Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 28 May 2020[1]

Case C-626/18

Republic of Poland
v
European Parliament,

Council of the European Union

(Action for annulment – Directive (EU) 2018/957 – Directive 96/71/EC – Posting of workers in the framework of the provision of services – Rules on working conditions and the health and safety of workers – Incorrect legal basis – Discriminatory, unnecessary or disproportionate restrictions – Infringement of the principle of freedom to provide services – Remuneration of posted workers – Long-term posted workers – Infringement of Regulation (EC) No 593/2008 on the law applicable to contractual obligations – Road transport)

1. The Republic of Poland claims, principally, that the Court should annul several provisions of Directive (EU) 2018/957[2] amending Directive 96/71/EC[3] concerning the posting of workers in the framework of the provision of services. In the alternative, it seeks the annulment of Directive 2018/957 in its entirety.

2. Today, I am also delivering my Opinion on the *parallel* action in C-620/18, *Hungary* v *Parliament and Council*,[4] which Hungary has brought against the same directive, on similar grounds. I shall refer to or reproduce the content of that Opinion where necessary in order to avoid repetition.

I. Legal framework

3. I refer to the description of the relevant provisions of Directives 2018/957 and 96/71 contained in the Opinion in Case C-620/18.

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16).

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

4 'Opinion in Case C-620/18'.

II. Procedure before the Court and forms of order sought by the parties

4. The Republic of Poland claims that the Court should declare Article 1(2)(a) and (b) and Article 3(3) of Directive 2018/957 invalid. It also seeks to have the European Parliament and the Council ordered to pay the costs.

5. In the alternative, if the Court finds that those provisions of Directive 2018/957 cannot be separated from the remaining provisions of that directive without changing their substance, the Republic of Poland claims that Directive 2018/957 should be annulled in its entirety.

6. The European Parliament and the Council contend that the Court should dismiss the action and order the Republic of Poland to pay the costs.

7. The Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the Commission were granted leave to intervene in the proceedings in support of the forms of order sought by the Parliament and the Council. All of the foregoing lodged written observations, with the exception of the Netherlands Government, which agreed with the position of the European Parliament and of the Council.

8. The hearing held on 3 March 2020, in conjunction with that in Case C-620/18, was attended by the Council, the Parliament, the Commission and the German, French, Netherlands, Polish and Swedish Governments.

III. Admissibility of the action

9. The European Parliament takes the view that the provisions of Directive 2018/957 that are principally contested by the Republic of Poland are indissociable from the remainder of that directive. Consequently, the partial annulment sought is not feasible.

10. Nonetheless, as the Republic of Poland has claimed, in the alternative, that the Court should declare the entirety of that directive invalid, the European Parliament considers the action to be admissible.

11. According to the Court's settled case-law, the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act. That requirement is not satisfied where the partial annulment has the effect of altering the substance of that act. Review of whether certain elements are severable requires consideration of the scope of those elements, in order to assess whether their annulment would alter the spirit and substance of the act. [5]

12. In my opinion, the Republic of Poland is challenging two provisions that may be regarded as crucial to Directive 2018/957, by virtue of both their scope and their purpose.

[5] Judgments of 29 March 2012, *Commission* v *Estonia* (C-505/09 P, EU:C:2012:179, paragraph 112); of 12 November 2015, *United Kingdom* v *Parliament and Council* (C-121/14, EU:C:2015:749, paragraphs 20 and 21); and of 9 November 2017, *SolarWorld* v *Council* (C-204/16 P, EU:C:2017:838, paragraphs 36 and 37).

13. The declaration of invalidity sought under the principal head of claim would, after all, affect two key measures under the new legislation: (a) the replacement of the concept of 'minimum rates of pay' with that of 'remuneration'; and (b) the regime applicable to long-term posted workers.

14. Those two new provisions also happen to be the principal amendments which Directive 2018/957 makes to Directive 96/71. They both have as their purpose to shift the balance of interests provided for in Directive 96/71 in order to give greater protection to workers posted in the framework of the transnational provision of services. To annul them in isolation would alter the essence of Directive 2018/957.

15. Nonetheless, as the European Parliament recognises, the action is admissible because it contains the alternative claim that Directive 2018/957 should be annulled in its entirety.

IV. Preliminary considerations

16. I shall begin my analysis of the grounds of invalidity by looking first at the second ground, an approach which I consider to be more consistent with the scheme of the legislation.

17. As regards the examination of the Court's case-law on this subject, the process of harmonising the directives concerning workers posted in the framework of the transnational provision of services and, more generally, the evolution of the rules of EU law governing such workers, I refer to the Opinion in Case C-620/18. [6]

V. Second ground: incorrect choice of legal basis for Directive 2018/957

A. Arguments of the parties

18. The Polish Government challenges the use of Articles 53(1) and 62 TFEU as the legal basis for Directive 2018/957 because that directive, unlike Directive 96/71, gives rise to restrictions on the freedom to provide services enjoyed by undertakings that post workers.

19. In that regard, it submits that:

— The main objective of Directive 2018/957 is to protect posted workers and its legal basis should therefore be the provisions of the FEU Treaty relating to social policy (even though the Polish Government does not specify them).

— Article 1(2)(a) and (b) of Directive 2018/957 does not have as its purpose to facilitate the pursuit of a professional activity on a self-employed basis (the provision of cross-border services), but actually undermines the pursuit of such activities. The replacement of the concept of 'minimum rates of pay' with that of 'remuneration' and the new regime applicable to long-term posted workers together give rise to unjustified and disproportionate restrictions on the freedom to provide services. There is therefore a contradiction in using the provisions governing the harmonisation of freedom of movement as the legal basis for that directive.

[6] Points 17 to 51.

20. The Council, the European Parliament and the German, French and Swedish Governments take the view that the legal basis of Directive 2018/957 (Articles 53(1) and 62 TFEU) is correct.

B. Assessment

21. In order to avoid repetition, I refer to the Opinion in Case C-620/18 as regards the Court's case-law on the legal bases of acts of the European Union,[7] and an analysis of the objectives, content and context of Directive 2018/957.[8]

22. Following that analysis, I can see no reason to take the view that the legal basis of Directive 2018/957 (Articles 53(1) and 62 TFEU) is incorrect.

23. Directive 2018/957 makes significant but limited amendments to Directive 96/71. According to the Court's case-law, an act amending an earlier measure will normally have the same legal basis,[9] which seems logical to me. Thus, Articles 53(1) and 62 TFEU may constitute an appropriate legal basis for Directive 2018/957 in the same way as they did for Directive 96/71, which the former directive amends.

24. Directive 2018/957 adapts the legislative solution provided by Directive 96/71 to the (growing) phenomenon of the transnational posting of workers with a view to making it easier for undertakings utilising this method of mobilising labour to provide services.

25. That adaptation was made necessary by developments in the EU employment markets and was geared towards improving protection for the working conditions of posted workers. It may be that, in certain cases, this brings with it a corresponding reduction in the competitiveness of undertakings to provide services in other Member States via this route, but that was the (legitimate) choice which the European legislature wished to make.

26. When enacting a harmonising provision, the EU legislature must not be deprived of the power to adapt that measure to any change of circumstances or change in knowledge, given that it is incumbent upon it to ensure that the interests recognised by the Treaty are protected.[10]

27. That is precisely what happened in the case of the adoption of Directive 2018/957. The EU legislature made changes to Directive 96/17 in order to adapt the balance of interests reflected in it to the new situation brought about by the transnational movement of workers. The interests in question remain the same but the focus and the point of balance between them have shifted towards greater protection for the employment rights of those workers. That rebalancing does not warrant a change to the legal basis used for Directive 96/71.

28. Finally, I would observe that the Republic of Poland submits (with little by way of reasoning) that Directive 2018/957 should have been founded on the legal bases of social policy, in particular Article 153 TFEU. For the reasons I set out in the Opinion in Case C-620/18,[11] I do not agree with that argument either.

7 Points 58 and 59.

8 Points 60 to 72.

9 Judgment of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 42).

10 *Ibidem*, paragraphs 38 and 39. See, to the same effect, judgments of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 34), and of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 77).

11 Points 80 to 85.

VI. First ground: infringement of Article 56 TFEU by virtue of the restrictions on the movement of workers imposed by Directive 2018/957

29. The Polish Government submits that Directive 2018/957 creates restrictions on the freedom to provide services within the European Union that are contrary to Article 56 TFEU. In particular, those restrictions stem from two new elements which that directive introduces into Directive 96/71 by imposing on Member States the obligation to guarantee for posted workers:

— that remuneration (including overtime rates) will be in line with the law and/or practice of the Member State to which the worker is posted (Article 1(2)(a));

— that all working conditions will be in line with the law and/or practice of the Member State of destination, in the case where the effective duration of the posting of a worker or the cumulative duration of the posting of workers that replace other workers in order to perform the same work exceeds 12 or 18 months respectively, provided that a motivated notification is submitted (Article 1(2)(b)).

30. In keeping with that approach, the Polish Government divides the first ground for annulment into two parts. I shall analyse these after making a preliminary point about the judicial review of harmonising directives concerning the freedom to provide services.

A. Preliminary point: judicial review of Directive 2018/957

31. The Republic of Poland examines the rules which Directive 2018/957 lays down with respect to the posting of workers (in the framework of the transnational provision of services) against the same parameters as have been used by the Court to review *national* measures restricting that type of legal relationship.

32. I refer to the study of that case-law, on reviewing the compatibility of harmonising directives with the freedom to provide services through the application of the principle of proportionality, which I conducted in my Opinion in Case C-620/18. [12]

33. That study leads me to the view that the Court's case-law on *national* measures restricting the posting of workers in the framework of the transnational provision of services cannot be directly extrapolated to an examination of the compatibility of an EU provision harmonising the law in that field (such as Directive 2018/957) with Article 56 TFEU.

34. Contrary to the argument put forward by the Republic of Poland, a harmonising directive may introduce restrictions on the freedom to provide services which, if adopted by a single Member State, would be contrary to Article 56 TFEU.

35. This is because any harmonising measure which protects a fundamental social interest such as the rights of posted workers hinders to some extent the freedom to provide services of the undertakings that use such workers. However, such a restriction impacts the internal market to a much lesser extent than an equivalent national measure, since the former applies throughout the territory of the European Union. The existence and restrictive effects of such a measure can be eliminated only by making working conditions the same in every Member State, a step which the European Union is not competent to initiate.

[12] Points 105 to 110.

36. The Court's case-law on reviewing the proportionality of harmonising measures shows that the EU legislature enjoyed a broad discretion in the very complex field of regulating the transnational posting of workers. The question is whether it exercised that discretion in a *manifestly* inappropriate manner in altering the balance of interests it had struck in Directive 96/71 by introducing the changes provided for in Directive 2018/957.

B. First part of the first ground: remuneration of posted workers

1. Arguments

37. The new Article 3(1) of Directive 96/71 replaces 'minimum rates of pay' with 'remuneration' as a working condition which the host Member State must apply to posted workers.

38. The Polish Government considers that, under that new provision, undertakings that post workers will have to pay them the same remuneration as local workers receive. The principle of equal pay would thus replace the obligation to pay the minimum wage.

39. In the Polish Government's submission, that obligation restricts the freedom to provide services of undertakings that post workers for that purpose. Those undertakings have to bear an additional burden that eliminates the competitive advantage arising from the existence of lower wages in the Member State where they are based. Such discrimination is contrary to Article 56 TFEU and is justifiable only on the grounds provided for in Article 52 TFEU.

40. The Polish Government further argues that, even if they were not discriminatory, those restrictions would hamper the freedom to provide services without being supported by overriding reasons in the public interest, since:

— no such support is afforded by the inadequacy of the concept of 'minimum rates of pay' from the point of view of providing an appropriate safeguard for the rights of posted workers and maintaining fair competition between local undertakings and those that post workers;

— the argument based on the substantial differences between the minimum wages paid by some Member States as compared with others does not constitute a valid justification either; and

— finally, use of the term 'remuneration' requires undertakings to pay contributions, for which there is no justification in the case of posted workers.

41. The European Parliament, the Council, the Commission and the intervening Governments consider the first part of this ground for annulment to be unfounded.

2. Assessment

(a) Discrimination against undertakings with posted workers

42. In the view of the Polish Government, the replacement, by Directive 2018/957, of 'minimum rates of pay' with 'remuneration' discriminates against providers of cross-border services who post workers, in the manner indicated above.

43. Such service providers would be faced with a twofold burden (compliance with the rules of both the State of origin and the host State) and would, in addition, have to bear additional costs, such as, for example, the costs connected with the translation of documents and those arising from having a representative in the State of destination. As local undertakings are in a different position from those that post workers, laying down a requirement of equal treatment in relation to remuneration constitutes discrimination.

44. To my mind, that reasoning is based on a misinterpretation of Directive 2018/957.

45. In the first place, remuneration is one of the working conditions exhaustively listed in the third subparagraph of the new Article 3(1) of Directive 96/71. It is true that the application of that provision to posted workers is compulsory and falls within the scope of mandatory rules for minimum protection. [13] However, this does not amount to full equality of treatment for posted and local workers. Thus, the social security contributions of, and taxes payable by, the former are not covered by Directive 96/71 but are governed by the rules of the State of origin. This in itself leads to discrepancies between the remuneration actually received by posted and local workers respectively.

46. In the second place, the third subparagraph of the new Article 3(1) of Directive 96/71 defines the concept of remuneration by reference only to its mandatory elements. [14] Consequently, that provision does not extend to posted workers the duty to pay other components of remuneration which are not mandatory under national law. It follows that Directive 2018/957 does not require that remuneration taken in its entirety should be *identical* for local and posted workers.

47. As indicated in the impact assessment arranged by the Commission with a view to the adoption of Directive 2018/957, the option of full equality of treatment between local and posted workers was expressly ruled out. [15]

48. Since introducing the concept of 'remuneration' in place of the earlier 'minimum rates of pay' is not discriminatory, there is, by extension, no need, contrary to what the Polish Government submits, to find support for doing so in the grounds provided for in Article 52 TFEU (public policy, public security and public health).

(b) Justification for non-discriminatory restrictions on grounds of overriding requirements in the public interest

49. The Polish Government submits, as I have stated, that, even if Directive 2018/957 did not introduce discriminatory measures, the restrictions which it imposes on the posting of workers by relying on the new concept of remuneration are not justified by any overriding requirement in the public interest.

[13] See recital 13 of Directive 96/71 and judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 74 to 81).

[14] 'The concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered *mandatory* by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.' My emphasis.

[15] Document SWD(2016) 52 final, of 8 March 2016, p. 27.

50. The Polish Government's reasoning in this regard starts from a premiss with which I do not agree. As I have made clear, a *harmonising measure* such as Directive 2018/957 cannot be judicially reviewed against the parameters which the Court has developed in its case-law for the purposes of *national measures* restricting the posting of workers and their possible justification on grounds of overriding requirements in the public interest.

51. Reviews of harmonising directives (including Directive 2018/957) in the light of primary law, in this case Article 56 TFEU, must be carried out in accordance with the principle of proportionality, according to the case-law of the Court which I set out in my Opinion in Case C-620/18. [16]

52. That clarification having been made, I shall analyse the reasons put forward by the Polish Government in support of the view that the concept of minimum rates of pay should not be replaced with that of remuneration. They are, in essence, as follows:

— the concept of minimum wage in Directive 96/71 provides appropriate protection for the rights of posted workers;

— differences between the minimum wages of some Member States as compared with others are justified;

— use of the term 'remuneration' requires undertakings to pay contributions, for which there is no justification in the case of posted workers.

53. Contrary to what the Polish Government submits, use of the term 'minimum rates of pay' in Directive 86/71 was not such as to ensure protection for posted workers and fair competition between local undertakings and undertakings based in other Member States that post workers. This is the reasoning which the European Parliament and the Council employed, and I agree with them.

54. In the first place, the expression 'minimum rates of pay' has given rise to practical difficulties, [17] as is apparent from the Court's case-law and, in particular, its judgment in *Sähköalojen ammattiliitto*, [18] in which the Court accepts a broad interpretation of the concept of minimum wage under Directive 96/71 which influenced the reform introduced by Directive 2018/957. [19]

55. The EU legislature took into account those difficulties of interpretation, as well as the interpretation advocated by the Court, when it adopted Directive 2018/957 and incorporated the concept of remuneration into Article 3(1) and (7) of Directive 96/71.

[16] Points 144 and 145.

[17] The French Government highlighted those difficulties at the hearing, pointing out that, in France, a distinction is drawn between the minimum wage (SMIC) and 'minimum rates of pay' within the meaning of Directive 96/71. The latter include not only the minimum wage but also night working and dangerous working allowances, which must be paid to posted workers too.

[18] Judgment of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86; 'judgment in *Sähköalojen ammattiliitto*').

[19] Judgment in *Sähköalojen ammattiliitto*, paragraphs 38 to 70, according to which 'minimum rates of pay' include:
- The possibility of calculating the minimum wage for hourly work or piecework on the basis of the categorisation of employees into pay groups, as provided for by the relevant collective agreements in the host Member State, provided that the calculation and the categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify.
- A daily allowance, on the same conditions as those governing the inclusion of that allowance in the salary paid to workers when posted within the host Member State.
- Compensation for daily travelling time, which is paid to workers on condition that their daily journey made is longer than one hour.
- The pay which the posted worker must receive for the minimum period of paid annual leave.

56. In the second place, the second subparagraph of Article 3(1) of Directive 96/71 provides that minimum rates of pay are to be established by the national law and/or practice of the host Member State. [20] The method of calculating those rates and the criteria used in that regard are also a matter for the host Member State. [21] The national laws and/or practices of the EU Member States in relation to the calculation of the minimum wage are very diverse (and not always transparent) in the Member States of the European Union, which makes it difficult for workers to be posted on the basis of working conditions which are fair and comparable to those of local workers. [22]

57. In the third place, undertakings had been found to be engaging in an improper practice whereby, when posting their workers, they would pay them the minimum wage without taking into account their pay group, their job tasks, their professional qualifications or their seniority, thus creating a difference in pay between posted workers and local workers in a similar position. [23]

58. At the hearing, the Commission reiterated what had already been stated in its impact assessment, which is to say that the fact that the 'minimum rates of pay' provided for in Directive 96/71 were being treated as interchangeable with the statutory minimum wage laid down in the national legislation of the host Member State had led in practice to a wage gap between local workers and posted workers, in particular in sectors such as the construction industry. [24]

59. In order to remedy that situation, the Commission studied the potential solutions and their economic consequences. It opted for that which it considered to be the most appropriate, which was to undertake a limited reform of Directive 96/71, in the form of the adoption of Directive 2018/957, rather than to publish an interpretative communication or refrain from amending Directive 96/71. [25]

60. The EU institutions enjoy a broad discretion to amend a provision in the case, inter alia, where it is apparent from its application that changes have taken place in the field regulated or that there have been inconsistencies in its implementation. In this instance, it has been duly demonstrated that those two premisses are met to a sufficient degree to justify the need to replace the concept of 'minimum rates of pay' with that of 'remuneration'.

61. It may be inferred from the foregoing that the EU legislature complied with the requirements of the principle of proportionality, without *manifestly* exceeding its broad discretion in a technical and complex field such as that in question here, when it opted for a measure (to introduce the concept of remuneration) capable of attaining the objectives pursued. That measure itself makes it easier to improve protection for posted workers and to guarantee fair competition between local undertakings and those that post their workers.

[20] 'The task of defining what are the constituent elements of the minimum wage, for the application of that directive, therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States.' Judgments in *Sähköalojen ammattiliitto*, paragraph 34, and of 7 November 2013, *Isbir* (C-522/12, EU:C:2013:711, paragraph 37).

[21] Judgment in *Sähköalojen ammattiliitto*, paragraph 39.

[22] See Fondazione Giacomo Brodolini (FGB), *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 97/71/EC in a selected number of Member States and sectors*, Final report, November 2015; Schiek, Oliver, Forde, Alberti, *EU Social and Labour Rights and EU Internal Market Law*, Study for the EMPL Committee, European Parliament, September 2015 (http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU%282015%29563457_EN.pdf).

[23] Document SWD(2016) 52 final, of 8 March 2016, pp. 10 and 11.

[24] Document SWD(2016) 52 final, of 8 March 2016, pp. 11 to 14.

[25] Document SWD(2016) 52 final, of 8 March 2016, p. 23 et seq.

62. In the view of the Polish Government, the existence of significant discrepancies between the minimum wages in the various Member States is no justification either. To accept it as such would be to eliminate a competitive advantage enjoyed by EU countries where wages are lower and to disregard the fact that posted workers retain links with their State of origin. [26]

63. Differences in workers' pay between one Member State and another stems from the way in which wages are fixed, a matter falling within the exclusive competence of the Member States and social partners. This is borne out by the exception provided for in Article 153(5) TFEU, inasmuch as this excludes wages from the harmonising competence of the EU institutions.

64. It is for this reason that the third subparagraph of the new Article 3(1) of Directive 96/71 determines the 'concept of remuneration' by reference to the national law and/or practice of the Member State to whose territory the worker is posted, in the manner set out above. [27]

65. Discrepancies between the rules applicable to the remuneration of posted workers will therefore be inevitable until such time as the EU is competent to harmonise those rules. The same was true, as I have already explained, of the concept of 'minimum rates of pay' used in the original version of Directive 96/71.

66. It is on this basis that Directive 2018/957 clarifies what posted workers are to be paid: the concept of remuneration operates as a conflict-of-laws rule guaranteeing that posted workers will receive, in the host Member State, those elements of remuneration that are compulsorily payable to local workers.

67. That legislative option is respectful of the principle of proportionality and of the principles laid down in Article 56 TFEU. It does not, as the Polish Government claims, require that posted workers receive the minimum wage payable in the host Member State because their lives (and their household finances) are still basically linked to their State of origin.

68. Directive 2018/957 does not eliminate wage inequalities between Member States. Posted workers may receive remuneration different from that received by local workers (except as regards those elements of it that are compulsorily payable) and the taxation and social security costs of the undertaking employing them may in some cases be lower. What the EU legislature *did* do was to improve on the protection of posted workers as originally provided for under Directive 96/71.

69. The Polish Government also considers the concept of remuneration introduced by Directive 2018/957 to be unjustified because it compels employers to pay disproportionate wages to workers posted from Poland because they are required to include contributions for which those workers would not [otherwise] qualify.

70. As I have already said, the new wording of the third subparagraph of Article 3(1) of Directive 96/71 extends to posted workers only the *compulsory* elements of the remuneration paid to local workers. The other social security contributions which local employers pay to their workers do

[26] The citation of the judgment of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235), is misplaced since this concerns a case of freedom to provide services in which there is no posting of labour.

[27] See footnote 14. To the same effect, recital 17 of Directive 2018/957 recalls that the setting of the rules on remuneration falls within the exclusive competence of the Member States, which exercise that competence in accordance with national law and/or practice.

not have to be calculated or paid by employers posting workers. Any such additional social security contributions will be paid to posted workers in accordance with the legislation of the State of origin.

71. The reference in recital 18 of Directive 2018/957 to the gross amount of remuneration is not intended to mean that the latter includes social security contributions which do not form part of those elements of remuneration that are compulsorily payable in the host State. It is intended to ensure that account is taken of all remuneration paid to posted workers by their employers so that this amount can be compared with the remuneration compulsorily payable in the host State. [28]

3. Overall answer to the first part of the first ground for annulment

72. In short, I do not consider the legislative option of replacing the concept of 'minimum rates of pay' with that of 'remuneration' to be unjustified or disproportionate in relation to the objective of protecting posted workers. It is true that that option may reduce, but does not eliminate, the competitive advantages enjoyed by undertakings in EU countries with lower labour costs that post workers to Member States with higher labour costs. That reduction is, however, consistent with the purpose behind Directive 2018/957 of adjusting the balance that underpinned Directive 96/71 by henceforth laying greater emphasis on the protection of posted workers without abandoning the objectives of ensuring fair competition between undertakings and facilitating the freedom to provide transnational services.

C. Second part of the first ground for annulment: long-term posted workers

1. Arguments

73. The new Article 3(1a) provides for the category of long-term posted workers and distinguishes it from that of 'ordinary' posted workers, the former being those posted for longer than 12 (or, exceptionally, 18) months.

74. In the view of the Polish Government, the new status of long-term posted workers gives rise to unjustified and disproportionate restrictions on the freedom to provide services which are contrary to Article 56 TFEU. It submits in this regard that:

— Directive 2018/957 treats long-term posted workers in the same way as local workers and workers from other Member States who have exercised the freedom of movement for workers provided for in Article 45 TFEU.

— The new Article 3(1a) creates a regime applicable to long-term posted workers which is incompatible with Article 9 of the Rome I Regulation. [29]

— The new rule providing for the cumulation of posting periods (for the purposes of calculating the period triggering long-term posted worker status) is disproportionate.

[28] Hence the last sentence of that recital states that the remuneration of posted workers is to include payments for expenditure on travel, board and lodging, unless these relate to expenditure actually incurred on account of the posting.

[29] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'Rome I Regulation').

2. Assessment

75. The new category of long-term posted workers is distinguished from that of 'ordinary' posted workers. The distinguishing criterion is the effective duration of the posting: if this exceeds 12 (or, exceptionally, 18) months, an ordinary posted worker will become a long-term posted worker.

76. At the end of that period, the (now long-term) posted worker benefits from a different legal regime, inasmuch as he is subject not only to the working conditions provided for in Article 3(1), but also to those applied by the Member State where the work is performed.

77. As is clear from recital 9 thereof,[30] Directive 2018/957 does not have the effect of requiring long-term posted workers to be treated in absolutely the same way as local workers (be the latter nationals or workers from other Member States who have exercised their freedom of movement).

78. The legal position of long-term posted workers continues to be one anchored in (covered by) the freedom to provide services, as is clear from recital 10 of Directive 2018/957.[31]

79. Contrary to the argument put forward by the Polish Government, the new Article 3(1a) of Directive 96/71 does not establish full parity between long-term posted workers and local workers, since:

— According to that provision, 'the first subparagraph of this paragraph shall not apply to the following matters: (a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses; (b) supplementary occupational retirement pension schemes'.

— Article 3(1a) provides that 'all the applicable terms and conditions of employment … in the Member State where the work is carried out' are to apply to long-term posted workers 'irrespective of which law applies to the employment relationship'. This means, as the European Parliament notes in its observations, that the private international law underlying the legal relationship to which posted workers within this category are party does not change.[32]

— Long-term posted workers are treated in the same way as local workers as regards 'all the … terms and conditions of employment … in the Member State where the work is carried out'. These must be understood as being 'working conditions and the protection of workers' health and safety', which are governed by Directive 96/71, according to the new Article 1(1) thereof. The discrepancies in matters such as social security or taxation therefore remain.

[30] 'Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out. That period should be extended where the service provider submits a motivated notification.'

[31] 'Ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties. However, the rules ensuring such protection for workers cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services, including in cases where a posting exceeds 12 or, where applicable, 18 months. Any provision applicable to posted workers in the context of a posting exceeding 12 or, where applicable, 18 months must thus be compatible with that freedom. In accordance with settled case-law, restrictions to the freedom to provide services are permissible only if they are justified by overriding reasons in the public interest and if they are proportionate and necessary.'

[32] The Commission advocated a change to the legal regime governing the individual employment contracts of long-term posted workers, recommending that such workers be subject to the employment law of the host State. See Article 2a of Commission proposal COM(2016) 128 and impact assessment SWD(2016) 52 final, p. 25.

80. In my opinion, the rules governing the new category of long-term posted workers are justified and entail proportionate restrictions on the freedom to provide services which are compatible with Article 56 TFEU.

81. The establishment of a period of 12 (or, exceptionally, 18) months removes the uncertainty present in the original version of Directive 96/71, Article 2(1) of which defined a posted worker as being one who carried out his work in a country other than his State of origin 'for a limited period'. The new rule, as I have said, dispels that uncertainty by making it clear that a worker is to be regarded as being posted on a long-term basis if his posting lasts longer than 12 (or 18) months.

82. I also consider the status of long-term posted worker to be reasonable, inasmuch as it reflects the situation of workers who will be living in the host State for a long period of time and whose participation in the labour market in that State will therefore be more extensive. On that basis, it is logical (and proportionate) that such workers should be subject to a greater number of employment rules in the State of destination, while at the same time retaining their links with the State in which the undertaking for which they work is established.

83. Neither do I share the view of the Polish Government that the new regime applicable to long-term posted workers is incompatible with Article 9 of the Rome I Regulation.

84. That article refers to the 'application of the overriding mandatory provisions of the law of the forum', but the new Article 3(1a) of Directive 96/71 is not a *law* of that kind.

85. The relationship between that directive and the Rome I Regulation is determined by Articles 8 ('Individual employment contracts') and 23 ('Relationships with other provisions of Community law') of the latter. [33]

86. Finally, the Polish Government argues that the third subparagraph of the new Article 3(1a) of Directive 96/71 gives rise to a disproportionate restriction that is incompatible with Article 56 TFEU, because, for the purposes of calculating the cumulation of time, it takes into account the work rather than the situation of the worker. What is more, it does not set a limit on the time that can be factored into that calculation.

87. As the Council and the European Parliament argue, and as is made clear in recital 11 of Directive 2018/957, that provision serves to prevent the status of long-term posted worker from being circumvented and abused. That status could otherwise be bypassed by replacing one set of posted workers with another set to perform the same work.

88. It is true that, as the Polish Government states, there is some imprecision in the wording of that provision, since it does not set a limit on the time that can be factored into the cumulation of periods during which posted workers perform the same work.

89. Nonetheless, the Polish Government does not demonstrate in its observations that there are any less restrictive alternatives that would prevent fraudulent behaviour. It simply states that the measures for identifying genuine postings and preventing abuse and circumvention that are

[33] See the Opinion in Case C-620/18, points 191 to 200.

mentioned in Article 4 of Directive 2014/67 would be sufficient.[34] However, those measures are designed to prevent fraud in single postings rather than in rotations of workers posted to perform the same work.

90. I therefore suggest that the first ground for annulment be dismissed in its entirety.

VII. Third ground: infringement of Article 58(1) TFEU by virtue of the application of Directive 2018/957 to the transport sector

91. Given that the arguments relating to this ground are similar to those in Case C-620/18, I refer to the Opinion in Case C-620/18,[35] in accordance with which this ground should be dismissed.

VIII. Conclusion

92. In the light of the foregoing, I propose that the Court:

(1) Dismiss in its entirety the action brought by the Republic of Poland.

(2) Order the Republic of Poland to bear its own costs, as well as those of the European Parliament and the Council of the European Union.

(3) Order the European Commission and the German, French, Netherlands and Swedish Governments to bear their own costs.

[34] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2014 L 159, p. 11).

[35] Points 172 to 180.