OPINION OF ADVOCATE GENERAL ALBER

delivered on 29 September 1999 [1]

A — Introduction

1. The present reference for a preliminary ruling submitted by the Tribunal correctionnel, Arlon, concerns — in order to clarify whether a French undertaking is required to pay the Belgian minimum wage for workers sent to Belgium — the interpretation of the Treaty provisions on the freedom to provide services (Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC)) and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. [2] Criminal proceedings are pending before the French court against an employer established in France for failing to comply with Belgian minimum-wage legislation applicable in the private security sector. Between 1 January 1996 and 14 July 1997 the employer posted French security guards to a shopping mall in Belgium.

2. The defendant employer is the managing director of 'Inter Surveillance Assistance', a security company with its registered office in France. At the relevant time 13 employees of the company, who were employed as security guards at the Cora shopping mall in Messancy, were not paid the minimum wage provided for in Articles 2 and 3 of the Collective Labour Agreement of 14 June 1993 concluded by Joint Committee No 317 and made mandatory by Royal Decree of 1 March 1995.

3. The basic wage received by those employees for the work carried out in Belgium was FRF 6 692 per month (for 169 hours), or approximately BEF 40 152, whereas the rate in Belgium would have been BEF 356.68 per hour, making BEF 60 278 for a month comprising 169 hours of work.

4. According to the order for reference, the Public Prosecutor's Office takes the view that Belgian legislation on minimum wages also applies to workers temporarily posted to Belgium due to its character as public-order legislation. [3]

1 — Original language: German.

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

3 — In French: 'loi de police et de sûreté'.

5. The employer, on the other hand, is of the opinion that he is only required to apply the French minimum wage. He also argued, during the proceedings before the referring court, that the specific nature of security duties requires that staff be moved around in order to avoid being recognised too easily by customers. This is consequently a case of services provided on a part-time basis. Directive 96/71 concerning the posting of workers in the framework of the provision of services is not applicable to work carried out in border zones where an employee may be required in the course of a day, a week or a month to carry out part of his duties in a neighbouring country.

6. As to the facts, it appears in the present case that some of the 13 employees concerned worked full days in Belgium whilst others worked there for only part of the time, as well as working in France.

7. In his defence the employer also argues that the employees concerned would have enjoyed protection under the French system the same as or substantially comparable to that provided for under the Belgian system. French minimum wages might be lower, but the French taxation system was more favourable. The defendant argues that regard must be had to the overall position.

8. The referring court concludes that if the French regime may or must be considered in detail and as a whole, it might be found to preclude the considerable risks of exploitation of workers and distortion of competition. The national court has therefore referred the following questions to the Court of Justice for a preliminary ruling:

— In 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, does the term 'period of posting' encompass the part-time period spent, whether randomly or not, by a frontier worker who comes from an undertaking in a Member State, performing, in the course of days, weeks or a month, a part of his services in the adjacent territory or territories of one of more other Member States?

— Are Articles 59 and 60 of the [EC] Treaty to be interpreted as being infringed where a Member State, for overriding reasons relating to the public interest, requires any undertaking from another Member State employing persons, even temporarily, on the territory of the first State to comply with its legislation or collective labour agreements relating to minimum wages, where that interest is already protected by the rules of the State in which the service provider is established and workers there are already in a comparable or similar position on the basis not solely of the legislation relating to minimum wages but of the overall

position (impact of taxation, welfare protection in relation to illness, including under the obligatory supplementary insurance which applies in France, and to industrial accidents, widowhood, unemployment, retirement and death)?

— In the same context, put differently: are the temporary national obligations set for employees to be understood as solely the minimum hourly rate of pay without assessing the overall position as regards the welfare protection enjoyed by employees who are required in their work to move from one State to another?

9. The Belgian labour inspection agency (Auditorat du travail d'Arlon), the Belgian, French, German, Netherlands and Austrian Governments and the Commission all submitted observations. I shall return to their observations during my legal analysis.

B — Opinion

I. *Preliminary issue of the admissibility of the first question referred*

10. The French, German and Netherlands Governments have expressed concern as regards the admissibility of the first question referred, which seeks an interpretation of Directive 96/71 although the period for implementation of the Directive, as determined in Article 7, does not expire until 16 December 1999. The material events all occurred before that date. They maintain that individuals[4] cannot derive rights from a directive before expiry of the period prescribed for its implementation. Since the Court can only answer by way of a preliminary ruling questions relevant for deciding the original dispute, the French and German Governments consider that the first question is inadmissible. The Netherlands Government proposes that further information be obtained in regard to the relevance of this question.

11. The Belgian Government, on the other hand, is of the view that the applicability of Articles 59 and 60 of the Treaty in regard to the posting of workers in the framework of the provision of services must be examined in the light of the Directive. The Directive is to be regarded as a continuation of the relevant case-law in this area. It encapsulates the compulsory provisions conferring minimum protection which must be observed by employers, and indicates the rules adopted in order to protect the interests of employees. Furthermore, the material events occurred partly before and partly after adoption of the Directive. The referring court has, moreover, expressly requested an interpretation of the term 'posting'.

4 — This is significant in so far as the defendant employer seeks to rely on the provisions of the Directive; see above, point 5.

12. It is true that the period prescribed for implementation of the Directive has not yet expired. Equally, the Court's case-law states that individuals may not rely directly on the Directive before expiry of that period.[5] However, that does not seem to be the case in the criminal proceedings which gave rise to these proceedings. The defendant employer made a reference to the scope of Directive 96/71. The referring court took up this reference and requests the Court's assistance in defining the term 'posting' for the purpose of examining the applicable national provisions in the light of Community law. For that purpose, the provisions of the Treaty, as primary law, are applicable. The Directive, on the other hand, is also of importance. Even where the period prescribed for implementation of the Directive has not yet expired, it is still binding Community law for the Member States.

The Court has made it clear[6] that provisions of national law must be interpreted and applied already during that period as far as possible in such a way as to be compatible with the relevant directives. Since the Member States have already adopted the uniform provisions of Community law, such an approach seems only logical. It must be even more so here, since in the present case it is primarily the Treaty provisions on freedom to provide services which are applicable. It is in this context that the referring court is requesting assistance on interpretation, and the Court should not decline to give it. The reference for a preliminary ruling must therefore be considered admissible without reserve.

II. *Substantive examination of the reference for a preliminary ruling*

13. Accordingly, the referring court's first question must be viewed in its context. The relevance of the provisions of the Directive can properly be appreciated only in the context of an analysis of Articles 59 and 60 of the Treaty.

14. Likewise the observations submitted in these proceedings address the referring court's questions in their factual context, so that it would seem appropriate to refer to them in relation to the individual questions at the point in my analysis where they become logically relevant.

15. Generally speaking, the object of examination may be described as the evaluation, in regard to Community law, of national rules which require service providers from another Member State to pay the minimum wage applicable at the place where service is provided. A feature of the present case

5 — Case 148/78 *Ratti* [1979] ECR 1629, paragraph 41 et seq., and Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411.

6 — *Inter-Environnement Walonnie*, paragraph 42 et seq.

also worth highlighting is that the obligation to comply with the minimum-wage legislation and the penalties ensuring such compliance are statutory,[7] whereas minimum wages themselves and their amount are established by mandatory wage agreements.[8]

16. Article 60(3) of the Treaty states:

'Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*'.[9]

17. The principle of equal treatment with nationals thus formulated would seem to favour, as a rule, the applicability of national minimum-wage provisions in regard to foreign service providers. Nevertheless, it is undisputed in Community law, and has been recognised by the Court, that the indiscriminate application of national provisions can in effect constitute, depending upon the facts of the case in question, a restriction to the freedom to provide services. The Court has consistently held that Article 59 requires 'not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services...'.[10] It follows that an additional financial burden may also have a restrictive effect.[11]

18. That may be the case here. An employer who runs an undertaking in a border zone and who sends his employees, on an irregular basis, from the Member State in which he is based to another Member State or even a third Member State, would not only be forced to take varying wage rates into consideration when paying his workers, which itself could involve considerable additional administrative effort, for example when calculating a worker's pay, or when carrying out the accounting, or in regard to complying with his fiscal and social security obligations towards various national authorities. He would also have to accept expenses substantially greater than simply the difference between minimum rates of pay, because taxes and social security contributions must usually be discharged on top of the salary paid out (even if that is done — at least partially — on the employee's behalf).

7 — See Article 56 of the Law of 5 December 1968 on collective labour agreements and joint committees (loi sur les conventions collectives de travail et les commissions paritaires, *Moniteur belge* of 15 January 1969).

8 — See Article 3 of the Convention collective de travail of 14 July 1993, declared mandatory by Royal Decree of 1 March 1995 (*Moniteur belge* of 4 May 1995).

9 — My italics.

10 — Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10, and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25, with further references.

11 — *Guiot*, paragraph 14.

Even if one were to take the gross earnings as criterion, as has been expressly advocated in some of the observations submitted to the Court, the additional costs to be borne by the employer would rise. An unconditional obligation to comply with minimum rates of pay applicable in the Member State in which service is provided can thus easily represent a restriction upon the freedom to provide services.

19. It is true that the Commission, referring to the Court's judgments in *Rush Portuguesa*[12] and *Vander Elst*,[13] takes the view that minimum-wage provisions should not, in themselves, be regarded as restrictions. One must not fail to recognise, however, that in both those cases the issue of compliance with minimum-wage legislation was not decisive for the ruling, and that the Court's observations in regard to minimum-wage provisions were made only *obiter dictum*. In view of the Court's case-law, which qualifies additional financial burdens[14] or provisions which may 'render less advantageous'[15] the activities of a service provider established in another Member State as having a restrictive effect, one must assume that the contested national provisions are capable of restricting the freedom to provide services.

20. Restrictions which arise from provisions applicable without discrimination must fulfil *four conditions* in order to be compatible with Community law, that is, in order to be justified: the provision must be applied in a non-discriminatory manner; it must be justified by overriding requirements of the general interest; it must be suitable for securing the attainment of the objective which it pursues; and it must not go beyond what is necessary in order to attain it.[16]

21. As regards the overriding requirements of the general interest the Court has made the following clarification: the freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest, in so far as that interest is not already safeguarded by the rules to which the provider of the service is subject in the Member State where he is established.[17]

22. Consideration of the questions raised in the present proceedings must be guided always by the need to maintain a balance between the four conditions outlined above. In this regard, Directive 96/71 indicates some of the considerations which guided the legislature and which may be seen, to a certain extent, to be the result of this process of seeking a balance. In any case they may be taken into account in the assessment to be carried out by the Court.

12 — Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.

13 — Case C-43/93 *Vander Elst* v *Office des Migrations Internationales* [1994] I-3803, paragraph 23.

14 — *Guiot*, cited in footnote 10, paragraph 14.

15 — *Reisebüro Broede*, cited in footnote 10, paragraph 25.

16 — *Reisebüro Broede* (cited in footnote 10), paragraph 28; Case C-55/94 *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37, and Case C-212/97 *Centros* v *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, paragraph 34.

17 — *Reisebüro Broede* (cited in footnote 10), paragraph 28, with further references.

For its part, the Directive must meet the objectives laid out in the Treaty. In so far as the Directive prescribes that such considerations must be in the form of a legal act, it serves — as has been pointed out in the observations submitted to the Court — the principle of legal certainty.

23. Independently of the Directive's temporal effects, however, it is necessary to clarify the preliminary question as to whether the Directive is applicable *ratione materiae* to facts such as those in the matter at issue before the national court. This preliminary question may not be directly relevant to the outcome of the main proceedings — since the period for implementation of the Directive has not expired [18] — but it will ensure that the assessments made here are appropriate to facts such as those at issue in the main proceedings.

III. *Scope of the Directive*

24. The scope of the Directive is defined by Article 1. Article 1(1) reads:

'This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.'

Article 1(3) reads:

'This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;...'.

25. The facts in the main proceedings fit that definition easily. The security company is established in France and posts workers on its account and under its direction to Belgian territory, and a contract has been entered into between that undertaking and the shopping mall receiving the service and an employment relationship exists between the security company and the worker. One

18 — See Article 7 of the Directive, which provides that the period for implementation expires on 16 December 1999.

may therefore consider that the Directive is applicable *ratione personae*.

26. The terms and conditions of employment covered by the Directive, that is to say its scope *ratione materiae*, are laid down in Article 3. Article 3(1) reads:

'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, *in so far as they concern the activities referred to in the Annex*.

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

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

(d) to (g)...'.[19]

27. However, the activities referred to in the second indent of the article cited above and listed in the Annex only concern those belonging to the construction sector; thirteen types of construction work are expressly listed. The Annex itself reads:

19 — My italics.

'The activities mentioned in Article 3(1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of the buildings, and in particular the following work:

1. excavation

...

13. improvements.'

28. The security work at issue in the main proceedings does not, of course, fall under the activities in this list. Because the minimum rates of pay applicable in Belgium in the security sector have been laid out in a collective labour agreement, they do not *per se* fall within the Directive's scope *ratione materiae*, either. Nevertheless Article 3(10) states in this context:

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

— ...

— 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.'

29. The legal situation in Belgium [20] which forms the basis of the main dispute would seem to fit that definition. The Directive would thus also be applicable *ratione materiae* due to the intervention of the national legislature.

30. The main proceedings concern the interpretation and application of the national provisions mentioned above,

20 — See Article 56 of the Law of 5 December 1968 cited in footnote 7 and Articles 1 to 3 of the Convention collective de travail of 14 July 1993 cited in footnote 8.

which the referring court is required to gauge in accordance with Community legal parameters, and the Court has been called upon to define those parameters in more detail. The four conditions laid down by the Court which must be fulfilled by the national provision in order for it not to be considered a restriction of the freedom to provide services prohibited by Community law are decisive.

IV. *Examination of the four conditions laid down by the Court which national provisions must satisfy*

31. Firstly, the national provision in question must be applied in a *non-discriminatory manner*. The condition would seem to be met in this case. In any event, it has not been the subject of dispute and has not in any other respect given rise to difficulty.

32. Next, it must be considered whether the provision is justified by *overriding requirements relating to the public interest*. The obligation to comply with minimum-wage legislation is intended to protect workers, whilst ensuring that competition in the relevant economic sector is not distorted. Those aims have been recognised as forming in principle overriding requirements relating to the public interest. [21]

Thus the Court ruled in Joined Cases 62/81 and 63/81 [22] in regard to minimum wage levels settled in collective labour agreements that:

'It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means.' [23]

33. That case-law has been confirmed on many occasions. [24] It was, for example, in this vein that the Court held in *Guiot* that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established; Community law also does not prohibit Member States

21 — See Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 18, with further references.

22 — Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223.

23 — *Seco* v *EVI* (cited in footnote 22), paragraph 14.

24 — *Rush Portuguesa* (cited in footnote 12), paragraph 18; *Vander Elst* (cited in footnote 13), paragraph 23, and *Guiot* (cited in footnote 10), paragraph 12.

from enforcing those rules by appropriate means.'[25]

34. Similar considerations in regard to minimum wages can be found in Directive 96/71. In so far as Article 3(1)(c) includes minimum rates of pay among guaranteed terms and conditions of employment, it recognises in principle that the provisions governing such minimum rates of pay are legislation for the protection of workers, adopted in the public interest.

35. Nevertheless — as has already been mentioned — when the Court has considered whether provisions are justified by the public interest, it has established that any justification will only apply in so far as the public interest has not already been taken into account by the laws of the State in which the service provider is established.[26]

36. It is in this context that the employer's defence in the main action and the second question put by the referring court are to be understood. Their contents can be briefly summarised as follows: Does pay lower than that usually applicable in the place and sector in question also violate Community law where the posted workers enjoy a comparable or even more favourable system of social security in addition to more favourable taxation legislation in the State where they normally reside? This question touches upon the fact that consideration for work carried out encompasses more than just pay. It may thus be understood as asking whether in the interests of substantive fairness it is necessary to consider the overall situation.

37. The observations submitted to the Court contain the following arguments:

The *Auditorat du Travail* is of the opinion that only wages may be the subject of comparison, regardless of the form they take (in cash or in kind).

38. The *Belgian Government* takes the view that applying the collective labour agreements of the place where service is provided complies with Community law. The rules of the State from which the workers are posted could only be applicable if they were more favourable. That is not the case here. Nor is there question of doubling of the burden on employers. Wage levels inferior to those applicable in the Member State in question would, for reasons of competitive equality alone, be unacceptable.

25 — *Guiot* (cited in footnote 10), paragraph 12.

26 — *Reisebüro Broede* (cited in footnote 10), paragraph 28, with further references, and *Guiot* (cited in footnote 10), paragraph 17.

The referring court's position would seem to indicate, however, that compliance with minimum-wage legislation might in some circumstances constitute a restriction on the freedom to provide services. It is only in that case that an examination could take place as to whether the national rules might be justified. It is for this reason that the Belgian Government observes, in the alternative, that any comparison must be based on the individual elements of the protective provisions at issue. The individual elements are not interchangeable, which is why a general assessment would not be appropriate. Moreover, one would encounter insurmountable practical difficulties in attempting a general assessment. A comparison of pay is, in itself, difficult enough.

39. The *French Government* observes that an overall comparison of the national regimes at issue might give rise to more questions than answers in view of the wealth of material to be taken into consideration. It is also by no means sure that the outcome of such a comparison would lead to the result desired by the defendant in the main proceedings, or that the minimum wage applicable in Belgium would not, after all, have to be paid. Such a discussion would in any event be meaningless, since the applicable French law, as well as Belgian law and finally also Directive 96/71, require the application of an entire package of social security provisions in regard to every posting, which would be contrary to any apportionment or selection of individual elements.

40. The *German Government* likewise takes the view that a global comparison of the regimes in question is not possible and that only pay, as such, may be the subject of comparison. The minimum wage applicable in the State in which services were provided could, however, only be applicable if the worker did not already receive equal or more pay under the valid rate in his home State. What is needed is thus a comparison of the benefits, comparing only like with like. Any comparison of minimum wages by means of criteria not already falling within the definition of terms and conditions of employment must be excluded. Employment conditions on the one hand and social security on the other are, as a rule, to be handled separately. This is also to be inferred from point 21 of the preamble to the Directive.[27]

Minimum wages are, after all, gross earnings. For this reason questions of taxation law and social security could — indirectly — be relevant when examining compliance with minimum wages, since the amounts to be deducted from gross earnings are governed by the laws of the State to which the posting is subject.

41. The *Austrian Government* also rejects, in essence, any global comparison. The

27 — This paragraph reads:
'... 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.'

case-law as it stands at present does not require a global comparison. The reference to differing social security regimes is not a reason for denying minimum wages to the posted worker. When carrying out the required benefits analysis only identical elements may be compared. Besides, it is gross earnings which are decisive. The Austrian Government observes, finally, that provisions of social security and taxation law are excluded from the Directive.

42. The *Netherlands Government* points out that, in accordance with the Court's case-law, an obligation to comply with provisions adopted in the general interest exists only where such interests are not already guaranteed by provisions of the State from which the workers are posted. The judgment in *Guiot* is of particular importance in the present case. The criteria of social security and taxation law as referred to by the national court are capable of influencing minimum wage levels. It is therefore of fundamental importance to ascertain whether comparable protection exists. However, it is necessary to consider every element individually. To this extent the present case is concerned only with minimum wages. The term minimum wage is to be understood as meaning gross earnings. The Netherlands Government observes finally that the obligation to comply with provisions adopted in the general interest in the State in which services are provided is reasonable only where these interests are not already sufficiently guaranteed by the laws of the State of the service provider.

43. Finally, the *Commission* takes the view that it is the earnings effectively received which must be compared. Directive 96/71 is concerned with neither social security nor taxation law. The wages which must be taken into consideration are gross earnings.

44. It is clear that, as the participants maintain, some sort of benefits analysis is required.[28] In the final analysis, it is common ground that the applicable minimum rates of pay must be compared, a view strongly supported by practical considerations. In this context it is ultimately gross earnings which are decisive, since net earnings are essentially dependent upon the worker's personal situation.

45. However, there seems to be a certain amount of uncertainty, expressed, for example, in the fact that the Commission speaks of wages effectively received[29] whereas the German Government admits that tax and social security law could also — indirectly — be relevant to minimum wages. These observations result from a general problem, also reflected to a certain extent in Directive 96/71. Article 3(1), second paragraph, thereof reads:

'For the purposes of this Directive, the concept of minimum rates of pay referred

28 — See Article 3(7), subparagraph 1, of the Directive.

29 — Le salaire effectivement perçu par le travailler (p. 6 of the Commission's written observations).

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.'

46. Article 3(7) reads:

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

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.' [30]

47. The following, according to Article 3(1)(c), are to be guaranteed:

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

48. As indicated in the Council's Statement of Reasons concerning Common Position (EC) No 32/96, [31] this provision was the subject of debate. The Commission had proposed a different content. The statement of the Council's reasons reads:

'in point (c) (minimum rates of pay):

— the reference to allowances has been dropped;

— point (c) has been made non-applicable to occupational retirement pension schemes.'

49. All of that reflects a difficulty expressly raised by the Belgian Government when it observed that even a simple comparison of wages is complex. Logically one must assume that social security benefits cannot

30 — Within the framework of a comparison, this may well be the minimum wage in the State from which the workers are posted.

31 — Common Position (EC) No 32/96 adopted by the Council on 3 June 1996 with a view to adopting the Directive concerning the posting of workers, Statement of Reasons III(2)(1)(e), second indent (OJ 1996 C 220, p. 1).

be included in a general comparison of wages since they are excluded from the scope of Directive 96/71. [32] The same must apply to taxation provisions. These are areas which must be clearly distinguished from one another in addition to being subject to different authorities. Lastly, practical considerations, as touched upon in the observations submitted to the Court, are not to be ignored.

50. It will thus have to be assumed that, when carrying out the benefits analysis prescribed by Community law, only gross wage rates are to be compared. In doing so, it must be borne in mind that, due to the applicable national social security and taxation regimes, it is not possible to attain a level of equal treatment that one could qualify as absolute. One will, however, be able to qualify the result as logically correct as well as being the 'lesser evil'. From the point of view of worker protection the level of pay represents an objective quantity as well as being an acceptable criterion in terms of competitive equality.

51. If the preamble to the Directive focuses exclusively on worker protection, it must be said that the political discussion which took place at the time of the Directive's adoption also showed — and this I mention purely in passing — that in this context the criterion of a level playing field for competition is to a great extent equated with protection of the national economy and is thus not completely free of protectionist characteristics. The (substantial) additional costs which, if applicable, may arise for the posting undertaking might in individual cases be relevant, if not directly in the benefits analysis, then when determining whether such a measure is proportionate.

52. In response to the questions referred to the Court it may be stated, at this stage, that the comparison should be confined to gross earnings.

53. The third of the four criteria established by the Court in order to determine whether a national provision adopted in the general interest complies with Community law is that it must be *suitable for securing the attainment of the objective which it pursues*. That it is so in the present case is quite clear. It is in the interests of the protection of workers for a worker to receive, as a result of the benefits analysis, [33] the larger amount, meaning, if applicable, the minimum wage of the place where the services are provided. The level of pay generally applicable at the place where the services are provided is also to be adhered to in order to prevent distortion of competition by wage dumping.

32 — See point 21 of the preamble to the Directive, cited in footnote 27.

33 — See Article 7(1) of the Directive.

54. Finally, the fourth and last criterion must be examined, that is, whether the measure *goes beyond what is necessary in order to attain its objective*. The reservations[34] expressed in connection with the criteria to be considered when making a benefits analysis with regard to the reasonableness of the obligation to pay the minimum wages applicable in the Member State and sector in question, where that entails a substantial additional burden, are even more pertinent in cases of services of minor duration or import. It is in that context that the referring court's first question arises. The question explicitly asks for an interpretation of the term 'length of the posting'. It is then clarified by asking whether or not the term includes posting on a part-time or sporadic basis. The term 'part-time' is not to be understood here in the classical sense of a part-time job, as can be deduced from the rest of the question, which speaks of performing a part of the services 'in the course of days, weeks, or a month'.

55. In such circumstances the obligation to comply with the minimum-wage legislation of the place where the services are provided might prove particularly onerous, since when calculating wages for one and the same period, the minimum wage rates of differing Member States could be applicable, in addition to the resulting administrative difficulties.

34 — See above, point 51.

56. The observations submitted to the Court on this question raised by the referring court are as follows:

The *Belgian Government* takes 'posting' to be a general term. It is applicable in cases such as that in the original proceedings as well as for part-time work. Neither the length of the posting, nor the fact that the services may be provided for only part of the time, nor the fact that they are to be provided in a border zone would prevent the Directive from applying. This view is supported by the Directive, which provides for few exceptions, none of which covers situations like that in the main proceedings.

57. The *French Government*, which considers the first question referred to the Court only in the alternative because it considers that it is inadmissible, starts by making it clear that when considering whether the national provisions — particularly penalties — are necessary care must be taken not to deprive the freedom to provide services of its '*effet utile*'.[35] It goes on to state that, pursuant to the Court's case-law and the contents of the Directive, one must, as a rule, assume that collective wage agreements are applicable. The Directive contains a social component in that it prescribes an upward harmonisation of protective provisions; however, it

35 — It refers to the Opinion of Advocate General Van Gerven in *Rush Portuguesa*, cited in footnote 12, points 17 and 18.

also caters to economic considerations in that it seeks to prevent distortion of competition. The principle of equal treatment requires that workers of an undertaking established in another Member State may benefit, under the same circumstances, from a minimum wage provided for by national legislation. Specifically in response to the question referred for a preliminary ruling, the French Government observes that the Directive does not differentiate according to the manner in which services are provided by the posted worker, that is to say, between full-time and part-time employment.

58. The *German Government*, which also answers the first question only in the alternative, considers that Member States may, under certain conditions, restrict the freedom to provide services beyond the scope of the Directive. National rules could therefore also be applicable to part-time employment. The Directive, for its part, provides for only a few exceptions.

59. The *Austrian Government* holds the view that the socio-political objective of guaranteeing minimum wage levels for each worker active in the territory of a Member State prevents any restriction of this obligation to full-time employees, since otherwise it would be possible to circumvent the purpose of the Directive. For this reason it is necessary to include part-time workers as well as those active in border zones in the cover provided by the rules. It may be true that the period for implementing Directive 96/71 has not yet expired. However, under the Directive compliance with minimum-wage legislation is nothing less than an obligation. Only the exceptions expressly mentioned in the Directive may be considered, and none is provided for for part-time workers.

60. The *Netherlands Government* points out that the Directive's scope is defined in Article 1(3). The duration of the services is irrelevant. The Directive provides for compulsory and optional exceptions, however, which allow for a relatively flexible application.

61. The *Commission* also refers to Article 1(3) of the Directive as well as to the Common Position of the Council and the Commission,[36] which indicates that the Directive must be applied in a case such as that at issue here. The applicability of the Directive does not depend on the duration of the services. It is therefore irrelevant whether the services are provided on a part-time basis.

36 — The Common Position is cited in the Report for the Hearing and states in effect, in regard to Article 1(3)(a) of the Directive, that the provision is applicable to postings which fulfil the following conditions:
- there must be a transnational provision of services by an undertaking under a contract between this undertaking and the beneficiary of the services;
- there must be a posting in the context of this provision of services.

62. As has also been pointed out in the observations, part-time employment is, in any event, not expressly excluded from the Directive's scope. Such a general exemption would also carry the risk of circumventing mandatory provisions, as rightly pointed out by the Austrian Government.

63. One may not, however, fail to recognise the fact that the term 'part-time posting' is not used by the referring Court in the classical sense of 'part-time employment'. Thus one cannot rule out the possibility that the special circumstances of workers who divide up their working hours due to the necessity of providing their services at different places may involve special problems which require independent consideration. The duration and extent of the services to be provided could therefore undoubtedly play a decisive role.

64. The general structure of the Directive reflects that. The Community legislature certainly recognised this problem and took it into consideration in the form of a compromise, in the form of the exemptions provided for in the Directive for short-term postings and work which is not significant. An analysis of those provisions affords an insight into the considerations of the legislature in regard to these particular situations.

65. Firstly, Article 3(2) of the Directive [37] contains a mandatory exemption for minimum paid annual holidays and minimum rates of pay (for certain kinds of work) where the period of posting does not exceed eight days. The length of the posting is thus quite clearly decisive in that case as regards the Directive's applicability.

66. Furthermore, paragraphs (3) to (5) of Article 3 provide for optional exemption. The exemptions in paragraphs (3) and (4) relate to the length of the posting and those in paragraph (5) to the significance of the work to be performed.

Pursuant to Article 3(3) [38] the Member States may opt to exclude the applicability of minimum wage rates — except in cases of temporary transfer of workers [39] — where the period of the posting *does not exceed one month*. It is therefore solely the duration of the posting which is decisive for this potential exemption.

37 — The provision reads:
'In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph 1(b) and (c) shall not apply, if the period of posting does not exceed eight days.
...'

38 — This provision reads:
'Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of 1(c) in the case referred to in Article 1(3)(a) and (b) *when the length of the posting does not exceed one month*' (my emphasis).

39 — See Article 1(3)(c).

Pursuant to Article 3(4)[40] Member States may delegate the powers conferred upon them by Article 3(3) to employers and labour by empowering them to either exclude the applicability of minimum wages in cases of postings not exceeding one month, or to derogate from a general exemption made by the Member State.

67. Article 3(5) concerns the significance of the posting and provides, in subparagraph 1, that Member States may provide for exemptions in regard to minimum annual holidays and minimum wages in the cases mentioned in Article 1(3)(a) and (b) of the Directive *where the amount of work to be done is not significant.*

Subparagraph 2 of Article 3(5) provides that Member States which avail themselves of the option referred to in the first subparagraph are to lay down the criteria which the work to be performed must meet in order to be considered as '*non-significant*'.

68. Thus, where the amount of work is not significant, minimum annual holidays and minimum wages can be excluded from the Directive's scope, in which case it is for the Member States alone to define what work is 'non-significant'. The Member States thus enjoy a relatively large freedom to derogate from the Directive.

69. As regards the reasons for the aforementioned exemption clauses point 16 of the preamble to the Directive states:

'... there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays;... when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements;... where the *amount of work* to be done is *not significant*, Member States may derogate from the provisions concerning minimum rates of pay and the minimum length of paid annual holidays.'[41]

70. The Statement of the Council's Reasons relating to the Common Position adopted on 3 June 1996[42] provides some indication

40 — The provision reads:
'Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this article, by means of collective agreements within the meaning of paragraph 8 of this article, concerning one or more sectors of activity, *where the length of the posting does not exceed one month*' (my emphasis).

41 — My emphasis.

42 — Cited in footnote 31.

as to the background and historical development of the exemption clauses. Part III.2.1(g), concerning non-application of the provisions on minimum paid annual holidays and minimum rates of pay (Article 3(2) to (5)), reads as follows:

'On the question of exemption, under certain conditions, from application of the provisions on minimum paid annual holidays and minimum rates of pay, the Council struck a compromise between the position of the Commission and some delegations, which sought *mandatory non-application* for postings lasting less than a given period, and the positions of the other delegations, which wanted either mandatory application from the first day of the posting or optional non-application to short-term postings.

The main points of the compromise worked out by the Council are as follows:

— mandatory non-application of the provisions on minimum paid annual holidays and minimum rates of pay to the initial assembly and/or first installation of goods, where these activities do not relate to the building industry and the period of posting does not exceed eight days (Article 3(2)),

— optional non-application to the posting of workers on the account of the undertaking and under its direction or within a group:

  — of the provisions on minimum rates of pay if the period of posting does not exceed one month, after consultation of employers and labour or on the basis of a collective agreement (Article 3(3) and (4)),

  — of the provisions on minimum paid annual holidays and minimum rates of pay, on the grounds that the amount of work to be done is not significant (Article 3(5)).'

71. Combined consideration of those reasons leads one to conclude that minimum wage rates are, in any event, not unconditionally applicable at all times. It may seem plausible, as advocated in some of the observations, to conclude from the existence of the exemptions that such provi-

sions are, as a rule, to be considered as falling within the Directive's scope. On the other hand, it must be recognised that only the construction sector falls mandatorily within the scope of the Directive, that is to say that the Member States must first explicitly designate, within the meaning of Article 3(10), other activities which are to fall within the Directive's scope.

72. It can thus by no means be assumed that minimum wage rates will be regularly applicable in all circumstances. It is therefore certainly possible to undertake a benefits analysis before applying mandatory minimum wage provisions, particularly where the period for implementation has not yet expired so that it remains to be seen whether national lawmakers will avail themselves of the exemption clauses, it being clearly the intention of the Community legislature that such an option be available.

73. For the purposes of the present case this means that it is for the national court to undertake such an analysis, balancing the benefits to the workers in question against the particular burden for the employer, taking into account the length and significance of the work.

74. Although it is not for the Court of Justice to undertake this analysis, several factors speak in favour of the Belgian minimum wage rates being applicable in the present case, since the defendant undertaking regularly provided services during an extended period of time consisting of several consecutive months. Furthermore, it is established that six or seven of the thirteen workers were employed full-time during the period in question, whilst the other workers were employed in Belgian territory for at least a substantial part of their work hours. [43] Thus, for example, during a site inspection an employee roster was discovered which covered a period of several months. [44]

75. Where the employer is capable of drawing up a detailed employee roster for extended periods of time, one may reasonably expect that he also indicate the number of hours worked by each of his employees at each site. That would not involve any substantial extra administrative effort. An accurate list of the hours worked should be made; the workers should then be paid at the applicable local rate. A legal appreciation of the factual circumstances is, however, a matter for the referring court.

43 — According to the record of a supplementary investigation (Annex 4 of the Belgian Government's written observations) carried out in regard to five workers mentioned by name, they worked *'l'essentiel'*, *'la totalité'*, *'une partie'* or *'principalement'* in Belgium.

44 — According to the record of a site inspection which took place on 21 March 1997 (Annex 1 to the Belgian Government's written observations), employee rosters were consulted for the period from June 1996 to March 1997.

C — Conclusion

76. In the light of the foregoing considerations I suggest the following answer to the questions referred to the Court for a preliminary ruling:

The term 'duration of the posting' in 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 generally includes the part-time posting of a frontier worker by an undertaking of a Member State, who carries out a part of his work during a period of days, weeks or months in the territory or territories of one or more Member States. In doing so, however, — at least prior to expiry of the period for implementation of the Directive — one must take into account the legislative possibilities and considerations provided for in Article 3(10), as well as in Article 3(3), (4) and (5), in evaluating the particular case, that is to say, the national court must first ascertain whether the national legislature explicitly prescribes national minimum wage provisions for the economic sector in question in the case of service providers established in another Member State and whether application of such provisions is reasonable having regard to the duration and significance of the services provided.

Where a Member State requires an undertaking established in another Member State which, if only temporarily, posts workers to the territory of the first Member State to comply with its statutory provisions or national collective wage agreements in regard to minimum wages on grounds of the public interest, it does not infringe Articles 59 and 60 of the Treaty (now, after amendment, Articles 49 and 50 EC) unless the public interest has already been taken into account by provisions in the State where the service provider is established. Comparison of the benefits of the various national rules to be carried out in this connection must be limited, however, to a comparison of gross minimum wages. Other factors which, although they may be capable of influencing a worker's economic situation, result from the applicable social security and taxation legislation are not to be included in the comparison of wages.