E-12/10-34

REPORT FOR THE HEARING
in Case E-12/10

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between the

EFTA Surveillance Authority

and

Iceland

seeking a declaration that by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement, i.e. 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, as adapted to the EEA Agreement by Protocol 1 thereto.

I Introduction

1. The case concerns what requirements the EEA States are permitted to impose as regards the employment conditions of workers posted to their territory.

2. The parties disagree whether the requirements set out in Articles 5 and 7 of the Icelandic Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment ("the Posting Act") are incompatible with Article 36 EEA and Article 3 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[1] ("Directive 96/71", "the Directive" or "PWD").

[1] OJ 1997 L 18, p. 1.

3. According to the first and second paragraph of Article 5 of the Posting Act, in the event of illness, a worker posted to Iceland shall be entitled to two days paid leave for every month worked during the first twelve months of his posting to Iceland. Further, under the fourth paragraph of Article 5, a worker absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, shall retain, in addition, his daytime wages for three months. After the first twelve months of work in Iceland, Article 5 of the Labourers' Rights Act No 19/1979 applies to posted workers on the same basis as national workers. The entitlement under the Posting Act is without prejudice to the application of more favourable terms that the worker may enjoy according to his employment contract, collective agreement or his home State legislation. On the other hand, if home State provisions provide the posted worker with treatment (employment conditions) less favourable than the entitlement under Icelandic law, Article 5 of the Posting Act requires the posting undertaking to "top up" the worker's entitlement to sick leave payments.

4. Article 7 of the Posting Act provides that posted workers working in Iceland for a period of two continuous weeks shall be insured against accidents at work (death, permanent injury and temporary loss of working capacity). The insurance must cover accidents at work and on the normal route to/from the workplace. These requirements do not apply if the relevant home State provisions provide more favourable treatment. However, if those provisions provide less favourable treatment, the posting undertaking must "top up" the amount and the extent of insurance coverage.

5. The present case turns on whether Article 3 of the PWD prevents Iceland from maintaining these rules.

II Legal background

European law

6. Article 7 EEA reads:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*
>
> *...*
>
> *(b) an act corresponding to an EEC Directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

7. Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

8. Article 9 of the Treaty on the Functioning of the European Union ("TFEU") reads:

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

9. Article 53(1) TFEU reads:

In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

10. Article 62 TFEU reads:

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

11. Article 157 TFEU reads:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

...

12. Article 31 of the Charter of Fundamental Rights of the European Union – *Social security and social assistance* – reads:

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

13. Article 34 of the Charter of Fundamental Rights of the European Union – *Social security and social assistance* – reads:

> *1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.*
>
> *2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.*
>
> ...

14. Article 14 of the European Convention on Human Rights ("ECHR") – *Prohibition of discrimination* – reads:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

15. Article 1 of Protocol 1 to the ECHR – *Protection of property* – reads:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> ...

16. In Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[2] ("Regulation No 1408/71"), as amended, the definition in Article 1(j) reads:

> legislation *means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security ...*
>
> *The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. ...*

17. Article 4 of Regulation No 1408/71 – *Matters covered* – reads:

> *1. This Regulation shall apply to all legislation concerning the following branches of social security:*
>
> *(a) sickness and maternity benefits;*

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[2] OJ, English Special Edition 1971 (II), p. 416.

...

18. Article 12 of Regulation No 1408/71 – *Prevention of overlapping of benefits* – reads:

1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. ...

19. Article 13(2) of Regulation No 1408/71 – *General rules* – reads:

Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...

20. Article 14 of Regulation No 1408/71 – *Special rules applicable to persons, other than mariners, engaged in paid employment* – reads:

Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

1. (a) A person employed in the territory of a Member State by a undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months ...

(b) If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first Member State shall continue to apply until the completion of such work, provided that the competent authority of the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent; ...

21. The preamble to Directive 96/71 reads:

...

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment

relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

...

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;

(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

...

(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community lays down the provisions applicable with regard to social security benefits and contributions;

...

22. Article 3 of the PWD – *Terms and conditions of employment* – as amended by the adaptation contained at point 30 in Annex XVIII to the EEA Agreement reads:

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

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual holidays;
(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
(e) health, safety and hygiene at work;

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

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

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

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

...

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

...

10. This Directive shall not preclude the application by Member States, in compliance with the EEA Agreement, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

23. Article 6 of the PWD – *Jurisdiction* – reads:

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted...

National law

24. Article 65 of the Icelandic Constitution reads:

Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects.

25. Article 72 of the Icelandic Constitution reads:

> *The right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by public interests. Such a measure shall be provided for by law, and full compensation shall be paid.*
>
> *The right of foreign parties to own real property interests or shares in business enterprises in Iceland may be limited by law.*

26. The Labourers' Rights Act No 19/1979 provides in Article 5 that all workers who have been employed by the same employer for a period of at least one year shall remain entitled to a month's wages in case of absence from work due to illness or accident.

27. The Act also provides in Article 6 for an entitlement to wages in case of absence from work due to illness or accident in the first year of employment. During the first year of service with the same employer, in cases of illness and accidents, workers shall not be required to forfeit any of their wages, in whatever form these may be paid, at the rate of two days' wages for each month of service.

28. The latter entitlement is the corollary of the minimum requirements stipulated by universally applicable collective agreements.

29. Article 1 of Act No 55/1980 on Working Terms and Pension Rights Insurance reads:

> *Wages, and other working terms agreed between the social partners shall be considered minimum terms, independent of sex, nationality or term of appointment, for all wage earners in the relevant occupation within the area covered by the collective agreement. Contracts made between individual wage earners and employers on poorer working terms than those specified in the general collective agreement shall be void.*

30. Article 1 of the Posting Act – *Scope* – reads:

> *This Act applies to undertakings that are established in other Member States of the European Economic Area... which post their workers temporarily in Iceland in connection with the provision of services ...*

31. Article 3 of the Posting Act – *Definitions* – reads:

> *For the purposes of this Act, the following terms are defined as follows:*
>
> *1. Undertaking: Undertaking is an individual, company or other party that runs a business operation and is established in another Member State of the European Economic Area... and provides services in Iceland under the Agreement on the European Economic Area... .*
>
> ...

3. Worker: A worker who normally works outside Iceland, but is posted temporarily in Iceland on the account of an undertaking (cf. item 1) in connection with the provision of its services.

32. Article 4 of the Posting Act – *Terms and condition of employment* – reads:

In the event of the posting of workers in Iceland in the sense of this Act, the following legislation, and regulations issued thereunder, shall apply to their conditions of employment, irrespective of the foreign legislation covering other aspects of the employment relationship between the worker and the relevant undertaking:

1. *Article 1 of the Working Terms and Pension Rights Insurance Act, No. 55/1980, with subsequent amendments, regarding minimum wages and other wage-related issues, overtime payments, the right to vacation pay, maximum working hours and minimum rest periods.*
2. *The Act on Working Environment, Health and Safety in the Workplace, No. 46/1980, with subsequent amendments.*
3. *The Holiday Allowance Act, No. 30/1987, with subsequent amendments.*
4. *Article 4 of the Vessel Inspection Act, No. 47/2003.*
5. *Section VI of the Air Traffic Act, 60/1998.*
6. *Articles 11, 29 and 30 of the Maternity, Paternity and Parental Leave Act, No. 95/2000.*
7. *The Act on the Equal Status and Equal Rights of Women and Men, No. 96/2000, and also other legal provisions proscribing discrimination.*

The first paragraph of this Article shall apply without prejudice to more favourable terms and condition of employment for worker according to his employment contract with the relevant undertaking, or a collective agreement or legislation in the state in which he normally works.

Payments that relate specifically to the employment shall be calculated as part of the worker's minimum wages. ...

33. Article 5 of the Posting Act – *Entitlement to wages in the event of illness and accidents* – reads:

Worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

Worker shall acquire entitlements through his work in Iceland for the same undertaking such that for each month worked during the first twelve months, two days shall be paid at regular wages. If the worker works for more than one year in Iceland, the acquisition of accumulation of entitlement to wages in the event of illness and wage payments shall be in accordance with Article 5 of the Act No. 19/1979, Respecting Workers' Right to Advance Notice of Termination of Employment and to Wage on Account of Absence through Illness or Accidents.

Entitlement to wages in the event of illness is an aggregate entitlement during each twelve-month period, irrespective of the type of illness.

If worker is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, he shall retain his daytime wages for three months in addition to their entitlement under the second paragraph of this Article.

...

If worker receives wages during absence resulting from illness or accidents in accordance with his employment contracts, collective agreements or the laws of his home country, he shall be paid the difference in wages if his entitlement under this provision is more to his advantage.

If the undertaking so requests, the worker shall submit to it a medical certificate regarding the illness or accident, demonstrating that he has been unfit for work due to the illness or accident. The undertaking shall pay for the medical certificate and the cost of obtaining it, providing that it is notified of the illness the first day of absence due to illness.

The provisions of this Article shall apply without prejudice to more advantageous entitlements that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

34. The first, seventh and ninth paragraphs Article 7 of the Posting Act – *Accident insurance covering death, permanent injury and temporary loss of working capacity* – read:

Worker who works in Iceland for a period of two continuous weeks or longer shall be insured at works against death, permanent injury and the temporary loss of working capacity. The insurance shall cover accident that occur at work and on a normal route between the worker's workplace and the dwelling place in Iceland, and shall take effect when two weeks' continuous working period in Iceland have been completed.

...

Compensation shall not be paid to worker under this provision if he receives compensation for his injury from legally-prescribed accident insurance ... . If the employer is liable to pay compensation to a worker who is insured against accidents under this provision, then compensation and per diem *allowances that may be paid to the worker shall be deductible in full from the compensation that the undertaking may be required to pay.* Per diem *allowances shall be paid to the undertaking as long as it pays the worker wages in respect of the accident.*

...

This provision shall apply without prejudice to more advantageous insurance cover that the worker may have according to his employment

contract with the relevant undertaking, a collective agreement or legislation in the state where he normally works.

III Pre-litigation procedure

35. Following a meeting in Reykjavík on 24 and 25 May 2007, the EFTA Surveillance Authority ("ESA") sent Iceland several questions regarding the Posting Act. By letter of 5 February 2008, Iceland replied with information on various issues in the Act.

36. By letter of 18 April 2008, ESA invited Iceland to provide further information concerning the terms and conditions of employment applicable to posted workers. By letter of 22 May 2008, Iceland provided ESA with the information requested.

37. On 11 March 2009, ESA sent a letter of formal notice to Iceland for failure to ensure compliance with Article 36 EEA and Article 3 of the PWD. Iceland neither submitted observations in response to the letter of formal notice within the time limit prescribed nor requested an extension of the period in which to reply.

38. The letter of formal notice was discussed at meetings in Reykjavík on 3 and 4 June 2009. In a follow-up letter, Iceland was invited to provide ESA with additional information on the framework applicable to sickness pay provided for in law and collective agreements. Iceland was also invited to comment on the comparison between the term "pay" mentioned in Article 3(1)(c) of the PWD and the concept used in Article 5 of the Posting Act. Iceland did not reply to the letter.

39. On 25 November 2009, ESA delivered a reasoned opinion. By letter dated 16 February 2010, Iceland stated that following consultation with the social partners it was intended to submit a bill to Parliament with a view to amending the Posting Act taking account of the comments made by ESA. The intention was for the bill to be submitted to Parliament in February or March 2010.

40. By letter of 16 March 2010, Iceland informed ESA that a bill had been prepared to amend the Posting Act in order to comply with ESA's conclusion that the obligation imposed on undertakings to register and provide information (Articles 8, 10 and 11 of the Act) was incompatible with EEA law. However, as regards Articles 5 and 7 of the Posting Act, which ESA had also concluded were incompatible with EEA law, Iceland disputed ESA's conclusions. On 15 June 2010, the Icelandic Parliament adopted Act No 96/2010 amending the Posting Act.

41. On 16 June 2010, ESA decided to refer the matter regarding Articles 5 and 7 of the Posting Act to the Court in accordance with Article 31 of the Surveillance and Court Agreement. As for Articles 8, 10 and 11 of the Posting

Act, the amending Act was considered sufficient to comply with ESA's reasoned opinion of 25 November 2009.

42. On 18 August 2010, ESA lodged the application commencing the action at the Court.

IV Forms of order sought by the parties

43. The EFTA Surveillance Authority requests the Court to declare that:

1. *By maintaining in force Articles 5 and 7 of Act No. 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement,* 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 *as adapted to the EEA Agreement by Protocol 1 thereto.*

2. *The Republic of Iceland bear the costs of these proceedings.*

44. Iceland requests the Court to declare that:

The application is dismissed.

V Written procedure before the Court

45. Written arguments have been received from the parties:

- the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, acting as Agents; and
- Iceland, represented by Bjarnveig Eiríksdóttir, Attorney at Law, and Dóra Sif Tynes, Attorney at Law, acting as Agents, and Íris Lind Sæmundsdóttir, Legal Officer at the Ministry for Foreign Affairs, acting as Co-Agent.

46. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Republic of Finland, represented by Henriikka Leppo, Legal Counsellor, acting as Agent;
- the Kingdom of Norway, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents; and

- the European Commission, represented by Johan Enegren, acting as Agent.

VI Summary of the pleas in law and arguments submitted

The EFTA Surveillance Authority

Preliminary remarks

47. The EFTA Surveillance Authority does not dispute the universal applicability of collective agreements under Icelandic law. However, it fails to see the relevance of that fact as the two requirements contested in this case are both imposed by legislation (Articles 5 and 7 of the Posting Act).

48. ESA does not dispute the fact that rights substantively similar to those granted to posted workers by virtue of Articles 5 and 7 of the Posting Act constitute minimum employment rights under Icelandic labour law. However, ESA considers this irrelevant to a resolution of the dispute as the Directive permits the host EEA State to impose its own labour law requirements only in respect of the matters listed in Article 3(1)(a)–(g).

49. ESA thus stresses the importance of employment terms being included among the issues listed in Article 3(1) of the PWD. It contends that the Article sets out an exhaustive list in respect of which the Member States may give priority to the rules in force in the host Member State.[3] Accordingly, employment conditions falling outside the scope of the Article are, in principle, incompatible with the Directive and Article 36 EEA.

Article 5 of the Posting Act is incompatible with Article 3(1)(c) of the PWD

50. According to ESA, Iceland has taken the view that the right to paid sick leave in accordance with Article 5 of the Posting Act falls within the concept of "minimum rates of pay" mentioned in Article 3(1)(c) of the PWD. ESA disagrees, essentially submitting that the latter Article does not extend to sick leave.

51. ESA acknowledges that the Directive does not harmonise the material content of the mandatory rules for minimum protection and that, accordingly, this content may be defined by the EEA States, subject to compliance with the EEA Agreement and the general principles of EEA law.[4] Consequently, the definition of the concept of "minimum rates of pay", referred to in Article 3(1)(c) of the PWD, is, in principle, a matter for the EEA States and may vary from one State to another. ESA further submits that the same applies with regard to the various

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[3] Reference is made to Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraphs 25 and 26.

[4] Reference is made to Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60 and the case-law cited therein.

methods applicable in the EEA States in calculating minimum rates of pay, in using particular periods of time as a reference (month, week, hours worked) and/or the productivity of workers. ESA adds that the Commission has stated that the Member States may determine the various allowances and bonuses included in the minimum pay applicable under Directive 96/71, but that in doing so they must remain within the limits set out in case-law from the Court of Justice of the European Union ("ECJ").[5]

52. ESA notes that the Directive was adopted on the basis of Articles 53(1) and 62 TFEU and submits, consequently, that the aim was to facilitate the freedom to provide services. Accordingly, a wide interpretation of Article 3 of the PWD to the detriment of service providers would be inconsistent with the legal bases. Moreover, ESA considers such interpretation incompatible with the ECJ finding that the list in Article 3(1) of the PWD is exhaustive.

53. ESA considers it inherent in the concept of "minimum rates of pay" that it constitutes remuneration for work actually performed by the posted worker under his employment contract. Article 3(1)(c) of the PWD refers to minimum rates of pay which in ESA's understanding refers to levels of pay reflected in nominal terms. It points out that when determining the content of minimum rates of pay in the context of this provision the ECJ has stated that it is the "gross amount of wages" that must be taken into account.[6] In ESA's view, other minimum employment rights cannot be included nor can minimum rates of pay be regarded as synonymous with all rights that may have a monetary value. According to ESA, such an interpretation would allow the limitations contained in Article 3(1) of the PWD to be circumvented.

54. ESA disagrees with Iceland that its own interpretation reduces the scope of national law in defining the minimum wage simply to the stipulation of hourly rates. According to ESA, national law may define the minimum wage for example in terms of hourly or monthly rates or apply a piece rate system. However, in ESA's view, it does not follow from using a monthly rate as a benchmark for the minimum wage that a worker is necessarily entitled to payment for the full month if he has been absent due to illness. It states as an example that under Icelandic labour law a worker receiving a fixed monthly wage who has been absent from work on grounds of illness for a period exceeding his accrued rights to sickness pay will have his monthly wage reduced in accordance with more detailed rules laid down in the relevant collective agreement.

55. As ESA sees it, in contrast to remuneration for work carried out, the right to sickness pay arises only on condition that a certain event takes place, namely, that a worker falls sick and is unable to perform his duties under the employment contract. ESA observes further that under Icelandic labour law an employer may

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5 Reference is made to SEC(2006) 439 of 4.4.2006, p. 16.

6 Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 29.

request a worker to submit a doctor's certificate to prove his eligibility for sickness pay. According to ESA, where those procedural requirements are satisfied, sickness pay comes as a replacement for loss of wages which the worker would have received if he had been able to comply with the contract.

56. With respect to the definition of "pay" established in Article 157(2) TFEU and related ECJ case-law to which Iceland refers, ESA acknowledges that, in the light of the wording and purpose of this provision on equal pay for men and women, the ECJ has adopted a wide definition of "pay".[7] However, ESA fails to see how this is relevant to the interpretation of Article 3(1)(c) of the PWD as the legal bases and purposes of the two sets of rules are different and there is no further link between them.

57. ESA asserts that the margin of discretion left to the EEA States cannot be interpreted so widely as to permit the EEA States to impose on posting undertakings terms and conditions of employment not listed in Article 3(1) of the PWD. In ESA's view, this is consistent with the interpretation of Article 3(7) of the PWD adopted by the ECJ, according to which this latter provision cannot justify the imposition of better terms than those provided for in Article 3(1) of the PWD. Consequently, it would be inconsistent with the rationale of that interpretation if the EEA States had the freedom to interpret Article 3(1) of the PWD so widely as to encompass employment rights other than those listed.

58. ESA adds some remarks on Case C-341/02 *Commission* v *Germany*, cited above. First, ESA disagrees with Iceland that the quoted phrase "gross amount of wages" supports the view that if sickness pay is defined under national law as part of the minimum wage, that right must also be covered by Article 3(1)(c) of the PWD. According to ESA, it is clear from what the dispute concerned that this view is incorrect. In essence, the case concerned to what extent the host Member State is allowed to exclude certain types of allowances and supplements paid by the foreign undertaking as not being component elements of the minimum wage. Second, ESA finds nothing significant in the ECJ's use of the term "minimum wage" and not "minimum rates of pay" as mentioned in Article 3(1)(c) of the PWD. According to ESA, the ECJ uses the terms synonymously, a usage which might be explained by the fact that the ECJ was not asked to assess specifically whether the relevant definition under German law complied with the term "minimum rates of pay". Moreover, ESA observes that the French language version of the judgment uses the term "les taux de salaire minimal", as does the French version of the Directive, whereas the English version of the judgment uses both "minimum wages" and "minimum rates of pay".

59. Furthermore, ESA contends that the English term in the Directive, "minimum rates of pay", is synonymous with, for example, the French "les taux de salaire minimal" and the Danish "mindsteløn". In ESA's view, the key issue is

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[7] Reference is made to Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 12 and the case-law cited therein.

that while the term covers whatever is defined by national law as the minimum wage, other employment rights cannot be covered by the term. ESA submits that it has not been presented with any language versions to undermine its contention that minimum wages (rates of pay) are reflected in nominal terms.

60. Finally, ESA details its understanding of how Article 3 of the PWD has been implemented in Icelandic law, that is, in Article 4 of the Posting Act. According to ESA, the legislative history of that provision indicates that Article 4 of the Posting Act contains the items which the Icelandic Parliament considered to come within the scope of Article 3 of the PWD. ESA submits that those items encompass "minimum wages and other wage-related issues", including "overtime payments", corresponding to what Article 3(1)(c) of the PWD prescribes. In ESA's view, Article 5 of the Posting Act introduces as a specific employment right the right to paid sick leave, thus underlining its particular and identifiable nature, separate from the right to receive minimum rates of pay.

Article 3(1)(c) of the PWD and Regulation No 1408/71

61. In ECJ case-law on the classification of sickness leave under Regulation No 1408/71, ESA finds further support for its conclusion that the concept of minimum rates of pay under Directive 96/71 does not extend to paid sickness leave. It makes particular reference to *Paletta*,[8] in which an obligation on an employer under German law to maintain wages in the event of illness, similar – according to ESA – to the sickness leave provided for under Article 5 of the Posting Act, in particular the right to three months of daytime wages provided for in the fourth paragraph, was classified as a sickness benefit. In ESA's view, it appears illogical if similar rights can be classified as both sickness benefits and minimum rates of pay under EEA law. It notes that recital 21 in the preamble to the Directive refers to Regulation No 1408/71 stating that the Regulation lays down the provisions applicable to social security benefits and contributions. In ESA's view, that reference suggests that the Directive does not cover issues regulated under Regulation No 1408/71. ESA also considers Iceland's reference to Article 1(j) of Regulation No 1408/71 – by which provisions of existing and future collective agreements are excluded from the concept of "legislation" – to be misplaced. In ESA's view, as the contested requirement is based on law (Article 5 of the Posting Act), that argument must be dismissed as irrelevant.

Article 3(1)(c) of the PWD, Icelandic labour law and Article 5 of the Posting Act

62. On the assumption, contrary to ESA's submission, that sickness pay comes within the scope of Article 3(1)(c) of the PWD in general, ESA submits that it falls to be assessed specifically whether Icelandic labour law defines such pay as being part of the minimum wage. ESA considers that not to be the case.

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[8] Case C-45/90 *Paletta* [1992] ECR I-3423. Reference is also made to Case C-332/05 *Celozzi* [2007] ECR I-563.

63. ESA submits that Iceland has failed to refer to any provision of Icelandic law stating that sickness pay is part of the minimum wage. It argues further that Article 1 of Act No 55/1980 on Working Terms and Pension Rights Insurance, adduced by Iceland, cannot be interpreted to this effect when due account is taken of its wording and purpose. ESA adds that it is incumbent on Iceland, when it advances an interpretation that is not easily discernible from the text of the Article, to adduce evidence in support of its interpretation.[9]

64. ESA thus takes the view that Icelandic law does not define sickness pay as part of a minimum wage. It submits further, illustrating this point with a specific example, that in collective agreements under Icelandic law pay is habitually defined as remuneration for work performed whereas sickness pay is regarded as a separate item distinct from pay.

65. ESA argues further that due to the distinct nature of the right to paid sick leave, the part of the workforce which does not make use of it has no right to credit for any unused sick leave, for example, in the form of a payment at the end of the employment relationship. ESA contends that this differs from the rules on wages according to which all unpaid wages must be paid at the end of the employment relationship.

66. In the light of Iceland's remarks on the English translation of the Posting Act, ESA observes that it considers the two expressions "sickness pay" and "entitlement to wages in the case of illness and accident" to be synonymous. As ESA sees it, both expressions cover the same situation, namely, where an employer is obliged to pay an employee despite his absence from work due to sickness (or accident).

Article 3(1)(c) of the PWD and Article 72 of the Icelandic Constitution

67. ESA does not dispute Iceland's assertion that wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property. However, ESA considers this irrelevant to the case at hand, arguing that the issue is not whether wages may be regarded as constitutionally protected property rights, but whether sick leave forms part of the definition of minimum wages.

Article 3(1)(c) of the PWD and ILO Convention No 95

68. ESA considers that the reference made by Iceland to the definition of wages in ILO Convention No 95 on the Protection of Wages has no bearing on the interpretation of Article 3(1)(c) of the PWD since the Convention is concerned with other matters, such as the form and procedures in relation to the payment of wages. Even on the assumption that the Convention is relevant as a matter of EEA law, ESA considers that, given the subject matter of the Convention and its purpose, it cannot serve as a frame of reference for the concept of minimum rates

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[9] Reference is made to Case C-543/08 *Commission* v *Portugal* [2010] ECR I-0000, paragraph 60.

of pay under Article 3(1)(c) of the PWD. ESA also adds that Iceland does not appear to be a party the Convention.

Article 7 of the Posting Act is incompatible with Article 3(1) of the PWD

69. ESA considers it evident from the wording of Article 3(1) of the PWD that it does not encompass such requirements as those provided for in Article 7 of the Posting Act, which consequently fall outside the nucleus of mandatory rules for minimum protection to be observed in the host country by companies posting workers there.[10] In ESA's view, Article 7 of the Posting Act is therefore incompatible with the Directive.

70. In this context, ESA considers it to be irrelevant how the rule is classified under national law, for example, as a rule of tort law or insurance law.

Article 3(7) of the PWD

71. ESA reiterates its arguments to the effect that the ECJ has found that the Directive must be interpreted as laying down a nucleus of mandatory rules for minimum protection and that, to this end, Article 3(1) of the PWD must be understood as setting out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.[11]

72. Against this background, ESA examines Article 3(7) of the PWD which provides that Article 3(1)–(6) shall not prevent the application of terms and conditions of employment that are more favourable to workers. ESA observes that in *Laval un Partneri*, cited above, the ECJ held that Article 3(7) of the PWD could not be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection and that such an interpretation would amount to depriving the Directive of its effectiveness.[12] ESA further submits that the ECJ thus concluded that the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1)(a)–(g) of the PWD unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment.[13]

73. According to ESA, it follows that Member States are not entitled on the basis of Article 3(7) of the PWD to impose standards of minimum protection in

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10 Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 25 and 26.

11 Reference is made to *Laval un Partneri*, cited above, paragraph 59, and *Commission* v *Luxembourg*, cited above, paragraphs 24 to 26.

12 Reference is made to *Laval un Partneri*, cited above, paragraph 80.

13 Reference is made to *Laval un Partneri*, cited above, paragraph 81, and Case C-346/06 *Rüffert* [2008] ECR I-1989, paragraphs 33 to 36.

areas beyond those listed in Article 3(1)(a)–(g). Therefore, Article 3(7) of the PWD cannot serve as a basis for maintaining Articles 5 and 7 of the Posting Act. ESA submits that those provisions can only be regarded as complying with Article 3 of the PWD if they fall under Article 3(10) on public policy.

Article 3(10) of the PWD – the public policy exception

74. In response to Iceland's assertion that Articles 5 and 7 of the Posting Act may be justified under the exception for public policy provisions set out in the first indent of Article 3(10) of the PWD, ESA submits, with particular reference to *Commission* v *Luxembourg*, cited above, that the exception must be interpreted strictly and that its scope cannot be determined unilaterally by the EEA States. ESA further submits that the exception also does not exempt the EEA States from complying with their obligations under the EEA Agreement and, in particular, those relating to the freedom to provide services.[14] In reply to Iceland's argument that Declaration No 10 to the Directive, referred to by the ECJ in the judgment, has not been incorporated into the EEA Agreement, ESA asserts that this is irrelevant to the present case since the ECJ held that the concept of public policy had to be understood in the context of the PWD in the same manner as in other areas of Community law. In this connection, ESA observes that the ECJ in a subsequent part of the judgment held also that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[15]

75. ESA asserts that Articles 5 and 7 of the Posting Act as a matter of principle cannot be regarded as public policy provisions and that the requirements established by the ECJ are not fulfilled. ESA submits that the ECJ has only in a very few cases accepted that Member States can rely on a public policy exception. ESA cites the judgments in *Omega*, *Van Duyn* and *Krombach* and argues that the issues raised in those cases are far removed from the requirements contained in the Posting Act.[16]

76. On ESA's understanding, Iceland also argues that the provisions of the Posting Act enjoy the status of public policy provisions because they ensure the protection of human rights, more specifically the right to property as enshrined in Article 72 of the Icelandic Constitution and Article 1 of Protocol 1 to the ECHR. However, ESA fails to see how these provisions, given their material content, can be decisive with regard to the compatibility with the Directive of Articles 5 and 7 of the Posting Act. Having regard to the judgment in *Krombach*,[17] ESA submits

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14 Paragraphs 29 to 33 of the judgment.

15 Ibid., paragraph 50.

16 Case C-36/02 *Omega* [2004] ECR I-9609, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 19, and Case C-7/98 *Krombach* [2000] ECR I-1935.

17 Cited above, paragraph 44 of the judgment.

that, in any case, only a manifest breach of fundamental rights is relevant and that the present case suggests nothing of that kind.

77. ESA further submits that, in any case, it is incumbent upon Iceland to demonstrate that Articles 5 and 7 of the Posting Act constitute public policy provisions. According to ESA, it is for Iceland to give the necessary reasons, which must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted, and precise evidence enabling the arguments to be substantiated.[18] In any event, ESA is of the opinion that Iceland has not fulfilled these requirements.

78. ESA disagrees with Iceland's assertion that there is a general principle in EEA law under which the terms and conditions of employment of workers shall be governed by the labour legislation of the State where the work is carried out. According to ESA, the general principle is that the terms and conditions of employment of workers are governed by the law chosen by the parties and temporary employment in a different country from the one in which the work is habitually carried out does not affect the validity of that choice.

79. Furthermore, ESA submits that it is not the purpose of Directive 96/71 to guarantee posted workers equal treatment in respect of all employment rights in the EEA State to which they are posted by their employer. In that respect, ESA disagrees with Iceland, arguing that such equal treatment cannot be secured via a wide interpretation of the concept of public policy, which has no basis in EEA law.

80. Finally, with regard to Article 7 of the Posting Act, and in the light of submissions by Iceland, ESA argues that the objective of ensuring that employers contribute to financing of the social security system does not constitute public policy. In this respect, ESA submits that, according to settled case-law, economic aims cannot constitute grounds of public policy.[19]

Restrictions under Article 36 EEA

81. According to ESA, Article 36 EEA requires the abolition of any restriction on the freedom to provide services, which is liable to prohibit, impede or render less advantageous activities of a service provider established in another Member State, unless it pursues a legitimate objective and is suitable and proportionate.[20]

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[18] Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 51 and 52.

[19] Reference is made to Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11, and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 15.

[20] Reference is made to Case E-1/03 *ESA* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 28; Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-279/00 *Commission* v *Italy* [2002] ECR I-1425, paragraph 31.

82. ESA submits that the ECJ has held that requiring undertakings established in other Member States to comply with requirements relating to matters not listed in Article 3(1) of the PWD is liable to make it less attractive or more difficult to carry out work in the host State and thus constitutes a restriction on the freedom to provide services.[21] ESA argues that this applies to Articles 5 and 7 of the Posting Act.

83. ESA acknowledges that protection of workers is a recognised overriding requirement in the general interest which may justify a restriction.[22] It argues, however, that requirements outside the scope of Article 3(1) of the PWD cannot be justified under that overriding requirement as the coordination achieved by the Directive regulates exhaustively (save for Article 3(10)) the issue of minimum protection for posted workers.[23] It submits that this is in conformity with consistent ECJ case-law which prevents recourse to overriding requirements in the general interest once secondary legislation exists providing for measures necessary to ensure protection of that interest.[24]

84. In ESA's view, it follows that a restriction on the freedom to provide services entailing the imposition of terms and conditions going beyond the nucleus of mandatory protection laid down in Article 3(1) of the PWD is only justifiable under the exception for public policy provisions in Article 3(10).

85. As ESA finds the case to concern legislative measures rather than collective action by trade unions, ESA fails to see the relevance of the overriding requirement concerning the right to take collective action against social dumping mentioned by Iceland. In any event, ESA submits, Article 3 of the PWD and Article 36 EEA do not hinder workers on the Icelandic labour market from taking collective action to safeguard their own minimum rights or to ensure that the mandatory protection under Article 3(1) of the PWD is respected.

Posted workers and social security under Regulation No 1408/71

86. ESA adds some remarks in response to submissions from Iceland regarding social security. At the outset, ESA submits that Article 3 of the PWD does not provide the EEA States with authority to impose requirements on posted workers on the basis that the requirements are within the ambit of Regulation No 1408/71.

87. Further, it seems to ESA that Iceland confuses the definition of the term posted worker for the purposes of Article 36 EEA and Directive 96/71 with the

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21 Reference is made to *Laval un Partneri*, cited above, paragraph 99.

22 Reference is made to Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33.

23 Reference is made to *Laval un Partneri*, cited above, paragraph 108.

24 Reference is made to Case C-257/05 *Commission* v *Austria* [2006] ECR I-134, paragraph 23, and Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 74.

definition in Article 14(1) of Regulation No 1408/71. ESA submits that the general rule under Regulation No 1408/71 is that a person's insurance benefits are defined by the legislation of the country of occupation (Article 13(2)(a) of Regulation No 1408/71) and that one of the exceptions to this rule is the posting of workers governed by Article 14(1) of Regulation No 1408/71. ESA further submits that, according to settled ECJ case-law, Article 14(1) applies to a worker who is subject to the legislation of a Member State, by reason of being employed by an undertaking in that Member State, with a view to his posting to another Member State provided that there exists a direct relationship between the undertaking and the worker during his period of posting and that the undertaking normally carries out its activities in the first Member State.[25]

88. ESA argues, therefore, that if the worker is a posted worker under Article 14(1) of Regulation No 1408/71, all rights and obligations of the home State in the field of social security remain applicable for the entire duration of the posting to the host State. On the other hand, if a foreign worker intends to register as a posted worker with the Icelandic social security system, but cannot provide documentation proving his status as a posted worker under Regulation No 1408/71, he will be covered by Article 13(2)(a) of that Regulation. ESA asserts that the consequence of that is that he will be covered by the legislation of the host State. In such a situation, EEA law permits Iceland to require the employer to pay social security contributions in accordance with Icelandic law. According to ESA, problems confronted by the national authorities in determining who is a posted worker in the meaning of Article 14(1) of Regulation No 1408/71 cannot serve as an overriding requirement in the general interest to justify the imposition on foreign service providers of the obligation to take out an accident insurance such as that prescribed by Article 7 of the Posting Act.

The Charter of Fundamental Rights of the European Union

89. ESA submits that Article 34 of the Charter, as referred to by Iceland, concerns the right to social security and social assistance in accordance with Community and national law. In ESA's view, its conclusion that Articles 5 and 7 of the Posting Act are incompatible with Directive 96/71 does not call into question the rights posted workers may have to social security under Regulation No 1408/71 or other instruments of EEA law. Similarly, ESA submits that nothing in the EEA Agreement prevents Iceland from granting posted workers access to benefits under its own system of social security. In any case, ESA is of the opinion that for the purposes of this case it is unnecessary to examine in detail the relationship to provisions of the Charter.

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[25] Reference is made to Case 35/70 *Manpower* [1970] ECR 1251, paragraphs 16 to 19, and Case C-202/97 *FTS* [2000] ECR I-883, paragraphs 22, 26 and 31.

Iceland

Fundamental importance of collective agreements being declared universally applicable

90. Iceland asserts that it is pivotal to the case that collective agreements in Iceland are universally applicable. It argues that all the ECJ case-law relied on by ESA in its application, including *Laval un Partneri* and *Commission* v *Luxembourg*, cited above, concerned requirements in collective agreements that were not universally applicable and that this was a decisive element in those cases. Iceland claims that the situation in the case at hand is therefore materially different as the agreements concerned are universally applicable.

91. Iceland takes the view that the Posting Act is not the source of the disputed requirements but merely constitutes additional legal protection of requirements laid down in such agreements. It submits, therefore, that, ultimately, the case turns on the universally applicable collective agreements in Iceland, not the Posting Act.

Relevant law

92. Iceland cites a considerable number of provisions of national law and in different fields of European law, including the ECHR, the TFEU and the Charter of Fundamental Rights of the European Union, to substantiate its pleas in law. Iceland considers the case to concern not only Article 3 of the PWD as such, but also other legal issues reaching considerably further. The various provisions cited by Iceland are quoted in section II above.

Entitlement to wages in case of illness or accident – introductory remarks

93. Iceland maintains that the entitlement to wages in case of illness or accident is included in the term "minimum rates of pay" in Article 3(1)(c) of the PWD and inherent in the concept of "minimum rates of pay" in Icelandic labour law.

EEA law and the concept of "minimum rates of pay"

94. At the outset, Iceland argues that the concepts of "pay" and thus "minimum rates of pay" are not generally harmonised in EEA law. By way of example, Iceland submits that the ECJ has held that the concept of "pay" in directives on social policy, such as the Pregnancy Directive,[26] is not the same as the concept of "pay" for the purposes of Article 157 TFEU.[27]

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[26] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348, p. 1.

[27] Reference is made to Case C-411/96 *Boyle and Others* [1998] ECR I-6401.

95. Furthermore, Iceland argues that the concept of "minimum rates of pay" or "minimum wage" is also not harmonised for the purposes of Directive 96/71. Subject to compliance with the EEA Agreement and general principles of EEA law, Iceland asserts that it is for Icelandic labour law and universally applicable collective agreements in Iceland to determine what constitutes the minimum wage for the purposes of implementation of the Directive in Iceland[28] and that nothing prevents Iceland from including entitlement to wages in case of illness or accident as part of a minimum wage determined on a monthly basis.

96. In this context, and in support of its national freedom with respect to defining the relevant "minimum rates of pay", Iceland makes reference to Article 7 EEA, according to which EEA States have the choice of form and method when implementing Directives.

97. Moreover, Iceland claims to find support for its assertions in the different language versions of the Directive. It submits that the different language versions use terms which are not entirely synonymous, but reflect the different notions of "minimum rates of pay" or minimum wages in national labour law and that, therefore, these different notions are decisive in determining what constitutes the minimum wage for the purposes of applying the Directive in each EEA State. It further submits that terms such as the Icelandic "lágmarkslaun" and the Danish "mindsteløn" refer in Nordic labour law to the determination of minimum wages on either a monthly or hourly basis. Consequently, Iceland argues that, at least in Icelandic labour law, it is inherent in the determination of minimum wages on a monthly rather than an hourly basis that the worker's right to absence from work due to illness or accident is included in the calculation.

98. In this context, Iceland also submits that a strict textual understanding of the English language term "minimum rates of pay" cannot be decisive since the ECJ in Case C-341/02 *Commission* v *Germany*, cited above, refers to both "minimum wages" and "minimum rates of pay".

99. With reference to recital 13 in the preamble to the Directive, Iceland adds that in its view the Directive merely provides for coordination of the laws of the EEA States, and not harmonisation, with respect to the nucleus of mandatory rules for minimum protection set out in Article 3 of the PWD. It submits further that the Directive establishes a system recognising the minimum wage as determined according to national practice in each EEA State.

100. Iceland also maintains that since the Directive is not concerned with social security or taxation the comparison between EEA States should be made on the basis of gross pay, not net take-home pay.[29] In Iceland's view, this goes to show, *inter alia*, that the Directive is neutral in respect of whether the host State opts

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[28] Reference is made to Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 19, and *Laval un Partneri*, cited above, paragraph 60.

[29] Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 29.

for sick leave payments as part of the social security system, which may be maintained by premiums deducted from gross wages, or a system providing that employers are to maintain the payment of wages in the event of sickness or accidents. Iceland acknowledges, however, that in order to avoid a dual burden account must be taken of elements of wages paid by employers established in other EEA States for the purpose of calculating minimum wages. Iceland submits that the Posting Act ensures this.

101. In conclusion, Iceland contends that by requiring posting undertakings to secure their workers' entitlement to wages in case of illness or accident, Iceland not only acts in conformity with the wording of Article 3(1) of the PWD, but also fulfils its obligation to guarantee posted workers their rights under Article 3(1)(c) of the PWD and furthers the objectives of Article 3(1). Those objectives are, Iceland submits, to avoid distortions of competition, to guarantee the rights of posted workers and to eliminate barriers and ambiguities affecting the freedom to provide services.[30]

Icelandic labour law and the concept of "minimum rates of pay"

102. At the outset, Iceland submits that "entitlement to wages in the case of illness or accident" is not the same as "sickness pay", a term used by ESA. It argued that "sickness pay" is generally provided for by social security measures, as opposed to the unchanged wages which are paid by the employer in the event of sickness or accident and which stem from the employment relationship as such. Moreover, it underlines that the term "sick leave", also used by ESA, does not necessarily imply continued payment of wages and is inappropriate.

103. Iceland further submits that since, according to Article 3 of the PWD, the "minimum rates of pay" may be laid down in national legislation or, as the case may be, in universally applicable collective agreements, it is of no importance whether there is a provision on minimum wages or a definition of that concept in Icelandic legislation. Iceland asserts that for more than thirty years the entitlement to wages in case of illness or accident has been considered an inherent element of minimum wages in Icelandic labour law, established in collective agreements which have been made universally applicable. It submits that the entitlement is negotiated in collective agreements as part of wages. Statistically the entitlement is said, on average, to represent 3.8% of salary.

104. As Iceland sees it, the fact that parts of the workforce in Iceland fail to make use of their entitlement to wages in the case of illness or accident (because they do not fall ill or have accidents) and thus lose that entitlement demonstrates its nature as part of the minimum wage and not as a replacement for loss of wages or a distinct employment right. If, on the other hand, it were a distinct employment

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30 Reference is made to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, point 33.

right, it would be natural, in Iceland's view, for unused rights to be recoverable by employees in the same manner as minimum paid annual leave.

105. Iceland adds, moreover, that the submission of a doctor's certificate is not a procedural requirement as such since it is left to the discretion of the employer to assess whether such proof of illness is needed.

Regulation No 1408/71 and Article 5 of the Posting Act

106. For the sake of completeness, Iceland considers it necessary to assess whether the right under Article 5 of the Posting Act must be considered as one of the "terms of employment" within the scope of Article 3 of the PWD or a social security "benefit" under Regulation No 1408/71.

107. In Iceland's view, it is clear both from the provisions of Regulation No 1408/71 and from the rulings of the ECJ that once consideration or a payment is based on an employment relationship, whether by virtue of a collective agreement or legislation, it is considered to constitute "pay" and not a "social security benefit". It submits also that no other conclusion can be drawn from *Paletta*, cited above.

108. Iceland refers to Article 1(j) of Regulation No 1408/71, claiming that this provision excludes schemes established under collective agreements from the scope of the Regulation. Iceland further asserts that the said provision recognises the freedom of the EEA States to organise their social security systems in accordance with national policy objectives, without harmonisation. Iceland thus considers the entitlement to maintenance of wages in the event of illness or accidents provided for by Icelandic labour law, from the outset, to fall outside the scope of Regulation No 1408/71. Further, it argues that since Iceland has made no declaration to the contrary, it remains the case that this entitlement cannot be classified as a benefit under Regulation No 1408/71. According to Iceland, *Paletta*, cited above, does not serve to bring the entitlement to wages during illness or accidents under Regulation No 1408/71, contrary to the wording of Article 1(j).

109. In Iceland's view, classification of the rights afforded to workers under Article 5 of the Posting Act as a social security benefit and not a minimum entitlement under national collective agreements is liable to undermine the autonomy of national labour standards to the detriment of the protection of workers built up in the Icelandic labour market over many decades. Further, it is Iceland's understanding that ECJ case-law recognises that even if maintenance of pay during sickness is in certain countries classified as a social security benefit, this should not be held to prevent other EEA States from enhancing the rights of workers by establishing entitlement to such maintenance of pay as an inalienable

part of their right to payment of minimum wages under national collective agreements.[31]

110. Iceland submits further that in *Gillespie and Others*, cited above, the continued payment of wages to a pregnant worker was classified as "pay" despite the fact that it was not rendered as payment for the contribution of the worker. Iceland argues that the same applies in respect of the maintenance of wages in the event of illness notwithstanding a worker's inability to render services to his employer during the period of sickness. Iceland further argues that what defines this entitlement is the direct contractual relationship between employer and worker and not social security legislation.

Article 3(10) of the PWD on public policy and Article 5 of the Posting Act

111. Should the Court conclude that the requirements under Article 5 of the Posting Act fall outside the ambit of Article 3(1) of the PWD, Iceland submits that these provisions are in any event justified on the basis that they derive from imperative provisions of collective agreements which are legally protected and from which there can be no exemptions. As Iceland sees it, the public policy exception in Article 3(10) of the PWD thus applies.

112. For the purposes of the present case, Iceland submits that the right to maintenance of wages in the event of sickness and accidents may be divided into two parts, first, the right as concerns the preservation of minimum wages and, second, the right as concerns the preservation of other wages. Iceland asserts that not only the former right, but also the latter right qualify as public policy exceptions under Article 3(10) of the PWD. Iceland submits that the preservation of all wages and not only minimum wages is important for the balance of rights and obligations in the Icelandic labour market. In Iceland's view, it is imperative that this is not changed so as to hamper the autonomy of the social partners to provide for flexibility, adaptation and diversity in setting pay standards.

113. Iceland also argues that the nature of industrial relations in the EEA States would be impaired were they not permitted to require foreign service providers to comply with provisions of collective agreements considered sufficiently important that the State concerned has enacted legislation rendering these a legally required minimum standard with which all employment contracts must comply.

114. Iceland submits that the requirements under Article 5 of the Posting Act are intended to secure the value of minimum wages and other wages for posted workers, which is considered imperative for the protection of workers and crucial to the social order in Iceland. It submits further that the requirements concerned

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[31] Reference is made to Case 171/88 *Rinner-Kühn* [1989] ECR 2741, paragraph 5 [*sic*]; *Paletta*, cited above, paragraph 15; Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 22; *Bötel*, cited above; Case C-457/93 *Lewark* [1996] ECR I-243; Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165; and Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 18.

are suitable and necessary in order to secure that objective,[32] and that they are non-discriminatory.

115. Moreover, Iceland relies on human rights provisions.[33] Reference is made to Articles 65 and 72 of the Icelandic Constitution, Article 14 ECHR and Article 1 of Protocol 1 to the ECHR. As Iceland regards the entitlement to wages in case of illness or accident to be inherent in the concept of wages, Iceland also considers the entitlement to constitute a property right the protection of which must be secured according to the Icelandic Constitution and the ECHR[34] regardless of the origin of the worker. Iceland observes that, under Article 6 of the PWD, judicial proceedings may be instituted in the host State in order to enforce the right to terms and conditions of employment guaranteed under Article 3 of the PWD.

116. Iceland further asserts that *lex loci laboris*, a general principle of international law, constitutes a general rule under EEA law. Consequently, it submits that workers must be covered by the labour legislation and social security system in the country where they work. According to Iceland, this principle is recognised in Directive 96/71 and Regulation No 1408/71. The relevant provisions of the Directive as well as the provisions of Regulation No 1408/71 which relate to posted workers are, in its view, exceptions in this respect. Moreover, Iceland adds that the posting of workers may, in some instances, last for several years.[35]

117. Iceland argues that ESA is too restrictive in its interpretation of the ECJ case-law on which it relies as regards public policy and Article 3(10) of the PWD. In Iceland's view, that case-law is in essence concerned with circumstances which are dissimilar to those of the present case. Iceland also contends that ESA fails to recognise the bargaining autonomy accorded to the social partners under EEA law.

118. Iceland refers in particular to *Commission* v *Luxembourg*, cited above, which, in its view, demonstrates that provisions of universally applicable collective agreements may in certain circumstances fall under Article 3(10) of the PWD.[36] Iceland submits that a case-by-case examination must be carried out to determine whether the rules in question promote the protection of workers and confer a genuine benefit on them.[37] It observes that the indexation of minimum

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32 Reference is made to *Laval un Partneri*, cited above, paragraph 101.

33 Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185.

34 Reference is made to *Kopecky* v *Slovakia* [GC], judgment of 28 September 2004, ECHR Reports 2004-IX, p. 144, §§ 45–52.

35 Reference is made to Case C-215/01 *Schnitzer* [2003] ECR I-14847.

36 Reference is made to paragraphs 65 and 66 of the judgment.

37 Reference is made to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, points 60 to 62.

wages has been deemed to comply with Article 3(10) of the PWD,[38] and submits that the same must apply to the requirements under Article 5 of the Posting Act. In this context, Iceland asserts further that for the purposes of preserving their value also the indexation of wages other than minimum wages may constitute legitimate means of safeguarding public policy.[39]

Article 36 EEA and Article 5 of the Posting Act

119. Iceland agrees with ESA that Article 36 EEA becomes relevant if Article 5 of the Posting Act is considered to fall outside Article 3 of the PWD. However, Iceland disagrees with the argument that the Directive prevents recourse to overriding requirements in the general interest as grounds for justification. Rather, Iceland asserts that the Directive merely coordinates national legislation.[40] Thus, when applying Article 36 EEA, Iceland asserts that the issue of justification must be dealt with as in a case of infringement of the EEA Agreement in the absence of a relevant directive.

120. According to Iceland, various objectives in the public interest may constitute a legitimate aim and these include the objectives referred to in discussion of Article 3(10) PWD. It refers to the arguments set out in that respect. In particular, Iceland maintains that Article 5 of the Posting Act is concerned with the recognised objective of worker protection.[41] It submits in that regard that the requirements of suitability, necessity and proportionality are fulfilled. Iceland also submits that ESA has failed to establish that any additional financial burden is placed on posting undertakings from countries where workers enjoy similar protection or that the social protection of workers is not enhanced.[42]

Accident insurance, Directive 96/71 and Article 36 EEA

121. Iceland submits that the insurance cover provided for under Article 7 of the Posting Act is a rule of national tort and insurance law, as such falling outside the ambit of Directive 96/71. It argues that EEA law does not preclude Member States from applying their legislation, or collective agreements as the case may be, to any person employed, even temporarily, within their territory.[43] Iceland submits that national rules on employees' insurance cover constitute such legislation. It argues further that tort and insurance law is not harmonised in EEA

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38 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 45.

39 Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 45 to 55.

40 Reference is made to Case C-490/04 *Commission* v *Germany*, cited above, paragraphs 19 to 21, and to the Opinion of Advocate General Ruiz-Jarabo Colomer in the case, point 28 [*sic*].

41 Reference is made to Case C-490/04 *Commission* v *Germany*, cited above, paragraph 46.

42 Ibid., paragraph 54 [*sic*].

43 Reference is made to recital 12 in the preamble to the Directive.

law and that in the absence of harmonisation, rules of tort and insurance law fall outside the ambit of EEA law.[44]

122. However, if the Court should conclude that the requirements of Article 7 of the Posting Act come within the scope of the Directive, Iceland submits that if in turn those requirements are considered a restriction, they are in any case justified. Iceland states that the objective of the legislation is to provide insurance cover to workers posted to Iceland and their families. Iceland considers this to be an imperative requirement. It adds that the requirements at issue are established in collective agreements which are legally protected and from which there can be no exemptions. Iceland refers to Article 3(10) of the PWD and reiterates its general arguments made in respect of that provision.[45]

123. Iceland further submits that any restriction at issue here is both suitable and necessary for securing attainment of the abovementioned objective.[46] It submits also that Article 7 of the Posting Act is necessary to protect the legal rights of workers posted to Iceland and thus ensure social cohesion. Essentially, Iceland submits the same with respect to any assessment under Article 36 EEA, should the Court find the requirements under Article 7 of the Posting Act to fall outside the Directive and within the scope of Article 36 EEA.

124. In addition, Iceland also submits essentially the same arguments concerning human rights as it advanced with regard to Article 5 of the Posting Act.[47]

Final remarks

125. Lastly, Iceland argues that it would be unacceptable as a matter of both national policy and EEA law that workers be afforded less protection under EEA law than under EU law. In this respect, it refers to Article 9 TFEU and Article 31 of the Charter of Fundamental Rights of the European Union.[48]

The Republic of Finland

Directive 96/71 and Article 5 of the Posting Act

126. The Republic of Finland argues that the interpretation of the concept of "minimum rates of pay" under Article 3(1)(c) of the PWD may be broad and that

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44 Reference is made to Case E-1/99 *Finanger* [1999] EFTA Ct. Rep. 119 and Case E-7/00 *Helgadóttir* [2001] EFTA Ct. Rep. 246.

45 Further reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 65 and 66, and to the Opinion of Advocate General Trstenjak in the case, points 60 to 62.

46 Reference is made to *Laval un Partneri*, cited above, paragraph 101.

47 Further reference is made to *Pressos Compania Naviera S.A. and Others* v *Belgium* [GC], judgment of 3 July 1997, ECHR Reports 1997-IV, p. 1296.

48 Reference is also made to points 51 to 55 of the Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota and Others* [2010] ECR I-0000.

account can be taken not only of actual working hours, but also of wages paid for a certain period when the employee is justifiably absent from work. In its view, therefore, the obligation pursuant to Article 5 of the Posting Act to pay wages during a period of illness is consistent with the Directive.

127. As the Republic of Finland sees it, the freedom of the individual Member State to define the concept of "minimum rates of pay" is only limited by Article 3(7) of the PWD, according to which certain allowances must be considered part of the minimum wage.

128. The Republic of Finland submits that the concept of "minimum rates of pay" encompasses remuneration for fulfilment of obligations by the employee under the contract of employment. It submits further that an employee does not fail to fulfil his contract when temporarily absent from work for justified reasons, such as temporary loss of working capacity. Accordingly, an employee is entitled to receive and his employer is obliged to pay the minimum wage even if the former has temporarily fallen ill.

129. The Republic of Finland argues that the contrary interpretation would lead to the conclusion that the sole possibility to define minimum rates of pay is the stipulation of hourly rates. Yet it is not uncommon, according to the Republic of Finland, for the wage to be defined as monthly pay, in which case the rates of pay include all breaks, days off and holidays, that is, justified absences from work. Thus, absence from work does not necessarily constitute a reason for a cessation in the payment of wages.

130. Further, the Republic of Finland contrasts the position with sickness benefits payable under a national social security system. In its view, such benefits are not remuneration for performance under the employment contract and, therefore, an employer is not obliged to pay them. The Republic of Finland further submits that such benefits typically replace the employer's responsibility to pay wages when the employee has lost his working capacity for a longer period of time as defined in national law.

131. The Republic of Finland draws special attention to several ECJ judgments. First, it mentions *Schultz-Hoff*,[49] concerning Directive 2003/88.[50] The Republic of Finland argues that in that case the ECJ established a principle that in calculation of a worker's benefits sick leave can be equated with actual working hours and that as regards workers on duly granted sick leave, the right to paid annual leave conferred by Directive 2003/88 on all workers cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State.[51] As an employee

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49 Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179.

50 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299, p. 9.

51 Paragraph 41 of the judgment.

who has been on sick leave is thus entitled to paid annual leave, the Republic of Finland submits that it would be illogical if Member States were precluded from requiring that an employee on short-term sick leave must be paid the minimum rate of pay.

132. Second, the Republic of Finland addresses Case C-341/02 *Commission* v *Germany*, cited above. It argues that the question of the kind of performance that is required from an employee did not arise in the case. Therefore, the judgment is of limited relevance to the case at hand. The Republic of Finland notes that the ECJ stated that in considering the component elements of the minimum wage, it is the gross amount of wages that must be taken into account. According to the Republic of Finland, this means that the amount of wages to be taken into account is the wage before taxes (as opposed to the net wage), and not that the pay must necessarily be reflected in nominal/numerical terms. Moreover, it is the understanding of the Republic of Finland that the ECJ focused on the interpretation of Article 3(7) not Article 3(1)(c) of the PWD and, accordingly, that the Member States' freedom to define the concept of "minimum rates of pay" is not restricted by the judgment.

133. Third, the Republic of Finland also addresses *Laval un Partneri*, cited above. In that context, it submits that the present case does not concern the imposition of standards in areas beyond those listed in Article 3(1) of the PWD. According to the Republic of Finland, the present case concerns interpretation of one of the matters expressly listed, namely, minimum rates of pay. Moreover, it argues that in *Laval un Partneri*, unlike the situation in the present case, the standard of protection imposed was higher than the minimum standard foreseen by the relevant national legislation and that, therefore, it cannot be inferred from *Laval un Partneri* that the Directive precludes legislation such as Article 5 of the Posting Act.

134. The Republic of Finland submits also that a broad interpretation of the concept of "minimum rates of pay" is supported by the objectives of Directive 96/71, in particular the protection of workers.[52]

135. The Republic of Finland submits further that the concept of "pay" under Article 157 TFEU, on equal treatment of male and female workers as part of EU social policy, is broad and covers the continued payment of wages to an employee in the event of illness.[53] In the view of the Republic of Finland, there is no reason to interpret the concept of "pay" more narrowly in Directive 96/71 than in the context of social policy since a main purpose of the Directive is to strike the balance between, on the one hand, the TFEU provisions guaranteeing free movement of services and, on the other hand, social policy. The Republic of

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52 Reference is made to recital 5 in the preamble to the Directive; to the Opinion of Advocate General Bot in Joined Cases C-307/09 to C-309/09 *Vicoplus* [2011] ECR I-0000, point 55, and to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, point 33.

53 Reference is made to *Rinner-Kühn*, cited above, paragraph 7.

Finland regards the two objectives as reconciled in Article 3(1) of the PWD establishing an exhaustive list of issues left to national legislation and advocates a harmonious interpretation of the concept of pay which applies both under Article 3(1)(c) of the PWD and Article 157 TFEU.

136. The Republic of Finland also considers such an interpretation to strengthen fair competition by making conditions for employment more equal.

137. It argues further that a broad interpretation of the concept of "pay" under Article 3(1)(c) of the PWD does not make the provision of services noticeably more difficult than does compliance with the other provisions of Article 3(1). In the view of the Republic of Finland, Article 5 of the Posting Act thus does not restrict the freedom to provide services in such a way as counters the objectives of the Directive. The Republic of Finland also contrasts the present case with Case C-341/02 *Commission* v *Germany*, cited above, arguing that in the latter case the problem from the point of view of the proper functioning of the internal market was an excessively narrow interpretation of the concept of "pay" adopted by the Federal Republic of Germany.

Regulation No 1408/71 and Article 5 of the Posting Act

138. Contrary to the view taken by ESA, the Republic of Finland considers it irrelevant to the interpretation of Article 3(1)(c) of the PWD that the continued payment of wages to an employee in the event of illness can also be classified as a sickness benefit within the meaning of Regulation No 1408/71. With reference to *Paletta*, cited above, the Republic of Finland observes that in that case in relation to the continued payment of wages to an employee in the case of illness the Court held that although covered by the concept of "pay" under Article 157 TFEU, it did not follow that the payment made by the employer could not at the same time constitute sickness benefits under the said Regulation.[54] The Republic of Finland observes further that the judgment in *Paletta* preceded the adoption of the Directive and submits, consequently, that the ECJ did not have the opportunity in that case to resolve the relationship between the continued payment of wages as part of minimum rates of pay under the Directive and payment thereof as a social security benefit.

139. The Republic of Finland adds that its interpretation of Directive 96/71 does not provide employees with double compensation from the employer and the social security system as this is excluded under Article 12 of Regulation No 1408/71.

Conclusion

140. In conclusion, the Republic of Finland submits that Article 36 EEA and Directive 96/71 do not preclude national rules according to which a posted

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54 Paragraph 15 of the judgment.

worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

The Kingdom of Norway

141. The Kingdom of Norway supports the submissions made by Iceland on the compatibility with EEA law of Articles 5 and 7 of the Posting Act.

Regulation No 1408/71, Directive 96/71 and Article 5 of the Posting Act

142. The Kingdom of Norway submits that Regulation No 1408/71 and Directive 96/71 constitute, *inter alia*, coordinating legislation laying down conditions for determining the national legislation applicable. It submits further that the ECJ has accordingly held that the provisions of Title II of Regulation No 1408/71 constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation.[55]

143. The Kingdom of Norway observes that under Title II of Regulation No 1408/71 Article 14(1)(a) states that the legislation of the home Member State shall apply to posted workers, provided that the anticipated work does not exceed 12 months, whereas Article 3 of the PWD stipulates that the legislation of the host Member State shall apply unless the home State legislation provides for more favourable conditions for posted workers. The Kingdom of Norway concludes from this that Regulation No 1408/71 and Directive 96/71 cannot apply simultaneously as they impose conflicting schemes of coordination of the Member States' legislation.

144. The Kingdom of Norway claims that the conflict must be resolved to the effect that benefits and contributions falling within the scope of Regulation No 1408/71 are not only excluded from the scope of Article 3(1) of the PWD, but fall outside the scope of the Directive in its entirety.[56] The Kingdom of Norway also argues that an overlap in application could entail a risk that Directive 96/71, in so far as social security legislation falls outside Article 3(1)(c) of the PWD, prevents host Member States from applying their social security legislation where this is required by Regulation No 1408/71 for the protection of workers, for example in situations where more than 12 months posting may be anticipated.

145. In summary, the Kingdom of Norway claims that if Article 5 of the Posting Act is deemed to constitute social security legislation for the purposes of Regulation No 1408/71 then ESA's application must be dismissed in so far as

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55 Reference is made to *FTS*, cited above, paragraph 20.

56 Reference is made to recital 21 in the preamble to the Directive and statements by the Commission in COM(2003) 458 final of 25.7.2003, p. 5.

Article 5 is concerned, for the reason that Directive 96/71 is inapplicable. Only if Article 5 of the Posting Act falls outside the scope of Regulation No 1408/71, does it fall to be considered, the Kingdom of Norway claims, whether Article 5 is compatible with Directive 96/71.

Article 3(1) of the PWD – preliminary observations

146. The Kingdom of Norway highlights that the ECJ has found provision of manpower to be a particularly sensitive matter from the occupational and social point of view, directly affecting both relations on the labour market and the lawful interests of the workforce concerned.[57] The Kingdom of Norway further asserts that the ECJ has consistently held that Community law does not preclude Member States from extending their legislation or collective agreements to any person employed, even temporarily, within their territory, no matter in which country the employer is established.[58] Moreover, the ECJ has held that Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first Member State to pay its workers the minimum remuneration laid down by the national rules of that State.[59] According to the Kingdom of Norway, the tenor of this case-law reveals that the ECJ, owing to the particularly sensitive matter concerned, has awarded the Member States a margin of discretion as concerns the extension of their labour law and, in particular, rules concerning minimum remuneration to workers temporarily employed on their territory.

147. The Kingdom of Norway further submits that the ECJ has stated that this case-law is enshrined in Article 3(1)(c) of the PWD.[60] It argues that it thus follows from recitals 6 and 13 in the preamble to the Directive that its aim is to coordinate Member States' laws by laying down a nucleus of mandatory rules for minimum protection. Reference is also made to the ECJ having stated that Directive 96/71 does not harmonise the material content of those mandatory rules for minimum protection and that that content may accordingly be freely defined by the Member States.[61] In the view of the Kingdom of Norway, this applies *a fortiori* to Article 3(1)(c) of the PWD and the concept of minimum rates of pay because of the particular provision in the second subparagraph of Article 3(1).

148. In conclusion, the Kingdom of Norway sees no grounds for a narrow interpretation of the nucleus of mandatory rules in Article 3 of the PWD and

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57 Reference is made to Case 279/80 *Webb* [1981] ECR 3305, paragraph 18.

58 Reference is made to Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.

59 Reference is made to Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; *Arblade and Others*, cited above, paragraph 33 [*sic*]; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21.

60 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 25.

61 *Laval un Partneri*, cited above, paragraph 60. Further reference is made to Commission statements in SEC(2006) 439 of 4.4.2006, p. 16.

highlights the Member States' margin of discretion in defining the content of those rules, in particular as concerns the concept of minimum rates of pay.

149. The Kingdom of Norway acknowledges, however, that the Directive also entails harmonisation of the Member States' laws. First, the Kingdom of Norway acknowledges that the possibility to secure posted workers conditions of employment falling outside the matters referred to in Article 3(1) of the PWD is limited. Article 3(10) provides that such conditions may only be justified on grounds of public policy, a notion which must be interpreted strictly.[62] Second, it acknowledges that Member States are prevented from providing for a higher level of protection than the standards referred to in Article 3(1) which the Kingdom of Norway also sees as minimum standards. In this respect, Article 3(1) of the PWD thus provides for total harmonisation.

150. The Kingdom of Norway argues, however, that it does not follow that also the content of the matters listed in Article 3(1) of the PWD should be narrowly construed. It asserts that this would entail harmonisation of the material content of those mandatory rules for minimum protection in contravention of the abovementioned ECJ case-law. In particular, the Kingdom of Norway refers to *Laval un Partneri*, cited above, arguing that in the light of the ECJ's strict interpretation of Article 3(7) of the PWD it is evident that the Member States' discretion to define the content of the matters listed in Article 3(1) of the PWD is an issue separate from the Member States' possibility to, within the scope of those matters, impose higher standards.

Article 3(1)(c) of the PWD and the concept of "minimum rates of pay"

151. According to the Kingdom of Norway, the wording and structure of Article 3(1)(c) of the PWD imply that the concept of "pay" includes several constituent elements, reflecting, *inter alia*, the conditions under which the work is carried out. This is said to follow from the plural in "minimum rates of pay" and the inclusion of "overtime rates". Further, the word "including" is said necessarily to imply that minimum rates of pay reflecting distinct working conditions other than overtime are included in the concept of pay. The Kingdom of Norway argues that the express exclusion of "supplementary occupation retirement pensions" implies also that the concept of pay is recognised as having a broad meaning.

152. The Kingdom of Norway adds certain remarks on Case C-341/02 *Commission* v *Germany*, cited above, underlining that the case did not relate to the host Member State's rights to define minimum rates of pay. The case concerned Article 3(7) of the PWD and revolved around the conditions under which the Member State had to recognise allowances and supplements provided to posted workers by the posted undertakings as constituent elements of the minimum wage when comparing that remuneration with the minimum wage prescribed by German law. The Kingdom of Norway argues that the judgment

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62 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 30.

affirms the host Member State's competence to define the constituent elements of its minimum wage and thereby provide the benchmark for comparison under Article 3(7) of the PWD. In this respect, it submits that the ECJ found that Germany was entitled to disregard for the purpose of Article 3(7) of the PWD such allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of Germany, and which alter the relationship between the service provided by the worker and the consideration which he receives in return.

153. The Kingdom of Norway agrees with ESA that "remuneration for work" must be considered to constitute the core of the concept of "pay". However, the Kingdom of Norway considers ESA's further definition of the concept, with reference to notions of whether work is "actually performed" or "arise only on the condition that a certain event takes place", liable to obscure. In its view, ESA's negative definition of "pay" by reference to those conditions lacks legal justification and may undermine the discretion to define the content of "pay" which is afforded to Member States by the second subparagraph of Article 3(1) of the PWD. According to the Kingdom of Norway, this is probably the reason why the ECJ consistently has avoided any attempts to define the notion of pay in Article 3(1)(c) of the PWD.

154. The Kingdom of Norway argues, however, that some guidance in defining "pay" may be derived nonetheless from the definition of "pay" in Article 157(2) TFEU, on equal pay for male and female workers, since it is a fundamental principle underlying the Directive to ensure equal treatment between workers. In ECJ case-law that definition has been further defined as a concept which comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis.[63]

155. The Kingdom of Norway acknowledges that the concept of "pay" must not necessarily have the same meaning under Directive 96/71 as under Article 157(2) TFEU. Nonetheless, the Kingdom of Norway asserts that the core of the definition under the latter provision and related case-law, that is, in its view, that pay means the consideration which a worker receives from his employer in respect of his employment, is of general application and readily transposable. It adds that in the context of the Directive the ECJ has already referred similarly to the consideration which the posted worker receives in return for the service provided.[64]

156. The Kingdom of Norway submits further that also the Commission has acknowledged that the definition of the minimum wage may vary in the different

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63 Reference is made to Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 29.

64 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 39.

Member States and that they have considerable discretion to determine its constituent elements.[65] Reference is also made to statements by the Council and the Commission found in the preparatory works to the Directive, to the effect that Article 3(1)(b) and (c) cover contributions to national social fund benefit schemes governed by collective agreements or legislative provisions, and benefits covered by these schemes, provided that they do not come within the sphere of social security.[66]

157. In summary, the Kingdom of Norway asserts that the outer limits of the concept of "pay" within the meaning of Article 3(1)(c) of the PWD must be assessed with reference to whether the benefits represent consideration which the worker receives in respect of his employment from his employer. In its view, Article 5 of the Posting Act makes the right to wages in the event of illness and the amount thereof entirely conditional on the work carried out by the posted worker. Consequently, the Kingdom of Norway argues that the wages in question are exclusively borne out of and represent consideration for work carried out by the worker and that such wages form an integral part of the worker's pay.

The second subparagraph of Article 3(1) of the PWD

158. According to the Kingdom of Norway, the purpose of the second subparagraph of Article 3(1) of the PWD is to underscore that Article 3(1)(c) does not define the concept of minimum rates of pay and that it is for the host Member State to define the concept in accordance with its national legislation and/or practice. In its view, the reference in the second subparagraph of Article 3(1) to the content of that concept being "defined" by the host Member State is not intended to introduce a formalistic requirement making the recognition of a Member State's definition conditional on whether it has employed the same notions as the Directive. Such an approach, it contends, could usurp the Member States' right to define the concept of minimum rates of pay.

159. In short, the Kingdom of Norway asserts that the second subparagraph of Article 3(1) of the PWD must be interpreted to the effect that if national law and/or practice, including collective agreements, provide for consideration which the worker is to receive in respect of his employment from his employer, this falls within the concept of "rates of pay" mentioned in Article 3(1)(c).

160. The Kingdom of Norway sees no reason to comment in detail on the additional requirement under Article 3(1)(c) of the PWD that the national measures must constitute "minimum" rates of pay. In its view, ESA has not questioned the minimum character of the relevant wages (the "wages in the event of illness and accidents") provided for in Article 5 of the Posting Act.

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65 Reference is made to SEC(2006) 439 of 4.4.2006, pp. 16–17.

66 Reference is made to statement No 7, Council document 10048/96.

Article 36 EEA

161. Leaving aside the specific assessment under Article 36 EEA, the Kingdom of Norway agrees with ESA's methodology in so far as the contested measures are deemed to fall outside the scope of Article 3(1)(c) of the PWD (and Regulation No 1408/71). In this event, it must be assessed whether the measures are compatible with the first indent of Article 3(10) of the PWD.

162. The Kingdom of Norway adds, however, that, in its view, a different situation applies if Article 5 of the Posting Act is deemed to fall within the scope of Article 3(1)(c) of the PWD. According to the Kingdom of Norway, since the level of protection concerning the matters referred to in Article 3(1)(a)–(g) of the PWD has been harmonised at Community level by the Directive,[67] any national measure relating thereto must be assessed in the light of the provisions of the Directive, and not Article 36 EEA.[68]

The Charter of Fundamental Rights of the European Union

163. The Kingdom of Norway agrees with ESA that the Court need not address the Charter in the present case. It observes that the Charter has not been incorporated into the EEA Agreement and consequently asserts that it lacks direct relevance for the interpretation of the Agreement.

The European Commission

General – Directive 96/71

164. The Commission submits that according to recital 13 in the preamble to Directive 96/71, the laws of the Member States should be coordinated in order to lay down a nucleus of mandatory rules for minimum protection ("the hard core") to be observed in the host country by employers who post workers to perform temporary work there. However, this does not entail a harmonisation of the material content of the mandatory rules which thus may be freely defined by the Member States on condition that the content complies with the Treaty and the general principles of EU law.[69]

165. The Commission further submits that for the purposes of defining the nucleus of mandatory rules for minimum protection, Article 3(1) of the PWD sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.[70]

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67 Reference is made to *Laval un Partneri*, cited above, paragraphs 80 and 81, and *Rüffert*, cited above, paragraphs 33 and 34.

68 Reference is made to Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9.

69 Reference is made to *Laval un Partneri*, cited above, paragraph 60.

70 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 26.

166. With regard to the material content of the "hard core" of minimum protection rules, the Commission observes that in its original proposal for a directive on the posting of workers it indicated that the directive would not be a labour law instrument but a directive concerning international private law closely related to the freedom to provide services. In drawing up the list contained in Article 3(1) of the PWD, the Commission applied three criteria: the rules ought to be mandatory or compulsory in all, or the majority of, the Member States; the rules ought to apply to all workers habitually employed in the same place, occupation and industry; and the designation and application of the mandatory rules should be compatible with the temporary nature of the performance of work in the host country.[71]

167. The Commission notes that the second subparagraph of Article 3(1) of the PWD provides that the concept of "minimum rates of pay" referred to in Article 3(1)(c) shall be defined by the national law and/or practice of the Member State to whose territory the worker is posted.

168. As regards the method for comparing the minimum rates of pay under Article 3(1)(c) of the PWD and the pay a worker receives under the terms of the employment relationship, the Commission observes that at the time of the adoption of the Directive the Council and the Commission made the following joint statement: "When comparing the remuneration specified in point (c) of the first subparagraph of paragraph 1 with that which should be paid by virtue of the law applicable to the employment relationship, account should be taken, where remuneration is not determined by the hour, of the relationship between the remuneration and the number of hours to be worked and of any other relevant factors."[72] According to the Commission, this means, for example, that when the remuneration received by the posted worker is determined on a monthly basis, a pro rata adjustment must be made on the basis of the number of hours worked during the month.

169. The Commission further submits that the criteria for determining the constituent elements of the minimum rate of pay have been defined by the ECJ as follows: allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.[73]

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71 Reference is made to COM(91) 230 final of 1.8.1991, p. 15, points 24 and 25.

72 Reference is made to statement No 9, Council document 10048/96 ADD 1.

73 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 39.

170. The Commission submits further that the ECJ has clarified that an automatic indexation of rates of pay other than the minimum wage does not fall within the matters referred to in Article 3(1)(a)–(g) of the PWD.[74]

171. The Commission submits that the ECJ has stated, *inter alia*, that while the Member States are, in principle, still free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context must be interpreted strictly. This applies particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services. Its scope cannot be determined unilaterally by each Member State. Moreover, according to the Commission, the ECJ has stated that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.[75]

Directive 96/71 and Article 5 of the Posting Act

172. In the Commission's view, the following features of the Icelandic legislation appear important when examining its compatibility with the nucleus of mandatory provisions under the Directive: (a) the legislation provides for the acquisition of entitlements which increase with the length of employment for a hypothetical event – future illness or accidents – to be paid in return for the worker fulfilling his or her obligation under the employment contract; (b) the legislation allows for certain absences from work, due to illness or accident or other factors; (c) the determination of the amount of hourly/monthly wages due appears to take into account the possibility of absence from work and the potential or acquired right to sickness pay; and (d) the legislation applies without prejudice to more advantageous entitlements under an employment contract.

173. In the Commission's view, the entitlements provided for in Article 5 of the Posting Act do not in all respects appear to relate directly to work performed and thus alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other. Consequently, the Commission contends that the entitlements in question do not qualify as constituent elements of the notion of minimum rates of pay.

174. According to Article 3(10) of the PWD, a Member State may impose terms and conditions of employment beyond those laid down in Article 3(1)(a)–(g) on grounds of public policy. The Commission argues that the justification advanced by Iceland, namely, the preservation of the value of minimum wages in the labour market and the maintenance of the balance of the rights and obligations of

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74 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 47.

75 Ibid., paragraphs 50 to 53.

the social partners, does not meet the requirement that a failure to impose this requirement would constitute a genuine and sufficiently serious threat to a fundamental interest of society.[76]

Directive 96/71 and Article 7 of the Posting Act

175. The Commission points out that the obligation for a foreign service provider to insure a worker posted to Iceland for a period of two continuous weeks or longer, against death, permanent injury and the temporary loss of working capacity, unless the worker has more advantageous insurance cover in the Member State of establishment, does not as such feature among the mandatory terms and conditions listed in Article 3(1)(a)–(g) of the PWD.

176. The Commission considers it questionable whether the notion of "health, safety and hygiene at work" in Article 3(1)(e) of the PWD may be interpreted to cover a civil liability obligation, since the provision in question has been understood, in its view, as referring to the requirements laid down in Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, as well as in the individual directives covering areas listed in the annex to that framework directive.[77]

177. The Commission agrees with Iceland that tort and insurance law are, in principle, a matter of the EEA States' competence. However, the Commission submits that it is settled case-law that Member States must exercise their national competence consistently with EU law.[78]

178. The Commission further submits that the ECJ held in *Laval un Partneri* that the obligation to pay insurance premiums, *inter alia*, for compensation for accidents at work and financial assistance for survivors in the event of death of the worker is a matter not specifically referred to in Article 3(1)(a)–(g) of the PWD.[79]

179. The Commission argues that unlike the situation in *Laval un Partneri*, the requirement for foreign service providers to pay insurance premiums for workers posted to Iceland has been laid down in legislation. Therefore, it remains to be examined whether the requirement may be imposed on grounds of public policy under Article 3(10) of the PWD. In the Commission's view, it is unclear from the facts of the case whether the requirement confers a genuine benefit on the posted workers concerned which significantly adds to their social protection and whether the requirement is proportionate to the public interest pursued.[80] In any

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76 Ibid., paragraph 50 and the case-law cited therein.

77 OJ 1989 L 183, p. 1.

78 Reference is made to *Laval un Partneri*, cited above, paragraph 87 and the case-law cited therein.

79 Ibid., paragraphs 83 and 22.

80 Reference is made to *Finalarte and Others*, cited above, paragraph 53.

event, in the view of the Commission, the requirement does not appear to meet the criteria laid down by the ECJ for a public policy exception.[81]

Conclusion

180. In sum, the Commission supports the declaration sought by ESA in so far as it relates to the failure of Iceland to fulfil its obligations under Article 3 of the PWD.

Per Christiansen
Judge-Rapporteur

[81] Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 50 to 53.