Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 September 2024*

(Reference for a preliminary ruling – Article 56 TFEU – Freedom to provide services – Construction sector – Posting of workers – Tax and social security advantages granted to employees and construction undertakings – Exemption from income tax – Exemption from health insurance contributions – Reduction in social security contributions – National legislation reserving the benefit of those advantages solely to construction services carried out in national territory – Legislation seeking to preserve labour in the national territory and to avoid concealed employment for salary-related reasons – Comparability of situations – Overriding reasons in the public interest – Social security protection of workers – The fight against tax fraud – Proportionality)

In Case C-387/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Satu Mare (Regional Court, Satu Mare, Romania), made by decision of 2 June 2022, received at the Court on 10 June 2022, in the proceedings

Nord Vest Pro Sani Pro SRL

v

Administrația Județeană a Finanțelor Publice Satu Mare,

Direcția Generală Regională a Finanțelor Publice Cluj-Napoca,

THE COURT (First Chamber),

composed of M.A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb (rapporteur), A. Kumin and I. Ziemele, Judges,

Advocate General: J. Kokott,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2023,

after considering the observations submitted on behalf of:

– the Romanian Government, by M. Chicu, E. Gane and A. Wellman, acting as Agents,

* Language of the case: Romanian.

– the European Commission, by T. Isacu de Groot and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 26 and 56 TFEU and of Article 20 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings between Nord Vest Pro Sani Pro SRL ('Nord Vest Pro'), on the one hand, and the Administrația Județeană a Finanțelor Publice Satu Mare (Office of Public Finance, Satu Mare, Romania) and the Direcția Generală Regională a Finanțelor Publice Cluj-Napoca (Regional Directorate-General of Public Finances, Cluj-Napoca, Romania), on the other hand, (together, 'the tax authorities') concerning the refusal of those authorities to grant employees of the construction sector who carry on their activities in other Member States the benefit of tax and social security advantages which employees of that construction sector have when operating in Romanian territory.

Legal context

European Union law

Directive 2006/123

3 Under Article 2(3) of Directive 2006/123, that directive is not to apply to the field of taxation.

4 Article 20 of that directive, entitled 'Non-discrimination', provides:

'1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.'

Directive 96/71/EC

5 Article 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 (OJ 1997 L 18, p. 1), entitled 'Scope', provides:

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

…

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

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

…'

Regulation No 883/2004

6 Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004'), states in paragraph 1 thereof:

'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.'

Romanian law

The Tax Code

7 Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code) of 8 September 2015 (*Monitorul Oficial al României*, Part I, No 688 of 10 September 2015), as subsequently amended and supplemented ('the Tax Code'), provides, in Article 60 thereof:

'The following persons shall be exempt from income tax:

…

5. Natural persons, in respect of employment income and income treated as such as referred to in Article 76(1), (2) and (3), in the period between 1 January 2019 and 31 December 2028 inclusive, provided that the following cumulative conditions are met:

(a) Employers carry on activities in the construction sector …

…

(b) Employers achieve a turnover from the activities referred to in point (a) and other activities specific to the construction sector representing at least 80% of the total turnover. …

(c) The gross monthly income from employment and income treated as such, referred to in Article 76(1), (2) and (3), earned by the natural persons to whom the exemption applies shall be calculated on the basis of a gross employment income of eight hours of work per day for a minimum of 3 000 [Romanian lei (RON) (approximately EUR 610)] per month. The exemption shall apply to the amounts of gross monthly income up to RON 30 000 [(approximately EUR 6100)] from employment income and income treated as such, as referred to in Article 76(1), (2) and (3), earned by the natural persons. Any such gross monthly income exceeding RON 30 000 shall not benefit from tax advantages;

…'

8 Under Article 78 of the Tax Code:

'(1) Recipients of employment income are liable to pay a final monthly tax which is calculated and deducted at source by the payers of that income.

(2) The monthly tax provided for in paragraph 1 shall be determined as follows:

(a) at the place of employment, by applying a rate of 10% to the calculation basis corresponding to the difference between net salary income, calculated by deducting from gross income compulsory social security contributions for one month, payable under Romanian law or international legal instruments to which Romania is a party, as well as, where applicable, the individual contribution to the State budget payable in accordance with the law, and the following factors:
   (i) the personal allowance granted for the month in question;
   (ii) the trade union contribution paid during the month in question, in accordance with the law;
   (iii) the contributions to pension funds …
   (iv) the supplementary health insurance premiums and medical services provided in the form of subscriptions, the cost of which shall be borne by the employees …

…'

9 Under Article 80(1) of that code:

'Payers of salary income and income treated as such shall be required to calculate and withhold income tax for each month at the date of payment of that income and to pay it into the State budget at the latest on day 25 of the month following the month in which that income is paid.'

10 In accordance with Article 138(a) of that code:

‘The rates of social security contributions shall be as follows:

25% for natural persons who are employees or who are liable to pay social security contributions under this Law.’

11 Article 138*bis* of that code states, in paragraph 1 thereof:

‘During the period from 1 January 2019 to 31 December 2028 inclusive, the rate of social security contributions laid down in Article 138(a) shall be reduced by 3.75 percentage points for natural persons who receive income from employment contracts concluded with employers who carry out activities in the construction sector and who satisfy the conditions laid down in Article 60(5).’

12 Article 139 of the Tax Code provides in paragraph 1(a) thereof:

‘The monthly basis for calculating social security contributions for natural persons who receive income from employment or similar income shall be the gross income from salaries and income treated as such received on the national territory and abroad, in accordance with the provisions of the applicable European social security legislation, and agreements on the social security systems to which Romania is a party, and shall include:

(a) income from wages and salaries, in cash and/or in kind, obtained under a contract of employment, an employment relationship or a special status provided for by law. …’

13 According to Article 146(1) of that code:

‘Natural and legal persons having the status of employer or treated as such shall be required to calculate and deduct at source the health insurance contribution payable by natural persons who receive employment income or income treated as such. The institutions referred to in Article 136(d) to (f) and the natural and legal persons who are employers or persons treated as employers are required to calculate the social security contributions which they are liable to pay under the law, as the case may be.’

14 Under Article 154(1)(r) of that code:

‘The following categories of natural persons shall be exempt from the payment of health insurance contributions:

…

(r) natural persons in respect of employment income and income treated as such, on the basis of employment contracts concluded with employers operating in the construction sector and fulfilling the conditions laid down in Article 60(5), during the period from 1 January 2019 to 31 December 2028 inclusive.’

15 In accordance with Article 156 of that code:

‘The rate of contribution to the health insurance payable by natural persons who are employees or are obliged to pay health insurance contributions under this law shall be set at 10%.’

16 Article 168 of the Tax Code provides in paragraph 1 thereof:

'Natural and legal persons having the status of employer or treated as such shall be required to calculate and deduct at source the health insurance contribution payable by natural persons who receive employment or income treated as such.'

Order No 611/2019 and Order No 2165/2019

17 Ordinul nr. 611/138/127/2019 pentru aprobarea modelului, conținutului, modalității de depunere și de gestionare a 'Declarației privind obligațiile de plată a contribuțiilor sociale, impozitului pe venit și evidența nominală a persoanelor asigurate' (Order No 611/138/127/2019 approving the model, content, detailed rules for the filing and management of the 'Return relating to payment obligations in respect of social security contributions, income tax and the register of insured persons'), of 31 January and 1 February 2019 (*Monitorul Oficial al României*, Part I, No 123 of 15 February 2019; 'Order No 611/2019'), and Ordinul nr. 2165/837/743/2019 pentru aprobarea modelului, conținutului, modalității de depunere și de gestionare a formularului 112 'Declarație privind obligațiile de plată a contribuțiilor sociale, impozitului pe venit și evidența nominală a persoanelor asigurate' (Order No 2165/837/743/2019 approving the model, content, detailed rules for the filing and management of Form 112 'Return relating to payment obligations in respect of social security contributions, income tax and the register of insured persons'), of 10, 15 and 17 May 2019 (*Monitorul Oficial al României*, Part I, No 404 of 23 May 2019; 'Order No 2165/2019') provides, in the eighth paragraph of Annex 6 thereto:

'The tax advantages laid down in Article 60(5), Article 138a, Article 154(1)(r) and Article 220quater(2) of the Tax Code shall not be granted in respect of employment income and income treated as such earned by posted workers.'

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

18 Nord Vest Pro is a company incorporated under Romanian law which is active in the construction sector. In the course of its activities, Nord Vest Pro provides, inter alia, services in Germany and Austria, in the form of the posting of workers, with a view to carrying out construction work in the territory of those two Member States.

19 Nord Vest Pro was the subject of an inspection carried out by the tax authorities, following which a tax assessment notice was issued on 10 May 2021. According to those authorities, that company had erred in finding that its employees carrying out construction work in Germany and Austria were beneficiaries of the exemption provided for in Article 60(5) of the Tax Code, concerning income tax. According to those authorities, under Article 78(2)(a) of that code, the rate applicable to those employees was 10% of income. Those authorities also took the view that Nord Vest Pro had erred in finding that the reduction in the social security contribution rate and the exemption from the payment of health insurance contributions, as provided for in Articles 138*bis* and 154(1)(r) of that code, respectively, were applicable to employees posted abroad, whereas, for that type of employee, the applicable rates were those laid down in Articles 138(a) and 156 of that same code, namely a rate of 25% for social security contributions and 10% for health insurance contributions.

20 In the light of the foregoing, the tax assessment notice set out the financial corrections to be carried out in respect of income tax and the contributions referred to above in a total amount of RON 331 906 (approximately EUR 67 255).

21 The claim submitted by Nord Vest Pro against that tax assessment notice was rejected by the Regional Directorate-General of Public Finances of Cluj-Napoca by a decision of 18 October 2021.

22 That rejection decision was the subject of an action brought by Nord Vest Pro before the Tribunalul Satu Mare (Regional Court, Satu Mare, Romania), which is the referring court.

23 That court states that that tax assessment was adopted by the tax authorities on the basis of Article 60(5) of the Tax Code, read in conjunction with Orders Nos 611/2019 and 2165/2019, from which it follows that the advantages at issue in the main proceedings are not granted in respect of the employment income and income treated as such received by posted employees. In addition, it states that the financial corrections were rendered necessary as a result of the adoption of the Ordonanță de urgență a Guvernului nr. 114/2018 privind instituirea unor măsuri în domeniul Investițiilor publice și a unor măsuri fiscal-bugetare, modificarea și completarea unor și prorogation unor termene (Government Emergency Order No 114/2018 on the adoption of certain public investment measures and certain fiscal and budgetary measures, amending and supplementing certain legislative acts, and extending certain time limits), of 28 December 2018 (*Monitorul Oficial al României*, Part I, No 1116 of 29 December 2018), the aim of which is, as is apparent from its explanatory memorandum, in essence, to support the activity of the construction sector in Romania through the grant of certain advantages to employees of that sector carrying out their activities on national territory.

24 According to that court, by limiting the benefit of those advantages to those employees, the Romanian legislature granted more favourable tax treatment to undertakings in the construction sector operating in Romania than undertakings operating in the territory of other Member States. Such a legislative approach runs counter to one of the main objectives of the European Union, namely the creation of an internal market. Such tax treatment, in so far as it entails that undertakings in the construction sector carrying on their activities outside the territory of Romania are taxed more than those undertakings operating in the national territory and, consequently, are discouraged from providing construction services outside Romania, in practice constitutes a major obstacle to the completion of an internal market.

25 In those circumstances, the Tribunalul Satu Mare (Regional Court, Satu Mare) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are the provisions of [Articles 26 and 56 TFEU and Article 20 of Directive 2006/123] to be interpreted as precluding or not precluding a legal situation such as that at issue in the present case, in which the Romanian legislature may treat differently, from a tax perspective, Romanian [undertakings] which conduct business on the territory of the Romanian State and [those which conduct business] on the territory of other [Member States of the European Union], with the result that the applicant company, which has provided services principally in [the Republic of] Austria and [the Federal Republic of] Germany, does not benefit from the tax exemptions enjoyed by other companies in the construction sector that conduct their businesses in Romania?’

Admissibility of the request for a preliminary ruling

26 The Romanian Government contends that the request for a preliminary ruling is inadmissible in so far as the referring court failed to have regard to Article 94(c) of the Rules of Procedure of the Court of Justice by failing to specify the reasons which prompted it to inquire about the interpretation of Articles 26 and 56 TFEU and Article 20 of Directive 2006/123, the links between those provisions and the legislation at issue in the main proceedings and the inferences to be drawn, in resolving the dispute in the main proceedings, from the requested interpretation of those provisions.

27 In that regard, it should be recalled that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of which the national court is presumed to be aware (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 68 and the case-law cited). Moreover, those requirements are set out in the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1).

28 Thus it is essential, as is stated in Article 94(c) of the Rules of Procedure, that the request for a preliminary ruling itself contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 69 and the case-law cited).

29 In the present case, it must be stated that, in so far as the question referred for a preliminary ruling concerns Article 20 of Directive 2006/123, the referring court has provided no information in support of the reference to that provision, with the result that the Court does not know the reasons which prompted that court to inquire about the interpretation of that provision or the connection it establishes between that provision and the legislation at issue in the main proceedings, contrary to the requirements laid down in Article 94(c) of the Rules of Procedure. Accordingly, the question referred is, to that extent, inadmissible.

30 By contrast, concerning Articles 26 and 56 TFEU, the referring court takes the view that undertakings in the construction sector carrying on their activities outside the territory of Romania were treated less favourably than undertakings operating in the national territory and were therefore discouraged from providing construction services outside Romania. In those circumstances, it must be considered that the order for reference contains a statement of the reasons which prompted the referring court to inquire about the interpretation of those provisions and the link that it establishes, in the specific context of the case in the main proceedings, between those provisions and the legislation at issue in the main proceedings. It must therefore be considered that, to that extent, the request for a preliminary ruling is admissible and a reply must be given as to its substance.

Consideration of the question referred

31 By its question, the referring court asks, in essence, whether Articles 26 and 56 TFEU must be interpreted as precluding legislation of a Member State that restricts the benefit of tax and social security advantages solely to employees of undertakings in the construction sector which carry on their activities in the territory of that Member State.

32 As a preliminary point, it should be stated, first, that, in so far as the question raised refers to Article 26 TFEU, that provision applies only to situations governed by EU law for which the Treaty lays down no specific rules. As that provision provides that the internal market is to comprise an area without internal frontiers in which, inter alia, the freedom of movement for workers and the freedom to provide services are ensured in accordance with the provisions of the Treaties and that those freedoms have been implemented by Articles 45 and 56 TFEU, it is not necessary to interpret Article 26 TFEU (see, to that effect, judgments of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraphs 55 and 56 and the case-law cited, and of 16 December 2021, *Prefettura di Massa Carrara*, C-274/20, EU:C:2021:1022, paragraph 22).

33 Secondly, as regards the European Commission's doubts as to the compatibility of the legislation at issue in the main proceedings with the rules on State aid, it suffices to note that, since, in the present case, that aspect raised by the Commission falls outside the subject matter of the question referred for a preliminary ruling, there is no need to adjudicate on it.

34 It is settled case-law that it is for the national court alone to determine the subject matter of the questions which it proposes to refer to the Court. Thus, where the request itself does not reveal a need to reformulate those questions, the Court cannot, at the request of one of the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, examine questions which have not been submitted to it by the national court. If, in view of developments during the proceedings, the national court were to consider it necessary to obtain further interpretations of EU law, it would be for it to make a fresh reference to the Court (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 37).

35 As regards Article 56 TFEU, which is cited in the question referred, the request for a preliminary ruling does not reveal a need to be reformulated. That request refers to a situation in which the company at issue in the main proceedings did not benefit from the tax and social security advantages at issue in the main proceedings 'for employees providing services in Germany and in Austria'.

36 In that regard, it must be borne in mind that national legislation governing the temporary movement of workers who are sent to another Member State to carry out work there in the framework of the provision of services by their employer and who return to their country of origin after the completion of their work, without at any time gaining access to the labour market of the host Member State, falls within the scope of the freedom to provide services (judgments of 27 March 1990, *Rush Portuguesa*, C-113/89, EU:C:1990:142, paragraph 15; of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 21; of 25 October 2001, *Finalarte and Others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraphs 22 and 23; and of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189, paragraph 37).

37 It follows that the present request for a preliminary ruling must be analysed in the light of Article 56 TFEU alone.

Whether there is a restriction on the freedom to provide services

38 It should be noted at the outset that the Member States must exercise their competence in the field of direct taxation in compliance with EU law and, in particular, with the fundamental freedoms guaranteed by the TFEU (judgment of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 41 and the case-law cited).

39 It is important to note that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 20 and the case-law cited).

40 Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 22 and the case-law cited).

41 In the present case, it is apparent from the order for reference and from the documents before the Court that, in accordance with the applicable legislation, the tax authorities refused, as regards the employees of the applicant company in the main proceedings, who were posted to the territory of the Federal Republic of Germany and the Republic of Austria, to benefit from the advantages provided for in point 5 of Article 60, Article 138*bis* and Article 154(1)(r) of the Tax Code which are granted, by contrast, to employees carrying out their activities in Romanian territory. Those advantages consist in, first, the exemption from income tax of those employees, secondly, in the reduction of their social security contributions and, thirdly, in the exemption from their health insurance contributions.

42 It should be noted that the legislation at issue in the main proceedings applies in a non-discriminatory manner to all undertakings, both Romanian and foreign, in the construction sector, provided that their employees carry out their duties in Romania.

43 However, such legislation, which establishes a different tax and social security system depending on whether the employees concerned carry out their tasks in the Member State concerned or in other Member States, although applicable without distinction to both Romanian and foreign undertakings in the construction sector, is nevertheless capable of dissuading Romanian undertakings from providing construction services in another Member State by the posting of workers to the territory of that Member State.

44 Such measures in favour of employees are also liable, subject to verification by the referring court, to reduce labour costs and thus confer an advantage on undertakings in so far as their activities are carried out on Romanian territory, by making the provision of services in another Member State less attractive.

45 In order to determine whether the legislation at issue in the main proceedings may, despite its restrictive effect, be regarded as compatible with the freedom to provide services, within the meaning of Article 56 TFEU, it is necessary to examine whether the difference in treatment which it establishes concerns situations which are not objectively comparable, or whether it is justified by an overriding reason in the public interest (see, by analogy, judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraph 46 and the case-law cited).

Whether the situations are objectively comparable

46 The comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue, as well as the purpose and content of the latter (judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraph 47 and the case-law cited).

47 Only the relevant distinguishing criteria laid down by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objectively different situation (judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraph 48 and the case-law cited).

48 In the present case, it is for the referring court, which alone has jurisdiction to interpret national law, to interpret that law in order to determine whether the situations are objectively comparable.

49 It should be stated, however, that, as the Commission essentially argued in its written observations, it appears that, in the light of the purpose and content of the legislation at issue in the main proceedings, undertakings established in Romania which provide construction services in that Member State and undertakings established in Romania which provide construction services by posting workers to another Member State are in a comparable situation, in so far as they carry out the same activities and are subject to the scheme under Romanian law concerning their obligations both as regards income tax and as regards health insurance and social security contributions.

50 That being so, for the purposes of examining whether there is an objective difference between the situation of undertakings in the construction sector whose employees work in the territory of Romania and those undertakings carrying out construction services in other Member States, the difficulty arises from the fact that the referring court does not in any way set out the objective pursued by the tax and social security advantages at issue in the main proceedings.

51 The referring court might be inclined to consider that, as the Romanian Government contends, the national legislation at issue in the main proceedings is intended to increase the net salaries of employees operating in the construction sector in Romania, in order to contribute to the social security protection of those employees and thus respond to the labour difficulties of that sector, which are liable to call into question its very viability.

52 In that regard, although that government stated that the public statistics show that, even with the benefit of the advantages conferred, employees active in Romania receive salaries which are significantly lower than the minimum salaries laid down in other Member States, such as the Federal Republic of Germany and the Republic of Austria, it should be stated that those statistics do not preclude that, in certain cases, those employees might receive the same salaries as those providing construction services in other Member States, since, according to the information in the documents before the Court, the exemption from income tax applies to gross monthly income up to RON 30 000.

53 In those circumstances, it appears that the difference in treatment arising from the legislation at issue in the main proceedings does not reflect an objective difference in situations, which is, however, a matter for the referring court to ascertain.

Whether there are overriding reasons in the public interest

54 It should be recalled that, according to settled case-law, a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the FEU Treaty, is justified by overriding reasons in the public interest and observes the principle of proportionality, which means that its application must be appropriate to ensure, in a consistent and systematic manner, the attainment of the objective at issue and must not go beyond what is necessary in order to attain that objective (see, to that effect, judgments of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 139 and the case-law cited, and of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 65 and the case-law cited).

55 In the present case, although the referring court does not specify the objective pursued by the national legislation at issue in the main proceedings, the Romanian Government contends, in essence, that the legislation at issue in the main proceedings is justified by overriding reasons in the public interest relating, first of all, to the need to ensure the social protection of employees in the construction sector and to ensure fair working conditions in the context of the internal market by reducing the pay gap at EU level, next, the objective of combatting undeclared work and thereby tax fraud and, lastly, the specific issues of the Romanian construction sector linked to the shortage of labour which that sector faces on account of the alarming migration abroad of qualified workers in that field for wage purposes.

56 As regards, in the first place, the need to ensure the social security protection of employees of that sector and to ensure fair working conditions, it must be borne in mind that the overriding reasons in the public interest recognised by the Court include both the protection of workers and the maintenance and promotion of employment as legitimate objectives of social policy (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraphs 73 to 75 and the case-law cited).

57 The Court has also recognised as overriding reasons in the public interest the fight against fraud, in particular social security fraud, and the prevention of abuse (see, to that effect, judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 37 and the case-law cited), as well as the desire to avoid disturbances on the labour market (judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 48 and the case-law cited).

58 In addition, the Court has held that, since the European Union has an economic and social purpose, the rights under the provisions of the FEU Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which includes, as is clear from the first paragraph of Article 151 TFEU, improved living and working conditions and proper social protection (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 77 and the case-law cited).

59 In the present case, it is true that the legislation at issue in the main proceedings allows, in principle, employees working in the construction sector in Romania to be granted an increase in net salaries in proportion to the sums corresponding to the tax and social security advantages at issue in the main proceedings. It is, however, for the referring court to ascertain whether that legislation is appropriate for the purpose of ensuring, in a consistent and systematic manner, the social security protection of employees in the construction sector by reducing the pay gap existing

at EU level, by ensuring, in particular, that undertakings pass on, in practice, the tax and social security advantages received to the salaries paid to employees leading to an increase in those salaries.

60 If that legislation is to be regarded as appropriate for the purpose of ensuring, in a consistent and systematic manner, the attainment of the objective pursued, it must also not go beyond what is necessary to attain that objective.

61 As regards, in the second place, the fight against concealed employment and tax fraud, it is settled case-law that both the action to combat concealed employment (see, to that effect, judgment of 15 June 2006, *Commission* v *France*, C-255/04, EU:C:2006:401, paragraphs 43, 46 and 52), and the need to ensure the effective collection of tax (see, to that effect, judgment of 22 December 2022, *Airbnb Ireland and Airbnb Payments UK*, C-83/21, EU:C:2022:1018, paragraph 63 and the case-law cited), and the fight against tax fraud (see, to that effect, judgment of 24 February 2022, *Pharmacie populaire – La Sauvegarde and Pharma Santé – Réseau Solidaris*, C-52/21 and C-53/21, EU:C:2022:127, paragraph 48 and the case-law cited), constitute overriding reasons in the public interest capable of justifying restrictions on the exercise of the freedoms of movement guaranteed by the FEU Treaty.

62 In that regard, suffice it to note that the fight against concealed employment and tax fraud cannot justify depriving, exclusively, undertakings whose employees carry out their work in another Member State of the tax and social security advantages at issue in the main proceedings. It cannot be presumed that the exercise of the freedom to provide services gives rise to cases of fraud.

63 As regards, in the third place, the specific issues of the Romanian construction sector linked to the shortage of labour on account of the migration of qualified workers in that field abroad for wage reasons, it is settled case-law that purely economic grounds, such as, in particular, promotion of the national economy or its proper functioning, cannot serve as justification for obstacles prohibited by the Treaty (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 72 and the case-law cited).

64 That being so, as the Advocate General argues, in essence, in points 45, 46 and 48 of her Opinion, considerations linked to the objective of combatting systemic risks faced by a Member State in a sector of particular importance for its development, such as, in the present case, the construction sector, in order to ensure the viability, even the continuity, of that sector, do appear to be overriding reasons in the public interest capable of justifying a restriction on the fundamental freedoms guaranteed by the FEU Treaty. National legislation conferring tax and social security advantages only on undertakings whose employees carry out their work in that Member State must be appropriate for ensuring, in a consistent and systematic manner, the attainment of the objective pursued and must not go beyond what is necessary to attain it, which it is for the referring court to ascertain (see, by analogy, judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraph 73).

65 In the light of all the foregoing considerations, the answer to the question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which restricts the benefit of tax and social security advantages solely to employees of undertakings in the construction sector which carry out their activities in the territory of that Member State and which are in a situation comparable to that of undertakings in the construction sector whose employees are posted to other Member States, provided that that national legislation is justified

by overriding reasons in the public interest and complies with the principle of proportionality, which entails that its application must be appropriate to ensure, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary to attain it.

Costs

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

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

Article 56 TFEU

must be interpreted as not precluding legislation of a Member State which restricts the benefit of tax and social security advantages solely to employees of undertakings in the construction sector which carry out their activities in the territory of that Member State and which are in a situation comparable to that of undertakings in the construction sector whose employees are posted to other Member States, provided that that national legislation is justified by overriding reasons in the public interest and complies with the principle of proportionality, which entails that its application must be appropriate to ensure, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary to attain it.

[Signatures]