OPINION OF ADVOCATE GENERAL MISCHO
delivered on 13 July 2000 [1]

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1 — Original language: French

1. These cases again raise a problem which has already been considered by the Court several times, namely the interpretation of Community law on the temporary posting of workers who are nationals of the European Union by undertakings established in one Member State ('the State of origin') to the territory of another Member State ('the host State') in the context of a transnational provision of services.

The German rules on paid holiday and the facts in the main proceedings

2. The German scheme of paid leave for workers in the building industry, which forms an integral part of their terms and conditions of employment, is governed by the Mindesturlaubsgesetz für Arbeitnehmer — Bundesurlaubsgesetz (Law on minimum holiday entitlement for workers, 'the BUrlG') and by the Bundesrahmentarifvertrag für das Baugewerbe (Collective framework agreement for the construction industry, 'the BRTV'). The scheme is implemented by means of a system of funds for paid leave governed, essentially, by the Verfahrenstarifvertrag (Collective agreement on the social fund scheme, 'the VTV'). The abovementioned collective agreements have been extended to the whole of the building industry by an order of the German Government.

3. The Arbeitsgericht Wiesbaden (Labour Court, Wiesbaden; 'the referring court') states that the BUrlG imposes a qualifying period of six months, in principle, during which a worker must have been in his employer's service before he may claim his full annual leave entitlement for the first time. However, the construction industry is a special case requiring a derogation from the general scheme of annual paid leave. This is because in the industry the place of work changes very often, resulting in workers frequently changing employer, and 'contracts of less than one year are very common'. In those circumstances the statutory qualifying period is often not satisfied, with the result that the worker is entitled to only a few days' leave, or none at all. Furthermore, in most cases, because their employment relationship has come to an end, workers do not receive their holiday entitlement in the form of time off, but must make do with payment in lieu of the holiday entitlement acquired.

4. The BUrlG [2] enables collective labour agreements to lay down derogating provisions to the extent necessary to enable construction workers to preserve their entitlement to an unbroken annual holiday, in spite of the frequent changes of employer.

2 — Paragraph 13(2) of the BUrlG.

5. It is on this basis, and to this end, that the BRTV [3] lays down rules providing that the different employment relationships entered into by the worker during the leave year, normally the calendar year, are to be treated as if they formed a single employment relationship. A worker is thus able by means of this fiction to accumulate holiday entitlement acquired with different employers in the course of the leave year, and to claim the whole of that entitlement from his current employer, regardless of the length of the employment relationship with that employer.

6. This system would ordinarily result in a heavy financial burden for the current employer since he would be required to give the worker holiday pay even for holiday acquired whilst working for previous employers. It was with a view to mitigating that risk, and ensuring an equal division of the financial burden between the employers concerned, that both sides of the industry in Germany decided to set up holiday pay funds.

7. The German employers contribute 14.45 % of the total gross wages of their business to the holiday pay fund, in return for which they are entitled to obtain full or partial reimbursement of the benefits they have paid to workers (holiday pay, additional holiday allowance, or a lump sum on a percentage basis, in respect of social security contributions borne by the employer).

8. Each month the employers must provide the Urlaubs- und Lohnausgleichskasse der Bauwirtschaft (the fund charged with the implementation of the paid leave scheme in the construction industry, 'the Ulak') with certain information to enable it to determine the total gross monthly wage bill of the undertaking and to calculate the contributions due.

9. The State Secretary of the Federal Ministry of Labour and Social Affairs extended the BRTV and the VTV to employers and workers not originally party to the collective agreements, provided that they come within the scope of those agreements, having regard to the undertaking, the territory and the individual worker.

10. Through the Law on the posting of workers of 26 February 1996 [4] ('the AEntG') the provisions of the construction industry's collective agreements concerning entitlement to paid leave (cited above) were applied with effect from 1 March 1996, and, subject to certain conditions, to

3 — Paragraph 8 of the BRTV.

4 — Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen — Arbeitnehmer- Entsendegesetz — AEntG of 26 February 1996 (BGBl. I, p. 227) (Law on compulsory employment terms applicable to the cross-border supply of services).

employment relationships between undertakings whose registered office is in a Member State other than the Federal Republic of Germany ('foreign providers of services') and workers they send for a fixed term to carry out construction work on sites in Germany ('posted workers').

11. To that end, Paragraph 8 of the BRTV, concerning the holiday entitlement of workers in the construction industry, was amended and the VTV supplemented, with effect from 1 January 1997, [5] by Part III, headed 'Holiday scheme for employers established outside Germany and their employees working in Germany'. [6]

12. The German Government points out in its written observations, however, that 'the system of social security funds in the construction industry includes a host of benefits laid down by collective agreement. Besides the holiday pay scheme, both sides of the construction industry have, taking into account the particular nature of the industry, also entrusted the social security funds in that sector with the administration of the following benefits: bonus pay for the periods 24 to 26 December and 31 December to 1 January, supplementary retirement benefit and continuing vocational training. The AEntG is only concerned with the administration of the "paid leave" benefit, payable by the undertaking under the system of social security funds, and it extends this to undertakings having their registered office abroad and to their posted workers'. The German Government emphasises that the legislature has thus confined its intervention to the essential terms and conditions of employment relevant to posted workers.

13. Foreign providers of services in the building industry are therefore now obliged to participate in the German fund scheme, which entails, most notably, the obligation to pay to Ulak 14.25% (14.82% until 30 June 1997) of the total gross wage bill for workers they have posted to Germany, and to provide the fund with certain information.

14. When a posted worker wishes to claim his right to paid leave, the foreign provider of services must notify Ulak, which then gives the worker directly the amount of holiday pay to which he is entitled. [7] Unlike employers established in Germany, the foreign service provider is not, therefore, required to advance the worker the holiday pay due to him. Nor, consequently, is it entitled to be reimbursed by Ulak.

5 — Amending collective agreement of 18 December 1996.

6 — New Paragraphs 55 to 71 of the VTV.

7 — Paragraph 65 of the VTV.

15. The same procedure applies, under Paragraph 66 of the VTV, where compensatory holiday pay is given when the posted worker returns to his own country without having taken the leave entitlement acquired in Germany. [8]

16. The obligation on providers of services established outside Germany to supply information appears to be more onerous than that imposed on German undertakings.

17. In 1997, the Portuguese companies Santos & Kewitz Construções Ld.ª ('Santos'), Tecnamb-Tecnologia do Ambiente Ld.ª ('Tecnamb'), Finalarte Sociedade de Construção Civil Ld.ª ('Finalarte'), Portugaia Construções Ld.ª ('Portugaia'), Engil Sociedade de Construção Civil SA ('Engil'), Amilcar Oliveira Rocha ('Amilcar'), Turiprata Construções Civil Ld.ª ('Turiprata') and Duarte dos Santos Sousa ('Duarte'), and the English company Tudor Stone Ltd ('Tudor'), in the exercise of their freedom to provide services, temporarily posted employees to Germany in order to carry out construction work.

18. They claim that Community law prevents their being made subject to the system of holiday pay funds, and, more particularly, to the obligation to pay contributions and provide information to Ulak.

19. Whilst Finalarte, Portugaia and Engil have commenced 'negative confirmation' proceedings before the Arbeitsgericht Wiesbaden to obtain a declaration that they are not subject to the obligations imposed on them by the AEntG, the other companies have been brought before the same court by Ulak for having failed to pay their contributions or supply the information requested.

Questions referred for a preliminary ruling

20. It is against this background that the national court has referred the following four questions to the Court for a preliminary ruling:

'1. On a proper construction of Articles 48, 59 and 60 of the EC Treaty, are those provisions infringed by a provision of national law — the first sentence of Paragraph 1(3) of the AEntG — which extends the application of provisions of collective agreements which have been declared generally binding concerning the collection of contributions and the grant of

8 — Paragraph 8(7.1)(1) of the BRTV.

benefits in connection with workers' holiday entitlements by joint bodies of parties to collective agreements, and thus the provisions of those agreements concerning the scheme to be complied with in that regard, to employers established abroad and their workers who have been posted to the area within which those collective agreements apply?

2. On a proper construction of Articles 48, 59 and 60 of the EC Treaty, are those provisions infringed by the second sentence of Paragraph 1(1) and the first sentence of Paragraph 1(3) of the AEntG which result in the application of provisions of collective agreements declared to be generally binding which:

   (a) provide for leave which exceeds the minimum length of annual leave laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time; and/or

   (b) allow employers established in Germany to claim the reimbursement of expenditure on holiday pay and holiday allowances from joint bodies of the parties to the collective agreements whereas, in the case of employers established abroad, they do not provide for such a claim but instead for a direct claim by the posted workers against the joint bodies of the parties to the collective agreements; and/or

   (c) in connection with the social fund scheme to be complied with under those collective agreements, impose on employers established abroad obligations to provide the joint bodies of the parties to the collective agreements with more information than that required from employers established in Germany?

3. On a proper construction of Articles 48, 59 and 60 of the EC Treaty, are those provisions infringed by Paragraph 1(4) of the AEntG under which — for the purposes of classifying businesses as covered by a collective agreement which has been declared generally binding and which, under the first sentence of Paragraph 1(3) of that Law, also applies to employers established abroad and their workers who

have been posted to the area within which that collective agreement applies — all workers posted to Germany, but only those workers, are treated as a business, while a different definition of a business applies to employers established in Germany which in certain cases results in different businesses falling within the scope of the generally binding collective agreement?

4. Is Article 3(1)(b) 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 to be interpreted as in any event, having regard to the correct interpretation of Articles 48, 59 and 60 of the EC Treaty, neither requiring nor permitting the rules at issue in Questions 1, 2 and 3?'

21. Before turning to examine those questions I consider it appropriate to consider whether Article 48 of the EC Treaty (now, after amendment, Article 39 EC) is in fact applicable to the situation at issue in the main proceedings.

Applicability of Article 48 of the Treaty

22. The facts in the main proceedings are not in dispute: an undertaking having its registered office in one Member State posts its own workers for a fixed period to a site in Germany in order to carry out a transnational provision of services. None of the parties disputes that this situation falls within Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now, after amendment, Article 50 EC).

23. The parties do not agree, however, on whether the posting of workers in the context of a transnational provision of services also falls within Article 48 of the Treaty.

24. The referring court takes the view that if the national provisions in question have the effect of restricting the freedom to provide services, they must thereby indirectly restrict the free movement of workers, because it is less likely that employees will be recruited and posted abroad if the employer is prevented, as a result of the extension of the holiday fund scheme, from

carrying out activities in Germany in exercise of the freedom to provide services.

25. Finalarte and Portugaia claim that Article 48 of the Treaty applies to the posting of workers. They claim that the application of national provisions which make foreign providers of services subject to the German holiday fund scheme constitutes a restriction of the freedom to provide services enshrined in Article 59 of the Treaty, and at the same time breaches Article 48 of the Treaty in that it prevents posted workers from 'following' their employer to the host State and working there on the same terms as in their State of origin.

26. The German Government's response is that the question whether the posting of workers falls within Article 48 of the Treaty is irrelevant to the main actions, because the free movement of workers is a fundamental right which can only be asserted by the workers themselves.

27. It argues, in the alternative, that Article 48 does not confer a right on a posted worker to work on the terms in force in his home State, but instead enshrines the principle of equal treatment, which means that the worker must be able to be employed on the same terms as apply to national workers.

28. Ulak advances the same interpretation of Article 48 as the German Government and points out that the Arbeitsgericht Wiesbaden bases its view on pure supposition, since there has been no reduction in the number of workers posted to Germany as a result of the entry into force of the AEntG.

29. For my part, I consider, along with Ulak, the Belgian Government and the Commission, that the issue has already been dealt with in the judgments in *Rush Portuguesa* and *Vander Elst*.[9] As stated in paragraph 21 of the latter judgment, 'workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work'.

30. Accordingly Article 48 does not apply to their situation, and there is no need to consider the questions referred for a preliminary ruling in the light of that provision. If certain posted workers wished to leave the service of the undertaking which had taken them to Germany in order to take up employment with an undertaking established in that Member State, then it is clear that Article 48 would give them the right to do so. That, however, has no bearing on the problem of potential restrictions on the freedom of foreign undertak-

9 — Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, and Case C-43/93 *Vander Elst* [1994] ECR I-3803.

ings to provide services, raised in these cases before the national court.

The first question

31. The referring court by its first question wishes to know essentially whether the extension of the holiday fund scheme to employers established abroad who post workers to Germany as part of the provision of services breaches Articles 59 and 60 of the Treaty.

32. In the introduction to its order for reference, the Arbeitsgericht Wiesbaden observes that 'reservations arise because the explanatory memorandum to the AEntG indicates *inter alia* that its declared aim is to protect business in the German construction industry from the increasing pressure of competition in the European internal market, and thus from foreign providers of services'. The referring court indicates that, from the beginning of discussions on the AEntG project, it was pointed out several times that such a law was intended, above all, to combat 'unfair competitive conditions resulting from low-pay competition in Europe' and 'wage and social dumping'.

33. The referring court asks to what extent foreign employers who exploit the fact that lower wages are paid in their home country, as a result of different standards of living, are engaged in 'unfair' competition. It considers that, in the European Union, the opening of markets, as an essential aspect of the internal market project, must allow more intense competition and greater international sharing of labour. It refers in this regard to Article 3A(1) of the EC Treaty (now Article 4(1) EC) and to Article 102A of the EC Treaty (now Article 98 EC). The prevention of competition as such cannot, therefore, in itself be a legitimate justification in the public interest.

34. The Advocate General cannot dismiss such preliminary observations of the referring court as mere incidental comment. They constitute the background to the questions raised, and also appear to reflect a common preoccupation of several courts in Germany. The Court will shortly turn its attention to the case of *Portugaia Construcões* (C-164/99), in which the referring court asks, in the body of one of the questions, whether overriding reasons of public interest justifying a restriction of the freedom to provide services can include not only the social protection of posted workers, but also the protection of the national construction industry and the reduction of unemployment in the host country.

35. I will therefore consider the questions raised by the referring court in the light of the principle of free competition. In that context it should first be noted that, according to the case-law of the Court, measures restricting the freedom to provide services cannot be justified on economic grounds. [10]

36. However, even if views were expressed during the political debate preceding the adoption of the AEntG, and expressions used in the introductory summary of that law itself, which could give rise to the impression that, in this case, it concerned the protection of an economic sector against foreign competition, we can only examine the content of that law and the other relevant texts in order to determine whether, objectively viewed, they guarantee to posted workers, as the German Government asserts, a level of social protection identical in substance to that enjoyed by workers in the construction industry who are established in Germany.

37. First, it is clear that most (and probably all) of the Member States have enacted minimum wage provisions, the purpose of which is to guarantee decent living conditions, as well as provisions governing daily, weekly and annual working time, intended to protect the health of workers and to ensure that they are allowed adequate rest periods.

38. Those laws necessarily prevent certain national undertakings from obtaining a competitive advantage over other undertakings established in the same country by imposing less favourable terms of employment on their own employees.

39. There is nothing in the Treaty which requires Member States to accept a different interpretation of competition when the interests of undertakings established in other Member States are involved, and to accept that such undertakings may obtain a competitive advantage by not respecting the law in question. On the contrary, the Court recognised at paragraph 25 of the *Vander Elst* judgment, cited above, that it is permissible to seek to exclude 'any substantial risk of workers being exploited or of competition between undertakings being distorted' (ECR I-3803 and I-3826).

40. It will be recalled that social policy, including rules on working conditions remains in principle within the competence of the Member States. Under Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 to

10 — Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, and Case C-398/95 *SETTG* [1997] ECR I-3091.

143 EC), 'the Community shall *support and complement the activities of the Member States* [11] in the following fields:

— improvement in particular of the working environment to protect workers' health and safety;

— working conditions;

— ... '

41. The Member States are therefore free to determine the level of social protection which they wish to accord to their workers. That right remains the prerogative of the Member States notwithstanding a certain degree of harmonisation of working conditions at Community level.

42. It is clear that if service providers established in other Member States could circumvent the level of social protection existing in the host Member State, that protection would, without doubt, ultimately be jeopardised because employers established in that Member State would seek a reduction of the level of protection in order to be able to compete on equal terms with undertakings providing services.

43. The general principle is clearly, therefore, that, save for the exceptions laid down by the case-law of the Court of Justice, which I will discuss later, a Member State's law extends to 'foreign' undertakings providing services. This is confirmed by the last paragraph of Article 60 of the EC Treaty (now the last paragraph of Article 50 EC), which states that the supplier may 'temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals'.

44. In other words, and in contrast to the assertions of some of the companies who are parties in the main proceedings, the Treaty does not confer on undertakings the right when carrying out activities in another Member State to bring with them not only their staff and equipment but also the laws of their country of origin.

45. It should also be noted that Article 102a of the Treaty, cited by the referring court, appears in the Treaty chapter concerning economic policy and not in those setting out the four fundamental freedoms. Article 3a of the Treaty, for its part, provides that 'the activities of the Member States and the Community shall include ...

11 — Emphasis added.

the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition'.

46. It does not follow from those provisions, however, that Community law places greater value on the principle of free competition than it does on the other principles. The fact is that the European Treaties simultaneously pursue several objectives, which must be reconciled.

47. The Arbeitsgericht Wiesbaden is right, of course, when it points out that nobody has ever thought to challenge the competitive advantage which results from the lower wages paid in certain Member States, so far as concerns the production cost of goods which are then exported to other Member States.

48. It should be recalled, however, that in the preamble to the Treaty establishing the European Economic Community the founding fathers already stated that they were 'resolved to ensure the economic and social progress of their countries' in 'affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples'.

49. In the following recital in the preamble they recognised that 'the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition'.

50. In the 1957 version of Article 117 of the Treaty they were agreed on the 'need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'.

51. This passage was reinforced in Article 136 EC, which is the successor to Article 117 of the EC Treaty, by further references to the 1961 European Social Charter, to the 1989 Community Charter of the Fundamental Social Rights of Workers, to the objective of promoting employment, to proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and to the combating of exclusion.

52. It is interesting to note that in a judgment of 4 April 1974, [12] cited by the German Government in its observations as to the non-applicability in this case of Article 48 of the Treaty, the Court referred to the purpose of Article 117 in affirming

12 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 45.

that the principle of non-discrimination (in that case, in the context of the free movement of workers) not only has the effect of allowing nationals of other Member States equal access to employment in each Member State 'but also... of guaranteeing *to the State's own nationals* [13] that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such [offer or] acceptance is prohibited'.

53. The German and French Governments therefore adopt the spirit of that decision when they state that if, on the same construction site, posted workers could be paid less than those of the host country and/or in other respects be given less favourable working conditions, that might jeopardise the level of social protection enjoyed by workers in the country in question, and perhaps even their jobs. The Belgian Government has adopted essentially the same position.

54. It also appears from the last paragraph of Article 117 of the Treaty that, whilst expecting that a 'harmonisation of social systems' will result from the 'functioning of the common market', the framers of the treaty assigned an important role to 'voluntarist' measures aimed at improving working conditions. The two directives referred to in the present cases, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [14] ('the working time directive'), and 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 [15] ('the posting directive'), are a reflection of that.

55. The fifth recital in the preamble to the last-mentioned directive states:

'... any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.'

56. It is probably for such reasons (even if it did not expressly say as much) that the Court held in 1982 in *Seco* v *EVI* [16] that:

13 — Emphasis added.

14 — OJ 1993 L 307, p. 18.

15 — OJ 1996 L 18, p. 1.

16 — Joined Cases 62/81 and 63/81 [1982] ECR 223, paragraph 14.

'It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. However, it is not possible to describe as an appropriate means any rule or practice which imposes a general requirement to pay social security contributions, or other such charges affecting the freedom to provide services, on all persons providing services who are established in other Member States and employ workers who are nationals of non-member countries, irrespective of whether those persons have complied with the legislation on minimum wages in the Member State in which the services are provided, because such a general measure is by its nature unlikely to make employers comply with that legislation or to be of any benefit whatsoever to the workers in question.'

57. As noted by both the Arbeitsgericht Wiesbaden itself, in its observations on the second question, and by the German Government, the *Rush Portuguesa* decision (cited above) has confirmed, at least tacitly, that the principle is of general application to all legislation and to collective agreements concluded by both sides of industry since the decision follows the wording of the *Seco* decision, without referring to minimum wages.

58. There is therefore no doubt that the Federal Republic of Germany is also entitled to impose on foreign providers of services its rules as to the period of leave and, at least in principle, the mechanism of the holiday fund scheme. The characteristics of that scheme must be examined in detail, however, because Article 60(3) of the Treaty does not mean 'that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States'. [17]

59. This is because, as the Court noted in paragraphs 33 to 38 of its decision in *Arblade*: [18]

'33 It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, Case C-43/93 *Vander Elst* v *Office des Migrations Internationales* [1994] ECR I-3803, paragraph 14, Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10, Case C-3/95 *Reisebüro Broede* v *Sandker* [1996] ECR I-6511, paragraph 25, and Case C-222/95 *Parodi* v *Banque H. Albert de Bary* [1997] ECR I-3899, paragraph 18).

17 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 16.
18 — Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453.

34 Even if there is no harmonisation in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules 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 (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17, Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 17, Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 18, *Säger*, cited above, paragraph 15, *Vander Elst*, cited above, paragraph 16, and *Guiot*, cited above, paragraph 11).

35 The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see, in particular, *Säger*, paragraph 15, Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I-4165, paragraph 37, and *Guiot*, cited above, paragraphs 11 and 13).

36 The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (see *Webb*, cited above, paragraph 19, Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraph 14, and Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18), and in particular the social protection of workers in the construction industry (*Guiot*, paragraph 16).

37 By contrast, considerations of a purely administrative nature cannot justify derogation by a Member State from the rules of Community law, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, in particular, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45).

38 However, overriding reasons relating to the public interest which justify the substantive provisions of a set of rules may also justify the control measures needed to ensure compliance with them (see, to that effect, *Rush Portuguesa*, cited above, paragraph 18).'

60. It is therefore appropriate to consider in turn whether the holiday fund scheme entails restrictions on the freedom to provide services and, if the scheme is not discriminatory, whether overriding reasons in the public interest justify such restrictions on the freedom to provide services. Where that is the case, it will also be necessary to check that this interest is not already protected by the rules of the Member State in which the provider is established and that the same result cannot be achieved by rules which are less restrictive (see, in particular, *Säger*, cited above, paragraph 15; *Kraus*, cited above, paragraph 32; *Gebhard*, cited above, paragraph 37; *Guiot*, cited above, paragraph 13, and *Reisebüro Broede*, cited above, paragraph 28).

(a) *Whether there is a restriction of the freedom to provide services*

61. Let me turn, firstly, to the question whether the holiday fund scheme restricts the freedom to provide services.

62. In this regard it is possible to distinguish the situation in the present case from that in *Seco*, *Guiot* and *Arblade* (cited above) in two respects.

63. In those three cases the referring courts were able to refer to the existence, in the country of origin of the undertakings, of obligations to contribute to funds covering the same risks and having objectives which were the same as, or at least similar to, those of the scheme in question. The Court could therefore take that observation as its starting point, and conclude from it that the obligation imposed by the host country '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, and may thus be deterred from providing services in the host Member State'. [19]

64. It is entirely appropriate to assume that, in the present case, the obligation to pay contributions to a holiday fund does not exist in the States of origin of the undertakings in question in the main proceedings because, if it did, the latter would certainly not have failed to set out the nature and extent of such obligation before the Arbeitsgericht Wiesbaden, and this would have been recorded in the order for reference. That is not the case.

65. The second, even more important, distinction between this and the earlier cases lies in the fact that it appears from the German law itself that the obligation on employers to pay contributions to the holiday fund is removed for employers established abroad who post workers to Germany once it is shown that contributions for those workers are made to a comparable fund in the State of origin (Paragraph 8(11.2) of the BRTV).

19 — *Arblade*, cited above, paragraph 50, and *Guiot*, cited above, paragraphs 14 and 15.

66. The system in place is therefore organised in such a way that a double obligation to contribute, such as that at issue in *Seco*, *Guiot* and *Arblade* (cited above), should not arise.

67. This does not, however, resolve the question of a potential doubling of the burden in the absence of a system of funds in the Member State where the provider is established. The parties to the main proceedings claim that they are already obliged by the laws of their respective countries of origin to provide paid leave for their employees. The financial burden represented by such leave [20] (whether taken in the form of days off or in the form of payment in lieu of holiday) therefore doubles with the contributions that the employer is required to make to the German holiday fund.

68. I say 'partially' because I start from the premiss that wages are lower in the country of origin, and that the number of days to which workers are entitled under the law of that country is also lower. If, on the other hand, wages and holiday entitlement are more or less identical, if not higher, in the country of origin, then the interest to be protected would already be — to adopt the phrase used by the Court — 'safeguarded by rules to which the provider is subject in the Member State where it is established'.

69. I assume therefore that this is not the case. All then depends on whether the employer subject to the German holiday fund scheme is or is not entitled under the law of his country of origin to refuse to give the posted workers paid leave for the days they take because these are paid by the German holiday fund.

70. If the employer does not have that possibility, the contributions payable to the German fund would therefore be added to the obligations imposed on the employer by the law of his country of origin. There would in that case be a serious, perhaps insurmountable, restriction of the freedom to provide services.

71. Consequently, compulsory membership of the fund would only be permissible if the contributions were adjusted to take account of the burden placed on the provider of services by the legislation of his country of origin.

72. If, on the other hand, as is conceivable, the employer providing services need not

20 — In so far as they concern the period spent by the posted worker in Germany.

pay the worker for leave days (whether or not taken) but can leave that entirely to the holiday fund, he would save the corresponding sums, and the additional financial burden which he would actually have to bear would be equal only to the difference between the burdens arising from the holiday scheme in his home country, on the one hand, and the German scheme on the other.

73. It is for the national court to determine which of these two situations applies in this case.

74. In the second situation, the foreign employer will find himself no worse off than employers established in the host Member State. To adopt the phrase used in paragraph 58 of *Arblade* (cited above) he will find himself 'on an equal footing, from the standpoint of competition', with them.

75. The fact remains that the employer/provider of services is subject to the above-mentioned additional burden as well as to all the administrative formalities attached to the holiday fund scheme.

76. According to the case-law of the Court, any additional burden by comparison with the scheme in force in the country of origin constitutes a restriction of the freedom to provide services. It must therefore be concluded, if this case-law is to be followed, that there is in the present case a restriction or obstacle.

(b) *Whether there is discrimination*

77. The referring court and the parties to the main proceedings claim that certain aspects of the German rules are discriminatory and that they are, therefore, only admissible subject to the special conditions laid down by Article 55 of the EC Treaty (now Article 45 EC), Article 56 of the EC Treaty (now, after amendment, Article 46 EC) and Article 66 of the EC Treaty (now Article 55 EC), which are not satisfied in this case.

78. I will need to return to that point at times when considering the questions referred for a preliminary ruling.

79. I will, however, note at this stage, subject to what I have to say on the third question, that this case involves legislation which is applicable without distinction to undertakings established in Germany and those established in other Member States.

80. Whilst a certain confusion has arisen from the fact that the Federal Republic of Germany has adopted an amendment to its law to take account of the fact that undertakings established in other Member States are, necessarily, not in exactly the same position as undertakings established in the host country, nevertheless, as the Court held at paragraph 17 of *Webb*, cited above, 'regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities'.

(c) *Whether there is an overriding reason of public interest*

81. All those who have submitted observations are agreed that in this case the only overriding reason of public interest which might be taken into consideration is the 'social protection of construction workers' which was accepted in *Guiot* and *Arblade*, cited above.

82. It is apparent, in my view, from the description of the holiday fund scheme given by the referring court that it considers that the German scheme effectively protects the holiday entitlement of employees of undertakings established in Germany. I will not therefore prolong this aspect of the inquiry.

83. As for the additional protection which the scheme may provide for posted workers, four different situations may be considered.

First situation: the foreign worker takes the leave to which he is already entitled before completion of the work carried out by his undertaking in Germany

84. I repeat that I am starting from the assumption that, under German law, the worker is entitled to more holiday, and to a higher daily rate of holiday pay, than in his country of origin. That benefit is paid to him by the holiday fund.

85. If the employer were not required to contribute to the fund, he might be tempted to pay the employee only the lower wage in force in the country of origin, and to grant fewer days' leave.

Second situation: the foreign worker leaves Germany after completion of the work without having taken any holiday

86. In that case, the fund pays him the equivalent of days not taken on the basis of

the number of days provided for under German law, and at the rate of pay he was earning in Germany.

87. If the German holiday fund scheme is found to be incompatible with Articles 59 and 60 of the Treaty, the foreign employer will not have contributed to the fund and the worker returning to his country will obviously not receive anything from the fund.

88. If he remains with the same employer, he will, perhaps, find it difficult to persuade the latter to allow him the days of leave to which he is entitled under German law, and not those under the law of the country of origin, and to pay him at the German rate.

89. If he changes employer after his return to the country of origin, and without having taken any holiday whilst with the former employer, he will be dependent upon the goodwill of the former employer in respect of the amount that he receives for holiday not taken in Germany, assuming that the law of the home country requires employers to pay those who leave their service a sum in lieu of the leave which they did not want, or were not able, to take.

90. It may be that the law of the home country imposes no such obligation. In that case, the holiday entitlement corresponding to the work carried out for the former employer, whether in Germany or in that employer's country of establishment, will be lost for good.

91. The compulsory participation of employers in the German fund scheme therefore confers an additional social advantage on the worker where he returns to his country of origin on completion of the work carried out by his employer in Germany.

Third situation: the posted worker leaves his employer during his stay in Germany in order to join another 'foreign' employer also carrying out work in Germany

92. The referring court takes the view that this situation is purely hypothetical and that only the first and second cases occur in practice.

93. The German Government quoted statistics at the hearing, however, to the effect that 22% of posted workers take advantage of that possibility. Furthermore, that figure, it maintained, does not include posted workers who enter into employment with an undertaking established in Germany, who are also very numerous (see the fourth situation, considered below).

94. If employers are required to contribute to the German fund scheme, the posted worker will receive from that fund a payment calculated on the basis of the number of days' entitlement to leave accumulated as a matter of German law, and on the basis of his 'German wage'. He would be able to take this holiday whilst with his new 'foreign' employer, at no cost to the latter, once he has accumulated holiday entitlement with the latter over and above the minimum beyond which, according to German law, holiday may be taken.

95. The posted worker will thus be able to take unbroken leave of a certain period.

96. If the foreign employer has not contributed to the holiday fund scheme, the worker will be dependent on the goodwill of his former employer to pay him for the leave entitlement accumulated under German law.

97. It may be that the former employer wishes to pay the worker only at the rate provided for by the law of the country of origin, and on the basis of the wage payable in that country.

98. The posted worker may therefore find himself in a less favourable position than if he can receive payment directly from the holiday fund for the leave not taken.

Fourth situation: the foreign worker leaves his foreign employer during his stay in Germany in order to join an employer established in Germany

99. In this case the worker is exercising the right of free movement as a worker provided for by Article 48 of the Treaty.

100. The rights and duties of his former employer continue, however, to be governed by Articles 59 and 60.

101. If that employer has been required to contribute to the holiday fund, the fund will pay the worker a sum in respect of the days not taken calculated on the German scale, and the worker will not, therefore, lose his entitlement. He may then cumulate the holiday not taken with that which he will acquire with his new employer, at no cost to the latter.

102. It is also possible that the fund, immediately applying the German 'domestic scheme', pays the sum directly to the

new employer (established in Germany) once the worker has taken his annual holiday from the latter's service. That is a practical detail which was not discussed during the hearing before the Court, but which has no effect on the social protection of the worker.

103. If the 'foreign' employer were not required to contribute to the fund, the worker would once again be dependent upon his goodwill, or on the possibility of obtaining a court order in his favour.

104. In this case, also, the social protection of the worker is therefore less well assured than by the holiday fund scheme.

105. In summary, the holiday fund scheme therefore confers on the posted worker in the majority of cases, and primarily in the case of a change of employer, additional social protection.

106. It also serves to bring about the objective sought, which is to guarantee holiday entitlement accumulated with one employer and an unbroken holiday of a certain period from a new employer, not only for workers employed by undertakings established in Germany, but also for posted workers.

107. It is therefore justified by an overriding reason in the public interest.

(d) *Whether the public interest in question is safeguarded by the rules of the State where the provider of services is established*

108. I have already touched on this aspect of the question in the course of examining the four possible situations above, but it is necessary to return to it in greater detail.

109. The Portuguese companies which are party to the main proceedings claim that the law of their country confers on workers holiday entitlement which not only satisfies the minimum set by the working time directive but is almost as generous as that provided for by the German rules.

110. The German Government's response is as follows:

'The public interest has not already been taken into account by the law of the State in which the provider of services is registered. That would for example be the case if, by contrast, the national provisions applying to workers in the construction industry in Portugal ... or the United King-

dom (States in which the various claimants in the main proceedings are registered) respectively provided for similar paid leave and guaranteed this by a comparable scheme, in particular as regards the duration of the work carried out in Germany.

Therefore, in order to avoid an unacceptable cumulation of burdens, Paragraph 1(3) of the AEntG expressly provides for an exception (in accordance with the *Guiot* decision) where "the foreign undertaking is also required to contribute to a comparable body in the State where it is registered". On the basis of this provision, the holiday pay fund has entered into "discharge agreements" with equivalent bodies *inter alia* in France, Austria and the Netherlands; further agreements are being prepared.

In the present case, it suffices to say that there is no equivalent body, either in Portugal or in the United Kingdom, to the German paid leave fund ... Furthermore, the first sentence of Paragraph 1(3)2 of the AEntG provides that benefits which an undertaking registered abroad has already granted by way of paid leave, before the posting, to workers whom it posts abroad are to be taken into account. That provision affects undertakings which are not already wholly exempt from participation in the German paid leave fund scheme by reason of Paragraph 1(3)1 of the AEntG'.

111. As I said at the outset, it is thus clear that German law ensures that an employer is not subject to the fund scheme in Germany if such a scheme exists in the country of departure.

112. It might be, however, that the worker receives essentially the same benefits under the law of his country of origin without there being a holiday fund.

113. It is for the national court to ascertain whether this is the case. It should, in this regard, carry out the exercise summarised by the Commission as follows:

'Compulsory participation in the holiday pay fund scheme would constitute an inadmissible restriction of the freedom to provide services if there was a guarantee that employers who post their workers confer on them the same holiday entitlement as that laid down by the German rules contained in the collective agreements. It would, furthermore, be necessary to guarantee holiday pay equal to that laid down by the German collective agreements. Furthermore, the worker must be entitled to carry over his holiday entitlement when he changes employer during the posting. Lastly, the worker must be entitled to

holiday pay as provided for by Paragraph 8(9) of the BRTV-Bau if he has not taken his holiday in Germany during his posting, and his holiday entitlement with regard to his employer remains outstanding.

It does not matter in what legal form the relevant rules are set out. It is important only to ensure that there is a legally enforceable guarantee conferring an identical (or a greater) level of protection on the worker.'

114. It seems unlikely to me that, in particular, the posted worker *who changes employer in Germany*, whether to enter the employment of another 'foreign' employer, or to enter that of an employer established in Germany, can obtain, under the rules *of his country of origin*, holiday pay for the leave not taken from the employer with whom he came to Germany, in proportion to the amount of holiday to which he is entitled under, and at the rate laid down by, German law.

115. Without wishing to prejudge the findings of the national court, I consider that it is, *prima facie*, very doubtful that the public interest pursued by the German law can be brought about by the rules in force in the State where the provider of services is established.

(e) *Whether the same result may be achieved by less restrictive rules*

116. This issue constitutes, in my opinion, a particularly difficult aspect of the problem.

117. In the context of the four possible situations set out above, I have set out the undoubted advantages which the scheme confers on the posted worker.

118. One possibility, of course, is for German law to require the foreign employer to pay the worker directly for holiday taken according to the German rules during his posting in Germany, or to compensate him in accordance with the same rules when the worker leaves the employer's service without having taken his holiday entitlement in order to enter the service of another employer in Germany.

119. For the employer, the financial burden would be smaller, for he would not have to contribute to the holiday fund a sum which probably serves also to cover the administrative expenses of that fund. He would also be discharged from the obligation to

provide the holiday fund with the quite detailed information which the referring court describes in its second question.

120. For the worker, the result, from a strictly financial viewpoint, would be the same. However, he would not be able to benefit from the cumulation of holiday entitlement which the fund system allows. Also, where the employer is not a member of the fund, the worker would be at greater risk in the case of insolvency of the employer.

121. There remains the case of the worker who leaves Germany with his employer without having taken any holiday. How could it be guaranteed, without the intervention of a holiday fund, that the worker would be paid according to the German rules?

122. The German Government is adamant on this point. It states [21] that the case where the worker only claims his holiday entitlement after his return to his country occurs most frequently. In its view, '[i]n the absence of guarantees, [those workers] will experience significantly greater difficulty than national workers in claiming holiday entitlement acquired abroad from their employer. The fact that the trade unions and the authorities in their State of origin have insufficient knowledge of the language and legal system of the State to which they are posted is a disadvantage for them. To that must be added the fierceness of competition in the construction industry, which naturally makes it less likely that undertakings would accept, for their workers, paid leave (for a longer period) acquired under foreign, and therefore, less well known legislation. In the cases of *Seco*, *Rush Portuguesa* and *Vander Elst* ... the Court itself formally recognised the Member States' competence to ensure respect for their laws by appropriate means'.

123. I have not found a convincing counter-argument to these observations anywhere in the file. The parties to the main proceedings point simply to the burden imposed by the German system. The Netherlands and Swedish Governments do the same, but emphasise that their own legislation gives adequate holiday entitlement to posted workers.

124. By contrast, the Belgian and French Governments regard the German scheme as the most effective guarantee of workers' rights.

125. The Commission considers only the situation in which workers' rights can be safeguarded in an identical way in the State of origin, without suggesting any less restrictive alternative solution that the Federal Republic of Germany might apply.

21 — Paragraph 23 of the German Government's observations.

126. I am therefore of the opinion that the first question should be answered as follows:

of the Treaty preclude national laws which provide for a period of leave for construction workers in excess of the minimum period of annual leave laid down by the working time directive.

127. Unless an identical or higher level of protection is afforded to the worker in the country of origin Articles 59 and 60 of the Treaty are not, in principle, to be interpreted as precluding the application of a scheme such as that set out in the first sentence of Paragraph 1(3) of the AEntG to an employer established abroad and to workers it posts abroad, provided that due account is taken of the mandatory burdens imposed on the employer by the law of his country of origin. Article 48 of the Treaty does not apply to the posting of workers by an employer established in another Member State.

130. Article 1 of that directive expressly states that it lays down *minimum*[22] health and safety requirements for the organisation of working time and applies in particular to *minimum* periods of annual leave.

131. Article 7 of the working-time directive provides that:

The second question

128. The question may be divided into three parts.

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

(a) *Duration of paid leave*

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

129. By the first part, the referring court asks essentially whether Articles 59 and 60

22 — Emphasis added.

132. Article 15 of the working time directive, under the heading 'Most favourable provisions', provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

133. The directive was to be implemented by 23 November 1996 at the latest.

134. It appears from the order for reference that, in Germany, workers in the construction industry are entitled, in each calendar year, to leave of 30 days worked, that is, 36 working days. [23] This holiday entitlement is therefore more extensive than that laid down by the working time directive.

135. The referring court considers that 'the longer holiday... appears in principle not to be a rule which is necessary in order to meet the public interest of "social employment protection"'.

136. In its view, the Court's case-law to the effect that Community law does not preclude Member States from extending their legislation or collective labour agreements entered into by the two sides of industry to all persons who provide services in their territory only applies to minimum wages. Holiday, on the other hand, is said to constitute a release from the obligation to work, so that only holiday pay may be regarded as a component of pay.

137. The referring court also considers that the German AEntG provision is not necessary, since the public interest is already safeguarded by the provisions of the countries of origin once the working-time directive has been implemented there.

The observations submitted

138. Finalarte, Engil, Portugaia, Tecnamb and Tudor essentially adopt the same position as the referring court.

23 — Under German law, the working week in the building industry runs from Monday to Friday.

139. The Belgian Government takes the view that the decision in *Rush Portuguesa*, that, as a matter of Community law, the Member States are not precluded from extending their legislation or collective labour agreements to all persons who provide services in their territory, should apply in this case. It considers that this principle also applies to national measures concerning the minimum period of paid leave, and that the fact that the working-time directive provides for a lesser period than that laid down by the BRTV does not alter that. The Belgian Government emphasises, in common with the German Government, that the working-time directive only lays down minimum requirements.

140. The Netherlands Government accepts that under Article 7 of the working-time directive in conjunction with Article 3(1) and (6) of the posting directive the posted worker is entitled to the number of days of paid leave laid down in the State of origin 'made up if need be' to the period of paid leave laid down by the State where the works are carried out.

141. Referring to the terms of Article 15 of the working time directive, Ulak points out that, in the construction industry, the longer period of paid leave is justified by the particular physical demands placed on workers in that industry.

142. The Commission considers that the Member States can extend their holiday rules to employers established abroad and to workers posted by them even when those rules lay down a minimum annual leave period exceeding the minimum period laid down by the directive. That is indicated sufficiently by Article 60(3) of the Treaty, under which the freedom to provide services may be exercised under the conditions which the host State lays down for its own nationals, and it also complies with the directive on the posting of workers.

143. The working-time directive only contains minimum requirements which, by virtue of Article 15, may be exceeded by the Member States and the two sides of industry even in the context of individual employment relationships.

144. Allowing longer leave is also justified by an overriding reason in the public interest, namely the protection of workers. The same result, a minimum annual leave period of 30 days worked, cannot be achieved by less restrictive rules.

145. It is for each Member State to decide for itself — subject to the relevant provisions of Community law — what is necessary in the public interest.

146. In the present case, the relevant authorities have ratified the decision of the two sides of industry which set the annual leave period in the construction industry at 30 days worked and, thus, set the framework for what they consider to be necessary in order to protect workers in this sector.

Legal assessment

147. Whilst I agree with the views expressed by the Belgian and Netherlands Governments, Ulak and the Commission, I would also draw attention to the considerations arising from Article 118 of the Treaty and the right of the Member States to define the level of social protection that they wish to ensure, set out at the beginning of my discussion of the first question.

148. They retain that right notwithstanding the minimum harmonisation of working conditions at Community level.

149. Article 15 of the working-time directive only serves to confirm this right, which flows directly from the Treaty.

150. Furthermore, the *right* of the Member States to require 'foreign' undertakings and the workers they post to accept the leave period fixed by their legislation has been transformed into an *obligation* by the posting directive.

151. I will come back to this matter in the context of the fourth question, but it may be noted at this stage that, since the Treaty authorises the Federal Republic of Germany to do what it has done (that is, to require foreign undertakings to observe the leave period laid down in the collective agreements), it is irrelevant, for the purposes of the main actions, that that approach was also made mandatory by the directive.

152. I therefore consider that Articles 59 and 60 of the Treaty do not preclude a Member State from requiring, by means of a national provision such as the second sentence of Paragraph 1(1) of the AEntG, undertakings established in another Member State and temporarily carrying out works on its territory to apply legal rules contained in collective agreements providing for a period of leave which exceeds the minimum period of annual leave laid down by the working time directive.

(b) *The method of payment for holiday pay*

153. By part (b) of its second question, the referring court asks whether Articles 59 and 60 of the Treaty permit a scheme which allows employers established in Germany to claim the reimbursement of expenditure on holiday pay and holiday allowances from the fund, whereas no such right is given to employers established abroad, but instead posted workers may make a direct claim against the joint bodies.

154. The referring court accompanies this question with the following comment:

'The holiday fund scheme differs in principle for foreign and for German employers in that German employers themselves meet their workers' claims for holiday pay and have their expenditure thereon reimbursed by the holiday pay fund. By contrast, the collectively agreed rules set out above and which apply to foreign employers who post workers are so framed that those foreign employers do not themselves receive payments from the holiday pay fund. That is because the posted workers may claim directly from the holiday pay fund. In order for the fund to calculate those claims, the additional obligations to provide information set out above must be complied with. There is, however, no objectively justified reason for preventing foreign employers, at the cost of more extensive notification obligations, from making direct claims against the holiday pay fund, and for thereby not considering them, in contrast to German employers, capable of handling their workers' holiday claims properly. That constitutes (overt) discrimination on the basis of the State in which the undertaking is established which, according to the case-law of the Court of Justice, would only be permissible under the specific conditions laid down by Articles 55, 56 and 66 of the Treaty. However, it is not apparent that those conditions are satisfied'.

The observations submitted

155. The undertakings who are parties to the main proceedings adopt a position similar to that of the referring court. They also emphasise that the holiday fund makes payments to the workers only two or three months after it receives an application.

156. Lastly, these undertakings advance various arguments concerning social security contributions and the amount of tax which would be deducted from holiday pay. They also use as an argument the fact that, contrary to what is provided for workers whose employer is established in Germany, the collective agreement does not provide for a standing certificate of pay for workers posted abroad. Paragraph 68 of

the VTV provides, instead, for a certificate from the holiday pay fund containing the necessary data about the posted worker in order that he can receive holiday pay.

157. As the referring court has not dealt with these matters in its observations on Question 2(b), however, I consider that the question I have to address is whether the scheme in question is incompatible with Community law simply because foreign employers do not receive payments from the holiday pay fund directly.

158. The German Government and Ulak deny that that makes the scheme incompatible with Community law. They emphasise that undertakings established in Germany must make financial provision for the holidays of their employees, whilst foreign undertakings have no such obligation.

159. The foreign undertaking is, thus, exempt from having to calculate and make payment in accordance with a holiday scheme with which it is not familiar.

160. This ensures that the employee's entitlement to paid leave is calculated and paid correctly. The separate treatment to which foreign undertakings are subject does not therefore constitute discrimination, but represents for them a financial advantage and a lesser administrative burden.

161. Other Member States in which there are comparable social security fund schemes (the Kingdom of Belgium, the French and Italian Republics, the Kingdom of the Netherlands, and the Austrian Republic) generally apply a system of direct payment of employee benefits by the social security funds as well. In any case the Federal Republic of Germany also expects to abandon the other procedures traditionally applied to national employees and to replace them by a system of direct payment.

162. Notwithstanding the requirement that foreign undertakings must provide additional information to enable payments to be calculated by the fund, there is thus, according to the German Government, no discrimination. Accordingly, part (b) of the second question should also be answered in the negative.

163. In its written observations, the Commission had taken the opposite view, but it

qualified that position considerably at the hearing.

164. It takes the view that, *prima facie*, there appears to be a clear case of discrimination but that, in fact, certain factors lend support to the argument of Ulak and the German Government that this method does not entail any disadvantage, either for the posted foreign worker, or for the foreign employer; on the contrary, the latter is in a position more favourable than that of undertakings established in Germany.

165. The Commission therefore considers that it is for the referring court to ascertain whether the scheme is an advantage or a disadvantage for the employer who posts workers, and whether the worker can indeed obtain holiday pay. The referring court should also take account of the claims of Finalarte to the effect that there are tax disadvantages, and that foreign providers of services will be harder hit.

166. To conclude, the Commission does not oppose the interpretation to the effect that a difference of treatment of that nature is compatible with the Treaty.

167. The French Government adopts the same position, pointing out that it is quite possible to have one and the same end achieved by different means according to particular circumstances, and for it not to be possible to do otherwise.

Legal assessment

168. I also consider that, subject to further examination to be carried out by the referring court into all aspects of the applicable scheme, it is not possible in principle to say that Article 59 et seq. of the Treaty precludes the direct payment of holiday pay to posted workers.

169. This is because I am not persuaded that a holiday fund system which can only be regarded as compatible with the Treaty if it comprises an increased level of social protection for the posted worker should be condemned because it confers precisely this advantage on the worker directly, bypassing the employer. Nor should the fact be overlooked that the worker is thus better protected should his employer become insolvent, or against the non-payment of benefits owing to the fact that the employer

has completed his services in Germany and returned to his country of origin, whilst the worker wishes to stay on in Germany to enter employment with another foreign or German employer.

170. From the point of view of the 'foreign' employer, even if he must provide certain additional information to the fund, he does not have to calculate the payments due himself and has only to pay the contributions due to the holiday fund. By contrast the national employer must both pay those contributions, and advance holiday pay to his employee.

171. I therefore propose to answer part (b) of the second question to the effect that a holiday fund scheme which requires holiday pay to be paid directly to the posted worker, whilst in the case of undertakings established in the host country it is paid to the employer, is not, by reason of this fact alone, incompatible with Article 59 et seq. of the Treaty.

(c) *The information to be provided*

172. The Arbeitsgericht Wiesbaden asks, thirdly, whether Articles 59 and 60 of the Treaty are infringed where the obligations imposed on foreign employers are more onerous, in terms of the information to be provided to the joint bodies, than those imposed on employers established in Germany.

173. It appears from the order for reference that before a new posted worker starts work the foreign service provider must provide the following data on a form provided by Ulak:

(1) the surname, first name, date of birth and home address of the posted worker, as well as his registration number with the holiday pay fund, if already available;

(2) the worker's bank details in Germany and in his country of origin;

(3) the construction site where the worker will work;

(4) the nature of the worker's activity;

(5) the start date and expected duration of the work;

(6) the employer's correspondence address in Germany;

(7) the names and addresses of the collection agencies, together with their addresses, to which the earnings-related social security contributions are remitted, and the number under which the worker is registered at those agencies;

(8) the name and address of the tax office to which income tax is remitted and the employer's and worker's tax reference numbers.

174. Further, Paragraph 59(3) of the VTV requires the foreign service provider to give the holiday pay fund, every month, and in respect of each posted worker, the following information:

(1) his surname, first name, date of birth and worker number;

(2) any changes to the first notification set out above;

(3) the amount of his monthly gross pay in DM.

175. By contrast, under Paragraph 27(2) of the VTV, it is only on special request by a fund that an employer established in Germany must notify the names and addresses of the workers employed in the relevant accounting period, and provide a breakdown of the total gross wages for each worker for that period.

176. Finally, under Paragraph 70 of the VTV, foreign providers of services must provide Ulak and 'the Federal Labour Office and its departments, and principal customs offices, with the information needed in order to determine *whether contributions have been duly paid to the holiday fund scheme*'.

177. The referring court considers that 'the amount of information required from foreign employers is considerably greater than the amount which German employers must provide. The extensive additional obligations to provide information make it significantly more difficult to provide services in Germany, in particular for smaller and medium-sized undertakings. Foreign employers can only understand those obli-

gations with difficulty, and they are associated with substantial administrative cost. The obligations to provide information apply to foreign employers solely because their business is established abroad. That, too, constitutes (overt) discrimination on the basis of the State in which the undertaking is established which, according to the case-law of the Court of Justice, would only be permissible under the specific conditions laid down by Articles 55, 56 and 66 of the Treaty. However, it is not apparent that those conditions are satisfied'.

The observations submitted

178. The German Government explains that there are practical reasons for those various requirements. Monitoring undertakings registered abroad is difficult, and it cannot be as thorough as in the case of construction companies registered in Germany.

179. The more extensive obligations of disclosure and information imposed on foreign undertakings are justified because the latter generally have access, without any difficulty, to the necessary information simply by consulting the pay records of the workers concerned, which information is also necessary for the calculation and payment of the employees' wages.

180. The Belgian Government considers that, in order to be justified, the notification of such information must be objectively necessary having regard to the objective to be achieved, namely the protection of the worker's holiday entitlement in full, and payment of holiday allowances, and to allow the necessary supervision.

181. Tecnamb and Engil adopt the same position as the referring court.

182. Tudor points out that the notification requirement is used to implement and monitor the holiday pay scheme. As Community law prohibits the extension of the holiday pay fund scheme to foreign providers of services, it must also prohibit that notification requirement.

183. The Netherlands Government considers that the obligation for foreign providers of services to supply additional information arises from the fact that Ulak alone is entitled to calculate the allowances payable to posted workers. It contends that a notification requirement is only justified as a means of checking that the paid leave to which the posted worker is entitled is at the same level as that laid down in the host

State. Holiday pay must, however, be paid in accordance with the law of the State of origin.

184. The Commission considers that:

'To the extent that notification requirements imposed on employers established in another Member State exceed those imposed on employers established in Germany, these rules may appear, at first sight, to be discriminatory. It is apparent from the settled case-law of the Court that, to the extent that these rules are not applicable to services without distinction as regards their origin, they may only be justified by the exceptions laid down by Article 56 of the EC Treaty (together with Article 66 of the EC Treaty), that is, for reasons of public policy, public security or public health. [24]

The Commission does not have sufficient criteria to enable it determine to what extent the discrimination may be justified for reasons of public policy and public security. It is for the national court to make such an assessment.'

24 — Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraphs 10 and 11.

185. The Commission draws attention, however, to the fact that:

'in this case the information required by Paragraph 59(2) of the VTV is also intended to ensure that the terms and conditions of employment are respected. The additional information may therefore be objectively necessary in order to guarantee that such conditions are complied with.

Effective controls are particularly important in view of the fact that the penalties for failure to comply with such conditions, which are laid down by Article 5 of the directive on the posting of workers, are much more difficult to apply in a transnational context than in a purely national context. The situations are distinguishable in that the authorities can often only know as a result of making inquiries in the State of origin whether the posting is, for example, an abuse of the freedom to provide services, or a device, or whether the requirements of the directive on the posting of workers as to minimum wages have been complied with. Given that employment rights are often circumvented in the construction industry, specific control by the authorities charged with monitoring the proper application of the law is necessary. This is why the Commission takes the view that additional notification requirements may be necessary to ensure effective mon-

itoring, which can only be carried out by the German authorities, on German territory. [25]

However, the various provisions regarding such monitoring must be proportionate, and may not exceed that which is necessary for it to be effective. In particular, the only documents which can be required are those which the employer already possesses by virtue of rules in force in the State of establishment. Superfluous and purely bureaucratic rules should be avoided inasmuch as they restrict the freedom to provide services and hinder the creation of jobs. It is for the national court to ensure that these principles are respected.

It should be emphasised in this context that Article 4 of the directive on the posting of workers favours, for the purpose of overcoming the typical difficulties posed by such monitoring, co-operation between the Member States as regards information. Implementation of the directive thus requires the competent authorities to cooperate in monitoring the employment conditions referred to in Article 1 of the directive.

25 — Case C-55/93 *Van Schaik* [1994] ECR I-4837, paragraph 20.

Having regard to the foregoing, the Commission suggests that Question 2(c) be answered as follows:

"Obligations laid down by the holiday fund scheme as to the information to be provided by employers established in another Member State which go beyond those placed on employers established in Germany do not infringe Articles 59 and 60 of the Treaty if, and to the extent that, they are necessary and appropriate to ensure effective monitoring of terms and conditions of employment within the meaning of Article 3 of the directive on the posting of workers. It is for the national court to determine whether this is the case".'

Legal assessment

186. A distinction should be made in my view between information necessary to prevent undeclared work and for the effective supervision of compliance with the terms and conditions of employment (such as the minimum wage and the maximum length of the working day, week and year), and that which is necessary for the application of the holiday fund scheme.

187. As to the first category, the following observations apply:

188. First, it is possible that it is only at first sight that the volume of information required of foreign employers exceeds that required of national employers, because in the case of the latter Ulak obtains certain information automatically from the German authorities, or has the possibility to do so. It should be borne in mind that before beginning trading activities German undertakings must comply with certain formalities, and that other information comes to the knowledge of the authorities by means of fiscal and social returns (see in particular point 12 above).

189. Second, since foreign undertakings only come to Germany to carry out works on one or more specific sites, effective supervision of them would not be possible if they were not required to notify the competent authorities of the location of the site, or sites, the start date, and likely duration of the works, the employer's address in Germany, the number and identity of posted workers [26] and, probably, other information as well, the need for which is for the referring court to determine.

26 — That seems to me to be indispensable in particular to prevent undeclared work.

190. Third, it should be noted that the decision in *Arblade*, cited above, has now established criteria applicable to the present case, on the subject of maintaining business and work records. The relevant paragraphs are as follows:

'58 An obligation of the kind imposed by the Belgian legislation, requiring certain additional documents to be drawn up and kept in 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.

59 Consequently, the imposition of such an obligation constitutes a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

60 Such a restriction is justifiable only if it is necessary in order to safeguard, effectively and by appropriate means, the overriding public interest which the social protection of workers represents.

61 The effective protection of workers in the construction industry, 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 exchanges of information between Member States as provided for in Article 4 of Directive 96/71.[27]

62 Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules.

63 The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State concerning, in particular, the employer, the worker, working conditions and remuneration may differ to such an extent that the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment.

64 On the other hand, 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.

65 Consequently, the authorities and, if need be, the courts of the host Member State must 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

27 — It will be noted that at the time of the facts in the present case, that Directive was not in force, and so neither was the system of information.

of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State.'

191. The references to 'site' or to 'accessible and clearly identified place' are attributable of course to the special features of the Belgian rules in question. There is nothing to prevent the Federal Republic of Germany from requiring the submission of documents to the competent administrative body provided they are genuinely necessary for the purposes of monitoring.

192. The task which falls to the national court, to compare existing documents in the State of origin with those required by the host State, is clearly not an easy one, but the fact remains that it alone is competent to apply Community law in the context of the particular case before it.

193. As to the second part of the distinction which I propose to apply, namely the specific information required for the purposes of the holiday pay scheme, it will be for the referring court to determine, first, in the light of the answers given by the Court, whether the application of this scheme is compatible with Community law, and, if so, then to determine whether all of the documents and information required for this purpose are strictly necessary.

194. As to the answer to Question 2(c), I am assisted by the response put forward by the Commission, but would wish to extend it somewhat. I therefore propose to answer in the following way:

195. In the context of freedom to provide services notification requirements imposed on employers established in another Member State do not infringe Articles 59 and 60 of the Treaty properly interpreted if, and to the extent that, they are necessary and appropriate:

— to ensure effective monitoring of compliance with the conditions of employment in force in the host country;

— to ensure the smooth running of the holiday pay fund scheme, provided that the application of this scheme to the employers in question is not, on other grounds, incompatible with those provisions.

It is for the national court to determine whether this is the case.

The third question

196. The third question referred by the Arbeitsgericht Wiesbaden requires us to consider whether Articles 59 and 60 of the Treaty preclude a national provision such as Paragraph 1(4) of the AEntG which requires, in substance, that all workers of a foreign employer posted to Germany, and only those, be treated as a business, while a different definition of business applies to employers resident in Germany, which in certain cases results in different businesses falling within the scope of the collective agreement.

197. Paragraph 1(4) of the AEntG provides that:

'For the purposes of classification as a business to which a collective agreement under subparagraphs 1, 2 and 3 applies, the workers deployed in Germany by the employer established abroad shall, in their entirety, be treated as a business'.

198. On the other hand, as the referring court emphasises, a different definition of business applies to employers established in Germany. This is described as follows:

'In German employment law a business is understood to be that organisational entity within which a businessman, by himself, or together with his staff, continuously pursues certain work-related objectives using tangible and intangible means. It is apparent from Paragraph 7(2)(2)(2) of the BRTV-Bau that the parties to the collective agreement in the construction industry also proceeded on the basis of that definition of a business; in connection with rules on the payment of, and allowances for, travel expenses, that provision designates as a business "the head office, the place of business, the branch and sub-offices and other permanent agencies of the employer" at which the worker is employed. It is also stated therein that if the worker is employed at a construction site, or a work site, the "nearest agency of the employer" is treated as a business. That makes it sufficiently clear that, in determining whether Germans are subject to a collective agreement, a business is not, for instance, merely the construction site, or even solely the workers deployed on a construction site, but that organisational entity from which workers are posted to construction sites.

By contrast, for the purposes of determining whether foreign employers are subject to a collective agreement, solely the posted workers themselves in their entirety are deemed to be a business.

The divergent definitions of a business referred to can lead to different practical consequences in the case of so-called mixed businesses. These are businesses which carry on, in part, non-construction activities, and, in part, construction activities. An example would be a business which, in part, trades in building materials, tiles for instance, and as for the remainder also employs a gang of workers who themselves lay, on behalf of third parties, the tiles sold. Under the relevant provisions of the collective agreement only the laying of the tiles is a construction activity and not the purchase and sale of tiles.

Under the first sentence of Paragraph 1(2) VI of the VTV businesses — apart from the special case of so-called independent business units — are always subject as a whole to the collective agreements in the construction industry regarding social funds. In accordance with the relevant German case-law of the highest court... mixed businesses are subject as a whole to such collective agreements if — based generally on a period of a calendar year — the working time of the workers employed in the construction sector is greater than the working time of the workers not employed in that sector. That means that the mixed business as a whole is subject to the collective agreements of the construction industry if, in a particular calendar year, the working time of the workers employed in the construction sector has taken up more than half of the total working time of the business.

If, in the example given, more workers are employed in the purchase and sale of tiles than in laying them, and the individual working time of the workers employed is the same, the activity of purchasing and selling predominates from the point of view of working time, so that the business as a whole is not subject to the collective agreements in the construction industry. That has the consequence that *the German employer in question does not need to pay any social fund contributions for those workers who are engaged in laying tiles.* [28] A foreign business with the same structure, which purchases and sells tiles in the country of origin and posts a gang of tile-layers to Germany, is liable to pay holiday fund contributions for the posted workers...

28 — Emphasis added.

As Paragraph 1(4) of the AEntG does not define an organisational whole of persons and objects for the carrying on of an economic activity as a business but designates solely the posted workers themselves as a business, the effect of that provision, which applies only to foreign employers, is to place such employers at a disadvantage. It also constitutes (overt) discrimination on the basis of the State in which the undertaking is established which, according to the case-law of the Court of Justice, would only be permissible under the specific conditions laid down by Articles 55, 56 and 66 of the EC Treaty. However, it is not apparent that those conditions are satisfied.'

The observations submitted

199. The foreign providers of services, in particular Tecnamb, Finalarte and Portugaia, as well as the Netherlands Government, adopt the same position as the referring court.

200. The French Government considers that the approach taken by the AEntG is the only practicable one.

201. The Belgian Government considers that this question is purely hypothetical, and that the definition of business applied by the AEntG constitutes a necessary condition for bringing the foreign provider of services within the holiday pay scheme.

202. The German Government submits that the question is inadmissible because it has no bearing on the outcome of the main proceedings. The referring court did not state that the foreign undertakings involved in the main proceedings would not be subject to the generally applicable collective agreements if the definition of business by the AEntG were otherwise.

203. In the alternative, it submits that if the criterion for inclusion of a foreign provider of services within the trade scope of the collective agreement is the work carried out by the posted workers rather than the totality of the activity of this undertaking, this is because the AEntG has a territorial scope, so that it cannot take account of the activity of the undertaking in its country of origin. Furthermore, it is impossible to verify the information given by the foreign provider of services on this subject. In any case, the failure to take account of activity carried out abroad may have as many advantages as disadvantages so far as mixed foreign undertakings are concerned.

204. The position of the Commission has changed in the course of the proceedings. In

its written observations, it took the view that there was overt discrimination on the basis of the country where the undertaking is registered. During the hearing, after referring to the practical difficulties raised by the application of this law, it stated that it had no solution to put forward and looked to the Court for guidance on the matter.

Legal assessment

205. As to the point raised by the German Government concerning the admissibility of this question, it is sufficient to refer to the case-law of the Court to the effect that it is for the national court alone to decide the relevance of a question asked, and that only a clear lack of any link with the main proceedings can render a question inadmissible. However this is clearly not the case here. [29]

206. Turning to the merits, I am of the view that, but for the problem of 'mixed businesses', the answer would be simple. As the referring court has portrayed it, the German law characterises as a business not only 'the head office, the place of business and the branch', but also 'the sub-office, and other permanent agency of the employer' and even 'the nearest agency of the employer'.

207. Given this, I fail to see why the foreign employer's representative in charge of the work of the workers posted to Germany cannot be regarded as 'the nearest agency of the employer'.

208. Matters are considerably complicated, however, by the fact that the wages of British and Portuguese tile-layers (to take the example given by the referring court) temporarily engaged in Germany are still subject to contributions, whilst the wages of tile-layers employed by an undertaking established in Germany cease to be so once the working time of the workers engaged in the construction industry (such as tilers) constitutes less than half of the total hours worked in the undertaking.

209. It is clear that, compared with mixed undertakings of this type, foreign providers

29 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 34.

of services do not find themselves 'on an equal footing from the standpoint of competition', [30] and that even if this system also sets up discrimination as between German undertakings, there is nevertheless a restriction of the freedom to provide services within the meaning of Article 59 of the Treaty.

210. To the extent that it is discriminatory, this restriction cannot be justified by overriding reasons in the public interest, no matter what form they may take. The only justification which could be put forward are those factors set out in Article 56 of the Treaty. It has not been shown, however, that any of these factors can validly be relied on in this case.

211. Various solutions may be envisaged in order to put an end to this discrimination. One possibility is to bring within the holiday pay scheme workers carrying out an activity within the construction industry who are employed by 'mixed businesses' even when the working time of the workers employed in the construction sector employed by these undertakings has taken up less than half of the working time of the business. Another solution is to bring 'foreign' undertakings providing services within the scheme currently applicable to this type of 'mixed business'.

212. It is for the German Government to adopt what appears to it to be the solution best suited to the legitimate concerns of worker protection which inspired the creation of the holiday fund scheme.

213. In conclusion, I propose to answer the third question as follows:

214. Articles 59 and 60 of the Treaty are to be interpreted as precluding the extension of a holiday pay scheme such as that at issue in the main proceedings to undertakings established in other Member States providing services in the construction industry if it does not apply to undertakings established in the host Member State, only part of whose activity is within that sector, as regards their staff employed in that sector.

The fourth question

215. The last question concerns the interpretation of Article 3(1) of the directive on the posting of workers, which provides that:

'Member States shall ensure that, whatever the law applicable to the employment

30 — See *Arblade and Others*, cited above, paragraph 58.

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

— by law, regulation or administrative provision and/or

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

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

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

216. The Arbeitsgericht Wiesbaden asks 'is Article 3(1)(b) of Directive 96/71 ... to be interpreted as in any event, having regard to the correct interpretation of Articles 48, 59 and 60 of the EC Treaty, neither requiring nor permitting the rules at issue in Questions 1, 2 and 3?'.

217. It evidently starts from the proposition that a directive cannot validate a holiday pay scheme which is contrary to the Treaty. I can only agree: a directive cannot authorise, still less require, measures which are contrary to Community law.

218. However, I do not consider that the directive does any such thing.

219. As I explained in relation to the first two questions, the Member States are *entitled* under the Treaty to require undertakings which provide services in their territory to respect the minimum wage and the minimum annual paid leave in force for the economic sector in question.

220. There is, therefore, no need for any such authorisation from an act of secondary legislation.

221. The directive on the posting of workers has now imposed an *obligation* on the Member States to require that these rules are complied with by undertakings established in other Member States.

222. Since the Federal Republic of Germany has exercised a right which it in any case has, the question whether the directive can lawfully impose on it a corresponding duty is irrelevant to the outcome of the main proceedings. It is therefore unnecessary to examine the concerns raised by the referring court as to the appropriate legal basis of this directive.

223. The same reasoning applies to the holiday pay fund scheme. Whether the directive authorises such a scheme, as we have seen above, the right of a Member State to require foreign undertakings to comply with the 'conditions of employment' in force in its territory also includes, in principle, the right to require them to comply with a holiday pay fund scheme. There again, the Member State is making use of a right which belongs to it in any event, and the question whether the directive can lawfully require it to avail itself of this right is, once again, irrelevant as regards the outcome of the main proceedings. It should further be noted that neither Article 3 nor any other provision of the directive requires the Member States to implement a holiday fund scheme.

224. However, the characteristics of such a scheme may differ from one Member State to another, and it will be necessary to examine each scheme on a case-by-case basis to determine whether the scheme in question, or certain characteristics of it, are compatible with the Treaty, which is what I have done here in respect of the German scheme.

225. I therefore propose to answer the fourth question as follows:

226. The directive on the posting of workers neither requires nor authorises the introduction of a holiday pay scheme contrary to the provisions of Articles 59 and 60 of the Treaty.

Conclusion

227. I therefore propose to answer the questions referred by the Arbeitsgericht Wiesbaden as follows:

(1) Unless an identical or higher level of protection is afforded to the worker in the country of origin Article 59 (now, after amendment, Article 49 EC) and Article 60 (now Article 50 EC) of the EC Treaty are not, in principle, to be interpreted as precluding the application of a scheme such as that set out in the first sentence of Paragraph 1(3) of the AEntG to an employer established in another Member State and to workers posted by it, provided that due account is taken of the mandatory burdens imposed on the employer by the law of his country of origin. Article 48 (now, after amendment, Article 39 EC) of the EC Treaty does not apply to the posting of workers by an employer established in another Member State.

(2) Articles 59 and 60 of the Treaty are to be interpreted as not precluding a Member State from applying to an undertaking established in another Member State and temporarily carrying out works in the first Member State of:

(a) provisions contained in collective agreements which provide for a period of leave which exceeds the minimum period of annual leave laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time;

(b) the application of a holiday pay fund scheme which requires holiday pay to be paid directly to the posted worker, whilst in the case of undertakings established in the host country it is paid to the employer;

(c) notification requirements, if, and to the extent that, they are necessary and appropriate:

— to ensure effective monitoring of compliance with the conditions of employment in force in the host country;

— to ensure the smooth running of a holiday pay fund scheme.

(3) Articles 59 and 60 of the Treaty are to be interpreted as precluding the extension of a holiday pay scheme such as that at issue in the main proceedings to undertakings established in other Member States providing services in the construction industry if it does not apply to undertakings established in the host Member State, only part of whose activity is within that sector, as regards their staff employed in that sector.

(4) 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 neither requires nor authorises the introduction of a holiday pay scheme contrary to the provisions of Articles 59 and 60 of the Treaty.