Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 6 May 2021[1]

Case C-428/19

**OL,
PM,
RO
v
Rapidsped Fuvarozási és Szállítmányozási Zrt.**

(Request for a preliminary ruling from the Gyulai Törvényszék (Gyula High Court, Hungary) (formerly Gyulai Közigazgatási és Munkaügyi Bíróság (Gyula Administrative and Labour Court, Hungary)))

(Reference for a preliminary ruling – Directive 96/71/EC – Freedom to provide services – Posting of workers in the context of the provision of services – Drivers working in international transport – Compliance with the minimum rates of pay of the country of posting – Daily allowance – Regulation (EC) No 561/2006 – Fuel economy allowance)

I. Introduction

1. The applicants in the main proceedings are international transport vehicle drivers. They are regularly posted from Hungary to France. Alleging that their actual wage during their posting is far below the applicable French minimum wage, thus breaching the conditions of employment guaranteed by Article 3(1) of Directive 96/71/EC[2] ('the Posted Workers Directive'), the applicants brought an action against their Hungarian employer before the Gyulai Törvényszék (Gyula High Court, Hungary).

2. It is in that context that the referring court seeks guidance on, inter alia, first, whether the Posted Workers Directive applies to the applicants; second, whether per diems paid to the applicants must be considered to form part of their minimum wage; and third, whether a fuel economy allowance that is occasionally paid to the applicants is of such a kind as to endanger road safety, in breach of Regulation (EC) No 561/2006.[3]

1 Original language: English.

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

3 Regulation of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1).

II. Legal framework

1. Directive 96/71

3. Pursuant to Article 1(1) of the Posted Workers Directive, 'this Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers … to the territory of a Member State'.

4. Article 2 of the Posted Workers Directive defines 'posted worker' as 'a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.

5. Article 3 of the Posted Workers Directive concerns the 'terms and conditions of employment'. In relevant part, it states as follows:

'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

…

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

…

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 that 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.'

2. Regulation No 561/2006

6. Chapter III of Regulation No 561/2006, under the heading 'Liability of transport undertakings', includes only Article 10. In accordance with Article 10(1), a 'transport undertaking shall not give drivers it employs or who are put at its disposal any payment, even in the form of a bonus or wage supplement, related to distances travelled and/or the amount of goods carried if that payment is of such a kind as to endanger road safety and/or encourages infringement of this Regulation'.

III. Facts, national proceedings and the questions referred

7. In 2015 and 2016, the applicants in the main proceedings entered into employment contracts with Rapidsped ('the defendant'), a legal person seated in Hungary, for the position of driver working in international transport.

8. By those contracts, in addition to paying the basic wages, the defendant committed itself to providing its employees with per diems that increase with the length of the posting. According to the referring court, an information brochure of the defendant describes that the per diems are intended to cover 'expenses incurred abroad'. In accordance with the terms of the employment contract, but at its own discretion, the defendant also awards to its drivers a fuel economy allowance in cases where the fuel consumption is lower than the 'normal' level of fuel consumption.

9. The work undertaken by the applicants required them to travel by minibus to France and then, in the exercise of their work, to cross borders on several occasions. At the start of each posting abroad, the defendant provided its drivers with a declaration authenticated by a Hungarian notary, together with an *attestation de détachement* (posting certificate) drawn up by the ministère du Travail, de l'Emploi et de l'Insertion (the French Ministry for Labour), stating that the workers' wage is EUR 10.40 an hour. That wage is higher than the French minimum wage per hour in that sector of employment, which is set at EUR 9.76.

10. The applicants in the main proceedings brought an action against the defendant before the Gyulai Törvényszék (Gyula High Court, Hungary), alleging that their wage for the work carried out in France is not equal to the French minimum wage. Under their employment contract, the applicants received a gross monthly salary of EUR 544, amounting to approximately EUR 3.24 per hour. That leaves a difference of EUR 6.52 per hour between the French minimum wage and the hourly wage received by those drivers.

11. The defendant, for its part, contends that the difference of EUR 6.52 per hour between the French minimum wage and the hourly wage received by the applicants is in fact covered by the per diems and the fuel saving allowance paid to the applicants. Those two allowances form part of the applicants' salary and, as such, the applicants have received payment equivalent to the French minimum wage.

12. In the light of the foregoing, the Gyulai Törvényszék (Gyula High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(1) of [the Posted Workers Directive], in conjunction with Articles 3 and 5 thereof and Articles 285 and 299 of the [Hungarian] Labour Code, be interpreted as meaning that an infringement of that directive and of the French minimum wage legislation can be relied upon by Hungarian workers as against their Hungarian employers in proceedings instituted before the Hungarian courts?

(2) Must per diems intended to cover the costs incurred during the posting of a worker abroad be regarded as forming part of the worker's wage?

(3) Is the practice whereby, in the event of a given economy based on the distance travelled and the fuel consumed, the employer uses a formula to pay the driver of a transport vehicle an allowance which does not form part of the wage provided for in his employment contract and on which no taxes or social security contributions are payable, contrary to Article 10 of [Regulation No 561/2006]?

Notwithstanding that the fuel economy [allowance] encourages drivers of transport vehicles to drive in such a way as might endanger road safety (for example, by freewheeling for as long as possible when going downhill)?

(4) Is [the Posted Workers Directive] applicable to the international transport of goods, account being taken in particular of the fact that the European Commission has initiated infringement proceedings against France and Germany for applying minimum wage legislation to the road transport sector?

(5) If it has not been transposed into national law, can a directive in itself create obligations incumbent on an individual and, therefore, constitute by itself the basis for an action against an individual in a dispute brought before a national court?'

13. Written observations have been submitted by the applicants, the defendant, the French, Hungarian, Netherlands and Polish Governments, as well as the European Commission. The applicants, the defendant and the Hungarian Government also submitted replies to a written question put by the Court.

IV. Analysis

14. This Opinion is structured as follows: I shall first deal with Question 4 concerning the applicability of the Posted Workers Directive (A). Thereafter, I shall follow the order of the questions raised by the referring court for Questions 1 to 5 (B to E).

A. Question 4

15. By its fourth question, the referring court, in essence, asks whether the Posted Workers Directive is applicable to the international provision of services in the road transport sector. In particular, is that directive applicable to the posting of drivers in that sector?

16. That specific question has been resolved in the recent judgment of the Court in *Federatie Nederlandse Vakbeweging*,[4] a case originating from the Netherlands and concerning the application of the Posted Workers Directive to drivers in international road transport. The Court held that the Posted Workers Directive *applies* to the transnational provision of transport services.[5] According to the Court, the text of Article 1(1) and (3) of the Posted Workers Directive, read in the light of recital 4 thereof, indicates that the directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to the territory of another Member State.

17. From that scope, Article 1(2) of the Posted Workers Directive excludes only services involving navy seagoing personnel. No exception is made for other sectors. Therefore, the directive applies, as a rule, to any transnational provision of services involving the posting of workers, irrespective of the economic sector to which that provision of services relates. That includes the transnational provision of services in the road transport sector.[6]

18. In view of that answer, it is indeed not necessary to deal in detail with the submissions of the parties challenging the applicability of the Posted Workers Directive in this case. However, for the sake of completeness, it may be useful to consider three specific arguments put to the Court in the present proceedings.

4 Judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:976).

5 Ibid., paragraph 41.

6 Ibid., paragraphs 31 to 33.

19. First, the Hungarian and Polish Governments question the choice of Article 57(2) and Article 66 TEC (now Article 53(1) and Article 62 TFEU) as the correct legal basis for the Posted Workers Directive. Those provisions, which relate to the free movement of services, cannot be read as extending to the transnational provision of services in the road transport sector.

20. In its judgment in *Federatie Nederlandse Vakbeweging*, the Court dismissed any doubts surrounding the choice of legal basis for the Posted Workers Directive. The Court held that the primary aim of that directive is not the *specific* regulation of transport services (in which case a reference to Article 58 TFEU[7] would have been necessary).[8] Instead, the directive seeks to react to the *general* social and economic consequences that flow from the posting of workers in the framework of the provision of (all and any types of) services.[9] As such, there was no need to refer to an additional legal basis for transport in order to indicate that the sector of road transport activities forms part of the scope of that directive.[10]

21. Contrary to the position maintained by the Hungarian and Polish Governments, the fact that the latest directive revising the enforcement requirements and establishing rules on the posting of drivers (Directive (EU) 2020/1057)[11] refers to Article 91(1) TFEU as its legal basis, and thereby the provision on transport, does not change that conclusion. Directive (EU) 2020/1057 seeks to harmonise *specific* rules for posting drivers *in the road transport sector*. Its scope is thus far more specific than that of the Posted Workers Directive. Accordingly, since the latter directive does not seek to lay down 'common rules'; conditions for the operation of 'non-resident carriers'; 'measures to improve transport safety'; or other 'appropriate provisions' *in the field of transport*, there was no need to refer to Article 91(1)(a), (b), (c) or (d) TFEU.[12]

22. Second, the defendant and both the Hungarian and Polish Governments allege that there is an insufficient degree of connection between the applicants and the territory of France. According to those governments, the applicants do not fall within the definition of 'posted worker' within the meaning of Article 2(1) of the Posted Workers Directive.

23. I disagree.

24. It is clear that, pursuant to Article 2(1) of the Posted Workers Directive, a 'posted worker' means any worker, who, for a limited period, carries out his or her work in the territory of a Member State other than the State in which he or she normally works. However, because a worker cannot, in the light of that directive, be considered to be posted to the territory of a Member State unless the performance of his or her work has a sufficient connection with that territory, the Posted Workers Directive presupposes the need to carry out an overall assessment of all the factors that characterise the activity of the worker concerned.[13]

7 Under Article 58 TFEU, the freedom to provide services, in relation to transport, is governed by the provisions of the title of the FEU Treaty devoted to transport, namely Articles 90 to 100 TFEU.

8 Judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:976, paragraph 37). See also my Opinion in *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:319, point 52) and, to that effect, judgments of 8 December 2020, *Hungary* v *Parliament and Council* (C-620/18, EU:C:2020:1001, paragraphs 159 and 160), and of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraphs 144 and 145).

9 See my Opinion in *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:319, point 51).

10 Judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:976, paragraph 40).

11 Directive of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 (OJ 2020 L 249, p. 49).

12 To that effect, judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:976, paragraph 39).

13 Ibid., paragraph 45 and the case-law cited.

25. In the particular case of drivers working in international road transport, the *degree of connection* between the activities carried out by such a worker, in the context of the provision of the transport service, and the territory of each Member State concerned, is of particular relevance. The same is true of the proportion represented by those activities in the entire service provision in question.[14]

26. While that assessment is for the referring court to carry out, in the present case, it has been accepted by all parties that the applicants are transported by minibus from Hungary to a particular destination in France. From that 'base', they appear to perform road transport services within France. In certain circumstances, that may also involve cross-frontier transport operations. However, it appears that, for all the work performed by the applicants during their period of posting, their 'base' generally remains the same until they return to Hungary. That implies a strong degree of connection between the provision of the transport services in question by the applicants and the territory of France.

27. Those characteristics are notably different for a worker who provides only limited services in the territory of the *host* Member State, such as was the case in *Dobersberger*.[15] In that case, the Austrian Federal Railways contracted with a company, via several subcontractors, for the performance of catering services on its trains.[16] The connection between the workers operating on those trains and the territory, through which they were passing, was rather fleeting and temporary.[17] As such, they were not considered 'posted workers' within the meaning of Article 2(1) of the Posted Workers Directive.

28. Accordingly, it appears to me that the actual circumstances of the applicants must be distinguished from those present in *Dobersberger*, or even from road transport workers who merely transit through, or offload goods in, the territory of another Member State that is different from their home or host Member State. That is because, in those examples, anything resembling a fixed 'base' from where to perform work was notably missing.

29. Third, the Hungarian Government submits that there is specific wording in the applicants' employment contracts, which essentially seeks to make working abroad the norm rather than the exception. That wording ensures that a posted worker cannot be considered to perform work in a Member State 'other than the State in which he normally works', within the meaning of Article 2(1) of the Posted Workers Directive, because that worker 'normally' works abroad. Therefore, no 'posting' within the meaning of that provision in fact takes place.

30. That argument is ill conceived. It places the logic of the Posted Workers Directive on its head and seeks to replace it with an empty tautology: a worker's ordinary place of work is where he works. If he works there at a given moment, he cannot be considered to be posted there since he is actually working there. Indeed, following that understanding, a Hungarian worker could by definition never be posted. He would simply happen to be constantly shifting his 'ordinary' place of employment pursuant to the wishes of his employer in Hungary. His ordinary place of employment would then be, for instance, the territory of France for three weeks in January, the territory of Germany for four weeks in February and March, and the territory of Spain for two weeks in April, without ever benefiting from the essential rules for minimum protection pursued by the Posted Workers Directive.

14 Ibid., paragraphs 47 and 48. See also my Opinion in *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:319, points 97 and 102 to 104 and the case-law cited).

15 Judgment of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110).

16 Ibid., paragraphs 9 and 10.

17 Ibid., paragraph 31.

31. The Posted Workers Directive is an instrument that, among other things, seeks to protect any worker that is 'posted'.[18] It assesses whether such a posting occurs *from the perspective of the worker* and his or her 'ordinary' place of employment during that worker's professional career, taking into account the worker's '(economic) centre of life'.[19] That assessment requires a high degree of predictability since a posted worker's 'ordinary' place of employment is, in principle, the place to which he or she would generally return after his or her posting. Accordingly, it is incorrect for that assessment to be made in isolation for the specific period during which the worker is posted in order effectively to ensure that a particular employment relationship escapes the applicability of the Posted Workers Directive.

32. It is precisely for the purposes of this 'shifting' nature of employment across the European Union that Article 3(1) of the Posted Worker sought to coordinate *mandatory rules for minimum protection*, thereby setting a base level for the terms and conditions of employment that must be observed in the host country by employers who post their workers.[20] Read alongside recital 17 of the directive, those rules can only be waivered in circumstances where the worker would be subject to more favourable terms and conditions.

33. In my view, it is thus clear that (whatever) contractual provisions to the contrary cannot override the applicability of the Posted Workers Directive for workers that are *objectively posted*, and thereby undermine the 'base level' of mandatory rules contained in Article 3(1) of that directive for such employment relationships.

34. In the light of the foregoing, I suggest that the Court answer Question 4 as follows:

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 must be interpreted as applying to the transnational provision of services in the road transport sector.

B. Question 1

35. By its first question, the referring court enquires whether an infringement of the Posted Workers Directive and of the French minimum wage legislation can be relied upon by Hungarian workers against their Hungarian employer in proceedings instituted before the Hungarian courts.

36. All parties that submitted observations in relation to that question consider that it depicts a request for clarification as to which EU law instrument(s) provides the referring court with *jurisdiction*. In my view, that is not the only reading of that question. On its text, the question may instead be enquiring about whether the referring court can in fact apply (a part of) French law in proceedings before it and, on its basis, potentially find an infringement of the law (and which law). Therefore, within that second possible understanding, the issue does not centre on the attribution of jurisdiction, but rather on the *applicable law*.

37. In any case, the answer to both understandings of Question 1 is rather clear. The jurisdiction of a Hungarian court to adjudicate in a case such as the present one is not at all limited by the Posted Workers Directive.

18 See recitals 5, 6, 13 and 14 of the Posted Workers Directive. To that effect, see also judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 77).

19 Term aptly employed by Advocate General Szpunar in rebutting similar argument made by the Hungarian Government in his Opinion in *Dobersberger* (C-16/18, EU:C:2019:638, point 60).

20 Recital 13 of the Posted Workers Directive. See also judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraph 81).

38. First, with respect to the *jurisdiction* of the referring court to hear the dispute in the main proceedings, it appears to be common ground that the present case concerns a claim by Hungarian workers against their Hungarian employer, before a Hungarian court vis-à-vis a contract concluded under Hungarian employment law. Given those rather clear jurisdictional 'hooks', it is only natural that the competent courts of the employer's place of establishment in Hungary are considered to be the place of default jurisdiction.

39. I would assume that that is already the case under Hungarian national rules. The potential applicability of EU private law instruments, such as, for instance, Regulation (EU) No 1215/2012,[21] would lead to the same result. Hungarian courts would be competent, either by default pursuant to Article 4(1) of that regulation (the defendant is apparently a Hungarian legal person, thus presumably domiciled in that Member State), or possibly, if the conditions of Article 5(1) of that regulation were satisfied,[22] under the special head of jurisdiction for employment contracts, in particular under Article 21(1)(a) of Regulation No 1215/2012.

40. Do Articles 3 and 5 of the Posted Workers Directive change anything in that regard, as the defendant alleges?

41. I fail to see how they could. Those provisions concern the monitoring and public enforcement[23] of certain minimum and mandatory terms and conditions of employment. They do not alter the (national) rules on jurisdiction. In fact, Article 6 of the Posted Workers Directive is the only provision that addresses jurisdiction. However, that provision simply *adds* an additional avenue of jurisdiction before the courts of the host Member State. In doing so, that provision naturally does not change the (default) jurisdictional rules for Hungarian courts to hear cases involving their nationals under the ordinary national rules on jurisdiction.

42. Second, as to the question of how to determine the *applicable law* in a dispute, such as that before the referring court, where an element of the mandatory minimum terms and conditions of the employment relationship derive from French law, the answer is also clear. Article 3(1) of the Posted Workers Directive introduces a 'mandatory' core of terms and conditions from which the Member States and employers of posted workers cannot deviate, *irrespective of the law applicable to the employment relationship*.[24] In essence, those terms and conditions set a baseline of protection for posted workers which cannot be undermined. The 'minimum rates of pay' form part of that baseline of protection for the period of the posting of the worker at issue,[25] and are determined by the national law of the host Member State that defines those 'minimum rates of pay'.[26]

43. In the present case, that necessarily means that the referring court applies French minimum wage legislation to the employment contract of the applicants to determine whether that contract satisfies the 'minimum rates of pay', as provided for in Article 3(1) of the Posted Workers Directive. In this way, the relevant elements of French law to which Article 3(1) of that directive points are mandatory rules that will supersede any other (or opposing) contractual provisions. Indeed, elements of French law will become the applicable norm in a case otherwise presumably governed, as to its substance, by Hungarian law.

21 Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

22 Which does not appear to be the case because both the employer, as well as the employee, appear to be domiciled in Hungary.

23 To that effect, judgment of 12 October 2004, *Wolff & Müller* (C-60/03, EU:C:2004:610, paragraphs 28 and 29).

24 To that effect, judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraph 75). See also judgments of 8 December 2020, *Hungary* v *Parliament and Council* (C-620/18, EU:C:2020:1001, paragraph 60), and of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 65).

25 See point (c) of the first subparagraph of Article 3(1) of the Posted Workers Directive.

26 See the second subparagraph of Article 3(1) of the Posted Workers Directive.

44. In practical terms, it might be added that, as the French Government correctly observes, the referring court can obtain, if the need arises, the necessary information on the French minimum wage legislation by means of international instruments for cooperation between courts, such as the European Judicial Network in civil and commercial matters or the European Convention on Information on Foreign Law.

45. In summary, by its very logic, Article 3(1) of the Posted Workers Directive comes rather close to a *lex specialis* concerning applicable law.[27] It is bound to lead to situations in which either elements of the substantive law of the host Member State will be applied in a dispute in the home Member State, or vice versa. Indeed, in the latter scenario, if the employees were to seek the legal protection of their EU law based rights in the Member State of their posting, the courts of that Member State would also likely be called on to apply elements of the substantive law of the home Member State, since that would be the law applicable to the employment contract in general.

46. In conclusion, I propose that the Court reply as follows:

Article 3(1) of Directive 96/71 must be interpreted as meaning that an infringement of the host Member State's national legislation on 'minimum rates of pay' can be relied upon in proceedings brought in the home Member State, assuming that the latter courts have jurisdiction to hear the case, for instance by virtue of the employer being domiciled in that State.

C. Question 2

47. By its second question, the referring court essentially asks whether per diems intended to cover the costs incurred during the posting of a worker abroad must be regarded as forming part of the worker's wage.

48. That question arises due to the disagreement, between the parties in the main proceedings, as to whether the per diems form part of the applicants' 'minimum pay', within the meaning of Article 3(1) of the Posted Workers Directive. Pursuant to Article 3(7) of that directive, that can be the case only where an allowance falling thereunder is 'specific to the posting'. In such circumstances, the Posted Workers Directive requires the allowance at issue to be considered part of the posted worker's wage. However, that starting assumption is rebutted if the allowance in question is 'paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging'. It is the interpretation of those requirements in relation to the per diems at issue in the present case that the referring court seeks guidance on.

49. It should be recalled that Article 3(7) of the Posted Workers Directive contains what the Court has described as the '"*rule-exception*" relationship' for taking account of allowances and supplements.[28] That relationship consists of two parts. The *first part* contains the *default rule*: 'allowances specific to the posting shall be considered to be part of the minimum wage'. That rule is subject to the *second part*, which lays down an overriding *exception*: an allowance forms part of the minimum wage '*unless* [said allowance is] paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.'[29]

27 Thus naturally leading in fact to parallels and potential tensions with other instruments governing the choice of law – see further my Opinion in *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:319, points 90 to 96).

28 Judgment of 14 April 2005, *Commission* v *Germany* (C-341/02, EU:C:2005:220, paragraph 30). My emphasis.

29 My emphasis.

50. In other words, whether an allowance is ‘specific to the posting’, within the meaning of the default rule in the first part of the second subparagraph of Article 3(7) of the Posted Workers Directive is not necessarily the decisive element to be established at the outset. That is because that determination will in practical terms only be relevant if the exception in the second part of that subparagraph is not triggered. Indeed, as a result of that construction, it is the *exception* that decides on whether the allowance at issue falls within the scope of that provision in the first place.

51. On the basis of the limited information in the case file, I agree with the defendant’s position that, in the present case, the per diems do not appear to be ‘paid in *reimbursement* of expenditure *actually* incurred on account of the posting’.[30]

52. It appears well established that the per diems, which range from EUR 34 to EUR 44 depending on the period of posting, are paid as *lump sums* and *without* the need for *proof of expenditure*. Apparently, that is because the cost of accommodation and food are considered eligible without proof under Hungarian law.

53. In view of the consequent lack of any hypothecation between the per diems and the costs arising from the posting, I find it difficult to accept the applicants’ argument that the diems are paid for expenditure *actually* incurred by virtue of the posting. Indeed, while certainly likely, without proof of how the per diems were spent, there is no evidence to suggest that the applicants in fact spent the per diems in the first place, and, even if they did, whether the per diems were spent to cover expenditure arising *on account of* their posting.

54. The criterion is one of expenditure *actually* incurred on account of their posting. I emphasise the word ‘actually’ because, to my mind, it is clear that its inclusion in the second subparagraph of Article 3(7) of the Posted Workers Directive implies the need for presentation of some form of proof that links the ‘reimbursement’ at issue with expenditure ‘incurred on account of the posting’. The kind of proof to be presented is of secondary nature. Indeed, the Court has previously held that the method of covering expenditure as a result of the posting has no bearing on the legal classification thereof.[31]

55. Having suggested that the exception to the default rule is unlikely to apply, the question that remains is whether the default rule itself applies, that is to say: whether per diems are in fact ‘allowances specific to the posting’ that shall accordingly be considered part of the minimum wage.

56. While that issue is ultimately for the national court to ascertain, it would appear to me that the answer ought to be in the affirmative for two reasons. First, it has been stated that the employees indeed receive per diems for the duration of their posting *because* they are actually being posted. Second, since they are in no way invoiced or reimbursed for the costs actually incurred, the lump sum (that are per diems) indeed becomes a part of the wage, to be used by the employee as he sees fit. It is therefore, in practical terms, *indistinguishable from* his normal salary.

57. In the light of the foregoing, the logic of the default rule of Article 3(7) of the Posted Workers Directive appears applicable here: any payment received *because* of the posting, *but* which cannot be singled out as a reimbursement of specific costs, is simply part of the (minimum) wage.

58. The information brochure that both the referring court and the applicants refer to, which allegedly expressly explains that the purpose of the per diems is to cover ‘expenditure incurred abroad’, does not affect that conclusion. Leaving aside for now the questionable evidentiary value of a document external to the applicants’ employment contracts for the purposes of interpreting the nature and purpose of the

30 My emphasis.
31 Judgment of 12 February 2015, *Sähköalojen ammattiliitto* (C-396/13, EU:C:2015:86, paragraph 59).

per diems, the mere designation of an expense for a certain purpose does not change the lack of any hypothecation of the per diems to actual expenditure. If anything, the information brochure clearly indicates that the nature of the lump sum of the per diems is specifically designed to cover a broad array of expenses while abroad, most of which are likely indeed to arise due to the posting, but some of which may not.

59. That being said, even if one were to take into account the information brochure, there would still be no evidence of any link between possible costs incurred and the payment of the per diems. Therefore, the mere fact that the applicants' employment contract may or may not attach a certain purpose to the per diems has limited bearing on the classification of those allowances in reimbursement of costs '*actually* incurred on account of the posting', within the meaning of Article 3(7) of the Posted Workers Directive.

60. In conclusion, I propose that the Court answer Question 2 as follows:

Per diems that are paid without proof of expenditure, and which remains for the national court to verify, are not paid in reimbursement of expenditure actually incurred on account of the posting, within the meaning of Article 3(7) of Directive 96/71/EC. Provided that the per diems at issue in the present proceedings are also paid as an allowance specific to the posting, they shall be considered to be part of the minimum wage.

D. Question 3

61. By its third question, the referring court seeks guidance on the compatibility of the fuel economy allowance with Article 10 of Regulation No 561/2006. That provision prohibits any payment which encourages dangerous driving.

62. The applicants maintain that the fuel economy allowance is in breach of Article 10 of Regulation No 561/2006. They explain that that allowance consists of a formula which rewards the drivers of transport vehicles for a lower fuel consumption per distance travelled than that which is considered 'standard' for that distance. Accordingly, in order to achieve the fuel savings required to obtain the allowance, drivers are encouraged to adopt a driving behaviour which represents a risk for road safety.

63. In line with the majority of views submitted to the Court, on the basis of the information provided in the present proceedings, I do not share that conclusion.

64. At the outset, it should be recalled that Regulation No 561/2006 pursues two objectives. That is to say, the improvement of working conditions *and* general road safety.[32] Furthermore, Article 1 of that regulation explains that it *also* aims at promoting improved working practices in the road transport industry. As such, to the extent that the fuel economy allowance contained in the applicants' employment contracts has the potential to undermine general road safety, it is necessary to assess whether that allowance is precluded by Article 10 of Regulation No 561/2006.

65. Article 10(1) of Regulation No 561/2006 prohibits transport undertakings from giving drivers any payment, even in the form of a bonus or wage supplement, that (i) is related to distances travelled and/or the amount of goods carried, and (ii) if that payment is of such a kind as to endanger road safety and/or encourages infringement of that regulation.

32 See, to that effect, judgments of 2 June 1994, *Van Swieten* (C-313/92, EU:C:1994:219, paragraph 22), and of 9 June 2016, *Eurospeed* (C-287/14, EU:C:2016:420, paragraph 39).

66. First, there is no sufficient evidence in the case file to establish that the fuel economy allowance clearly 'relates' to distance travelled and/or the amount of goods carried. Naturally, an indirect link exists between distance/weight carried and fuel consumption. That cannot be denied. One need not be a physicist to understand that mass and energy relate, and that a certain amount of energy is necessary to move mass over a certain distance.

67. However, there is more to the consumption of fuel than mere distance travelled and weight carried. Indeed, as the French Government explains, fuel consumption is multifactorial. For instance, ambient and environmental conditions, tyre pressure, driving style, and even aspects such as the use of air conditioning devices may all have an impact on the fuel consumption of drivers.[33] None of those aspects are discussed by the referring court. In fact, that court is completely silent on why it considers the fuel economy allowance to 'relate to' distance travelled and/or the amount of goods carried. In the absence of such an explanation, I am not convinced that the fuel economy allowance, in the abstract, even falls within the scope of Article 10(1) of Regulation No 561/2006 in the first place.

68. Second, and purely for the sake of argument, even if the fuel economy allowance fell within the scope of Article 10 of Regulation No 561/2006, no evidence has been presented by the applicants that that allowance as such actually incentivises dangerous driving. Intuitively, one would instead assume that such an allowance might in fact have the opposite result; dangerous driving is more often the result of driving fast, accelerating too much or in the wrong places, with such activities demanding more, rather than less, fuel.

69. The referring court provides the example of a driver freewheeling down a hill for as long as possible to save fuel. It is indeed possible to imagine that, in some scenarios, a truck freewheeling on a motorway, be it in the right-hand lane, but at a very low speed, or even in the left-hand lane, overtaking another truck for several kilometres, precisely because it is trying to save fuel, is indeed perhaps not indicative of overall road safety.[34] However, without any further details or explanation, there is simply no automatic causality between such behaviour and a fuel economy allowance.

70. This is not to say that there may not be contributing factors which, in practice, could have the effect of turning an otherwise innocent financial encouragement into an incentive to drive dangerously. As the European Commission correctly observes, if the remuneration encouraging fuel saving were based on a standard defined in such a way as to make the grant of a flat-rate premium not conditional on greater fuel economy in relative terms (for example, when the total annual consumption is below the 'standard' level by at least 5%), but on absolute consumption over a certain distance (such as by paying a premium of EUR 50 per 100 litres of fuel saved), then there may be instances where a driver feels encouraged to drive less safely. Similarly, if the reimbursement requirement for 'additional costs' arising from fuel consumption above the 'standard' level calculated is wholly unreasonable, a driver would have a certain indirect incentive to save as much fuel as possible, irrespective of the road, environmental or geographical conditions in which he is being asked to operate.[35]

71. What is clear is that neither the referring court, nor the interested parties, have identified or submitted anything which may substantiate those considerations. Therefore, I find it impossible to conclude that, *in the abstract*, a fuel economy allowance would be per se precluded by Article 10 of Regulation No 561/2006.

33 For illustration, see, for example, the Joint Research Centre (of the European Commission) Science for Policy Report, Zacharof, N. G. et al., 'Review of in use factors affecting the fuel consumption and CO2 emissions of passenger cars', 2016, p. 7.

34 Or if not outright detrimental to the road safety, then certainly not beneficial to the mental well-being of drivers effectively queuing at low speed in the left-hand lane as a consequence.

35 Indeed, it would certainly not improve general road safety if an unreasonably low 'standard' consumption limit were calculated, for example, for a 20-tonne truck to climb and descend the Stelvio Pass in Italy.

72. In conclusion, I propose that the Court answer Question 3 as follows:

Article 10 of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 must be interpreted as not precluding, in itself, a fuel economy allowance that may be paid to a posted worker by his or her employer when a standard rate of fuel consumption is not exceeded. Whether, in the particular circumstances of a case, the fuel economy allowance nonetheless must be understood as related to distances travelled and/or the amount of goods carried and is of such a kind as to endanger road safety and/or encourages infringement of Regulation No 561/2006 falls to the national court to determine.

E. Question 5

73. By its fifth question, the referring court asks whether a directive that has not been transposed into national law can create obligations incumbent on an individual and, therefore, constitute, in and of itself, the basis for an action against an individual in a dispute brought before a national court.

74. By that question, the referring court wishes to know, in essence, whether directives can have horizontal direct effect. That being said, the referring court provides no explanation as to why that question is asked and how it is at all relevant in the main proceedings. Although one does not need to stretch their imagination too far to deduce that the referring court probably means the Posted Workers Directive, there is nevertheless no basis for the Court to determine which provision the referring court seeks guidance on, and, most importantly, why the resolution of that question is necessary for the underlying proceedings.

75. In this regard, it must be recalled that Article 94 of the Rules of Procedure of the Court of Justice, which determines the content of requests for a preliminary ruling, states in point (c) that the latter must, inter alia, contain 'a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings'.

76. Since the referring court has failed to fulfil this obligation, I propose that the Court consider Question 5 to be inadmissible.

V. Conclusion

77. I propose that the Court answer the questions referred for a preliminary ruling by the Gyulai Törvényszék (Gyula High Court, Hungary) as follows:

Question 4

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as applying to the transnational provision of services in the road transport sector.

Question 1

Article 3(1) of Directive 96/71 must be interpreted as meaning that an infringement of the host Member State's national legislation on 'minimum rates of pay' can be relied upon in proceedings brought in the home Member State, assuming that the latter courts have jurisdiction to hear the case, for instance by virtue of the employer being domiciled in that State.

Question 2

Per diems that are paid without proof of expenditure, and which remains for the national court to verify, are not paid in reimbursement of expenditure actually incurred on account of the posting, within the meaning of Article 3(7) of Directive 96/71. Provided that the per diems at issue in the present proceedings are also paid as an allowance specific to the posting, they shall be considered to be part of the minimum wage.

Question 3

Article 10 of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 must be interpreted as not precluding, in itself, a fuel economy allowance that may be paid to a posted worker by his or her employer when a standard rate of fuel consumption is not exceeded. Whether, in the particular circumstances of a case, the fuel economy allowance nonetheless must be understood as related to distances travelled and/or the amount of goods carried and is of such a kind as to endanger road safety and/or encourages infringement of Regulation No 561/2006 falls to the national court to determine.

Question 5 is inadmissible.