



Press and Information

Court of Justice of the European Union
PRESS RELEASE No xx/20
Luxembourg, **Error! Reference source not found.**

Judgments in Cases C-**Error! Reference source not found.** and C-626/18
Error! Reference source not found. and Poland v **Error! Reference source not found.**
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The Court dismisses the actions brought by Hungary and Poland seeking the annulment of the directive strengthening the rights of posted workers

Given, in particular, the changes in the internal market following the successive enlargements of the European Union, the EU legislature could undertake a reassessment of the interests of undertakings taking advantage of the freedom to provide services and the interests of their workers posted to a host Member State, in order to ensure that the freedom to provide services is exercised by those undertakings and undertakings established in the host Member State on a level playing field

Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,¹ has been partially amended by Directive (EU) 2018/957.² The EU legislature endeavoured, when adopting Directive 2018/957, to ensure the freedom to provide services on a fair basis, by guaranteeing competition that would not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers. To that end, Directive 2018/957 seeks to ensure that the terms and conditions of employment of posted workers are as close as possible to those of workers employed by undertakings established in the host Member State.

Following that logic, Directive 2018/957 made, inter alia, amendments to Article 3(1) of Directive 96/71, in relation to the terms and conditions of employment of posted workers. The effect of those amendments, guided by the principle of equal treatment, is, in particular, that those workers are no longer subject to the 'minimum rates of pay' fixed by the legislation of the host Member State, but to the 'remuneration' provided for by that legislation, the latter concept being wider than that of the minimum wage. Further, where the effective duration of a posting exceeds 12 months or, exceptionally, 18 months, Directive 2018/957 required, by means of the insertion of Article 3(1a) into Directive 96/71, the application of almost all the terms and conditions of employment of the host Member State.

Hungary (Case C-620/18) and Poland (Case C-626/18) each brought an action seeking the annulment of Directive 2018/957. Those Member States relied on, inter alia, pleas in law claiming the choice of an incorrect legal basis for the adoption of that directive, an infringement of Article 56 TFEU, guaranteeing the freedom to provide services, and an infringement of the 'Rome I' Regulation.³ By its judgments, **the Court dismisses the two actions in their entirety.**

Findings of the Court

First, the Court states that **the EU legislature could rely, in the adoption of Directive 2018/957, on the same legal basis as that used for the adoption of Directive 96/71**, namely Article 53(1)

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

² Directive (EU) 2018/957 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, and corrigendum, OJ 2019 L 91, p. 77).

³ 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) ('the 'Rome I' Regulation').

and Article 62 TFEU,⁴ which permit, in particular, the adoption of directives seeking to make it easier to exercise the freedom to provide services.

As regards legislation which, like Directive 2018/957, amends existing legislation, it is important to take into account, for the purposes of identifying the appropriate legal basis, the existing legislation that it amends and in particular, its objective and content. Further, **where a legislative act has already co-ordinated the legislation of the Member States in a given EU policy area, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge.** The Court refers, in that respect, to the successive enlargements of the European Union that have occurred since the entry into force of Directive 96/71, and to an impact assessment, produced in the context of the amendment of that directive. That assessment finds that Directive 96/71 had given rise to an un-level playing field as between undertakings established in a host Member State and undertakings posting workers to that Member State, and to a segmentation of the labour market, because of a structural differentiation of rules on wages applicable to their respective workers.⁵

The Court states that the fact that Article 53(1) and Article 62 TFEU empower the EU legislature to coordinate national rules which may, by reason of their heterogeneity, impede the freedom to provide services between Member States, **cannot entail that that legislature need not also ensure due regard for, inter alia, the overarching objectives** laid down in Article 9 TFEU. **Those objectives include the requirements pertaining to the promotion of a high level of employment and the guarantee of adequate social protection.**

Accordingly, in order best to achieve the objective pursued by Directive 96/71, given the changed circumstances, **it was open to the EU legislature to adjust the balance inherent in that directive by strengthening the rights of posted workers in the host Member State so that competition between the undertakings posting workers to that Member State and the undertakings established in that State should develop on a more level playing field.**

The Court also adds, in that context, that Article 153 TFEU, which concerns solely the protection of workers and not the freedom to provide services within the European Union, could not constitute the legal basis of Directive 2018/957. Since that directive does not contain any harmonisation measures, but does no more than coordinate the legislation of the Member States in relation to the posting of workers, prescribing the application of certain terms and conditions of employment laid down as mandatory by the host Member State, that directive cannot be contrary to the exception to the competences of the Union laid down in the initial paragraphs of Article 153 TFEU that is specified in Article 153(5) TFEU.

Second, the Court examines the plea in law concerning a claimed infringement of Article 56 TFEU, and, more specifically, the claim that Directive 2018/957 removes the competitive advantage, in terms of costs, enjoyed by the service providers established in some Member States. The Court states that Directive 2018/957, in order to achieve its objective, undertakes a re-balancing of the factors affecting whether the undertakings established in the various Member States may compete with one another. However, that directive **does not remove any competitive advantage which the service providers in some Member States may enjoy**, since it has in no way the effect of eliminating all competition based on costs. The directive provides that posted workers are to be entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration rendered mandatory in that Member State. That directive does not therefore have any effect on the other cost components of the undertakings which post such workers, such as the productivity or efficiency of those workers, as mentioned in recital 16 of that directive.

Third, as regards the examination of the legality of the rules relating to the concept of 'remuneration' and the rules relating to long-term posting, laid down respectively in point (c) of the

⁴ Directive 96/71 was adopted on the basis of Article 57(2) and Article 66 EC, which were replaced by the abovementioned articles of the FEU Treaty.

⁵ Working document SWD(2016) 52 final of 8 March 2016, entitled 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71'.

first subparagraph of Article 3(1) and in Article 3(1a) of the amended Directive 96/71, the Court recalls that, when an action is brought before the Courts of the European Union for the annulment of a legislative act such as Directive 2018/957, those courts must be satisfied solely, with regard to the substantive legality of that act, that it does not infringe the EU and FEU Treaties or the general principles of EU law and that it is not vitiated by a misuse of powers. With regard to judicial review of compliance with those conditions, the EU legislature has a broad discretion in areas, such as the legislation relating to the posting of workers, in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. In the light of that broad discretion, the Court holds that, as regards the rule concerning long-term posting, the EU legislature did not commit any manifest error in holding that **the consequence of a posting for a period in excess of 12 months should be that the personal situation of the posted workers concerned should to an appreciable degree more closely resemble that of workers employed by undertakings established in the host Member State.**

Fourth, the Court states that the impact assessment, taken into consideration by the EU legislature in support of its position that the protection of posted workers provided for by Directive 96/71 was no longer appropriate, drew attention, in particular, to two circumstances which could reasonably have led the EU legislature to consider that the concept of 'minimum rates of pay' in the host Member State was no longer apt to ensure the protection of those workers. In the first place, the Court had adopted a broad interpretation of that concept in the judgment *Sähköalojen ammattiliitto*,⁶ to include a number of elements in addition to the minimum wage provided for by the legislation of the host Member State. Consequently, it could be found, in the impact assessment, that the concept of 'minimum rates of pay', as interpreted by the Court, was significantly at odds with the widespread practice of undertakings posting workers to another Member State, that practice being to pay to those workers only the minimum wage. In the second place, it is clear from the impact assessment that, in the course of 2014, substantial differences in remuneration had come to light, in several host Member States, between workers employed by undertakings established in those Member States and the workers who were posted there.

Fifth, the Court examines the alleged infringement of the 'Rome I' Regulation by Article 3(1a) of the amended Directive 96/71, which provides that, in the case of a posting that exceeds 12 months, the application of almost all the obligations laid down in the legislation of the host Member State to posted workers is to be mandatory, whatever the law applicable to the employment relationship. In that regard, the Court notes that Article 8(2) of the 'Rome I' Regulation provides that, where a choice of law has not been made, the individual employment contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work, that country not being deemed to change if the employee is temporarily employed in another country. However, Article 23 of the 'Rome I' Regulation provides for the possibility of derogation from the conflict-of-law rules established by that regulation, where provisions of EU law lay down rules on the law applicable to contractual obligations in certain areas. Given both its nature and its content, Article 3(1a) of the amended Directive 96/71 constitutes a special conflict-of-law rule, within the meaning of Article 23 of the 'Rome I' Regulation.

Unofficial document for media use, not binding on the Court of Justice.

The full texts of the judgments ([C-620/18](#) and [C-626/18](#)) are published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgments are available from " [Europe by Satellite](#) " ☎ (+32) 2 2964106

⁶ Judgment of the Court of 12 February 2015, *Sähköalojen ammattiliitto* ([C-396/13](#)). (See also Press Release No [17/15](#)).