OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 5 May 2010[1]

I — Introduction

1. The Rechtbank van eerste aanleg van het gerechtelijk arrondissement Antwerpen (Court of First Instance of the judicial district of Antwerp, 'the Rechtbank') asks the Court of Justice to clarify whether Belgian law may be interpreted as compatible with Article 5 of Directive 96/71/EC[2] concerning the posting of workers and with Articles 56 and 57 TFEU.

2. The present case is, essentially, a consequence of the judgment of the Court in *Arblade and Others*,[3] which provided the criteria necessary for determining, in the light of Articles 56 and 57 TFEU, whether national legislation designed to verify the lawfulness of the intra-Community movement of workers is compatible with those articles. Specifically, various uncertainties have arisen concerning the lawfulness of the obligation incumbent on employers to send to the Belgian employment authorities a prior declaration of posting and to keep available documents comparable to the Belgian individual account or pay slip.

3. Ten years later, the Court has to examine an issue similar to that raised in *Arblade and Others*, but in the context of a new national legal framework and following an important development in European Union case-law on social matters. The present case provides, therefore, an opportunity to establish whether the finding that the European Union pursues a social aim also, as the Court declared in its judgments in *Viking Line* and *Laval*,[4] and following the entry into force of the Treaty of Lisbon, has any impact on the case-law laid down in *Arblade and Others*.

1 — Original language: Spanish.

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

3 — Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453.

4 — Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, *Viking Line*, [2007] ECR I-10779, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

II — Applicable legislation

A — *European Union law*

1. Freedom to provide services

4. The first paragraph of Article 56 TFEU provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

2. Directive 96/71

5. With a view to harmonising the posting of workers as a result of the cross-border provision of services, Directive 96/71 introduced a series of measures concerning the rights of workers and the obligations of employers. Article 3(1) of that directive provides as follows in connection with terms and conditions of employment:

'Terms and conditions of employment

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

— by law, regulation or administrative provision,

and/or

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

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

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

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

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

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

6. Article 5 authorises Member States to take appropriate measures in order to comply with Directive 96/71, in the following terms:

'Measures

Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.'

B — *National law*

7. Belgium transposed Directive 96/71 into national law by the Law of 5 March 2002, [5] in which it also included the points to which the Court of Justice referred in *Arblade and Others*. Among other measures, in the part which concerns this case, the transposition law established a simplified regime for the keeping of certain social documents by undertakings posting workers to its territory ('the simplified regime'). That regime was implemented

5 — *Belgisch Staatsblad* of 13 March 2002.

by the Royal Decree of 29 March 2002, [6] which defined activities in the field of construction, expressly set out in the second paragraph of Article 6 of the transposition law.

8. As is apparent from the submissions of the Commission, the Belgian Government and the defendants in the main proceedings, the simplified regime for keeping social documents, created by the Law and by the Royal Decree of 29 March 2002, has not been applicable since 1 April 2007 when it was replaced 'by a new, more convenient and more accessible system' entailing a declaration of posting in electronic format, which is known as a 'Limosa declaration'; [7] nevertheless, for the purposes of this reference for a preliminary ruling, the 2002 legislation is, *ratione tempore*, the relevant national legal framework.

9. The version of Article 8 of the transposition law in force at the material time relieved employers of the need to satisfy the conditions of Article 6b(2) of Royal Decree No 5 of 23 October 1978 concerning the keeping of social documents, although only for the period of six months fixed by the King under that provision. Thus, employers were relieved from drawing up work rules, [8] pay slips, [9] documents relating to contracts of employment, [10] and the document and immediate declaration of employment, with the result that those employers were not subject to the Belgian social security rules. [11]

10. Under Article 6b(2) of Royal Decree No 5, employers are relieved of the requirement to draw up and keep the social documents provided for in or pursuant to Chapter II of the decree, provided that they satisfy two conditions. In the first place, before an employee starts work, the employer must send the competent officials a declaration of posting, drawn up in accordance with Article 6c. In the second place, the employer must keep available to those officials during the period established in the first paragraph copies of the documents provided for by the legislation of the country where he is established provided that those documents are equivalent to the 'individual account' governed by Article 4(1) of the Royal Decree or to the 'pay slip' referred to in Article 15 of the Law of 12 April 1965 on the protection of workers' remuneration.

11. If the employer should not be in possession of 'equivalent documents', Article 6c(4) of Royal Decree No 5 provides that he must draw up and keep the individual account

6 — *Belgisch Staatsblad* of 17 April 2002.

7 — Acronym for 'Landenoverschrijdend Informatiesysteem ten behoeve van MigratieOnderzoek bij de Sociale Administratie' (cross-border information system for the investigation of migration by the social authorities). The Commission states in its written observations that this system is the subject of infringement proceedings for breach of Article 56 TFEU (proceedings No 2007/2367).

8 — Article 4 of the Law of 8 April 1965

9 — Article 15 of the Law of 12 April 1965.

10 — Articles 4 and 123 of the Law of 3 July 1978.

11 — Article 38 of the Law of 26 July 1996.

and pay slip, as provided for in the Belgian legislation.

12. Chapter III of the Royal Decree of 29 March 2002, entitled 'detailed rules regarding dispensation from the drawing-up and keeping of social documents', consists of Article 3 which requires that, before posted workers start work, the employer must send to the Social Laws Inspectorate, by letter, email or fax, a 'prior declaration of posting' in accordance with Article 4 of the decree. Certification of receipt and approval of the declaration must be given within five working days of the date on which it was received by the Inspectorate, which for that purpose must send, by the same channels, a 'registration number' for the employer's declaration (second paragraph). The worker may start work only after the date on which the Inspectorate notifies the registration number to the employer, failing which the employer will not be entitled to the dispensation (third paragraph).

13. Chapter IV of that Royal Decree, concerning the 'declaration of posting', consists of Article 4, which sets out the information to be included in the prior declaration:

'1. With regard to the employer: surname, first name, place of establishment or name or headquarters of the undertaking, the nature of its activity, the address, telephone number, fax number, email address and identification or registration number of the employer with the competent social security body in the State of origin.

2. With regard to the employer's servant or agent who is responsible for keeping available the equivalent documents: the surname, first name, company name, address, telephone and fax numbers, and email address.

3. With regard to each employee posted to Belgium: the surname, first name, domicile, date of birth, civil status, sex, nationality, address, telephone number, number and type of identity document, the date on which the employment contract was concluded, the date on which the employee began employment in Belgium and the work performed.

4. With regard to the terms and conditions of employment applicable to the employees posted: the length of the working week and the hours of work.

5. With regard to the posting: the type of services provided within the context of the posting, the starting date of the posting and its

envisaged duration, and the place where the work is to be performed.

6. With regard to the equivalent documents: the place where they are kept and retained, in accordance with Article 5 of the present Decree.'

14. Article 4(2) of the Royal Decree requires the declaration to be drawn up in line with a model annexed thereto.

15. Chapter V of the decree governs the 'detailed rules for the keeping available and retention of equivalent documents', distinguishing 'during the period of employment of workers posted to Belgium' in the first part (Article 5) from 'after the period of employment of workers posted to Belgium' in the second part (Article 6).

16. Article 5(1) provides that employers are obliged to keep copies available to the inspection services, either at the workplace to which the worker is assigned or at the Belgian address of a natural person who retains them as an agent or servant. This obligation includes that of duly completing the documents in accordance with any obligations which may be applicable to them under the law of the State of origin. Should they fail to comply with that obligation, Article 5(1) concludes by providing that they must draw up and complete the individual account and payslip in accordance with the Belgian legislation.

17. After the six months referred to in Article 2 of the Royal Decree have passed, employers must retain for five years, available to the relevant inspection services and in the places referred to above, a copy of the equivalent documents, and they must draw up the Belgian individual account and pay slip should they fail to comply with that obligation. However, Article 5(3) provides that copies of equivalent documents may be retained in any form, provided that they are legible and that the method of reproduction allows them to be effectively monitored.

18. Similarly, Article 6 concerns the obligation of employers to lodge with the Employment Inspectorate copies of the equivalent documents, continuing after the period of employment in Belgium has ended.

III — The facts and the main proceedings

19. Termiso Limitada, a Portuguese company specialising in insulation and soundproofing in the ship repair sector, would post welders and fitters from its workforce in Portugal to the shipyard belonging to

Antwerp Ship Repair in Antwerp, in order to execute subcontracts.

20. Every time a contract was concluded, Termiso would request E101 forms [12] from the Portuguese authorities, while for its part Antwerp Ship Repair would send the appropriate notification of posting of the workers to the Employment Inspectorate, for the purposes of Article 69 of the Law on economic readjustment of 14 August 1978. [13]

21. During an inspection carried out on 12 July 2004 by the Federal Public Social Security Service Inspectorate at Antwerp Ship Repair's shipyards, it was found that 53 metalworkers posted from Termiso Limitada were working there. None of the postings of those workers had been the subject of a prior declaration, which had not, therefore, been sent in advance to the Belgian inspectorate. Meanwhile, Termiso's foreman was unable to provide evidence of any salary documents.

22. On 14 July 2004, the Employment Inspectorate brought administrative proceedings against Termiso Limitada for infringement of the Belgian legislation on the keeping of social documents; on 17 November 2004 it was decided that no further action was to be taken in those proceedings.

23. Belgium has defined as an offence failure to comply with the conditions laid down in Belgian social legislation. [14] On the basis of that definition, the Public Prosecutor's Office charged Termiso Limitada (employer and legal person criminally liable), Vítor Manuel dos Santos Palhota (shareholder and managing director), Mário de Moura Gonçalves (deceased) and Fernando Luis das Neves Palhota (shareholder and technical director) with the commission of several offences, consisting of failure to draw up individual accounts in respect of the employees posted and of failure to pay the statutory minimum wage and additional payments for overtime in accordance with the Belgian legislation.

IV — The question referred for a preliminary ruling and the procedure before the Court of Justice

24. In the criminal proceedings brought before it against Termiso Limitada, Vitor Manuel dos Santos Palhota, Mário de Moura Gonçalves and Fernando Luis das Neves Palhota, the Rechtbank stayed the proceedings and referred the following question to the

12 — The defendants in the main proceedings acknowledge that, although those forms were not issued promptly, this delay never aroused the suspicion of the Belgian Employment Inspectorate.

13 — *Belgisch Staatsblad* of 17 August 1978.

14 — The applicable provisions of criminal law have not been specified in the order of the Rechtbank or in the written and oral pleas put forward by the various parties.

Court of Justice for a preliminary ruling under Article 267 TFEU:

'Do the provisions of Article 8 of the Law of 5 March 2002 and Articles 3, 4 and 5 of the Royal Decree of 29 March 2002 (implementation decree) infringe Article 49 and Article 50 of the EC Treaty, in that they require foreign employers who wish to post workers to send in advance a declaration of posting to the Social Laws Inspection Service (Dienst Toezicht op de Sociale Wetten) and also to keep documents comparable to the Belgian individual accounts or pay slips, as a result of which access to the Belgian services market is prevented or at least hampered?'

25. The reference for a preliminary ruling was lodged at the Court Registry on 26 November 2008.

26. Written observations were lodged, within the period indicated in Article 23 of the Statute of the Court of Justice, by the Belgian, German, French, Greek and Danish Governments and by the Commission and the defendants in the national criminal proceedings.

27. The agents of the Kingdom of Belgium, the Hellenic Republic, the French Republic, the EFTA Surveillance Authority and the Commission appeared at the hearing held on 25 February 2010.

V — Admissibility

28. Belgium argues that the reference for a preliminary ruling is inadmissible on three grounds.

29. First, it submits that the question raised by the referring court is based on a misinterpretation of Article 8 of the Belgian law transposing Directive 96/71 and its implementing legislation, which is that the 'simplified regime' concerned is compulsory for providers of services. So, that legislation creates an alternative system, which allows employers either to opt for the simplified regime or, alternatively, to draw up and keep the Belgian documents.

30. Second, Belgium argues that the order for reference is vitiated by inadequate reasoning, in that it is not possible to deduce from its factual and legal framework the reasons why the Belgian legislation conflicts with the present Article 56 TFEU, also calling into question the relevance of Directive 96/71 for the purposes of disposing of the substantive issue.

31. Third, Belgium denies that the Court is entitled to give a ruling on Article 57 TFEU because no one disputes that the work carried out in Belgium by the employees of Termiso Limitada entails a provision of services, arguing that, moreover, it is for the national court to apply that article.

32. In connection with the first ground of inadmissibility, it is quite clearly an insufficient basis for dismissal *a limine* of the reference for a preliminary ruling. First, because it is not for the Court to analyse national law, the preliminary ruling mechanism being based on a clear separation of functions between the national courts and the Court of Justice, which is empowered to rule on the interpretation or validity of European Union provisions only on the basis of the facts which the national court puts before it. [15] Second, because, regardless of the reasons which may have led the Rechtbank to focus its uncertainties on the simplified regime, it is for that court alone to determine whether it is necessary to seek a ruling from the Court of Justice and to choose the factual and legal framework on which it is based. [16]

33. In connection with the second ground of inadmissibility, it should be noted that, according to settled case-law, the dismissal at the outset of a reference for a preliminary ruling may be justified only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, [17] where the problem is hypothetical, [18] or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [19]

34. Definition of the factual and legislative context of the question referred for a preliminary ruling is essential in order for the Court of Justice to provide the national court with a useful interpretation of European Union law, [20] and also, beforehand, so that those who participate in the preliminary-ruling proceedings may submit observations. [21]

35. That being so, and despite the brevity of the order, there can be no doubt that it provides a minimal but sufficient explanation of the relationship between Article 56 TFEU, Directive 96/71 and the 2002 Belgian legislation, and of the factual circumstances on which the uncertainties of the referring court are based. In addition, the fact that the referring court invokes Directive 96/71 in no way affects the jurisdiction of the Court of Justice, since the referring court is also correct in invoking Article 56 TFEU, a provision which is indeed relevant for the purposes of replying to the question.

15 — Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16; Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 11; and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraphs 25 to 27.

16 — Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46; and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 24.

17 — Case C-505/07 *Compañía Española de Comercialización de Aceite* [2009] ECR I-8963, paragraph 26.

18 — Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19.

19 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

20 — Orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4; Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 8; and Case C-45/08 *Spector Photo Group* [2009] ECR I-12073, paragraph 26.

21 — Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6.

36. The third ground of inadmissibility put forward by Belgium warrants the same outcome, having regard to the fact that Article 57 TFEU prohibits discrimination in the context of freedom to provide services, which is precisely the problem underlying the case referred by the Rechtbank.

37. Accordingly, the question is not vitiated by any grounds of inadmissibility.

VI — The substance

A — *The criterion for assessment*

1. A preliminary point: the posting of workers, Directive 96/71 and the interests in issue

38. The present case brings to light once again the inherent tension between the construction of the internal market and the protection of social values. As has been seen in previous cases, the posting of workers creates a conflict between undertakings which exercise freedom to provide services, those of their employees who are transferred as a result of the provision of those services, and the Member States that host such undertakings and employees. Directive 96/71 attempts to address that tension, and its aim is to achieve a balance between an employer's freedom to provide his services and the safeguarding of certain standards of social protection.

39. The essential feature which determines the application of the directive is the carrying-on of an economic activity in a Member State other than the State of origin of the undertaking concerned, which, at the same time, on its own account and instructions, posts an employee to that Member State. Therefore, the European Union legislature is aware that 'it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged', [22] which is why the directive includes rules for determining the applicable employment law.

40. The question relating to the applicable provisions (whether those of the State of establishment or those of the host State) is resolved by reference to the need to coordinate the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection, [23] which must be observed in the State of destination notwithstanding the duration of the posting. [24] That view is crystallised in Article 3(1) of the directive, which provides that 'Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings... guarantee workers posted to their

22 — Recital 6 in the preamble to Directive 96/71.
23 — Recital 13 in the preamble to Directive 96/71.
24 — Recital 14 in the preamble to Directive 96/71.

territory the terms and conditions of employment' covering such significant matters as, inter alia, maximum work periods and minimum rest periods, minimum rates of pay, and health at work. Article 3(7) guarantees, in any event, the 'application of terms and conditions of employment which are more favourable to workers'. [25]

41. As a closing provision, Article 3(10) affords Member States the right, provided that they respect the Treaties, to impose on undertakings which post employees to their territory 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.

42. The rules referred to above, which may be described as the substantive aspect of the directive in so far as it concerns the employment relationship, coexist with an additional but essential set of rules in order to give them effect; in other words, the national supervision and monitoring provisions, intended to establish that the rights of posted workers are respected. The Belgian provisions in issue in the present case come within that set of rules. Such provisions, usually adopted and implemented by the State of destination, are not part of the substantive provisions of the directive because, first, they are not included in Article 3, and, second, Article 5 entrusts the Member States with the effective safeguarding of its objectives.

43. One consequence follows from the foregoing: in so far as Article 5 confers on Member States the power to adopt measures to ensure compliance with Directive 96/71, the compatibility of such measures with European Union law must be assessed in the light of the Treaties. [26] Therefore, the present case does not call for an interpretation so much of Article 5 of the directive as of Articles 56 and 57 TFEU, which establish the freedom to provide services and the general conditions which are imposed on Member States in order to safeguard the effectiveness of that freedom.

25 — The specific nature of the regime established by Directive 96/71 is all the more evident when it is compared with the applicable general legal rules in Articles 3 and 6 of the Rome Convention of 19 June 1980 on the law applicable to general contractual obligations (OJ 1980 L 266, p. 1). The convention opts for a different solution, providing that, in the absence of choice by the parties (the main criterion), the employment contract will be governed by the law of the State in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or by the law of the country in which the place of business through which he was engaged is situated (the subsidiary criterion), subject always to the possibility that, under certain conditions, the rules of another legal system, in particular, that of the Member State to whose territory a worker has been temporarily posted, may take effect in addition to the law declared to be applicable to the contract (the criterion of mandatory law).

26 — Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 30.

44. That consequence is, moreover, consistent with the case-law of the Court, which has recently given a broad interpretation of the substantive provisions of Directive 96/71 that was clearly inclined in favour of freedom to provide services. It is well known that *Laval un Partneri* construed Article 3 of Directive 96/71 so as to limit the latitude of Member States to impose on undertakings from other Member States which post employees to their territory social protection measures other than those set out in that article. That interpretation of Article 3 of Directive 96/71 also places conditions on the application of Article 56 TFEU, and, more specifically, on the standard of the review to be effected in respect of national measures for the protection of employees. That approach, which is no stranger to criticisms or ambiguities, [27] was recently reiterated in *Rüffert* [28] and *Commission* v *Luxembourg*. [29]

45. However, when the measures in question concern the supervision and monitoring measures which Member States adopt to ensure compliance with Article 3 of Directive 96/71, the Court has confirmed that the relevant criterion for review is the Treaty. That is clear from *Commission* v *Luxembourg*, in which the Court analysed substantive national measures in the light of Article 3 of Directive 96/71, leaving the supervision and monitoring measures to be reviewed pursuant to the Treaties.

46. Accordingly, the criterion for assessment, like the standard of review to be applied to the national measures in issue, is that provided for in the Treaties, as occurred in *Arblade and Others*. Thus, the statement of the law laid down in that case remains fully applicable, notwithstanding the recent development which took place after the judgment in *Laval un Partneri*.

47. As the Court stated in *Arblade and Others*, that finding 'does not prevent the national court from taking account, in accordance with a principle of its criminal law, of the more favourable provisions of Directive 96/71 for the purposes of the application of national law, even though Community law imposes no obligation to that effect.' [30] Accordingly, in so far as Directive 96/71 lays down criteria which lessen the criminal liability of defendants, it may be taken into consideration when applying Articles 56 and 57 TFEU.

2. Restrictions on freedom to provide services and their justification

48. Where the rules applicable to services have not been harmonised, obstacles to

27 — Kilpatrick, C., 'The ECJ and Labour Law: A 2008 Retrospective', *Industrial Law Journal,* Vol. 38, No 2, Oxford University Press, 2009, pp. 196 to 202.

28 — Case C-346/06 [2008] ECR I-1989.

29 — Case C-319/06 [2008] ECR I-4323.

30 — *Arblade and Others*, paragraph 29.

Article 56 TFEU sometimes arise as a result of the fact that national laws are aimed at any person who is in national territory, while also applying to providers of services who, established in other Member States, are temporarily in national territory. It is settled case-law that this fundamental freedom requires not only the elimination of all discrimination on grounds of nationality against providers of cross-border services, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services. [31]

49. The Court therefore uses a broad definition of 'restriction' in relation to freedom to provide services, ranging from the actual prohibition of an activity to merely reducing its appeal. That development is consistent with that which has occurred in connection with other freedoms, notably, the free movement of goods.

50. According to the wording of Article 52(1) TFEU, applicable to the freedom to provide services through the reference made therein to Article 62 TFEU, restrictions of that freedom may be justified on grounds of public policy, public security or public health. However, when a restriction is a measure which applies without distinction and does not give rise to direct discrimination, the Court has accepted that such a measure may also be justified 'by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established'. [32] That justification must be interpreted strictly, [33] and by means of a review of proportionality. [34]

51. However, since 1 December 2009, when the Treaty of Lisbon entered into force, it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms. Specifically, the posting of workers, in so far as it may alter the amplitude of the freedom to provide services, must be interpreted in the light of the social provisions introduced by that Treaty. Article 9 TFEU lays down a 'cross-cutting' social protection

31 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 16; Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 30; and Case C-219/08 *Commission* v *Belgium* [2009] ECR I-9213, paragraph 13.

32 — In that connection, see *Arblade and Others*, paragraph 34; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33; *International Transport Workers' Federation and Finnish Seamen's Union*, paragraph 77; and *Laval un Partneri*, paragraph 103.

33 — Case C-319/06 *Commission* v *Luxembourg*, paragraph 30.

34 — *Arblade and Others*, paragraph 35.

clause obliging the institutions 'to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.' That requirement is laid down following the declaration in Article 3(3) TEU that the construction of the internal market is to be realised by means of policies based on 'a highly competitive social market economy, aiming at full employment and social progress'.

52. That social obligation is reflected even more clearly in Article 31 of the Charter of Fundamental Rights, a text that is now part of primary European Union law, which provides that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity.' Among those conditions, provision is made for a guarantee relating to working hours, rest periods and paid leave, which is illustrative, albeit not exhaustively, of a minimum framework for the protection of workers.

53. As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.

54. Thus, in order for the employment measures in issue in the host Member State to be justified in the terms set out above, they must be suitable for ensuring the attainment of the objective they pursue and must not go beyond what is necessary to achieve that objective. This criterion of proportionality, which the Court has consistently applied in its case-law on the fundamental freedoms, is usually described as the appropriateness test and the necessity test, respectively.

55. It is, therefore, necessary to determine whether the disputed measures constitute a restriction of freedom to provide services and, then, if the reply is affirmative, to assess whether those measures are justified by reviewing their proportionality. This analysis

must be performed in an individualised manner, examining every measure concerned separately and in the light of a standard of review which, in accordance with the Treaty, is to be particularly sensitive to the social protection of workers.

B — *The Belgian control measures*

56. The simplified regime introduced in Belgium in 2002 relieves service providers established in another Member State from drawing up certain documents provided for in the law of the host State, provided that (a) they send to the Belgian social laws inspection service a prior declaration relating to each worker posted, in accordance with a detailed model; (b) they keep and hold available to the relevant authorities documents from the undertaking's State of establishment which are comparable to the individual account and pay slip provided for under Belgian law; and (c) the temporary posting does not exceed six months.

57. Therefore, the simplified regime never applies to postings of more than six months, but it is excluded also in the case of postings of less than six months if the prior declaration requirement is not satisfied, the general regime then applying.

1. The declaration prior to posting

(a) Introduction

58. The Commission and the defendants in the main proceedings submit that the compulsory declaration and the consequences of failure to produce it in fact conceal a genuine authorisation which impedes freedom to provide services. On the other hand, the Belgian Government emphasises that Community case-law has expressly allowed that method of supervision, denying that it constitutes a necessary condition in order to be able to circumvent the ordinary regime.

59. Notwithstanding the arguments put forward by Belgium, all the indications are that there is a restriction of freedom to provide services, given that that Member State infringes the requirement that service providers from other Member States must be on an equal footing with those from its own territory, for only the former are required to produce the declaration.

60. As a starting point, it should be recalled that the Court has held that a prior declaration is justified in the interests of the protection of workers. [35] There can be no objection to the requirement that a provider of services

35 — Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 46; *Commission* v *Germany*, paragraphs 41 and 42; and *Commission* v *Belgium*, paragraph 16.

should complete such a formality to certify that the situation of the workers concerned is lawful, particularly with regard to matters of residence, work permits and social security cover in the Member State where that provider employs them. Such a measure does not go beyond what is necessary to prevent the abuse to which the implementation of the freedom to provide services may give rise.

61. As I will explain below, that justification may be successfully put forward with regard to the *content* and *form* of the declaration. However, making approval of the declaration dependent on a time *before* the posting, and a number of matters relating to its *practical application*, raise uncertainties as to whether it is compatible with Article 56 TFEU.

(b) The content of the declaration

62. The particulars which, according to Article 4 of the Royal Decree of 29 March 2002, must be included in the prior declaration do not raise too many uncertainties following an analysis in the light of the Treaties. As the States which have submitted observations have argued, the aim pursued by this detailed information is to confirm, in accordance with the criteria set out in Directive 96/71, that the situation of workers in the State of origin is lawful and to establish the rights to which those workers ought to be entitled in the place where the services are to be temporarily provided. These particulars are, moreover, essential in order to know which rules are more favourable to them. The detailed information concerning the employer, the employees,[36] and an indication of the applicable terms and conditions of employment, more particularly the working week and hours of work, are aimed at verifying the lawfulness of their employment in the State of origin. Accordingly, the objective of determining the rights granted to the employees in the host State is proportionate to the requirement to provide information concerning 'the type of services provided within the context of the posting, the date of commencement of the posting and its envisaged duration, and the place where the work will be performed'.

63. Similarly, to know the place where the comparable documents are kept and retained, together with the particulars of the individual who is responsible for them in Belgium, is consistent with the effective protection of employees. That was the finding of the Court in *Arblade and Others*, where it held that such protection, 'particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and *clearly identified* place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or

36 — Particularly relevant are 'the date on which the employment contract was concluded, the date on which the employee commenced employment in Belgium and the work performed'.

exchanges of information between Member States as provided for in Article 4 of Directive 96/71.'

(c) The form of the declaration

64. Nor is the requirement that the declaration should be drawn up in standard form to be regarded as an excessive burden for providers of services; rather, this requirement affords them legal certainty and simplifies the task of sending the declaration. Furthermore, service providers may complete the form in their own language. [37]

(d) Certification of approval prior to posting

65. The Belgian provisions which accompany the legislation in issue warrant closer inspection, particularly the provisions concerning the dispensation from drawing up and keeping the Belgian social documents provided that the inspectorate certifies 'receipt and approval of that declaration' within five working days of receipt, issues a registration number for the declaration and notifies it to the employer.

66. Belgium describes the prior declaration system as 'a mere notification procedure', [38] denying that it is a prerequisite for a posting to take place. However, that interpretation appears to be contradicted by Belgium's assertion that 'the application of the simplified regime is dependent on the sending of a declaration of posting' [39] and by the wording of the provisions which govern it.

67. According to *Commission* v *Germany*, a prior control measure carried out by the authorities of the State of destination 'exceeds what is necessary to prevent the abuse to which the implementation of the freedom to provide services may give rise.' [40] Prior verification of compliance with the requirements is at odds with the merely informative purpose which case-law attributes to this type of notification, which is simply to enable the national authorities 'to check that information subsequently and to take the necessary measures if those workers' situation was not regular'. [41]

37 — That was confirmed at the hearing by the representative of the Belgian Government.

38 — Paragraph 32 of its statement in intervention.
39 — Paragraph 31 of its statement in intervention.
40 — *Commission* v *Germany*, paragraph 42.
41 — *Commission* v *Germany*, paragraph 41.

68. It is also important to note that, as concerns the posting of workers from a non-member country employed by an undertaking established in the European Union, the Court has held that national law may not make performance of their services subject to the issue of an administrative visa. [42] It appears reasonable, therefore, for the Court to maintain an equivalent stance with regard to employees who, like the employees of Termiso Limitada, are citizens of the Union.

69. However, the instant case has a special feature vis-à-vis the case-law concerning nationals of non-member countries, since, following the prior declaration which employers are required to produce, the Belgian authorities must issue a mandatory registration number. As was stated above, the approval of the authorities of the host State does not always entail checks that the posting is intended to satisfy all the requirements laid down in the social legislation. On the contrary, the declaration of approval may be interpreted as a procedural step which simply records that the declaration has been completed correctly. However, the Belgian regime warrants a very different assessment in the light of the fact that it is impossible for the provision of services to commence before the registration number for the declaration, without which, as has been confirmed, the posting cannot take place, has been issued and sent to the employer.

70. Consequently, the mere transmission of information to the authorities of the State of destination and the certification of receipt are potentially capable of becoming mechanisms for verification and authorisation prior to commencement of the work. Such an outcome is difficult to reconcile with the Treaties, especially if it is analysed from the point of view of its effectiveness.

(e) The administrative effectiveness of the declaration

71. It is clear that to have information about the circumstances surrounding a particular employment relationship makes the work of inspection easier. With the certification of approval of the prior declaration, the inspectorate is made aware of the details of the employment relationship in order to prevent any defects which might affect it before the work begins. Thus, if such irregularities are detected, an employer will not be given a registration number (since, as has already been stated, neither the posting nor the work can take place without a registration number), thereby avoiding the verification of those defects on site by the inspectorate.

42 — In Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15; Case C-445/03 *Commission* v *Luxembourg*, paragraph 24; and *Commission* v *Germany*, paragraph 34, the Court held that that requirement constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

72. However, from the perspective of Article 56 TFEU, such administrative effectiveness does not justify making the posting conditional on the approval of the declaration through the issue of a registration number.

73. Arblade and Others categorically states that the criterion of making it easier for the authorities to perform their supervisory task 'is not sufficient, for the purposes of justifying such a restriction of freedom to provide services', and goes on to state that '[i]t must also be shown that those authorities cannot carry out their supervisory task effectively'. [43] To the same effect, the Court declared in *Commission* v *Luxembourg* that it was disproportionate to require certain documents to be retained by an agent residing in Luxembourg, and held that 'the Grand Duchy of Luxembourg does not submit any specific evidence in support of the argument that only the retention of the documents concerned by an agent residing in Luxembourg enables the authorities to carry out the checks for which they are responsible'. [44]

74. The particulars in the declaration are sufficiently clear to enable subsequent checking, without its being possible to ascertain to what extent making it subject to approval within five days is necessary for the performance of those checks.

75. Nor does such a requirement entail for posted workers a genuine benefit or one additional to that which subsequent checks would provide them with. [45] Indeed, the very existence of the national proceedings, reflecting the checks made by the authorities concerning the wages of the employees of Termiso Limitada, is proof that advance checking of the individual declaration of posting is not conclusive for the purposes of the tasks of the Belgian inspectorate.

76. In addition, as regards the time-limit of five days within which the Belgian authorities must acknowledge receipt and issue a registration number, it has been established that that period, although short, may impede the freedom to provide services of an undertaking such as Termiso, in that the provision of the type of services it offers requires the almost immediate posting of its workers to Belgium, [46] which would not be possible if it was necessary to wait for a reply from the inspectorate within that time-limit. By way of example, a system of positive silence, whereby a registration number would be presumed to have been issued if the authorities failed to reply within the time-limit, could serve as an alternative method. That solution shows, therefore, that there are means less onerous than waiting for confirmation and a registration number, thus confirming that an analysis

43 — *Arblade and Others*, paragraph 76.

44 — Case C-319/06 *Commission* v *Luxembourg*, paragraph 91.

45 — The criterion of an additional benefit for workers, albeit limited to the comparison of the laws of the State of origin and the host State, is highlighted in *Finalarte and Others*.

46 — According to the arguments of the defendants in the main proceedings, which were corroborated at the hearing, repairs of the sort carried out by Termiso necessitate the urgent posting of workers.

of the system does not withstand a review of proportionality. [47]

(f) Summary

77. In the light of the arguments set out, Articles 56 and 57 TFEU must be interpreted as meaning that they preclude national legislation which makes the posting of workers and the actual beginning of the provision of services conditional on certification of receipt and approval of the prior declaration within five working days following the date on which it was received by the Inspectorate.

2. The documents from the State of establishment equivalent to those of the host State

(a) Introduction

78. The second measure to cause the Rechtbank to entertain doubts is that requiring an undertaking established in another Member State to keep available to the competent authorities certain documents from the State of origin which are comparable to documents of the State of destination, specifically, those corresponding to the Belgian individual account and pay slip.

79. The prohibition of 'dual checks', in conjunction with the case-law of the Court of Justice, makes it possible to assert that Directive 96/71 requires a reasonable degree of equivalence between the guarantee mechanisms laid down in the host State and those laid down in the employer's State of origin. This requirement of comparable conditions tends to arise frequently in connection with social documents, the usual starting point for an employment inspectorate.

80. In his Opinion in *Arblade and Others*, Advocate General Ruiz-Jarabo Colomer analysed the effectiveness of that requirement of equivalence, pointing out that States of destination 'must examine whether those undertakings already meet similar obligations under the legislation of the Member State of establishment, having regard not so much to the names of the various documents as to their content and the purpose they serve. If they do, the two bodies of legislation must be recognised as equivalent'. Thus, 'such undertakings may be required to comply with the legislation of the host Member State only in so far as it supplements the legislation of

47 — It is most illuminating that the agent of the Commission acknowledged as much at the hearing.

the State of establishment, but not if the two overlap' (point 89).

81. The Court followed that approach in its judgment in that case, stating that the obligation to draw up and keep the documents of the host Member State 'gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State' (paragraph 58). The Court held that 'the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents, one of which conforms to the rules of the Member State of establishment and the other to those of the host Member State, if the information provided, as a whole, by the documents required under the rules of the Member State of establishment is adequate to enable the controls needed in the host Member State to be carried out'.[48] Consequently, the Court concluded that 'the imposition of such an obligation constitutes a restriction on freedom to provide services within the meaning of Article 59 of the Treaty'.[49]

82. Underlying the statement of the law laid down in *Arblade and Others* is the principle of mutual trust between Member States, for, in short, prohibition of the 'double burden' entails acceptance of the law of another Member State (that of the State of origin) as a valid instrument for the protection of the public interest in the State of destination.

83. On the basis of the considerations set out, it could be asserted that requiring production of the documents of the State of origin (in the abstract, without considering the obligations to keep and retain them) does not amount to a restriction of Article 56 TFEU, in view of the fact that, on the one hand, an undertaking is required to draw up the documents in the State in which it is established, like other undertakings, and, on the other, that undertakings established in the place where the service is provided are also required to produce the 'equivalents' referred to in the Belgian legislation. However, the specific characteristics of the Belgian rules, particularly the obligation to retain the documents concerned, may, as will be shown below, lead to a different outcome.

(b) Documents equivalent to the individual account and payslip in the host State

84. Leaving aside the essential nature of the choice which, according to the Belgian Government, its system offers providers of services (to opt for the simplified regime or undertake directly to draw up the documents

48 — *Arblade and Others*, paragraph 64.
49 — *Arblade and Others*, paragraphs 58 and 59.

provided for in Belgium), it is clear that the aim of the simplified regime is to relieve employers of a number of procedural steps, such as the drawing-up and keeping of certain documents (inter alia, the individual account and pay slip) which, in accordance with Article 56 TFEU, may be required in the event of a temporary posting of workers only where their social protection is not guaranteed by the documents provided for in the legislation of the Member State in which the undertaking is established.

85. The submissions of Belgium confirm that interpretation: given that *Arblade and Others* precludes the imposition of a general obligation on employers from other Member States to draw up the individual account provided for in Belgian law, the latter relieves employers of that burden on certain conditions.

86. Arblade and Others has defined a main criterion and a subsidiary criterion, clearly directing the authorities and, as the case may be, the courts of the host Member State to 'verify in turn, before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State, that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment'.[50]

87. If an employer should not have those equivalent documents, the legislation of the host State requires him to draw up and keep the individual account and pay slip provided for in Belgian law. It is not, therefore, appropriate to criticise a regime which requires the production of certain social documents equivalent to those of the State of establishment, relegating to a subsidiary requirement the ordinary regime of document production. It is clear that this approach is compatible with the case-law laid down by the Court in *Arblade and Others*.

88. However, it is more difficult to justify the fact that Belgium restricts the case-law of the Court to postings of less than six months, since postings in excess of that period are subject also to Article 56 TFEU. After all, postings for more than six months are still temporary, as may be inferred from the judgments in *Rush Portuguesa*, *Vander Elst*, *Finalarte*, and *Commission* v *Luxembourg*, in which the Court stated that, when workers are posted by an undertaking which is not established in the host State but which provides services there, those workers 'do not aspire

50 — *Arblade and Others*, paragraph 65.

to access to the employment market of the Member State where they are posted'. [51]

(c) The content of the documents

89. The individual account for each worker gives details of the services provided by a worker during a year and of the remuneration received. The payslip, which is sent to workers in each remuneration period, states the exact method used to calculate their remuneration together with the appropriate deductions.

90. Those two documents are quite clearly adequate for the purposes of determining the financial rights of workers, in that they make it possible to check that the limits laid down by legislation or by collective agreement have been respected and that workers have actually been paid for all the days they have worked, including public holidays and annual leave; they are also necessary for the purposes of verifying the minimum wage and overtime payments. Further, the documents are necessary for comparing an employee's rights under the various legislative systems concerned and, from the perspective of recognising the equivalence of the documents from the State of establishment to those of the State of destination, they are less incisive than other alternatives, such as completing the Belgian documents directly.

(d) The keeping of the documents

91. It is necessary to draw attention to the three different aspects of the keeping of the documents: the first relates to holding available and keeping the equivalent documents during the period of employment of workers posted to Belgium; the second extends the obligation to keep the documents for up to five years after the expiry of the period of six months since the worker was first posted, and the third refers to the place where the documents are to be kept, that is to say, the place to which the worker is posted or the Belgian address of a natural person who keeps them as agent.

92. As to whether that obligation is enforceable over time, the organised system for

51 — See Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 15; *Vander Elst*, paragraph 21; *Finalarte and Others*, paragraph 22; Case C-445/03 *Commission* v *Luxembourg*, paragraph 38.

cooperation and exchanges of information between Member States provided for in Article 4 of Directive 96/71 renders superfluous the keeping of such documents in the host Member State after an employer has ceased to employ workers there. [52] Moreover, case-law accepts the keeping 'of certain documents at the address of a natural person residing in the host Member State' but only for as long as the posting lasts. [53] Therefore, although the obligation to keep equivalent documents for the duration of the posting is compatible with the principle of proportionality, prolongation of that obligation for five years after the work has been carried out is more questionable, as confirmed by paragraphs 77 and 78 of *Arblade and Others* and by paragraphs 90 to 94 of Case C-319/06 *Commission* v *Luxembourg*. The fact that the Member States may have alternative mechanisms for cooperation which replace that burden borne by the employer, and which, moreover, entail an administration cost which unnecessarily deters the provision of services in a Member State other than that of establishment, confirms that this is a disproportionate requirement contrary to Article 56 TFEU.

(e) Summary

93. It may be inferred from all the foregoing that Articles 56 and 57 TFEU must be interpreted as meaning that they do not preclude national legislation requiring the production of certain documents from the State of establishment (in the instant case, the Belgian individual account and pay slip) which are equivalent to those which must be drawn up in the State of destination. However, a system such as the Belgian, which requires certain documents from the State of establishment equivalent to those of the host State to be retained after the workers' posting has ceased, is disproportionate and is not justified in the light of Articles 56 and 57 TFEU. A system which requires the direct production of the documents of the host Member State for temporary postings of workers for a duration of more than six months warrants the same criticism.

52 — Case C-319/06 *Commission* v *Luxembourg*, paragraph 92, and *Arblade and Others*, paragraph 79.

53 — That may be inferred *a contrario* from paragraph 74 of the judgment in Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095: 'While it is true that at paragraph 76 of that judgment [*Arblade and Others*] the Court considered that it is not sufficient, for the purposes of justifying a restriction of freedom to provide services – involving retaining certain documents at the address of a natural person residing in the host Member State – that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task, that paragraph of that judgment, however, involved the obligation on the employer to make those documents available to the competent authorities, even after the employer had ceased to employ workers in that State.'

VII — Conclusion

94. Having regard to the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling as follows, declaring that:

'(1) Articles 56 and 57 TFEU must be interpreted as meaning that they preclude national legislation which makes the posting of workers and the actual beginning of the provision of services conditional on certification of receipt and approval of the prior declaration within five working days from the date on which it was received by the Inspectorate.

(2) Articles 56 and 57 TFEU must be interpreted as meaning that they do not preclude national legislation which requires the production of certain documents of the State of establishment (in the instant case, the Belgian individual account and pay slip) which are equivalent to the documents that must be drawn up in the State of destination. However, Articles 56 and 57 TFEU must be interpreted as meaning that they preclude national legislation which requires

— certain documents of the State of establishment equivalent to those of the host State to be kept after the posting of workers has in fact ceased;

— documents of the host State to be obtained when the temporary posting of workers is for a duration of more than six months.'