Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 18 September 2014[1]

Case C-396/13

Sähköalojen ammattiliitto ry
v
Elektrobudowa Spółka Akcyjna

(Request for a preliminary ruling from the Satakunnan käräjäoikeus (Finland))

(Freedom of movement for workers — Posted workers — Pay claims deriving from an employment relationship — Regulation (EC) No 593/2008 (Rome I Regulation) — Choice of law — Article 8 — Law applicable to individual employment contracts — Article 14 — Assignment of pay claims to a trade union — Article 23 — Special conflict-of-law rules relating to contractual obligations — Directive 96/71/EC — Article 3 — Concept of 'minimum rates of pay' — Discretion afforded to Member States — Freedom to provide services — Social protection of workers)

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1. An undertaking established in Poland posts workers to Finland in order to carry out work at the construction site of a nuclear power plant. Under collective agreements of 'universal applicability' [2] in the relevant sector in Finland, the workers are entitled to certain rights, including a minimum wage that consists of several different elements. The workers subsequently assign the pay claims arising from those collective agreements to a Finnish trade union. The trade union then brings proceedings against the employer seeking to enforce those rights.

2. Two issues arise. Firstly, the referring court asks for guidance in relation to the choice of law to be applicable as to the assignment of pay claims. Whereas assignment to a third party (here: a trade union) is allowed under Finnish law — and even constitutes a common practice in this particular context — such assignment appears to be prohibited under Polish law. [3] Secondly, the referring court enquires as to how the concept of 'minimum rates of pay' ought to be construed for the purposes of Directive 96/71. That directive requires the host Member State to ensure a minimum level of protection (concerning, inter alia, pay) for workers posted within its territory. In that respect, the Court has now the opportunity to revisit its extensive body of case-law in this field and to provide, to the extent possible, a positive definition of the concept of minimum rates of pay within the context of posting of workers.

2 — See Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

3 — In accordance with Article 84 of the Polish Labour Code (Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy, Dz.U. 1974 nr 24 poz. 141 z późn. zm, and later amendments), the assignment to a third party of remuneration arising from an employment relationship is prohibited.

I – **Legal framework**

A – *EU law*

1. The Rome I Regulation [4]

3. The Rome I Regulation governs the choice of law relating to contractual obligations. Recital 23 is of particular relevance here. It reads as follows:

‘As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of law rules that are more favourable to their interests than the general rules.’

4. In accordance with Article 3(1) of the regulation a contract is to be governed by the law chosen by the parties.

5. Article 8(1) of the regulation contains a specific rule for the choice of law applicable in relation to individual employment contracts. It provides as follows:

‘An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.’

6. Article 14 of the Rome I Regulation specifies the law applicable to voluntary assignment and contractual subrogation of claims. Article 14(2) states as follows:

‘The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.’

7. Article 23 of the Regulation provides as follows:

‘… this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.’

2. Directive 96/71

8. Directive 96/71 lays down the rules governing the posting of workers in other Member States. According to recital 5 in the preamble thereto, Directive 96/71 seeks to reconcile, on the one hand, promotion of the freedom to provide transnational services with the need for fair competition and measures guaranteeing respect for the rights of workers, on the other.

4 — Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6). This is the successor to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) (‘the Rome Convention’).

9. It also transpires from recitals 6 and 13 in the preamble to Directive 96/71 that its purpose is to coordinate the laws of the Member States to be applied to the transnational provision of services. This is done by laying down the terms and conditions governing the employment relationship envisaged, including, notably, the core of mandatory rules for minimum protection to be observed in the host Member State by employers that post workers to perform temporary work within the territory of a Member State where the services are provided.

10. As regards the issue of the choice of the law applicable, recital 11 states that the Rome Convention does not affect the application of EU law provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations.

11. Article 3, as far is relevant here, reads as follows:

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

— by law, regulation or administrative provision, and/or

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

…

(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……

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

…

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

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

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.

…

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

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

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

12. The Annex to the directive lists the activities mentioned in Article 3(1), second indent. Those activities include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, as specified in that annex.

B – *Finnish law*

13. The Employment Contracts Law [5] contains provisions relating to employment contracts concluded between employer and employee. Paragraph 7 in Chapter 1 of that law provides for the possibility of assigning claims arising from the employment contract to a third party without the consent of the other party to the contract where a claim arising from that contract has fallen due.

14. Paragraph 7 in Chapter 2 of the Employment Contracts Law lays down the rules with regard to the general applicability of collective agreements. It provides as follows:

'The employer shall observe at least the provisions of a national collective agreement considered representative in the sector in question (universally applicable collective agreement) on the terms and working conditions of the employment relationship which concern the work the employee performs or the nearest comparable work …'

15. The Posted Workers Law [6] applies, in accordance with Paragraph 1 thereof, to work carried out under an employment contract within the meaning of Paragraph 1 of Chapter 1 of the Employment Contracts Law by a worker posted to Finland.

16. Paragraph 2 of the Posted Workers Law governs the terms and conditions of employment applicable in relation to posted workers. It provides that — irrespective of the law governing the employment relationship — certain provisions of Finnish law are to be applied in so far as they are more favourable to the worker than the legal provisions that would otherwise be applicable. Those provisions include provisions of universally applicable collective agreements within the meaning of Paragraph 7 of Chapter 2 of the Employment Contracts Law as regards annual leave, working hours and occupational safety.

17. In accordance with Paragraph 2 of the Posted Workers Law, posted workers are to be paid a minimum rate of pay equivalent to remuneration specified in a collective agreement within the meaning of Paragraph 7 of Chapter 2 of the Employment Contracts Law.

II – **Facts, procedure and the questions referred**

18. The present case arises from a dispute between a Finnish trade union, Sähköalojen ammattiliitto ry ('the trade union'), and a Polish undertaking, Elektrobudowa Spółka Akcyjna ('Elektrobudowa'). At issue are the pay claims of 186 Polish workers who — after concluding employment contracts with Elektrobudowa in Poland — were posted to work at the construction site of a nuclear power plant in Olkiluoto, Finland. The work was carried out under the supervision of Elektrobudowa's registered branch in Eurajoki, Finland.

5 — Law No 55/2001 of 26 January 2001 on employment contracts (Työsopimuslaki).

6 — Law No 1146/1999 of 9 December 1999 on posted workers, as amended by Act No 74/2001 (Laki lähetetyistä työntekijöistä).

19. The workers concerned have individually assigned their pay claims to the trade union. The workers are members of the trade union which has taken over the recovery of the pay claims before the referring court. In essence, the trade union claims that Elektrobudowa did not pay the employees in accordance with the applicable collective agreements for the electricity sector and for electrical installation work in the building technology sector ('the applicable collective agreements').[7] It is common ground that those collective agreements, chronologically successive, have been declared universally applicable in accordance with Article 3(8) of Directive 96/71 and, under the Annex thereto, also fall within the scope of the directive.[8]

20. More specifically, the trade union contends that Elektrobudowa did not respect the minimum rights for workers stipulated under the collective agreements. Those collective agreements have different rules for time-based hourly pay and piecework pay. The trade union argues that Elektrobudowa did not comply with its obligations under those agreements to offer its employees piecework in order to raise the level of earnings. Since work should have been offered on the latter basis, special piecework guarantee pay must be paid. In addition, the workers were not individually assigned to pay groups in accordance with the collective agreements. The trade union further argues that the workers concerned are entitled to a holiday allowance, a daily flat-rate allowance and compensation for travelling time, as specified in the collective agreements.

21. For its part, Elektrobudowa contends that the dispute is a matter between the posted workers and the undertaking. It argues that this is so because a claim cannot be assigned to a third party under the Polish Labour Code, which does not allow an employee to waive his right to remuneration arising under an employment relationship or to transfer it to a third party. Given that the law applicable to individual employment contracts and the relationships and rights arising therefrom are, according to Elektrobudowa, governed by Polish law, the claims cannot validly be transferred to the trade union. Moreover, as to the issue of the appropriate level of compensation for the work performed, Elektrobudowa argues that the pay claims are incompatible with Directive 96/71 and/or Article 56 TFEU.

22. In response to the submissions made by Elektrobudowa regarding the assignability of the claims, the trade union contends that the assignment of the claims is valid, given that they are based on work carried out in Finland and the workers concerned are also members of the trade union acting as claimant in the proceedings before the referring court. Prohibiting such assignment would, according to the trade union, be contrary to several rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter').

23. Entertaining doubts as to the proper interpretation of EU law, the Satakunnan käräjäoikeus (Satakunta District Court) decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) May a trade union acting in the interests of workers rely directly on Article 47 of [the Charter] as an immediate source of rights against a service provider from another Member State in a situation in which the provision claimed to be contrary to Article 47 (Article 84 of the Polish Labour Code) is a purely national provision?

7 — Respectively 'Sähköistysalan työehtosopimus 2010—2013', available at URL: http://osasto019.sahkoliitto.fi/@Bin/112850/S%C3%A4hk%C3%B6istysalan%2BTES%2B2010-2013.pdf(375.pdf and 'Talotekniikka-alan sähköasennustoimialan työehtosopimus 2007—2010', not available online.

8 — It must be emphasised that the possibility of laying down minimum terms and conditions in accordance with Article 3(1) and (8) of Directive 96/71 by collective bargaining concerns only the building sector. For an analysis of the legislative procedure leading to the adoption of the directive, see Davies, P., 'Posted workers: Single market or protection of national labour law systems?', 34(1997) *Common Market Law Review*, pp. 571 to 602.

(2) Does it follow from [EU] law, in particular the principle of effective legal protection flowing from Article 47 of [the Charter] and Articles 5, second paragraph, and 6 of [Directive 96/71], interpreted in conjunction with the freedom of association in trade union matters protected by Article 12 of [the Charter], in proceedings concerning claims which have become due for the purposes of that directive in the State where the work is performed, that the national court must not apply a provision of the labour code of the workers' home State which prevents the assignment of a pay claim to a trade union of the State in which the work is performed, if the corresponding provision of the State in which the work is performed permits the assignment of a pay claim which has become due and hence the status of claimant to a trade union of which all the workers who have assigned their claims are members?

(3) Must the terms of Protocol No 30 annexed to the Treaty of Lisbon be interpreted as meaning that a national court situated in a country other than Poland or the United Kingdom must take them into account in the event that the dispute in question has a significant link with Poland, in particular where the law applicable to the contracts of employment is Polish law? In other words, does the Polish-UK Protocol preclude the Finnish court from determining that the Polish laws, regulations or administrative provisions, practices or measures are contrary to the fundamental rights, freedoms and principles proclaimed in [the Charter]?

(4) Must Article 14(2) of the Rome I Regulation be interpreted, having regard to Article 47 of [the Charter], as prohibiting the application of national legislation of a Member State which contains a prohibition of the assignment of claims and demands arising from an employment relationship?

(5) Must Article 14(2) of the Rome I Regulation be interpreted as meaning that the law applicable to the assignment of claims arising from a contract of employment is the law which applies to the contract of employment in question under the Rome I Regulation, regardless of whether the provisions of another law also affect the content of the individual claim?

(6) Is Article 3 of Directive 96/71, read in the light of Articles 56 and 57 TFEU, to be interpreted as meaning that the concept of minimum rates of pay covers basic hourly pay according to pay groups, piecework guarantee pay, holiday allowance, flat-rate daily allowance and compensation for daily travelling time, as those employment and working conditions are defined in a collective agreement declared universally applicable and falling within the scope of the Annex to the directive?

6.1. Must Articles 56 [and 57] TFEU and/or Article 3 of [Directive 96/71] be interpreted as precluding Member States in their capacity as "host State" from imposing, in their national legislation (a universally applicable collective agreement), on service providers from other Member States an obligation to pay compensation for travelling time and a daily allowance to employees posted to their territory, taking into account that under the national legislation referred to all posted workers are regarded as travelling to work for the whole period of their posting, which entitles them to compensation for travelling time and daily allowances?

6.2. Must Articles 56 and 57 TFEU and/or Article 3 of [Directive 96/71] be interpreted as not permitting the national court to decline to recognise a pay classification created and used in its home State by a company from another Member State, if that has been done?

6.3. Must Articles 56 and 57 TFEU and/or Article 3 of Directive [96/71] be interpreted as permitting an employer from another Member State to determine, validly and so as to bind the court of the country in which the work is performed, the categorisation of employees in pay groups in a situation in which a universally applicable collective agreement in the country in which the work is performed requires a categorisation into pay groups with a different end result to be made, or may the Member State which is the host State to which

the employees of a service provider from another Member State have been posted lay down rules to be observed by the service provider on the criteria for categorisation of employees into pay groups?

6.4. When interpreting Article 3 of [Directive 96/71], read in the light of Articles 56 and 57 TFEU, are accommodation paid for by an employer who is obliged under a collective agreement mentioned in Question 6 to do so and meal vouchers provided in accordance with a contract of employment by a service provider from another Member State to be regarded as compensation for expenses caused by being a posted worker or as part of the concept of minimum rates of pay within the meaning of Article 3(1)?

6.5. May Article 3 of [Directive 96/71] in conjunction with Articles 56 and 57 TFEU be interpreted as meaning that a universally applicable collective agreement of the State in which the work is performed must be regarded as justified on the ground of requirements of public policy, when interpreting the question of piecework pay, compensation for travelling time and daily allowances?'

24. Written observations in the present proceedings have been submitted by Sähköalojen ammattiliitto and Elektrobudowa, as well as by the Finnish, Belgian, Danish, German, Austrian, Polish, Swedish and Norwegian Governments, and by the Commission. Oral argument was presented by Sähköalojen ammattiliitto and Elektrobudowa, as well as by the Finnish, German, Polish and Norwegian Governments, and by the Commission at the hearing on 11 June 2014.

III – **Analysis**

A – *The context*

25. The referring court has put a number of questions to the Court. As already explained above, however, the complex of problems that arises in the main proceedings turns on two — albeit intimately linked — issues. To deal with those issues, I will begin, by way of some introductory remarks, by describing the underlying rationale of Directive 96/71, and the objectives it seeks to achieve. In that context, a brief overview of the relevant developments in the case-law is provided. As regards the two main problems arising in the present case, I will first consider the issue of the law applicable to the assignment of pay claims. I will then enquire into the concept of 'minimum rates of pay'. In light of that analysis, I will try to provide the referring court with helpful guidance as to how the elements of the remuneration at issue in the main proceedings ought to be dealt with.

1. The paradox in Directive 96/71

26. It is widely known that cases such as *Laval un Partneri*,[9] *Rüffert*,[10] and *Commission* v *Luxembourg*[11] have fuelled an intense debate in legal scholarship on, in particular, the consequences of the freedom to provide services for workers' rights (and the rights of trade unions to protect those rights) in cross-border situations. The present case, as a sequel to the above-mentioned line of cases, once again demonstrates that the provision of services across national borders remains a vexed issue. Indeed, it involves a number of difficulties relating, in particular, to the position of posted workers[12] carrying out work in a Member State other than the one where they were hired.

9 — C-341/05, EU:C:2007:809 ('*Laval*').

10 — *Rüffert*, C-346/06, EU:C:2008:189.

11 — *Commission* v *Luxembourg*, C-319/06, EU:C:2008:350.

12 — In accordance with Article 2 of Directive 96/71, '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.

27. How then to determine the appropriate standards of protection for those workers? Directive 96/71 is designed (at least to some extent) to remedy those difficulties and to give answers as to when standards set by the host Member State ought to be applied. In that regard, it follows from the preamble to the directive that — by indicating which rules of the host Member State are to be applied by foreign undertakings to the workers posted — it aims to reconcile the objective of promoting the transnational provision of services, on the one hand, with 'fair competition', on the other. In that context, it seeks to ensure that Member States take appropriate measures to guarantee a certain minimum level of protection for the workers concerned.

28. On a further level, however, tension can be observed between the openly articulated objectives of the directive. Alongside the freedom of movement, the directive also embodies the desire of the Member States to protect their internal labour markets. [13] The lack of convergence between the labour costs of various Member States undoubtedly provided an impetus for the introduction of rules governing the posting of workers from one Member State to another. [14]

29. In fact, before the entry into force of the directive, a large body of case-law [15] of this Court constituted the basis for determining which law was to be applied to posted workers providing services in a Member State other than the one where their employer usually operated. What is of particular relevance here is that in *Rush Portuguesa* [16] and *Vander Elst* [17] the Court gave the host Member State wide discretion to apply its labour law to posted workers, provided that the relevant Treaty provisions on freedom to provide services were respected. [18] To a certain extent, that gave host Member States *carte blanche* to extend the application of the entire body of their domestic labour law to posted workers. According to that line of thinking, foreign undertakings were free to provide services in the host Member State, provided that they adapted to the labour laws of the host State.

30. Against that backdrop, Directive 96/71 presents itself in somewhat paradoxical terms. It appears to be based on the response of the Commission to that case-law, albeit substantially watered down in course of the subsequent legislative procedure. [19] Indeed, it seems to represent a compromise between the competing interests of the Member States sending out foreign workers and those receiving them. While the Treaty provisions on the basis of which the directive was enacted (namely Articles 57(2) and 66 EC) place a clear emphasis on the promotion of cross-border provision of services, the end-result is a directive which — at least on the face of it — tips the balance in favour of the protection of domestic labour systems.

31. Indeed, issues deemed to be of particular importance for safeguarding a minimum level of protection for posted workers are articulated in Article 3(1) of Directive 96/71. Those matters, which can be described as the nucleus of mandatory rules for minimum protection, include working hours, annual leave and minimum pay. With regard to that nucleus, the starting-point of the directive is that the legislation of the host Member State ought to be applied to posted workers. Undertakings that post their employees must consequently apply the legislation of the country in which the contract is being performed, unless the law of the home State is more favourable for the worker. [20]

13 — See, in this regard, Davies, P., op. cit., especially p. 591.

14 — See the Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services (COM(91) 230 final), especially pp. 5 to 8.

15 — See, for example, *Webb*, 279/80, EU:C:1981:314; *Seco and Desquenne & Giral*, 62/81 and 63/81, EU:C:1982:34; and *Rush Portuguesa*, C-113/89, EU:C:1990:142.

16 — EU:C:1990:142.

17 — C-43/93, EU:C:1994:310.

18 — *Rush Portuguesa*, EU:C:1990:142, paragraphs 17 and 18, and *Vander Elst*, EU:C:1994:310, paragraph 23.

19 — See Davies, P., op.cit., p. 591, on the tensions inherent in Directive 96/71.

20 — See *Laval*, EU:C:2007:809, paragraph 80, and *Rüffert*, EU:C:2008:189, paragraphs 32 to 34.

32. Fundamentally, however, while the original aim of Directive 96/71 may or may not have been to *set limits*, rather than to endorse the freedom to provide services — or more probably an irreconcilable combination of those objectives — the Court has seemingly shifted its focus from the protection of the domestic labour market to the freedom to provide services in the case-law subsequently handed down.

2. The approach taken in the case-law

33. The paradigm shift described above emerges clearly from the authority devolving from *Laval*.[21] As a logical corollary to the objective of promoting the freedom to provide services, special emphasis was placed on the need to guarantee certain minimum rights for the workers posted in order to avoid social dumping.[22] Those minimum rights are arguably designed to ensure posted workers an adequate level of social protection during the posting. In that regard, clearly set minimum wages provide workers with sufficient means to sustain their living in the host Member State for the duration of the posting.[23]

34. By the same token, the approach taken by the Court substantially limits the freedom of Member States to impose standards higher than the requisite minimum in relation to posted workers.[24] Similarly, while the EU legislature had no intention of obliging Member States to set minimum wages if no provision to that effect was made in the legislation of the Member State in question,[25] *Laval* appears to have limited substantially the scope for Member States to maintain their own approaches to wage-setting.[26]

35. It is important to bear those developments in the case-law in mind when interpreting the provisions of Directive 96/71.

36. The difficulty here lies in the fact that Directive 96/71 does not expressly harmonise the material content of those mandatory rules.[27] On the contrary, Member States have adopted markedly different approaches in this field.[28] Indeed, it is settled law that Member States are free to define the content of those rules, provided that this is done in compliance with EU law.[29]

37. Viewed from this angle, the problems arising in this instance in relation to the meaning of the concept of 'minimum rates of pay' are not entirely novel. Indeed, the Court has already given guidance on what may *not* be considered as being included in the minimum rates of pay. That case-law has dealt with issues such as: the method for determining whether or not the posted workers

21 — EU:C:2007:809.

22 — Ibid., paragraphs 103 to 108.

23 — See, for example, Sigeman, T., 'Fri rörlighet av tjänster och nationell arbetsrätt', 2005 *Europarättslig tidskrift*, pp. 465 to 495, at p. 474.

24 — *Laval*, EU:C:2007:809, paragraphs 80 and 81; *Rüffert*, C-346/06, EU:C:2008:189, paragraphs 32 to 34; and *Commission* v *Luxembourg*, EU:C:2008:350, paragraph 47. See also Kilpatrick, C., 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', 6(34) 2009 *European Law Review*, pp. 844 to 865.

25 — See the Commission Proposal for a directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2012) 131 final), p. 3. See also Council Doc. 10048/96 ADD1 of 20 September 1996.

26 — See, to that effect, *Laval*, EU:C:2007:809, paragraph 81. For literature, see, for example, Kilpatrick, C., op. cit., pp. 853 and 854.

27 — See *Commission* v *Germany*, C-490/04, EU:C:2007:430, paragraph 19.

28 — See, for example, van Hoek, A., and Houwerzijl, M., *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, p. 8 et seq., available at URL http://ec.europa.eu/ social/main.jsp?catId= 471.

29 — *Laval*, EU:C:2007:809, paragraph 60; *Commission* v *Germany*, EU:C:2007:430, paragraph 19; and *Isbir*, C-522/12, EU:C:2013:711, paragraph 37.

have in reality received wages equal to the minimum wage in the host Member State;[30] whether or not a statistical average of paid wages in a particular sector may be considered as constituting the minimum wage;[31] and what kind of elements of remuneration are to be excluded from the concept of minimum wage.[32]

38. However, that case-law does not provide any explicit answer to the question as to what the concept of 'minimum rates of pay' actually means. In particular, the Court has stated that while the Member States remain free to determine the material content of the minimum rates of pay within the meaning of Directive 96/71, elements of remuneration which 'alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives by way of remuneration for that service, on the other, cannot be considered to constitute minimum pay.[33] As I will try to illustrate in points 70 et seq. below, I do not believe that that observation provides assistance for the purposes of construing the concept of 'minimum rates of pay' in any meaningful way.

39. The Court is therefore called upon, in the present case, to strike a balance between, on the one hand, the interests of undertakings that wish to make use of the competitive advantage that posting workers from one Member State to another may bring, and on the other hand, the interests of the workers concerned. Before dealing with that issue, however, it is first necessary to address the concerns of the referring court as to the assignability of the pay claims deriving from collective agreements of universal applicability in the host Member State.

B – *Article 3(1) of Directive 96/71 as a special choice-of-law rule*

40. Questions 1 to 5 turn, in essence, on pinning down the law that ought to be applied to determine whether a posted worker may assign a pay claim against his employer to a trade union in the host Member State. In order to reply to that question the provisions of the Rome I Regulation must be read in conjunction with those of Directive 96/71.

41. In order to decide which law is to govern the *assignability* of a particular claim, first the law governing the (admittedly disputed) *claim* itself must be determined. This is clearly articulated by Article 14(2) of the Rome I Regulation which provides that the 'law governing the assigned or subrogated claim shall determine its assignability'. Indeed, given that the question of assignability of a claim logically depends on the existence of that claim, it is necessary to determine the law applicable to the claims at issue.

42. At the outset, it must be called to mind that the main rule in relation to the choice of law in contractual relationships is expressed by Article 3(1) of the Rome I Regulation. Accordingly, the choice of the parties is to be respected as far as possible. The idea that parties are at liberty to choose the applicable law is also mentioned in Article 8(1) of the Rome I Regulation which lays down the main rule in relation to employment contracts. It is therefore the choice of the parties that, in accordance with the principle laid down in Article 3(1), is to govern the employment contract in question.[34]

30 — *Commission* v *Germany*, C-341/02, EU:C:2005:220.

31 — *Laval*, EU:C:2007:809.

32 — *Isbir*, EU:C:2013:711.

33 — Ibid., EU:C:2013:711, paragraph 45.

34 — Article 8 also provides a set of hypotheses by reference to which the law applicable to individual employment contracts ought to be determined in other circumstances (namely, in the absence of choice).

43. As regards the present case, it can be seen from the case-file that the parties that have concluded the employment contracts have expressly chosen Polish law (albeit with an ambiguous reference in the contract of employment that the provisions of the Finnish labour law are also 'considered') as the law that ought to govern the terms of employment of the workers concerned. In the final analysis, however, it is not necessary to determine the law governing the individual employment contracts underlying the present case.

44. Rather, it is important to bear in mind that the trade union has based its claims on rights arising from a number of provisions contained in the relevant collective agreements that have been declared universally applicable in the host Member State (that is, in Finland). Those provisions concern the minimum rights that are to be guaranteed to workers in the relevant employment sectors. Indeed, the problems underlying the present case stem precisely from the fact that the relevant collective agreements provide for workers' rights that do not correspond to rights guaranteed to workers under, for example, Polish law.

45. On this point, both the Polish Government and Elektrobudowa argue that claims arising from an employment contract cannot be 'separated' from the overall contract. Any other conclusion would result, so they argue, in increased uncertainty as regards the law applicable in relation to claims arising from the employment relationship. Accordingly, the law applicable to the individual employment contract governs, in their submission, all claims arising from that relationship. In their view, the law applicable is Polish law, in accordance with the express choice made by the parties. Consequently, the claims made by the trade union ought to be examined on the basis of the applicable Polish legislation.

46. I am not convinced by this line of argument.

47. On the one hand, I do not see any reason that would rule out the possibility of a concurrent application of two (or more) laws to rights and obligations arising from one and the same contract. Indeed, this scenario is also clearly envisaged — and accepted — in Article 8(1) of the Rome I Regulation, which admits of the concurrent application of several laws to the same contract of employment. [35]

48. On the other hand, as the Austrian Government notes, the question that is decisive here is in fact which set of choice-of-law rules are to be applied: those contained in the Rome I Regulation or perhaps a more specific choice-of-law rule contained in another EU legal instrument, in accordance with Article 23 of the Rome I Regulation?

49. At this juncture it must be pointed out that according to recital 23 in the preamble to the Rome I Regulation, the regulation is by no means oblivious to the need to protect parties that are regarded as the weaker party in the contractual relationship under consideration. To protect such parties, precedence ought to be given to choice-of-law rules that are more favourable to the interests of such parties, rather than to the general rules.

50. Here, it must be called to mind that Article 23 of the Rome I Regulation contains an exception to the applicability of the choice-of-law rules which that regulation lays down. In other words, where provisions of EU law lay down choice-of-law rules relating to contractual obligations in relation to particular matters, those rules are to be given precedence.

35 — See also Report on the Convention on the law applicable to contractual obligations by Giuliano, M., and Lagarde, P. (OJ 1980 C 282, p. 1), in particular with regard to Article 12(2) of the Convention which governs the issue of assignability: 'Notwithstanding the provisions of paragraph 2, the matters which it covers, with the sole exception of assignability, are governed, as regards relations between assignor and debtor if a contract exists between them, by the law which governs their contract in so far as the said matters are dealt with in that contract.'

51. It is my firm understanding that Article 3(1) of Directive 96/71 — and the national measures implementing that provision — constitutes an expression of such a rule in relation to issues governed by that provision. Here, it is of particular significance that Article 3(1) provides that the Member States are to ensure that, *whatever the law applicable to the employment relationship*, undertakings respect the core of mandatory rules referred to in that provision (including minimum rates of pay). That provision thus sets out, as the Court has previously noted, 'the level of protection which must be guaranteed' by the host Member State.[36] In that regard, with respect to the mandatory rules identified in the directive, the choice-of-law rule deriving from Article 3(1) of the Rome I Regulation overrides all other (more general) rules envisaged in the same regulation.

52. In that regard, Directive 96/71 takes as its starting-point that questions hinging upon (in addition to the six other matters listed in Article 3(1)) the minimum rates of pay, are governed by the legislation of the host Member State (unless the home State provides for more extensive protection).[37] Indeed, it follows from recital 13 in the preamble thereto that Directive 96/71 is designed to coordinate the laws of the Member States in order to lay down a core of mandatory rules for minimum protection to be observed in the host Member State by employers who post workers there. That nucleus of mandatory rules is set out in Article 3(1) of the directive.

53. True, the solution adopted in the directive may stand in contrast to the free choice made by the parties with regard to the applicable law. That is the case in the proceedings before the referring court. In this sense, it is also contrary to the general rule regarding the choice of law laid down in Article 8(1) of the Rome I Regulation for employment contracts. Nor does it correspond to the other hypotheses listed in Article 8. However, this state of affairs is clearly accepted: not only is it recognised in Article 23 of that regulation and confirmed by recital 11 in the preamble to Directive 96/71 but it is also in keeping with the objective, mentioned by recital 23 in the preamble to the regulation, of giving precedence to choice-of-law rules that are favourable to the weaker party.

54. As a matter of principle, the terms and conditions of employment that the host Member State can impose on undertakings posting workers in its territory are listed exhaustively in Article 3(1) of Directive 96/71.[38] There is only one exception to that rule, namely the one stated in Article 3(10) of the directive, which allows Member States (subject to the relevant Treaty provisions and in compliance with the principle of equal treatment) to impose rules on matters other than those referred to in Article 3(1) where it is deemed necessary on the basis of public policy considerations. I will come back to that exception in point 115 below.

55. Consequently, in so far as the pay claims at issue before the referring court arise from the minimum rates of pay within the meaning of Article 3(1)(c) of Directive 96/71 which are to be respected, the question whether or not those claims are well-founded is to be determined on the basis of the law of the Member State which is applicable in accordance with Article 3(1) of the directive.[39] That is, the law of the Member State to which the workers have been posted.

56. In other words, the pay claims that are at issue in the main proceedings fall within the scope of the special choice-of-law rule expressed in Article 3(1) of Directive 96/71. This is so, in particular, given that that provision refers to the law of the Member State to which the workers are posted. It follows, in accordance with Article 14(2) of the Rome I Regulation, that the assignability of those claims is necessarily also governed by the law of that State.

36 — *Laval*, EU:C:2007:809, paragraph 81.

37 — See, to that effect, idem, and *Rüffert*, EU:C:2008:189, paragraph 34.

38 — See *Commission* v *Luxembourg*, EU:C:2008:350, paragraphs 31 and 49.

39 — Here, it must also be pointed out that to decide on the issue of the applicable law it is not necessary first to establish whether or not the claims made are, as such, justified. It is sufficient in this regard that a claim exists. If this were not so, it would result in a somewhat unusual order of assessment whereby the substantive question would need to be dealt with first before the choice-of-law question could be decided upon.

57. In light of the above, it is my view that on a proper construction of Article 14(2) of the Rome I Regulation, read in conjunction with Article 3(1) of Directive 96/71, the question as to whether a posted worker may assign a pay claim against his employer to a trade union in the host Member State is to be determined by the law applicable to the pay claims in question. To the extent that those claims arise from terms and conditions referred to in Article 3(1) of Directive 96/71, it is the law of the Member State to which the workers are posted that is to be applied not only with regard to those claims but also with regard to the assignability thereof.

58. Lastly, so far as Questions 1 to 4 are concerned, I wish to point out that they are of relevance only in so far as Polish law is held to govern the assignability of pay claims in the circumstances of the present case. Given that I am firmly convinced that the assignability of the pay claims is governed by Finnish law, those questions are not dealt with in this Opinion. That being clarified, I will now turn to the concept of minimum wage.

C – *Minimum rates of pay*

59. The second issue on which the referring court seeks guidance turns on the concept of 'minimum rates of pay' within the meaning of Directive 96/71, as interpreted in light of Article 56 TFEU. Although the referring court has divided Question 6 into a number of sub-questions, I believe those questions can be dealt with together. In essence, the question that this Court is asked to clarify is what constitutes 'minimum rates of pay' within the meaning of Directive 96/71. Before turning to that question, I will make some general observations concerning the system of collective agreements underlying the present case in relation to Article 3(8) of the directive.

1. Universally applicable collective agreements in the context of Directive 96/71

60. In times of financial crisis in particular, collective bargaining as a method for wage-setting is a contentious issue. Directive 96/71 also accepts, subject to a number of conditions, the possibility of setting minimum standards of protection for posted workers by means of collective bargaining.

61. The minimum wage set by national law and/or practice in the host Member State must be determined in accordance with the procedures laid down by Directive 96/71. More specifically, it follows from Article 3(1) that, as regards the building sector (as defined in the Annex to the directive), the minimum terms and conditions referred to in that provision may be set 'by law, regulation or administrative provision, and/or by collective agreements … which have been declared universally applicable' within the meaning of Article 3(8).

62. In this case, Elektrobudowa has argued that the Finnish collective agreement system is not transparent given that it allows domestic undertakings to conclude, under certain conditions, alternative collective agreements that take precedence over the one declared universally applicable in the sector concerned. As a consequence, foreign undertakings wishing to provide services in Finland are, in its view, subject to differential treatment that cannot be justified. Indeed, Article 3(8) of Directive 96/71 expressly provides that minimum standards set by universally applicable collective agreements must be observed by *all* undertakings in the geographical area and in the profession or industry concerned.

63. Admittedly, the referring court has not specifically taken up this issue nor asked the Court to give guidance on this point. Nor have the parties addressed this question in detail. However, I would make the point that a system such as the Finnish one in which (domestic) undertakings may 'circumvent' the applicability of the universally applicable collective agreement by concluding another — possibly more

specific and even, in some cases, less favourable to the workers —collective agreement [40] does not seem to be entirely unproblematic from the perspective of the provision of services across national borders.

64. In fact, it seems doubtful to me whether such a system is entirely consonant with the ruling of the Court in *Portugaia Construções*. [41] According to that judgment, where, unlike an employer from the host Member State, an employer established in another Member State cannot avoid obligations arising from the collective agreement governing the economic sector concerned, that amounts to unequal treatment contrary to what was then Article 49 EC. In that case, a domestic employer was able to pay wages lower than the minimum wage laid down in a universally applicable collective agreement by concluding another collective agreement specific to one undertaking, while that option was not open to an employer established in another Member State. Undoubtedly, certain parallels can be observed between that situation and the one complained of by Elektrobudowa.

65. Be that as it may, the compatibility of the Finnish system of collective agreements with EU law is not directly at issue in the present case. I will therefore now move on to enquire into the concept of minimum rates of pay in more detail.

2. The concept

66. It is clear that Member States retain substantial discretion in determining the material content of the rules referred to in Article 3(1) of Directive 96/71. However, as the case-law mentioned in point 37 above demonstrates, there are limits to that discretion. If no limits were to be set, this would substantially hamper the objective of encouraging the freedom to provide services across the European Union. The case-law of the Court provides some pointers on the basis of which the contours of the concept of the 'minimum rates of pay' can be pinned down.

67. In *Laval* the Court, on the one hand, recognised that Member States have an obligation to extend the minimum level of protection provided for in their national legislation to posted workers. [42] On the other hand, however, it stated that that level of protection cannot, as a matter of principle, go beyond what is provided for in Article 3(1), first subparagraph, points (a) to (g), of Directive 96/71. [43] In view of that statement, *Laval* has been argued to have transformed the directive from one of minimum harmonisation to one of full harmonisation on this particular issue. Accordingly, the minimum standard set in the directive — which left Member States with broad freedom to apply higher (than minimum) host Member State standards to posted workers — can be argued to have now been transformed into a ceiling. [44]

68. Be that as it may, the intention of the EU legislature does not appear to have been to introduce an obligation to set up a system of minimum rates of pay. It also did not, at the outset, limit the competence of the Member States to define the content of that minimum (the outer limits of that competence obviously being governed by Articles 56 and 57 TFEU). Moreover, as an exception to the

40 — In accordance with Paragraph 7(1) in Chapter 2 of the Finnish Employment Contracts Law, all employers, as a matter of principle, are to apply at least the provisions of the collective agreement that has been declared universally applicable in the sector in question as regards the terms and conditions of the employment relationship. However, there is an exception to that rule. In fact, Paragraph 7(3) in Chapter 2 thereof states that where an employer (or his organisation of employers) has concluded a collective agreement with a national employee organisation, he is to apply that agreement instead.

41 — C-164/99, EU:C:2002:40.

42 — See *Laval*, EU:C:2007:809, especially paragraphs 80 and 81.

43 — Ibid., paragraph 80.

44 — See, inter alia, Deakin, S., 'The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy"' in Bruun, N., Lörcher, K., and Schömann, I. (eds), *The Lisbon Treaty and Social Europe*, Hart Publishing, Oxford: 2012, pp. 19 to 43, at p. 28; Kilpatrick, C., op. cit., p. 848.

rule that home State legislation is to apply to posted workers, Article 3(1) of Directive 96/71 is to be interpreted restrictively. The issues to which standards set by the host Member State are to be applied are accordingly restricted to those listed in Article 3(1), and the level to be applied is the minimum set in the host Member State.[45]

69. However, that approach does not tell us what kind of elements may be included in the *minimum* set by the host Member State in relation to minimum rates of pay.

70. The Court attempted to do this in *Isbir*. There, the Court held that only elements of remuneration *which do not alter the relationship* between the service provided by the worker, on the one hand, and the consideration that he receives in return, on the other, can be regarded as constituting the minimum wage within the meaning of Directive 96/71.[46] On the basis of that, the Court considered that the formation of a capital amount that the worker will benefit from in the longer term cannot be regarded, for the purposes of Directive 96/71, as forming part of the usual relationship between the work done and the financial consideration for that work from the employer. That was all the more so given that the aim of the contribution was one of social policy.

71. The above statement is, in fact, based on the judgment of the Court in *Commission* v *Germany*[47] where the Court was dealing with an altogether different situation. In that case, what was at issue was *not* the competence of the host Member State to define the concept of minimum rates of pay. Rather, what was under examination were the methods of determining whether the posted workers *actually* received wages equal to the minimum wage in the host Member State. More specifically, that judgment clarified the conditions under which the host Member State is to take into account allowances paid to the posted workers which are not defined as constituent elements of the minimum wage in the host Member State. In that particular context, the Court held that if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.

72. The result reached by the Court in *Isbir*[48] has a certain appeal. However, I do not believe that the above ruling concerning the elements that can or cannot be regarded as forming part of the minimum rates of pay within the meaning of Article 3(1)(c) of Directive 96/71 is a workable yardstick as regards the competence of the Member States to define the concept of minimum rates of pay.

73. In my view, that dictum of the Court is based on an artificial division between, on the one hand, remuneration which is consideration for the work carried out and, on the other hand, other types of remuneration. Firstly, it is difficult to make such a distinction given that remuneration necessarily represents a counterpart to the work carried out. Secondly, and as the Norwegian Government correctly pointed out at the hearing, the problem with distinguishing between different types of remuneration is already apparent from Article 3(1)(c) which explicitly mentions overtime pay as a constituent element of minimum wage. Compensation for overtime cannot properly be regarded as intrinsically linked to the work performed as it pertains to the particular circumstances in which the work is carried out. In other words, the definition provided in *Isbir* overlooks the subjective aspects of remuneration which cannot, given the inclusion of overtime pay in Article 3(1), be disconnected from minimum rates of pay.

45 — *Laval*, EU:C:2007:809, paragraphs 80 and 81; *Rüffert*, EU:C:2008:189, paragraphs 33 and 34; and *Commission* v *Luxembourg*, EU:C:2008:350, paragraphs 24 to 26.

46 — *Isbir*, EU:C:2013:711, paragraph 40.

47 — EU:C:2005:220.

48 — EU:C:2013:711, paragraph 40.

74. Quite the contrary, I believe the limit to the discretion of the Member States can be found by reading Article 3(1) of Directive 96/71 in light of the objective of providing a minimum level of social protection for the posted workers, and *not* in light of the protection of the domestic labour market. In addition, a number of other conditions must be fulfilled too.

75. Firstly, as mentioned above, to comply with the directive, the minimum wage laid down by legislation and/or collective agreements in the host Member State must have been set in accordance with the procedures laid down by that directive. More specifically, it follows from Article 3(1) that collective agreements must have been declared universally applicable within the meaning of Article 3(8), which provides more specific conditions. Notwithstanding the possible problems inherent in the Finnish collective agreements system briefly touched upon above, it emerges from the order for reference — and none of the parties has disputed this — that the collective agreements referred to have been declared universally applicable and that those collective agreements set the standards that foreign undertakings are to observe in relation to posted workers. [49]

76. Secondly, and perhaps most fundamentally, the Court placed special emphasis in *Laval* on the fact that Article 3(1)(c) refers to 'minimum' rates of pay. That provision thus excludes rates of pay which are higher than the minimum rates laid down in the relevant provisions. [50] In other words, even assuming that in practice most (or all) workers receive *de facto* a higher wage as a result of personal circumstances, this does not change the fact that it is the absolute minimum laid down in, as the case may be, legislation and/or the collective agreement in question that is the relevant benchmark for the purposes of Article 3(1)(c). Any other solution would in practice result in accepting a multitude of *minima*, or rather, of different rates of pay which hinge upon the personal circumstances of each worker and which, as a result, go beyond the absolute minimum accepted in the host Member State.

77. Bearing in mind the observations of the Court in *Laval*, I will now deal with the different aspects of remuneration that are at issue in the proceedings before the referring court.

3. The constituent elements of minimum wage

78. The concept of 'minimum rates of pay' may include a plethora of elements and it may take many different forms in different Member States. Indeed, minimum wage can be based on a particular period of time (monthly or hourly) or, indeed, on a particular level of productivity; it may entail a single agreement-based rate for all employees in a given industry or different minimum wage rates depending on occupation, skills and jobs as laid down in collective agreements. In addition, various allowances and bonuses are typically included in the applicable minimum wage. [51] Consequently and in view, in particular, of the discretion enjoyed by Member States in defining the content of 'minimum rates of pay', providing a positive, global definition of that concept by judicial construction does not seem desirable. As the following assessment shows, determining the contours of the applicable minimum necessarily involves a case-by-case assessment.

a) Pay classification and categorisation of employees into pay groups

79. It is apparent from the case-file that the workers concerned have been paid time-based pay. That pay appears to satisfy the minimum amount of the lowest pay group of time-based payment under the collective agreements applicable. However, it remains lower than piecework guarantee pay provided for in those agreements. The problem that arises in relation to pay classification and pay groups provided

49 — It is, however, disputed whether those collective agreements are, in reality, applicable to the workers concerned. That issue, although undoubtedly an interesting one, lies outside the competence of this Court.

50 — *Laval*, EU:C:2007:809, paragraphs 70 and 71.

51 — See the Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2006) 159 final), p. 16.

for in the collective agreements in question is that Finnish legislation does not lay down an overall (or indeed, sector-specific) minimum wage. Instead, this issue is decided by the relevant social partners in collective bargaining. A further difficulty lies in the fact that the collective agreements on which the trade union relies include rules on both time-based and piecework pay.

80. In that regard, the trade union maintains that a foreign employer posting workers to Finland is under an obligation to offer its employees work on a piecework basis in order to raise the level of earnings, in which case a special piecework guarantee pay is to be paid. Another closely related and contentious issue is the assignment (or the absence thereof) of the workers to pay groups in accordance with the collective agreements at issue.

81. There seems to be little doubt that both time-based (hourly pay) and piecework pay are forms of remuneration for the services rendered and are, therefore, covered by the concept of 'minimum rates of pay' within the meaning of Article 3(1) of Directive 96/71. However, I have difficulty accepting the argument advanced by the trade union and supported by the great majority of Governments having submitted observations to the Court. They argue that piecework guarantee pay ought to constitute the minimum for the present purposes. In fact, I cannot see any cogent reason why anything other than the lowest pay (in this case hourly, time-based, pay) referred to in the collective agreement could be considered the 'minimum' for the purposes of Article 3(1)(c) of Directive 96/71. The same observation applies to the pay groups under discussion. Indeed, if one were to adopt any other position, it would in practice mean allowing a situation akin to the one expressly prohibited by *Laval* where the trade union demanded that a foreign undertaking comply with a rate of pay based on a statistical average of wages paid to professionally qualified workers.[52] Indeed, such an average can hardly be construed as forming the 'minimum' within the meaning of Directive 96/71.

82. Most fundamentally, we are dealing here with collective agreements applicable within a specific sector of the building industry. In those circumstances, I cannot see how the lowest rate of pay — be it by pay classification or by pay groups — provided for in the collective agreements would not adequately protect the posted workers. After all, that pay will be applicable in the case of some of the domestic workers too. In that respect, anything beyond that minimum will also, necessarily, fall foul of Article 56 TFEU.[53]

83. Bearing in mind the emphasis the Court has placed on the freedom to provide services in its case-law, it is my understanding that allowing the Member States to impose particular pay classifications or pay groups on foreign undertakings beyond the minimum expressly provided for in the relevant legislation or collective agreements would place unwarranted emphasis on the protection of the domestic labour market to the detriment of the free provision of services. In so far as the undertaking posting workers to the host Member State complies with that minimum, the host Member State cannot impose a specific pay classification or require that undertaking to place its employees into specific pay groups. That would result in a wage exceeding the minimum provided for in the relevant collective agreements.

52 — See, to that effect, *Laval*, EU:C:2007:809, paragraph 71. In its reasoning the Court also attached particular significance to the fact that the collective agreements in question did not satisfy the requirement in Articles 3(1) and 3(8) of Directive 96/71 to be employed as the correct benchmark for minimum pay in the host Member State.

53 — See point 90 et seq. below. Indeed, it is important to bear in mind that posted workers, as opposed to migrant workers, are by definition only temporarily carrying out work in the host Member State so that it does not seem necessary or appropriate that all the rights enjoyed by workers habitually carrying out work in the host Member State are extended to posted workers. This is also confirmed by the approach taken by the Court in earlier case-law. See on the difference concerning the rights enjoyed, Kilpatrick, C., op. cit., pp. 847 to 849. See also, on the particular case of the building industry, Davies, P., op. cit., p. 601.

b) Holiday allowance and the problem of competing *minima*

84. The referring court also has expressed doubts as to how to deal with the holiday allowance at issue in the case before it. At the outset, I observe that the holiday allowance ('lomaraha') is an element of remuneration which is not provided for in the relevant legislative provisions governing annual leave and holiday compensation ('lomakorvaus') in the Annual Leave Law.[54] Unlike holiday compensation, this element of remuneration is based on provisions of the collective agreements. The payment of that allowance means that the holiday compensation as provided for in legislation is increased by 50%.

85. At this juncture, before examining the nature of the holiday allowance as a form of remuneration in more detail, it is necessary to address briefly the submission made by Elektrobudowa in relation to this allowance. It argues that a holiday allowance such as the one at issue cannot be regarded as forming part of the minimum rates of pay because it goes beyond what is required for in legislation.

86. The wording of Article 3(1) of Directive 96/71 explicitly accepts that the applicable minimum rates of pay may be laid down in legislation *and/or* collective agreements. This seems to indicate that while some elements of those minimum rates of pay may be based on legislation, others may well have their foundation in (universally applicable) collective agreements. In that respect, there appears to be nothing in the directive that would exclude — a priori — this particular allowance from the scope of the concept of 'minimum rates of pay'. This is so even though it constitutes a supplement to the holiday compensation provided for in legislation.

87. I must, however, formulate one important caveat. The approach set out in point 85 above is premised on the assumption that we are dealing with *different* elements of remuneration. If that were not the case, we would in fact be dealing with competing *minima* to the extent that both the applicable legislation *and* the relevant collective agreement of universal applicability within the meaning of Article 3(8) would contain provisions on one and the same element of remuneration.[55] Under this scenario, and account being taken of the overarching objective of Directive 96/71 — as construed by the Court — of promoting the freedom to provide services, such a conflict would need to be decided in favour of the lowest of those '*minima*'.[56] Any other conclusion would not only be irreconcilable with that objective but also conceptually incompatible with the idea of a 'minimum'.

88. Now, after closing that parenthesis, I will move on to discuss the holiday allowance as a constituent element of 'minimum rates of pay' within the meaning of Article 3(1) of Directive 96/71.

89. In this respect, I would observe that under Article 3(1)(b) of Directive 96/71, undertakings posting workers to another Member State are to respect not only the minimum rates of pay but also the rules governing minimum *paid* annual leave in the host Member State. Merely because a part of the pay is provided for in a collective agreement cannot mean that it should be excluded from the scope of the concept of pay. Excluding it would effectively deprive the workers posted to the host Member State in question from receiving remuneration that corresponds to the minimum applicable in that State, thereby infringing Directive 96/71. Unlike the allowances discussed below, the holiday allowance constitutes an intrinsic part of the remuneration which the worker receives in return for the services he renders.

54 — Law No 162/2005 of 18 March 2005 on annual leave as amended by Law No 1448/2007 (Vuosilomalaki). Paragraphs 16 and 17 of that law lay down the rules according to which holiday compensation is to be paid to the employee during and at the end of an employment relationship.

55 — On the issue of competing minima in relation to a situation where a statutory minimum wage coexists with a minimum defined in a collective agreement, see Kilpatrick, C., op. cit., pp. 855 and 856.

56 — See *Laval*, EU:C:2007:809, paragraph 78 in the context of collective agreements that did *not* satisfy the criteria laid down in Article 3(8) of Directive 96/71.

c) Additional allowances for work assignments

90. The flat-rate daily allowance and the compensation for travelling time provided for in the collective agreements also pose a host of difficulties for the referring court. Admittedly, it would be tempting to argue that such allowances ought not to fall within the scope of 'minimum rates of pay' quite simply because of the lack of any link between those allowances and the work performed. After all, they are both attached to the person (and personal situation of the person) carrying out the work.

91. However, that would be at odds with the wording of Article 3(1)(c) of Directive 96/71 which explicitly mentions overtime pay as a constituent element of minimum pay. Indeed, as already alluded to in point 73 above with regard to the ruling of the Court in *Isbir*,[57] overtime pay is, like the allowances in question here, intrinsically linked to the personal situation of the worker and not to the actual work carried out. In view of that fact, I am unable to see how those allowances could automatically fall outside the scope of Article 3(1)(c) of Directive 96/71.

92. Indeed, additional allowances for work assignments may fall within the scope of Article 3(1)(c) of Directive 96/71, *provided that they correspond to a rate which is regarded as the minimum rate of pay for such assignments*. That proviso is an unavoidable consequence of the discretion enjoyed by the Member States when defining the material content of that concept. None the less, an important proviso applies here. The content of mandatory rules concerning minimum protection for the purposes of Article 3(1)(c) of Directive 96/71 must also respect Article 56 TFEU.[58]

93. It is settled law that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services that are established in other Member States. It also requires the abolition of any restriction which is liable to prohibit, impede or render less attractive activities of a provider of services established in another Member State where he provides similar services. This is so even if the restriction applies without distinction to national providers of services and to those of other Member States.[59]

94. It must be borne in mind that Member States are not to make the provision of services in their territory subject to compliance with all the conditions required for establishment. This is to ensure that the provision of services across national borders is not impeded unduly. In that regard, the application of national rules of the host Member State to foreign undertakings is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional economic burden.[60]

95. It is apparent from the case-file that the allowances in question apply to both foreign undertakings and domestic competitors alike. However, I cannot exclude a priori that the obligation imposed on foreign service providers to pay those allowances is liable to make it less attractive, or indeed more difficult, for those service providers to perform their services in the host Member States. That obligation is therefore capable of constituting a restriction on the freedom to provide services within the meaning of Article 56 TFEU. Such an obligation would effectively deflate any competitive advantage that lower labour costs in the home Member State might offer. That is so because those

57 — EU:C:2013:711.

58 — See, similarly, Case E-2/11, *STX Norway Offshore AS and Others* v *The Norwegian State*, paragraph 72 et seq.

59 — *Arblade and Others*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 33, and *Portugaia Construções*, EU:C:2002:40, paragraph 16 and case-law cited.

60 — *Mazzoleni and ISA*, C-165/98, EU:C:2001:162, paragraphs 23 and 24, and *Portugaia Construções*, EU:C:2002:40, paragraph 18 and case-law cited. See also *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 46 and case-law cited.

allowances are to be paid — subject to a number of conditions — in circumstances where the work is carried out in a place other than that where the employees were hired.[61] Therefore, it would seem that whilst some domestic undertakings do not need to pay those allowances, the payment thereof is a necessary consequence of posting workers to the host Member State.

96. Where the relevant provisions fall to be applied without distinction to all persons and undertakings operating in the territory of the host Member State, it is well-established case-law that the restriction may be justified where overriding requirements relating to the public interest are met. This is so unless that interest is safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established. In addition, the restriction must constitute an appropriate measure for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it.[62] What is of particular significance here is that the overriding reasons relating to the public interest include the social protection of workers.[63]

97. While, in the final analysis, it remains a matter for the referring court to determine, it seems to me that both allowances at issue here fulfil the purpose of compensating the employee for additional costs incurred by him as the result of a work assignment. As regards posted workers, it could be argued that the payment of those allowances ensures the attainment of a level of remuneration necessary to sustain a reasonable standard of living during the work assignment. That is why I cannot exclude, *in abstracto*, that the payment of those allowances could be necessary for the social protection of the employees concerned.

98. However, the payment of those additional allowances must also be proportionate to the attainment of that objective, having regard to all the relevant factors. In particular, the referring court is to weigh up, on the one side, the administrative and economic burdens imposed on providers of services against, on the other side, the increased social protection that they confer on workers compared with the protection guaranteed by the law of the Member State where their employer is established.[64]

99. To assist the referring court in its task, I will make the following observations.

i) The flat-rate daily allowance

100. On the one hand, the referring court starts from the assumption that the posted workers will, by virtue of the collective agreements in question, be entitled to the flat-rate daily allowance for the entire period of their posting.[65] This is because they were hired in Poland and not at the place where the work is to be carried out. I have difficulty accepting that this would constitute a proportionate measure to protect the posted workers.

101. There are essentially two reasons for this.

102. Firstly, a flat-rate daily allowance such as the one at issue in the main proceedings is designed to offset additional expenses that may be incurred by an employee during a period of time when he is (temporarily) away from his place of residence. Typically, this is the case of work assignments requiring an overnight stay. While it is not disputed that the employees were hired in Poland, during

61 — This is clear from the mechanism put in place by Article 14 of the collective agreement for the electricity sector. In accordance with that provision, the payment of a (full or partial) flat-rate daily allowance and compensation for travelling time are only required if the work site is at least 40 km from the place where the workers were hired and at least 15 km from the domicile of the worker.

62 — See, for example, *Webb*, EU:C:1981:314, paragraph 17; *Analir and Others*, C-205/99, EU:C:2001:107, paragraph 25; *Mazzoleni and ISA*, EU:C:2001:162, paragraph 26; *Wolff & Müller*, C-60/03, EU:C:2004:610, paragraph 34; and *Portugaia Construções*, EU:C:2002:40, paragraph 19. For a more recent expression of this rule, see also *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 44.

63 — *Arblade and Others*, EU:C:1999:575, paragraph 36, and also, to that effect, *Mazzoleni and ISA*, EU:C:2001:162, paragraph 27.

64 — See, for example, *Finalarte and Others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraphs 49 and 50.

65 — For the year 2012 this daily allowance was set at EUR 36/day.

their posting in Finland they nevertheless stayed in accommodation paid for by their employer, in the vicinity of the construction site of the nuclear power plant. In those circumstances, it seems difficult to argue persuasively that the payment of the daily flat-rate allowance is necessary to protect the workers posted.

103. Secondly, if the host Member State were allowed to require an allowance such as the one at issue to be paid to posted workers for the entire period of posting, I am convinced that this would substantially hamper the ability of foreign undertakings to compete with domestic competitors as those undertakings would undoubtedly be deterred by the costs involved in posting workers. [66] By its very nature, the obligation to pay posted workers an allowance such as the flat-rate daily allowance for the *entire* period of their posting would place foreign undertakings at a disadvantage. This seems to be the case because undertakings posting workers to Finland are systematically required to pay that allowance whilst domestic undertakings are not necessarily or systematically required to do so.

ii) Compensation for travelling time

104. It is apparent from the order for reference that the collective agreements also require the employer to pay compensation for travelling time to the employees where the daily commute to the place of work takes more than one hour. The trade union claims payment of that allowance in accordance with the lowest rate provided for in those agreements. There is disagreement between the parties as to whether or not the length of the daily commute has in reality exceeded one hour.

105. Be that as it may, travelling to the place where the work is carried out undoubtedly entails not only costs to the employee but also a loss of time. While the daily commute from the accommodation provided by the employer to the place of work cannot be considered actual working time, it is none the less time spent for the purpose of carrying out the services agreed in the employment contract. Furthermore, in the particular circumstances of the present case, it seems that the length of time spent commuting to the place of work is not a matter in respect of which the employees have a free choice, given not only the location of the accommodation paid for by the employer but also the remoteness of the construction site.

106. In that regard, compensating the worker for that time with a specific allowance which is (once the threshold of one hour a day is reached) proportionate to the time spent travelling to work, does prima facie seem a measure that genuinely contributes to the social protection of workers. After all, like compensation for overtime, the payment of compensation for travelling time ensures that employees are compensated for the time and money lost as a result of the daily commute.

107. However, like the flat-rate daily allowance, the requirement imposed on foreign undertakings to compensate their posted workers for travelling time does seem to possess a deterrent effect as regards the transnational provision of services. That is so because of the additional costs that that obligation entails. That said, the need to require foreign undertakings to pay that compensation is, in my view, intimately linked to the factual circumstances of the case at hand. If, for example, as a result of the remoteness of the location of the place of work all domestic workers were entitled to such compensation, then *not* paying that compensation to posted workers would appear to deprive those workers of the minimum protection required by the host Member State. If, however, this were not the case and some domestic workers were not entitled to that compensation, I cannot see any reason that would justify, from the perspective of the social protection of workers, systematically imposing such a

66 — In accordance with the collective agreements in question, in addition to the conditions mentioned in footnote 61 above, a further requirement for the payment of a full flat-rate daily allowance exists. In accordance with Article 14(A)(2) of the agreement, the full daily allowance falls to be paid only where the long distance commute (‘työmatka’) takes over 10 hours.

requirement on foreign undertakings. Like the daily allowance, compensation for travelling time can in my opinion be justified and consequently regarded as necessary from the perspective of the social protection of workers only where a domestic worker who carries out work under similar conditions is, in all circumstances, entitled to the payment of that allowance.

108. Summing up, it is my understanding that the daily flat-rate allowance and compensation for travelling time are covered by Article 3(1)(c) of Directive 96/71. However, given that the application of those allowances to foreign undertakings posting workers may render the provision of services less attractive to the extent that it involves expenses and additional economic burden, it is for the referring court to assess whether the universally applicable collective agreements which provide for the allowances at issue pursue the objective of the social protection of workers and to check that they do not go beyond what is necessary to attain that objective.

109. As the above analysis has sought to show, the question of what may be covered by 'minimum rates of pay' in each individual case, and with regard to each individual element of remuneration, can be answered by taking as a starting point the rate of pay corresponding to the minimum rate prescribed in the relevant provisions applicable in the host Member State and by verifying, as regards allowances dependent on the personal circumstances of the employee, whether the payment of those allowances is necessary for the social protection of workers.

4. Consideration of accommodation and meal vouchers in calculating minimum wage

110. In the case before the referring court, Elektrobudowa has provided accommodation and meal vouchers for the posted workers concerned.[67] The question that therefore arises is how those benefits ought to be dealt with in determining whether or not those workers have *de facto* received a wage equal to the minimum laid down in the host Member State. Article 3(7) of Directive 96/71 provides that allowances specific to the posting are to be considered as part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. Are we here dealing with reimbursement of expenditure actually incurred as a result of the posting, or something else?

111. Even on a literal interpretation of Article 3(7) the answer to that question appears to be relatively straight-forward. After all, although the employer has not reimbursed board and lodging *ex post* to the employees, it has provided accommodation and meal vouchers to those employees during the posting. It could none the less be argued that those benefits constitute allowances 'specific to the posting' and ought, accordingly, to be taken into consideration in calculating whether or not the posted workers receive a wage corresponding to the minimum standard applicable in the host Member State. However, treating those benefits in that way would in my view help circumvent the purpose of Article 3(7) of Directive 96/71.

112. That provision intends to rule out the possibility of taking into account, for the purposes of calculating minimum wage, benefits related to travel, *board and lodging* in a way that would deprive the workers concerned of the economic counter-value of their work. This is so because all of those benefits are intrinsically linked to the posting of workers. One could of course argue that the meal vouchers in particular constitute an additional benefit. After all, posted workers have the same food-related expenses when working in their home State. However, the meal vouchers, or to adopt the terminology employed in the directive, expenditure on board, seem none the less necessary to

67 — It appears from the order for reference that Elektrobudowa is required, in accordance with the collective agreements in question, to pay for accommodation in circumstances where the work is carried out in a place other than where the employees were hired. However, the meal vouchers, which can also be used to buy groceries in certain stores, are provided in accordance with the contract of employment.

compensate for the higher cost of living in the host Member State. With that in mind, it can hardly be disputed that including the accommodation and meal vouchers provided by the employer in the calculation of minimum wage would in practice lower the overall wage-level of the posted workers concerned below the accepted minimum.

113. The judgment of the Court in *Commission* v *Germany* is particularly useful. There, the Court held that where an employer requires a worker to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.[68] That same idea is reflected in Article 3(7) of Directive 96/71. Indeed, to the extent that taking such benefits into account would alter, in a manner detrimental to the worker, the balance between the services rendered by the worker and the consideration received in return, those benefits ought not to be taken into consideration in operating the comparison between the gross amount of wages *de facto* received by the posted workers and the minimum rates of pay required by the legislation of the host Member State.

114. In other words, accommodation and meal vouchers provided by the undertaking posting workers to the host Member State are to be considered reimbursement of expenditure actually incurred on account of the posting. Therefore, they cannot be taken into account in calculating whether or not the workers posted have received wages equal to the minimum laid down in the host Member State.

5. The public policy exception in Article 3(10) of Directive 96/71

115. Finally, the referring court wishes to know whether — to the extent that the benefits in question[69] fall outside the nucleus of mandatory rights laid down in Article 3(1) — they may be construed as matters covered by Article 3(10) of Directive 96/71. That provision allows Member States to apply to undertakings posting workers to their territory terms and conditions of employment on matters *other than those referred to in Article 3(1)* in so far as this concerns public policy provisions.

116. I believe that question must be answered in the negative.

117. Firstly, I observe that in accordance with Article 3(10) of Directive 96/71, that provision only applies to terms and conditions of employment covering matters *other* than those specifically referred to in Article 3(1), first subparagraph, points (a) to (g) in so far as those terms and conditions are applied in compliance with the Treaty.[70] Secondly, it is apparent from the case-law of the Court that Article 3(10) must — as an 'exception to an exception' — be interpreted restrictively.[71]

118. More specifically, to fall within the scope of the public policy exception, the provisions in question must be deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.[72] For example, rules prohibiting forced labour can, most likely, qualify as such provisions.[73] Particularly mindful of

68 — See, in that regard, *Commission* v *Germany*, EU:C:2005:220, paragraphs 39 and 40.

69 — Namely, piecework pay, compensation for travelling time and daily allowances.

70 — See, to that effect, *Laval*, EU:C:2007:809, paragraph 82. See also *Rüffert*, EU:C:2008:189, paragraphs 36 and 37 in respect of what was then Article 49 EC.

71 — See *Commission* v *Luxembourg*, EU:C:2008:350, paragraph 31. The exception, as expressed in Article 3(1) of Directive 96/71 in the present case being to the principle of the application of the legislation of the home Member State.

72 — See *Commission* v *Luxembourg*, EU:C:2008:350, paragraph 29 to 31 and case-law cited. As one commentator has observed, the impact of the dicta of the Court in *Commission* v *Luxembourg* is to interpret Article 3(10) 'almost out of existence'. See Barnard, C., 'The UK and Posted Workers: The Effect of *Commission* v *Luxembourg* on the Territorial Application of British Labour Law', 1(38) 2009 *Industrial Law Journal*, pp. 122 to 132, at p. 129.

73 — *Commission* v *Luxembourg*, EU:C:2008:350, paragraphs 3 and 32.

the need to interpret Article 3(10) so as not to compromise the freedom to provide services, the Court has therefore emphasised that 'public policy provisions' are to be construed so as to cover only those mandatory rules which cannot be derogated from and which, by their nature and objective, meet overriding requirements relating to the public interest.

119. In light of this, arguably very narrow, construction of Article 3(10) of Directive 96/71, the elements of remuneration mentioned by the referring court cannot meet the high requisite standard established by the Court in its previous case-law. Most importantly, all of them — as has been explained above — fall within the scope of Article 3(1)(c) of the directive. Moreover, they all go *beyond* the bare minimum required by legislation and/or collective agreements [74] and cannot, in that sense, be considered necessary to meet overriding requirements relating to the public interest.

IV – **Conclusion**

120. In light of the foregoing, I propose that the Court answer the questions referred by the Satakunnan käräjäoikeus as follows:

(1) On a proper construction of Article 14(2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), read in conjunction with Article 3(1) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, the question as to whether a posted worker may assign a pay claim against his employer to a trade union in the host Member State is to be determined by the law applicable to the pay claims in question. To the extent that those claims arise from terms and conditions referred to in Article 3(1) of Directive 96/71, it is the law of the Member State to which the workers are posted that is to be applied not only with regard to those claims but also with regard to the assignability thereof.

(2) On a proper construction of Article 3(1)(c) of Directive 96/71, read in the light of Article 56 TFEU, the concept of minimum rates of pay may cover basic hourly pay according to pay groups, piecework guarantee pay, holiday allowance, flat-rate daily allowance and compensation for daily travelling time, as those employment and working conditions are defined in a collective agreement declared universally applicable within the meaning of Article 3(8) of Directive 96/71 and falling within the scope of the Annex to that directive (or, as the case may be, in other relevant instruments). However:

— the host Member State cannot impose particular pay classifications or pay groups on foreign undertakings posting workers to that State beyond the minimum expressly provided for in such a collective agreement in the host Member State;

— the host Member State cannot impose on foreign undertakings posting workers to that State the obligation to pay a daily flat-rate allowance to the workers posted during the entire period of posting or compensation for travelling time for those workers where the referring court finds that applying those allowances to those foreign undertakings renders the provision of services less attractive and where the payment of those allowances goes beyond what is necessary to attain the objective of the social protection of workers.

74 — See also, *mutatis mutandis*, *Laval*, EU:C:2007:809, paragraph 84.

(3) On a proper construction of Article 3(7) of Directive 96/71, accommodation paid for and meal vouchers provided by an undertaking posting workers in the circumstances of the present case are to be regarded as reimbursement of expenditure actually incurred on account of the posting. Therefore, they cannot be taken into account when calculating whether or not the workers posted have received wages equal to the minimum laid down in the host Member State.

(4) On a proper construction of Article 3(10) of Directive 96/71, elements of remuneration such as piecework pay, compensation for travelling time and daily allowances provided for in collective agreements that have been declared universally applicable cannot be construed as constituting terms and conditions of employment, the observance of which is necessary to meet overriding requirements relating to the public interest within the meaning of that provision.