates partly to cabotage transport — that is to say: transport carried out exclusively in the territory of a Member State other than that in which that worker habitually works — will that worker then in any case for that part of his work, be considered to be working temporarily in the territory of the first Member State? If so, does a lower limit apply in that regard, for example, in the form of a minimum period per month in which that cabotage transport takes place?
- (3)(a) If the answer to Question 1 is in the affirmative, how should the term “collective agreements ... which have been declared universally applicable”, as referred to in Article 3(1) and the first subparagraph of Article 3(8) of [Directive 96/71], be interpreted? Is that an autonomous concept of European Union law and is it therefore sufficient that the conditions laid down in the first subparagraph of Article 3(8) of the [Directive 96/71] have for practical purposes been met, or do those provisions also require that the collective labour agreement was declared universally applicable on the basis of national law?
- (3)(b) If a collective labour agreement cannot be regarded as a universally applicable collective labour agreement within the meaning of Article 3(1) and the first subparagraph of Article 3(8) of the [Directive 96/71], does Article 56 TFEU preclude an undertaking which is established in a Member State and which posts a worker to the territory of another Member State from being obliged by contractual means to comply with the provisions of such a collective labour agreement which is in force in the latter Member State?’

21. Written observations have been submitted by the FNV, Van den Bosch Transporten BV, the German, French, Hungarian, Netherlands, and Polish Governments, as well as the European Commission. The same parties participated in the hearing that took place on 14 January 2020.

IV. Analysis

22. This Opinion is structured as follows: I shall start with two preliminary clarifications concerning the scope (and the limits) of the present case (A). I will then proceed to the issue of the applicability of the PWD to the road transport sector (B). Next, I will turn to more specific issues concerning the circumstances that are relevant for determining whether a driver in road transport is to be considered as ‘posted’ (C). Finally, I will close with a few remarks on the notion of ‘collective agreements that have been declared universally applicable’ (D).

A. Preliminary remarks

23. Two issues have to be clarified at the outset.

24. First, Van den Bosch Transporten BV made a distinction between the arrangements that applied to the transport operations before and after 2013. It explained in some detail its current mode of operation, including the structure of the connection points for the drivers that the group operates in various Member States. It also provided samples of the routes undertaken by the drivers, demonstrating the multi-leg and international nature of the journeys made.

25. Nevertheless, as stated by the referring court and emphasised by the FNV at the hearing, the case in the main proceedings relates to 2013, during which (apparently) most of the drivers’ shifts started and ended in Erp.

26. Second, there is no further information provided as to the specific modalities under which the transport operations concerned in the main proceedings were carried out. It follows merely from the order for reference that the relevant ‘active shifts’ of the drivers started and ended in Erp, and that the Dutch company concluded charter contracts with either the German or Hungarian company.

27. Certainly, the relevant matters of fact are for the national court to ascertain. The reason they are being mentioned at this stage, as preliminary issues, is twofold.

28. First, naturally, the role of this Court is to interpret EU law, whereas it is the role of the national courts to apply it to the specific case. (6) Thus, no position is taken on whether (and when) there was in fact posting of workers in the individual case at hand.

29. Second, the degree of interpretative guidance that this Court is able to reasonably give depends on the level of detail that is provided by the referring court. That is particularly the case with regards to questions, such as the second set of questions posed by the referring court (questions 2(a) to 2(c)), the assessment and the criteria of which are, to a great extent, likely to be circumstantial and contextual. For a court (or certainly for its Advocate General, not gifted with the skills and foresight of a legislator), it is rather difficult to draft any comprehensive set of criteria for deciding whether there was in fact a posting without knowing the facts of a particular case. In sum therefore, those factors determine the level of abstraction at which the answer to the questions raised by the referring court may and will be provided in this Opinion.

B. Question 1: Does the PWD apply to road transport?

30. By its first question, the referring court asks whether the PWD applies to a driver in international road transport who carries out his work in more than one Member State.

31. The FNV, the German, French and Netherlands Governments, as well as the Commission, suggest that the answer should be in the affirmative. However, the opposite view is taken by Van den Bosch Transporten BV and by both the Hungarian and Polish Governments.

32. At the outset, I wish to clarify the scope of that question and the ensuing discussion. The question posed, and subsequently debated by the parties, is whether the PWD applies to workers engaged in *road transport*. This is a normative discussion regarding the scope of an EU legislative instrument: should the PWD apply to a certain type or *field of activity*, namely road transport? Or rather: on the basis of what provisions or considerations would that specific field be excluded from the scope of the PWD?

33. Two points are particularly noteworthy. First, by posing a question in this way, drivers engaged in (international) road transport are considered to be a logical subset of (all) the workers engaged in road transport. However, naturally, if the scope of the PWD were not to include *road transport*, that exclusion would not only concern drivers, but also potentially other workers engaged in road transport. Equally, if road transport were excluded, what effect would this have on other modes of international transport?

34. Second, there are two levels of the discussion and two types of argument presented by the parties on this issue: normative and practical. The *normative* level is concerned with the question whether, as a matter of legal construction of an instrument, and its interpretation, road transport is covered by the PWD. This question obliges one to consider whether there is anything in the text, context (including its legislative history and its legal basis), as well as in the purpose of the PWD that would lead to the conclusion that road transport was excluded from its scope?

35. Then there is the *practical* or pragmatic level of reasoning: would it actually make sense if international transport services, and in particular drivers carrying out those services, were declared to fall within the scope the PWD? Would it not be more reasonable, taking into account the practical difficulties that any such declaration poses in view of the specific type of work of an international driver, to exclude services relating to this field of activity from the scope of the PWD?

36. The latter considerations are certainly valid. As such, I shall return to them at the end of this section (5). However, in my view, the text (2), legislative context and history (3), as well as the purpose (4) of the PWD clearly confirm that there is simply no such field-related block exemption from the scope the PWD. Before carrying out that analysis, I shall first start with the key argument raised by the Hungarian and Polish Governments concerning the legal basis chosen and the consequences that should be drawn from that legal basis for the scope of the PWD (1).

1. *Legal basis*

37. Poland and Hungary contest the applicability of the PWD to the road transport sector by reference to the legal basis on which the PWD was adopted. The PWD is based on the former Article 57(2) and Article 66 TEC (now Article 53(1) and Article 62 TFEU), which are provisions applicable to services. Conversely, the former provision, equivalent to Article 91 TFEU at the time, which is the legal basis specific to transport, was not included among the legal bases on which the legislature relied. The same is true as regards the amending Directive (EU) 2018/957.⁽⁷⁾

38. Pursuant to Article 58(1) TFEU, ‘freedom to provide services in the field of transport shall be governed by the provisions of the Title [of the TFEU] relating to transport’. That means that Union acts which aim to harmonise matters concerning transport in particular must be based on the respective provisions of Title VI of the TFEU (Article 90 et seq.). These matters are, pursuant to Article 91(1) TFEU, ‘(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions’.

39. The legal bases chosen by the EU legislature to adopt the PWD exclude, in the view of Hungary, transport from its scope. According to established case-law, transport is not governed by the provisions on services. That government also points to the fact that the Services Directive ⁽⁸⁾ excludes, in Article 2(2)(d), transport from its scope. ⁽⁹⁾

40. This argument is found in certain corners of legal scholarship. Some authors indeed note that in the light of their special status within the Treaty, it is not obvious that the PWD applies to transport services. ⁽¹⁰⁾ Other commentators seem to assume that these services are not excluded for that very reason. ⁽¹¹⁾

41. The issue of the legal basis of the PWD was recently discussed by the Advocate General Szpunar in *Dobersberger*. He noted that ‘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. Yet [the PWD] is based merely on Articles 53(1) and 62 TFEU and not, in addition, on

Article 91 TFEU'. He concluded that '... while one can only speculate why Article 91 TFEU was not included as a legal basis for the adoption of [the PWD], services in the field of transport are commonly not considered to fall outside the scope of [PWD]. ... It does indeed appear to be received legal wisdom that services in the field of transport are, in principle, covered by the directive'. (12)

42. In its judgment, the Court did not take any explicit position on that issue. It just stated that 'free movement of services in the transport sector is governed not by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58(1) TFEU'. (13)

43. Within that context, does the fact that the specific provision applicable to transport was not included amongst the legal bases of the PWD prevent the latter from being applied to posting of workers in the transport sector?

44. I do not think so.

45. First, in structural terms, I find the argument that it would be possible *interpretatively* to limit the scope of an act of EU secondary law, *in spite of its clear wording*, by reference to the provisions of primary law on which it was based (or rather on which it should allegedly have been based, but was not) *years ago* a rather singular proposition.

46. To be clear, the correct choice of legal basis for an act of secondary law is naturally of utmost importance. But that choice (and its appropriateness) is to be examined in the context of a potential challenge *to the validity* of that secondary law measure. (14) I would caution against that logic being employed to create additional block exemptions, which are not contained, or at least hinted at, anywhere in the text of such a secondary law instrument. That is hardly a matter of legal interpretation. That is a recipe for legal chaos.

47. Moreover, the case-law of this Court has already confirmed that the primary legal basis on which an act of secondary law was adopted is not necessarily conclusive for the purposes of interpreting *the scope* of secondary law measures. That has particularly been the case in instances where the invoked Treaty provisions refer to a cross-border element, but the secondary law instrument adopted on its basis contains, on the face of it, no such requirement. Notable examples in this category include various EU secondary law measures adopted under Article 114 TFEU. (15) More recently, the same question arose with regard to the entire package of procedural directives arising out of the Stockholm programme, and based on Article 82(2) TFEU. (16)

48. The fact that those primary law bases mention, in one way or another, cross-border elements, has not been seen as sufficient reason to limit the scope of secondary law instruments that were adopted on their basis, but which make no reference to any such condition of cross-border link. In this context, the Court refused the 'interpretative reduction' of the scope of such instruments which themselves contained no such limitation. I do not see why it should, on an even thinner argumentative basis, embrace the 'interpretative creation of a block exception' because a Treaty article was also not referred to.

49. Therefore, with the interest in legal certainty for the (normal) addressees of Union legislation also in mind, it is necessary to reiterate that any (and all) legislation must be read and interpreted on its face value. If a Member State takes issue with the scope of application as clearly stated in its text, it is naturally entitled to challenge the validity of that measure as a privileged applicant pursuant to Article 263 TFEU.

50. Second, and in view of the first argument, on a subsidiary note, it should be recalled that to determine whether an act of secondary law is based on an appropriate legal basis for the purpose of assessing its validity, the Court distinguishes between the *primary* aim and content of the legislation on the one hand, (17) and other fields that are *secondary* and that may incidentally be touched upon, on the other hand.

51. From that perspective, it is rather clear to me that the primary aim and content of the PWD is not the regulation of transport services. The aim of the PWD is to react to the social and economic consequences that flow from the posting of workers in the framework of the provision of (all and any

types of) services. In principle, those consequences affect all employers equally, irrespective of the nature of the services that they provide. (18) They are transversal, applicable to all services.

52. In my view, and without wishing to comment on the choice of proper legal basis, the invoking of the specific legal basis for the regulation of services in the field of transport would have been necessary only if, regardless of the type of EU legal act, that legal act is intended to regulate *specifically* the provision of services in road transport. But that is clearly not the case with regard to the PWD. (19)

53. Services are provided in a number of areas or fields. A number of those areas potentially touched upon are contained in other titles of Part Three of the TFEU. Following the reasoning suggested by the Hungarian and Polish Governments to its full implications, could the same or similar arguments then be made with regard to other sectors that are specifically regulated elsewhere by primary law? Would the applicability of the PWD also then be excluded for services in the field of say, public health, energy, tourism or culture, because those specific fields and their specific legal bases have also not been invoked in the PWD?

54. For those reasons, I do not consider that the absence of a reference to the specific legal basis for transport in the PWD has as its effect the exclusion of the posting of workers in the field of road transport from the scope of that directive. With that preliminary point settled, I shall now turn to the arguments relating to the text, context, and purpose of PWD, viewed in particular in the context of the rather complex legislative history of that instrument.

2. *Text*

55. Based on its wording, there is nothing in the PWD that would exclude road transport from its scope. The PWD is drafted in general terms.

56. That is further borne out by the explicit exclusion of seagoing personnel in Article 1(2) of the PWD from its scope, as pointed out by the German, French and Netherlands Governments, as well as by the Commission. (20) That example shows that, if something is to be excluded from the scope of an otherwise generally worded act, it can and should be stated clearly.

57. Yet road transport, or any other transport not falling under the explicit exception of Article 1(2) of the PWD, is simply not excluded. For me, the analysis could really stop here. However, further objections to that conclusion were based on the PWD's legislative history and purpose.

3. *Legislative context*

(a) *The historical intent of the legislature*

58. The PWD finds its origin in the Commission's proposal of 1991 ('the 1991 Proposal'). Its explanatory part stated, as some of the parties in the present proceedings recalled, that 'the combination and interdependence of [draft] Articles 1 and 2 makes it unnecessary to incorporate a list of exclusions such as commercial travellers, members of the travelling personnel of an undertaking which operates *international transport services for passengers or goods* by rail, road, air, internal waterway or by sea, and civil servants and equivalent personnel employed by public administrative bodies'. (21)

59. That wording of the text implies that international road transport was supposed to be excluded from the scope of the (then future) directive. However, a declaration of the Council made within the legislative procedure adds a nuance to that, as stated in essence by the German Government and the Commission, because it does not suggest excluding international transport from the scope of the PWD in all circumstances, but only when the general conditions of the applicability of the PWD are not satisfied. (22)

60. At the hearing, the Commission drew attention to further legislative documents that seem to attest to the open-ended nature of the discussion that took place during the legislative process on the inclusion of transport within the scope of the PWD. (23)

61. It is thus rather clear that various ideas were expressed during the legislative process about the scope of the future directive. In my view, a court could and should take note of what the legislature intended. Its primary task nonetheless remains one of interpreting the law that has, once adopted, a life of its own. Two elements ought to be underlined in this regard.

62. First, provided that the legislature was clear as to the objectives, it is fair to assume that an exemption for road transport could certainly have been included in the text of the directive. Alternatively, there could have been at the very least an indication of that legislative intent somewhere in the authoritative statement of aim and purpose of the measure, which are, in EU law, recitals. Instead, there is absolutely nothing of that sort in either of the two, neither in the legal text, nor in the recitals to PWD. Hopes, ideas, or wishes are not legally binding. The adopted text is.

63. Second, that observation must surely be even more so the case in the context of EU law and its legislative procedures. Such legislative procedures involve multiple actors (typically the Council, the Parliament, and the Commission), with each of those actors being composed of a number of further actors, and each of them potentially having different ideas with regard to what they wish to achieve. Within such a system, it is only the final text that can be the point of reference, not the wishes or ideas of one of the actors expressed along the legislative way about what it believed it was doing at a particular stage of the legislative process.

(b) Subsequent legislative developments

64. On a subsidiary note, it would also appear that the legislative developments subsequent to the adoption of the PWD seem to rely on the assumption that the PWD *does* apply to road transport.

65. In this regard, some of the parties referred to Regulation (EC) No 1072/2009, (24) which lays down the rules applicable, among other things, to cabotage and recital 17 of which mentions that the PWD applies to cabotage. (25) A similar statement is found at recital 11 of Regulation (EC) No 1073/2009. (26)

66. It is also worth noting that Article 9(1)(b) of Directive 2014/67/EU mentions, among the administrative requirements and control measures that the Member States may impose to ensure compliance with the requirements attached to posting, ‘an obligation to keep or make available and/or retain copies, ... payslips, time-sheets ... and proof of payment of wages ... during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or *for mobile workers in the transport sector the operations base or the vehicle with which the service is provided*’. (27)

67. Among other things, the French Government referred to a Commission document which states that ‘the position of this Commission has always been that the [PWD] is applicable to the road transport sector’. (28) I also take note of an impact study published by the Commission, stating that ‘in the case of the cross-border provision of road transport services, the rules of [the PWD] also apply, as well as those of the enforcement Directive 2014/67/EC’. (29)

68. The adoption of Directive 2018/957 modifying the PWD was the next legislative development in this context. (30) According to Article 3(3), this modifying directive shall not apply to the road transport sector, until a legislative act establishing specific rules is adopted. Again, the parties in the present proceedings offered different views as to the implications of this clause for assessing whether or not the *current* version of the PWD applies to road transport. (31)

69. Furthermore, in taking specific steps to lay down rules for posting workers in the road transport sector, the Commission published a proposal (‘the 2017 Proposal’) whose recital 9 states that ‘difficulties have ... been experienced in applying the rules on posting of workers specified in [the PWD] ...’. The explanatory text of the 2017 Proposal further cites among the ‘key social rules applying to road transport’, ‘provisions on posting of workers established in Directive 96/71/EC’. It is further stated that ‘these legal acts are part of a wider effort to improve the working conditions of drivers, ensure fair competition between operators and improve the safety of European roads, as well as to ensure a balance between the drivers’ social protection and operators’ freedom to provide cross-border services’. (32) The same proposal also states the need to address the difficulties stemming from

the ‘differences in interpreting and applying of Directives 96/71/EC and 2014/67/EU to the road transport sector’ as the current ‘posting provisions and administrative requirements do not suit the highly mobile nature of the work of drivers in international road transport’. (33)

70. That proposal thus repeatedly admits that the existing general posting rules are ill-suited to the transport sector and that their application poses particular difficulties, which the 2017 Proposal thus repeatedly states and acknowledges that these issues should be addressed. (34) However, the acknowledgement of the inadequacy of the existing rules can hardly mean that those rules are not applicable to a sector. It means exactly the opposite: that they are in fact applicable, otherwise, they could hardly be judged as problematic.

4. *Purpose*

71. As expressed in essence in the 1991 Proposal, the aim of the PWD is not to harmonise labour laws. (35) Although, as the Court noted, it does provide some information about the material content of mandatory rules that must be applied. (36)

72. One can consider that harmonisation to be a means to pursue the aim of achieving, as stated by Advocate General Szpunar in reference to recital 5 of the PWD, ‘a threefold objective, which is the promotion of the transnational provision of services, in a climate of fair competition, and guaranteeing respect for the rights of workers’. (37) As was also noted by Advocate General Szpunar, the combination of those objectives does not necessarily result in a harmonious whole. For this reason, he considered that it was ‘more coherent to consider [the PWD] as a measure which seeks to reconcile the opposing objectives of the freedom to provide services and the protection of the rights of workers’. (38)

73. I would also have some intellectual difficulty in seeing how exactly the PWD promotes the ‘transnational provision of services’. (39) If anything, the very purpose of the PWD is to limit the free transnational provision of services, by putting accent on the rights of workers and on a climate of fair competition, particularly in relation to the countries to which the workers are being posted.

74. However, for what is relevant here, I do not see how those two stated objectives of the PWD could call into question the rather straightforward conclusion drawn from the text of that directive as to its scope. There is nothing in the protection of the minimum ‘rights of workers’ or ‘climate of fair competition’ that could not be applicable to road transport or would call for the exclusion of that specific field from the scope of an otherwise transversally applicable directive.

5. *‘It should be excluded because it does not work’*

75. In sum, in my view, there is nothing in either the legal basis or in the legislative procedure that would cast doubts on the clear conclusion flowing from the text, context, as well as the purpose of the PWD: there is no exclusion regarding road transport. The PWD is intended to apply to all services, including the road transport.

76. That is the clear normative conclusion. Nonetheless, there is, as already mentioned, (40) the lingering argument concerning the ability of the PWD to actually apply to drivers engaged in international road transport. By reference to the specificity of the road transport sector, some of the parties argued that, due to its high mobility, that sector is simply unfit to be governed by the rules of the PWD. (41)

77. A number of practical difficulties have likewise been acknowledged in the 2017 Proposal. (42)

78. It has also been pertinently observed that the notion of posting ‘reflect[s] the idea of a sedentary worker, habitually employed in one Member State, sent on a temporary basis to another Member State and eventually returning to the first Member State’. (43) Indeed, similarly to the cabin crew of an airplane, the truck drivers are of course ‘mobile by definition’ and ‘the carrying out of activities in several Member States is a normal aspect of their working conditions’. (44) Thus, while determining whether a situation of posting has occurred is much more complicated in comparison to sedentary sectors, it is not impossible.

79. I fully acknowledge the (somewhat self-evident) mobile nature of the transport sector, and the difficulties that arise in the implementation of the obligations laid down by the PWD. However, I do not think that those practical factors should be allowed to change the rather clearly normatively stated scope of an EU legislative instrument.

80. Certainly, EU rules and legislation, as much as any legislation, ought to be practical and feasible. In cases of interpretative doubts, where several options are possible, going for the option that is likely to work best in practical terms is certainly a good recipe. In my view, in extreme situations, legislation that is, or rather that has become wholly unfeasible and impracticable should be annulled. (45) However, to suggest that something ought to be judicially excluded by interpretation, against the clear wording of the text, on the basis that it encounters problems in practice, would indeed be a novelty in the interpretation of EU law, and would no doubt have a major impact on a number of other areas of EU law as well.

6. *Interim conclusion*

81. In the light of the foregoing, my first interim conclusion is that the PWD is to be interpreted as applying to a worker who works as a driver in the road transport sector and who is posted, within the meaning of that directive, to the territory of a Member State other than the Member State in which he or she normally works.

C. *Question 2: Circumstances relevant for the determination of the ‘posted’ status in road transport*

82. The second question posed contains three sub-questions. First, the referring court wishes to ascertain the criteria that should be used to determine whether a driver in the road transport sector is to be considered as having been posted (1). Second, it also enquires whether, in essence, the fact that the undertaking posting the worker is linked to the undertaking to which that worker is posted has any significance for that determination (2). Finally, the referring court also asks whether, in the case of cabotage, the worker would be, in any case for that part of his or her work, considered posted and, if so, whether any *de minimis* rule (such as minimum length of the cabotage) applies (3).

1. *Criteria to determine the existence of posting*

83. The first sub-question concerns the criteria to determine whether a driver is to be considered as having been posted ‘to the territory of a Member State’ as referred to in Article 1(1) and (3) of the PWD and whether that worker ‘for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’ as referred to in Article 2(1) of the PWD.

84. The two provisions referred to by the referring court partly overlap. Article 2(1) of the PWD defines the concept of ‘posted worker’. It states that it 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’. The term ‘to the territory of a Member State’, appears in some of the other provisions of the PWD. It generally refers to the same concept as Article 2(1) of the PWD. However, Article 2(1) provides more details as to the territorial and temporal dimension of the notion of posting (‘in the territory of a Member State other than the State in which he normally works’ and ‘for a limited period’).

85. Thus, I shall focus on the definition provided in Article 2(1) of the PWD. Once the criteria for determining whether a situation described under Article 2(1) has arisen are ascertained, they will also provide an answer to the question whether a worker is to be considered as posted ‘to the territory of a Member State’ under Article 1(1) and (3) of the PWD.

86. In its judgment in *Dobersberger*, the Court observed that ‘... a worker cannot, in the light of [the PWD], be considered to be posted to the territory of a Member State if the performance of his or her work does not have a *sufficient connection with that territory*. That interpretation derives from the scheme of [the PWD] and, in particular, Article 3(2) thereof, read in the light of recital 15, which, in the case of the very limited provision of services in the territory to which the workers concerned are

sent, states that the provisions of that directive on minimum rates of pay and minimum paid annual holidays are not applicable'. (46)

87. With regard to the specific type of activity at issue in *Dobersberger*, namely the provision of catering and cleaning service on international trains, the Court concluded that workers carrying out such services cannot be considered, for lack of a 'sufficient connection', as posted within the meaning of the PWD when crossing a Member State because they 'carry out a significant part of their work in the Member State of establishment of the undertaking which assigned them to provide services on international trains, that is to say all activities falling within the scope of that work with the exception of the on-board service provided during the train's journey, and who begin or end their shifts in that Member State'. (47)

88. How then should the existence of such 'sufficient connection' be assessed with regards to drivers in international road transport? The parties who contend that road transport falls within the scope of the PWD put forward various criteria which could be taken into account in this context.

89. The German Government suggests developing an approach consistent with the criteria applied in the context of Article 8(2) of the Rome I Regulation on the determination of the applicable law to the employment contract, whilst simultaneously warning against simply transposing those criteria into the context of a different instrument such as the PWD. Article 8(2) of the Rome I Regulation states that 'to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee *habitually carries out his work* in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'. (48)

90. As regards the need for consistency in the interpretation of the PWD and the Rome I Regulation, (49) both instruments indeed seek to determine (some elements of) the law to be applied to different aspects of an employment relationship. However, it should be noted that Article 8(2) of Rome I Regulation is concerned with determining the law that governs *the whole employment relationship* in the absence of the choice of law in the employment contract. By contrast, Article 2(1) of the PWD refers to the State of posting, the (selected) mandatory labour law standards of which, in the matters specified in Article 3(1)(a) to (g) of the PWD, must be guaranteed to posted workers.

91. Therefore, both instruments pursue different objectives. The determination of the 'applicable law' also triggers different consequences. Most importantly, as clearly stated in the Rome I Regulation (and previously by the Rome Convention) (50) to which the PWD refers, (51) a situation of posting does not affect the law applicable to the employment. In other words, the fact that the posting of a worker triggers the applicability of the listed mandatory labour standards of the host State does not stop his employment relationship from being governed by the law determined on the basis of the rules of the Rome I Regulation.

92. However, those differences indeed do not prevent taking into account, on a more general level of abstraction, similar criteria by analogy. After all, both instruments seek to ascertain certain types of *material connections* between the worker and a given Member State. Those material connections will tend to be similar as they aim to establish a significant physical presence of a given person in a given territory. (52)

93. The equivalent of Article 8(2) of the Rome I Regulation in the Rome Convention was interpreted by the Court in *Koelzsch*. (53) That case concerned a driver, domiciled in Germany and working in international transport, who contested the applicability of (the contractually chosen) Luxembourgish law to his dismissal by his Luxembourgish employer, a subsidiary of a Danish company. He claimed that his situation should be covered by the mandatory rules of German law, Germany being the major destination of the loads he transported from Denmark, in lorries stationed in Germany and registered in Luxembourg.

94. The Court concluded that in order to determine 'the country in which the employee habitually carries out his work', account should be taken 'of all the factors which characterise the activity of the employee' and in particular 'the place from which the employee carries out his transport tasks, receives

instructions concerning his tasks and organises his work, and the place where his work tools are situated ... the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks'. (54)

95. Similarly, in the context of determining the 'place where the employee habitually carries out his work', within the meaning of Article 19(2)(a) of Regulation 44/2001, the Court stated that where the employment contract is 'performed in the territory of several Contracting States and where there is no effective centre of professional activities from which an employee performs the essential part of his duties vis-à-vis his employer', that concept is to be understood as 'referring to the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer'. (55)

96. Moreover, in the light of the competing objectives that the PWD pursues, (56) the criteria to be applied should reflect the need to provide the posted workers with the protection that is due in the light of their presence in the host Member State. However, those criteria should not extend the application of the posting rule to just any form of presence in a given Member State as that would cause undue burden for the undertakings posting workers.

97. When faced with a mosaic of possible connecting elements, the list of which may be particularly diverse in the road transport sector, one must necessarily conduct a case-specific analysis and consider the mutual interplay between those elements. In similarly 'mobile circumstances', Advocate General Saugmandsgaard Øe, and the Court, referred to 'a number of indicia' (57) or a 'circumstantial method' that 'makes it possible not only to reflect the true nature of legal relationships, ..., but also to prevent [the respective concept] from being exploited or contributing to the achievement of circumvention strategies'. (58)

98. Certainly, there are likely to be clear-cut cases at each end of the possible spectrum.

99. On the one hand, I agree with those suggesting that mere transit to a Member State or a simple cross-border transport does not qualify as 'posting' within the meaning of the PWD. Such a situation will not allow for the establishment any materially relevant connection between the driver and the Member State through which he or she transits. The situation is similar with regards to what is referred to as 'bilateral transport operations' in which, in principle, the driver crosses a border to deliver the load abroad and drives back.

100. On the other hand, one can imagine a scenario in which an employer places at the disposal of a party located in another Member State for whom the services are intended, a driver employed by him or her to carry out, on a temporary basis, national or international transport operations for that party. For that purpose, that driver will be transported to the place of business of the party for whom the services are intended, will receive instructions and load trucks there, and will carry out the carriages from and to that place. Such a situation will amount, in my view, to a posting within the meaning of the PWD. For all practical purposes, the driver at issue would be transferred to another Member State, assigned to the local base of operations from which transport operations will be carried out, and will be returning to that place after the completion of the transport operations for the time of the posting.

101. Between these two scenarios, many other less clear-cut situations may arise, involving a number of variables. One can imagine a multi-destination international transport operation involving loading and unloading in different locations, with the instructions being received by the driver progressively throughout the transport operation in different locations of the Union.

102. In such a scenario, the examination to be carried out is necessarily bound to be case-specific and circumstantial. In one set of circumstances, specific indicia may be relevant whereas in other factual settings, weighted against another set of indicia, they may not.

103. However, stated at a rather high level of abstraction, (59) what is likely to be particularly significant is the place of the undertaking or the person to whom the services of the workers concerned are provided. Especially, if that place is also the one where the transport operations are organised and the drivers receive their assignments and to which they return after the completion of their work.

104. Those elements, whilst not exhaustive, are to be considered in their mutual interplay. Thus, for instance, the place where the instructions are actually received will matter less when they are received on a flexible basis by electronic communication and literally ‘on the road’. However, should they be received, for example, at the place where the transport operations start and end, that is, the place of business of the person on whose behalf they are carried out, such a place will be relevant. By the same token, and considered in isolation, it should not be relevant who immediately transmits the instructions to the respective driver or where they originate from since both places may be located somewhere other than where the driver is actually located, carries out the essential part of his or her work, and covers his or her living costs.

105. above, I conclude that the concept of ‘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’ within the meaning of Article 2(1) of the PWD must be understood as a worker who has a sufficient connection with such a territory. Whether such a sufficient connection exists must be determined by reference to all relevant indicia, to be considered together, such as the location of the person to whom the services at issue are addressed, the place where the transport operations are organised and the drivers receive their assignments, and the place to which they return after the completion of their work.

2. *Relevance of intra-group links*

106. Does the affiliation between the companies concerned make any difference for the assessment of whether there is a posting of workers? The PWD takes into account the relevance of such links for the scenario of intra-group posting described in Article 1(3)(b) of the PWD.

107. The present case is, however, not concerned with the different modalities of posting depending on whether the situation falls under Article 1(3)(a) or (b) of the PWD. The question posed by the referring court is in fact much broader, focusing on the extent to which intra-group ties are relevant for the very concept of the posting of workers under Article 2(1) of the PWD. Should the existence of intra-group link be relevant when considering the earlier question as to whether the situation of posting has occurred at all?

108. The FNV and the Netherlands Government argue, in substance, that the existence of such links should be part of the criteria to be taken into account when assessing whether there is a situation of posting.

109. I cannot agree with such a general proposition. As explained in the preceding section of this Opinion, under the current legislative framework, which lacks any guidance as to the criteria to be used, the examination is bound to be very case-specific. In the course of that assessment, the fact that a worker is posted to an undertaking affiliated with the undertaking making that posting is in and of itself not decisive. A worker can naturally be posted in exactly the same way to an undertaking that is in no way affiliated with the undertaking posting that worker.

110. On the other hand, it also cannot be stated in absolute terms that such an affiliation would always be, under all circumstances, deprived of any relevance. Certainly, in practical terms, intra-group affiliations make it easier for the undertakings involved to agree on a strategy which consists in avoiding the application of the posting rules than it would be for two non-affiliated undertakings. But should that assumption be pushed as far as to in effect create a ‘suspicion of avoidance’ based on the mere fact that certain services are being provided within or between companies which are in one way or another affiliated with each other? That certainly cannot be the case.

111. Be that as it may, besides the general statement that all three respondent companies have the same shareholder, the information provided in the case file does not reveal any further indications as to why the affiliation between the respective companies should be relevant with respect to the decision as to whether workers have been posted.

112. I would thus suggest leaving that matter indeed open ended: an affiliation between the undertakings involved in a given posting, taken together with all other relevant indicia, may potentially matter for the overall consideration of whether the situation of posting has occurred. It is, however, not in itself decisive.

3. *Cabotage and de minimis rule*

113. In the light of the previously expressed doubts regarding the applicability of the PWD to road transport, by the next sub-question, the referring court wishes to know whether cabotage constitutes a situation in which the worker would be considered as posted. If so, it wishes to know whether any *de minimis* rule applies to such posting.

114. First, the concept of cabotage refers generally to a situation in which the transport is carried out between two locations in the same Member State by an undertaking established in a different Member State. Article 2(6) of Regulation No 1072/2009 defines cabotage as ‘national carriage for hire or reward carried out on a temporary basis in a host Member State’. (60)

115. ‘The conditions under which non-resident hauliers may operate transport services within a Member State’ (61) are further specified in Article 8 of Regulation No 1072/2009. (62) In principle, those rules allow up to three cabotage operations to be carried out in the host Member State upon the completion of an international transport into that State, within seven days as from the moment of completion of that transport operation.

116. I recall that recital 17 of Regulation No 1072/2009 declares that the provisions of the PWD apply to transport undertakings performing a cabotage operation.

117. Second, as regards *de minimis* rules, recital 14 of the PWD states that ‘... a “hard core” of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker’s posting’.

118. However, under Article 3(3) of the PWD, the Member States may decide — after consulting employers’ and employees’ representatives — that the host country’s minimum pay requirement need not apply if the entire duration of the posting lasts for less than one month. No information has been provided in the present case as to the use of that possibility in the Netherlands, and so therefore I shall assume that that exception has not been implemented by that Member State.

119. Apart from that exception, the PWD does not subject the existence of posting to any *de minimis* rule, such as the minimum length or time of the transport carried out, as the Commission and German Government point out.

120. Third, connecting the two previous elements together leads me to the conclusion that for a situation of posting to arise in the specific context of cabotage, no minimum time limit applies.

121. In the light of those elements, my next interim conclusion is that the application of the PWD to cabotage is not subject to any minimum rules concerning the length of such operation in the host Member State.

D. *Question 3: Collective agreements declared universally applicable*

122. By its third question, the referring court wishes to clarify the concept of ‘collective agreements ... which have been declared universally applicable’, as referred to in Article 3(1) and the first subparagraph of Article 3(8) of the PWD (1). It also inquires whether Article 56 TFEU precludes a situation in which an undertaking, posting a worker to the territory of another Member State, would be obliged contractually to comply with a collective agreement that cannot be regarded as universally applicable (2).

1. *Concept of ‘collective agreements which have been declared universally applicable’*

123. Is the concept of ‘collective agreements ... which have been declared universally applicable’ appearing in the PWD an autonomous concept of EU law? Or is the assessment, subject to the conditions set out in Article 3(1) and the first subparagraph of Article 3(8) of the PWD, a matter for national law?

124. It follows from Article 3(1) of the PWD that the labour law standards to be granted to posted workers are defined not only in the respective laws of the Member States, but also in ‘collective agreements ... which have been declared universally applicable ... in so far as they concern the activities referred to in the Annex’. That annex concerns, in short, the construction sector. Moreover, by virtue of Article 3(10) of the PWD, the Member State may apply the labour law standards defined in such collective agreements concerning activities other than construction works.

125. From the wording of the preliminary question, as well as from the facts of the present case, I understand that the referring court is interested in the part of the definition which is concerned with the declaration of universal applicability, as opposed to elements under Article 3(8) of the PWD which relate to the observance of an agreement ‘by all undertakings in the geographical area and in the profession or industry concerned’. I shall thus focus on the issue of the ‘declaration of universal applicability’. That is also the approach embraced by all the parties who have commented on this issue in the present proceedings.

126. The parties have expressed different points of view on whether the concept of ‘collective agreements which have been declared universally applicable’ constitutes an autonomous concept of EU law or whether it is to be defined by reference to national law, or by a combination of both. They also expressed different views concerning the implication of the judgment in *Rüffert*. (63) Taking note of the fact that the collective agreement at issue in that case was not declared universally applicable based on national law, the Court observed that ‘in addition the case file ... does not contain any evidence to support the conclusion that that agreement is nevertheless capable of being treated as universally applicable within the meaning of [... PWD]’.

127. On the one hand, for the Netherlands Government and the FNV, in the absence of a reference to national law, the concept of ‘an agreement declared of general application’ is in principle an autonomous concept of EU law. The Netherlands Government adds that a collective agreement that has been declared universally applicable under national law may still not satisfy the conditions of Article 3(8) of the PWD. Conversely, a collective agreement that has not been declared such can never fall within the scope of Article 3(8) of the PWD.

128. On the other hand, according to the German and Polish Governments, universal applicability cannot be determined without reference to national law. In order to fall under Article 3(8) of the PWD, an agreement has to be declared universally applicable under national law *and* comply with Article 3(8) of the PWD. Universal applicability thus requires an act of domestic law.

129. While I agree with the Netherlands Government and the FNV as regards the absence of an express reference to national law, I consider that the language of Article 3(1) of the PWD logically refers to national law, to the extent that it requires the universal applicability to have been ‘declared’. Such a declaration, as is rightly pointed out by the German and Polish Governments, requires a specific declaratory act to be taken at national level, following national rules on how such collective agreements should be negotiated and adopted and by whom. As such, I fail to see how such a declaration could constitute a matter of EU law, as all those rules are clearly a matter for national labour law.

130. If the EU legislature intended to establish the concept of the ‘collective agreements ... which have been declared universally applicable’ as an autonomous and independent concept of EU law, it would have presumably used a different wording, perhaps without referring to ‘declaration’ of universal applicability, and would have provided for at least some substantive or procedural criteria as to how that universal applicability should be assessed. Such an autonomous concept of universal applicability would have to be established based on intrinsic characteristics of the respective agreements. Conversely, by specifying that the collective agreements concerned are those that have been *declared* universally applicable, the EU legislature referred, in my view, to a system under which such a declaration may occur. Because there are no elements that can be relied on in that context in EU law, that system has to necessarily be a national one, in the context of the national organisation of the social dialogue to be conducted among the respective stakeholders.

131. Similarly, the second subparagraph of Article 3(8) of the PWD refers to ‘a *system* for declaring collective agreements to be of universal application’. (64) Under that provision, it is only in the absence of such a *system* that the PWD introduces a subsidiary criterion for the Member States to rely on, allowing them to base themselves on ‘collective agreements ... which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’, and/or ‘collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory’.

132. That subsidiary option however does not change the main rule that relies on a national system of declaration.

133. As a matter of fact, Netherlands law provides for such a system, as pointed out by the Commission. It follows from the case file that the collective agreement at issue, namely the CLA GT, is to be considered, under national law and subject to the assessment by the referring court, covered by a universal declaration due to the links that exist between that agreement and the CLA PGT.

134. In sum, the concept of ‘collective agreements which have been declared universally applicable’ under Article 3(1) of the PWD is to be understood as referring to national law. In other words, whether a collective agreement has been declared universally applicable must be determined by reference to the applicable national law on that matter.

2. *Existence of a restriction to Article 56 TFEU*

135. By question 3(b), the referring court asks whether Article 56 TFEU precludes an undertaking which is established in a Member State and which posts a worker to the territory of another Member State from being obliged by *contractual means* to comply with the provisions of a collective agreement which cannot be regarded as universally applicable under the PWD.

136. That question by the referring court is asked only in the event that the reply to question 3(a) leads to the conclusion that the collective agreement at issue cannot be regarded as having been declared universally applicable within the meaning of the PWD. In such a scenario, the obligation to apply the basic labour conditions of the CLA GT would not flow from the PWD but could still flow from Article 44 of the CLA GT. Would that amount to a restriction within the meaning of Article 56 TFEU, as is claimed by Van den Bosch Transporten BV in the main proceedings?

137. That question requires several clarifications.

138. First, whether the CLA GT is to be considered as having been declared universally applicable is a matter of national law. Thus, it is ultimately a decision for the referring court to make. The referring court indicates in the order of reference that under national law, the collective agreement at issue, the CLA GT, is to be considered as having been declared universally applicable.

139. If that is indeed the case under national law, then question 3(b) is hypothetical.

140. Having said that, the referring court can still reach a contrary opinion and conclude that the CLA GT cannot be considered as having been declared universally applicable. That would make it necessary to respond the question 3(b).

141. Second, as set out in the order for reference, the source of the incompatibility would be the application of the basic labour conditions set out in the CLA GT to a foreign undertaking posting workers, despite the fact that the CLA GT cannot be considered to be universally applicable. The referring court asks that question despite the fact that Article 44 of the CLA GT appears to link the applicability of those obligations only ‘*when that stems from the [PWD]*’. (65) In my opinion, for the purpose of question 3(b), that part of Article 44 of the CLA GT has, in reality, to be rather read as ‘even when that does not stem from the PWD’.

142. Seen in this light, question 3(b) would then be asking whether Article 56 TFEU precludes an undertaking which is established in a Member State and which posts a worker to the territory of

another Member State, from being obliged to comply with the provisions of a collective agreement which cannot be regarded as having been declared universally applicable under the PWD.

143. Assuming that I have understood the question correctly, and leaving aside the puzzling issue of under which provision of national law could a collective agreement that is not universally applicable still be declared binding on service providers from other Member States, the response to that question would indeed subsequently follow from the analysis of restrictions to the freedom to provide services under Article 56 TFEU.

144. I agree with the Netherlands Government that the situation described in question 3(b) would then constitute a restriction of freedom to provide services. It would impose a burden on the undertakings concerned, because it would require compliance with obligations corresponding to those defined in the PWD *beyond the scope* of that instrument. The key question would then be whether such a restriction could be justified by overriding reasons relating to the public interest and whether it meets the test of proportionality.

145. I note that the order for reference does not contain any further information about the possible justification and elements relevant for the test of proportionality.

146. As regards the justification by overriding reasons to the public interests, I agree with the German and Netherlands Governments that the protection of workers (66) and prevention of unfair competition (67) could qualify as such. Those grounds effectively overlap with the objectives pursued by the PWD discussed above. (68) It is thus for the referring court to verify whether, viewed objectively, the authors of the CLA GT pursued, when drafting Article 44 thereof, the promotion of the rights of the posted workers or the prevention of unfair competition.

147. As the Court repeatedly recalled, in order to be justified, a measure must be apt to ensure attainment of the objective pursued by it and must not go beyond what is necessary in that connection. (69) That assessment would be ultimately for the referring court to make, bearing in mind however, that in and within the PWD, the European legislature already achieved a certain balance between the competing and rather opposing objectives pertaining to the PWD.

V. Conclusion

148. I suggest that the Court reply to Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

- (1) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it also applies to a worker who works as a driver in the road transport sector and who is posted, within the meaning of that directive, to the territory of a Member State other than the Member State in which he or she normally works.
- (2)(a) The concept of ‘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’ within the meaning of Article 2(1) of Directive 96/71 must be understood as a worker who has a sufficient connection with such a territory. Whether such a sufficient connection exists must be determined by reference to all relevant indicia, to be considered together, such as the location of the person to whom the services at issue are addressed, the place where the transport operations are organised and the drivers receive their assignments and to which they return after the completion of their work.
- (2)(b) Affiliation between the undertakings involved in a given posting, taken together with all other relevant indicia, may potentially matter for the overall consideration of whether the situation of posting has occurred. It is, however, not in itself decisive.
- (2)(c) Cabotage is covered by the scope of Directive 96/71. The application of Directive 96/71 to cabotage is not subject to any minimum rules concerning the length of the cabotage operation in

the host Member State.

- (3) Article 3(1) of Directive 96/71 is to be interpreted as meaning that the question whether a collective agreement has been declared universally applicable must be determined by reference to the applicable national law.

[1](#) Original language: English.

[2](#) Directive of the European Parliament and of the Council of 16 December 1996 (OJ 1997 L 18, p. 1).

[3](#) The 1980 Convention on the Law Applicable to Contractual Obligations (OJ 1980 L 266, p. 1, consolidated version (OJ 2005 L 334, p. 1); ‘the Rome Convention’).

[4](#) Regulation (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’).

[5](#) Italics added.

[6](#) See, for example, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 132).

[7](#) Directive of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71 (OJ 2018 L 173, p. 16).

[8](#) 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).

[9](#) Referring to judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 44).

[10](#) See, for example, Van Hoek, A., Houwerzijl, M., *Report for the Dutch Social Partners in Transport*, Radboud University, Nijmegen, 2008, p. 88.

[11](#) For example, Barnard, C., *EU Employment Law*, Oxford University Press, Oxford, 2012, p. 234; Van Overbeeke, F., ‘Do we need a new conflict-of-laws rule for labour in the European road transport sector? Yes we do’, *From social competition to social dumping*, Intersentia, Cambridge, 2016, pp. 107-108 (footnote 2); Lhernould, J-P., ‘Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services — What will change in 2020?’, *ERA Forum*, vol. 20(2), 2019, p. 255.

[12](#) Opinion of Advocate General Szpunar (C-16/18, EU:C:2019:638, points 34, 35 and 37).

[13](#) Judgment of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110, paragraph 24).

[14](#) See, notably, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741) or of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04

and C-155/04, EU:C:2005:449).

[15](#) See, for example, judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 41 to 43) or of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraphs 40 to 42).

[16](#) See judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraphs 32 and 33) and my Opinion in that case exploring that issue in detail (EU:C:2019:95, especially points 37 to 54).

[17](#) Judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraphs 96-97) and of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraph 41).

[18](#) With the explicit exception provided for merchant navy undertakings as regards seagoing personnel, pursuant to Article 1(2) of the PWD. In this regard, I cannot but to subscribe to the reasoning made on this point by Procureur-Generaal Drijber before the referring court in the case in the main proceedings (Opinion of 7 September 2018, NL:PHR:2018:943, point 5.3).

[19](#) Compare, *a contrario*, the explanation concerning the legal basis provided by the Commission in the current proposal of rules on posting specific to transport sector: ‘Directives 96/71/EC and 2014/67/EU are founded on (what is now) Article 53(1) TFEU. However, since the rules proposed here exclusively pertain to situations specific to the provision of transport services, Article 91(1) TFEU should be relied upon.’ Proposal for a directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, COM(2017) 278 final, p. 3 in fine.

[20](#) See also van Hoek, A., Houwerzijl, M., *Report for the Dutch Social Partners in Transport*, Radboud University, Nijmegen, 2008, p. 88. observing that the explicit exclusion of seagoing personnel of merchant navy undertakings ‘indicates that other personnel in international transport do in principle fall under the scope of the Directive, in so far the other conditions are met’.

[21](#) COM(91) 230 final, SYN 346 of 1 August 1991, Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, point 23. The draft Article 1 provided that the directive ‘shall apply to undertakings regardless of the State in which they are established ...’. The draft Article 2 enumerated the three situations of posting. (Italics added.)

[22](#) Council document No 10048/96, Statements for entry in the Council Minutes. SOC 264 CODEC 550, Statement No 3: ‘The provisions of Article 1(3)(a) cover posting situations which meet the following conditions: — the transnational provision of services by an undertaking on its own account and under its direction under a contract concluded between the undertaking and the party for whom the services are intended; — posting as part of such provision of services. Therefore, if the above conditions are not met, the following situations do not fall within the scope of Article 1(3)(a): — that of 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; ...’ (Italics added.)

[23](#) Document of the Council Working Party on Social Questions on 29 October 1992, 9790/92 of 10 November 1992, p. 5; document of the Council Working Party on Social Questions of 13 July 1993, 9570/93, of 3 November 1993, p. 5; document of the Council Working Party on Social Question on 24 September 1992, 8255/92 of 9 October 1992, p. 5.

[24](#) Regulation of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

[25](#) Defined by Article 2(6) of that regulation in essence as ‘national carriage for hire or reward carried out on a temporary basis in a host Member State’.

[26](#) Regulation of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88).

[27](#) Directive of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ 2014 L 159, p. 11). (Italics added.)

[28](#) Revision of the Posting of Workers Directive — frequently asked questions, 8 March 2016, updated on 24 October 2017 (MEMO/16/467).

[29](#) Support study for an impact assessment for the revision of the social legislation in road transport, Final report, Study contract No MOVE/D3/2016-605, authors: Gibson, G., Tsamis, A., Lohr, E., Guidorzi, E., Levin, S., May 2017, p. 7.

[30](#) Cited above, footnote 7.

[31](#) For the purpose of this case and this Opinion, I do not think it necessary to engage in the (EU law rather traditional) type of discussions as to whether a rule embodied in a new version of legislative instrument is (i) a codification of what has always been there, although just ‘implicit’ or (ii) a genuine amendment, expressly enacting a new rule departing from the previous version of that same instrument.

[32](#) COM(2017) 278 final Proposal for a directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, p. 2.

[33](#) Ibid, p. 2.

[34](#) I note that such difficulties were already acknowledged in the Commission proposal of 8 March 2016 for amending Directive 96/71/EC, COM(2016) 128.

[35](#) See also judgments of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 60 and 68), and of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, paragraph 31). See also p. 16, point 27 of the proposal COM(1991) 230.

[36](#) Judgment of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, paragraph 31). See also judgment of 19 June 2008, *Commission v Luxembourg* (C-319/06, EU:C:2008:350, paragraph 24 and the case-law cited).

[37](#) Opinion in *Dobersberger* (C-16/18, EU:C:2019:638, point 23).

[38](#) Opinion of Advocate General Szpunar in *Dobersberger* (C-16/18, EU:C:2019:638, points 23 and 24). See also judgments of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 74 to 76), and of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, paragraph 30).

[39](#) Unless naturally the unspoken assumption behind that proposition is that if one were not to accept *some* restrictions on the freedom to provide services, there would be *none* at all. In this way, in a truly Orwellian language, restriction is indeed freedom.

[40](#) Above, point 35.

[41](#) Similar views have been expressed in some parts of legal scholarship. See, for example, Lhernould, J-P., ‘Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services — What will change in 2020?’, *ERA Forum*, vol. 20(2), 2019, p. 255; Van Overbeeke, F., ‘Do we need a new conflict-of-laws rule for labour in the European road transport sector? Yes we do’, *From Social Competition to Social Dumping*, Intersentia, Cambridge, 2016, pp. 114 and 119-120; Even, Z., Zwanenburg, A., ‘A Dutch insight into the applicability of the Posted Workers Directive on international road transport. But still: a long and winding road ahead? (NL)’, *European Employment Law Cases*, vol. 2(3), 2017, p. 157; Laagland, F., ‘Navigeren door het labyrint van grensoverschrijdende detachering — de fundamentele verkeersvrijheden, de Detacheringsrichtlijn en het internationaal privaatrecht’, *Arbeidsrechtelijke Annotaties*, vol. 10(2), 2016, p. 19.

[42](#) See the explanatory memorandum of proposal referred above in footnote 32, p. 5 and the draft recital 9.

[43](#) Opinion of Advocate General Saugmandsgaard Øe in Joined Cases *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2019:592, point 131), concerning the flying personnel in the context of posting under Regulation (EEC) No 1408/71 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, Series I 1971(II), p. 416), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) .

[44](#) Ibid.

[45](#) See my Opinions in *Lidl* (C-134/15, EU:C:2016:169, point 90), and in *Confédération paysanne and Others* (C-528/16, EU:C:2018:20, point 139).

[46](#) Judgment of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110, paragraph 31).

[47](#) Judgment of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110, paragraph 33). The concept of sufficient connection is also referred to in the draft recitals 11 and 12 of the 2017 Proposal quoted above, footnote 32.

[48](#) Italics added.

[49](#) The recitals 7 to 11 of the PWD repeatedly refer to the Rome Convention, which is the legal predecessor of the Rome I Regulation.

[50](#) Recital 34 of the Rome I Regulation: ‘The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with [the PWD].’

[51](#) See recital 10 of the PWD: ‘Whereas Article 7 of the said 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.’ See, to that effects effect, Article 8 of the Rome I Regulation. Article 8(2) in fine states: ‘The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.’

[52](#) See by analogy and on the relevance of the notion of ‘home base’ under Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1999 L 373, p. 4) for the purpose of determining the concept of ‘place where the employee habitually carries out his work’ under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2000 L 12, p. 1 (‘Regulation 44/2001’), judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraphs 65 to 69).

[53](#) Judgment of 15 March 2011, (C-29/10, EU:C:2011:151). See also judgment of 15 December 2011, *Voogsgaerd* (C-384/10, EU:C:2011:842).

[54](#) Judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraphs 48 and 49). See also judgment of 12 September 2013, *Schlecker* (C-64/12, EU:C:2013:551, paragraphs 30 to 34 and the case-law cited).

[55](#) Judgment of 14 September 2017, *Nogueira and Others*, (C-168/16 and C-169/16, EU:C:2017:688, paragraphs 58 to 59). See also judgment of 27 February 2002, *Weber* (C-37/00, EU:C:2002:122, paragraph 49 and the case-law cited).

[56](#) Above, points 72 to 73.

[57](#) Opinion of Advocate General Saugmandsgaard Øe in Joined Cases *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:312, points 85 and 95).

[58](#) Judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraphs 61 and 62).

[59](#) Above, points 28 to 29.

[60](#) Similarly, Article 1(4) of Regulation No 1072/2009 states that it ‘shall apply to the national carriage of goods by road undertaken on a temporary basis by a non-resident haulier as provided for in Chapter III’. See also the definition of cabotage in Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88).

[61](#) Recital 2 of Regulation No 1072/2009.

[62](#) On the possible number of loading and unloading points under that regulation see judgment of 12 April 2018, *Commission v Denmark* (C-541/16, EU:C:2018:251).

[63](#) Judgment of 3 April 2008 (C-346/06, EU:C:2008:189, paragraph 26).

[64](#) Emphasis added.

[65](#) Emphasis added.

[66](#) See, in this sense, judgment of 24 January 2002, *Portugaia Construções* (C-164/99, EU:C:2002:40, paragraphs 28 to 29).

[67](#) Judgment of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, paragraphs 41 and 42).

[68](#) See above, points 72 and 73 of this Opinion.

[69](#) Judgment of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, paragraph 43).
