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► **To cite this version:**

Marco Rocca. One train! (but different working conditions) – CJEU 19 December 2019, C-16/18 (Michael Dobersberger v Magistrat der Stadt Wien). *Arbeidsrechtelijke Annotaties*, 2020, 3, pp.50-71. hal-03520287

HAL Id: hal-03520287

<https://hal.science/hal-03520287>

Submitted on 31 Aug 2022

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One train! (but different working conditions)

CJEU 19 December 2019, C-16/18 (Michael Dobersberger v Magistrat der Stadt Wien)

Marco Rocca*

Abstract

The *Dobersberger* decision of the Court of Justice of the European Union deals with the legal situation of posted workers on an international train. These workers, employed by a Hungarian company and based in Hungary, operate on a train connecting Budapest with Salzburg and Munich. The Court concludes against their inclusion under the Posting of Workers Directive, considering their connection to the Austrian territory as too limited. This decision is based on a selective representation of the facts and sits difficultly with the letter of the law and the intention of the legislator.

Keywords: Posting of workers, International train, Transport sector, Subcontracting, Short-term posting

- *You see the train doesn't stop at Tucumcari...*
 - *This train'll stop at Tucumcari.*
 - For a Few Dollars More, 1965

1. Introduction

On 19 December 2019 the Court of Justice (hereinafter, “the Court” or “CJEU”) delivered its decision in the *Dobersberger* case.¹ The case dealt with the specific situation of catering staff of an international train under the Posting of Workers Directive (hereinafter “PWD”).² Notwithstanding the relative specificity of the facts at stake, the importance of the case is highlighted by the fact that it was decided by the Grand Chamber, while witnessing the interventions of the Austrian, Czech, German, French, Hungarian, and Polish Governments, as well as of the European Commission.

The reasons for such an interest are, of course, multifaceted. However, the main explanation for this is that the case at stake deals with the posting of workers, a topic which has been the

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¹ CJEU 19 December 2019, C-16/18 (Michael Dobersberger v Magistrat der Stadt Wien), hereinafter “*Dobersberger*”.

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.

source of a lacerating debate at European level for (at least) the past 13 years. As we will see in a moment, *Dobersberger* deals with the scope of application of the European legal framework for posting of workers. As such, from the get-go the case had the potential to exclude an important number of workers and activities from these rules. More specifically, in *Dobersberger* the Court of Justice had to decide whether a group of workers, employed by a Hungarian company and operating catering services on a train connecting Budapest with Salzburg and Munich under a contract for services with the Austrian railway operator, would fall under the scope of the legal framework for posting of workers.

The present case note provides a short description of the case, both from a factual and legal perspective, as well as a detailed analysis of the decision delivered by the Court of Justice. The objective of this analysis is twofold. The first aim is to highlight the legal reasoning developed by the Court, in order to allow the reader to appreciate its limited legal underpinning. The second is to situate the decision in the context of the ongoing discussion on posting of workers so as to try and assess its impact on this field.

The contribution is structured as follows. In the next Section I will provide some context for the decision by considering the evolution of the legal framework for posting of workers. Section 3 provides an outline of the facts and the procedure of the *Dobersberger* case, the next two Sections focus on the Opinion delivered by AG Szpunar (4) and the decision ultimately reached by the Court of Justice (5). In Section 6 I develop a critical analysis of the decision, focusing on the legal reasoning deployed by the Court to justify its decision. Section 7 is instead devoted to an assessment of the broader meaning of the decision and its consequences for the field of posting of workers.

2. Context: a new chapter in the posting saga

The concept of “posting of workers” covers the situation where an employer established in a Member State (the Home State) temporarily sends its workers to the territory of a different Member State (the Host State) in the context of a contract for services,³ an intra-group posting⁴ or a provision of manpower by a temporary work agency.⁵ The PWD was adopted in 1996, after a protracted negotiation lasting 5 years.⁶ The text was a compromise between the country of origin principle, characterising the freedom to provide services, and the position emerging from the early case law of the CJEU on the issue, leaving the Host State free to apply the entirety of their labour regulations to posted workers.⁷ As such, the PWD mandates Member States to apply a list of minimum conditions to posted workers, covering important elements of working conditions such as minimum rates of pay,⁸ working time and paid leave.⁹ In order to be applicable to posted workers, these conditions have to be established by legislation or collective agreements which are either universally or generally applicable in the Host State.¹⁰

The issue of posting of workers gained again political prominence during the campaign for the French referendum of 2005 on the EU constitutional treaty through the infamous figure of the

³ Article 1(3)(a) of the PWD.

⁴ Article 1(3)(b) of the PWD.

⁵ Article 1(3)(c) of the PWD.

⁶ For a more detailed account of the birth of the PWD, see J. Hellsten, On the social dimension in posting of workers, Helsinki: Publication of the Labour Administration, no. 301, 2006; M. Rocca, Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights, Antwerp: Intersentia, 2015, pp. 113-142.

⁷ CJEU, 27 March 1990, C-113/89 (*Rush Portuguesa v Office national d'immigration*), §18.

⁸ This has recently changed to cover the whole “remuneration” as we will see in the next paragraph.

⁹ Article 3(1) of the PWD.

¹⁰ Articles 3(1) and 3(8) PWD.

‘Polish plumber’,¹¹ and in connection with the negotiation of the Services Directive.¹² A few years later, the decisions of the CJEU in a series of landmark cases -the most famous being the *Laval* decision-¹³ put this question squarely at the centre of the debates about the EU social dimension. In the words of the so-called Monti Report, these decisions revived ‘the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level’.¹⁴ In these decisions the Court interpreted the PWD in light of its legal basis, the freedom to provide services, and concluded that the list of minimum conditions represented in fact a ceiling for the protection awarded to posted workers, as conditions going above or beyond those allowed by the PWD would constitute unjustified restrictions to the freedom to provide services due to their lack of necessity.¹⁵

The ensuing debate led, first, to the adoption of the so-called Enforcement Directive¹⁶. This instrument did not touch the substantive aspects of the posting legal framework, aiming instead at enhancing the cooperation between national authorities,¹⁷ making sanctions more effective, and allowing Member States to introduce mechanisms for joint liability in case of subcontracting.¹⁸ Importantly, for the case here at stake, the Enforcement Directive allowed Member States to introduce an obligation for the posting undertakings to make a simple declaration “at the latest at the commencement of the service provision”, as well as “to keep or make available and/or retain copies, in paper or electronic form” of a series of documents related to the employment relationship.¹⁹

From a practical point of view, the continued attention for posting of workers is also based on the continuous quantitative increase of the phenomenon after 2010. Indeed, from 2010 to 2018 the number of posted workers²⁰ in the EU has increased from 1 100 000 to 1 800 000.²¹ Although the number may appear low in absolute terms, amounting to around 0.8% of the total EU

¹¹ A. Crespy, Legitimizing resistance to EU integration: Social Europe as a europeanized normative frame in the conflict over the Bolkestein directive, *Les Cahiers Européens de Sciences Po.*, no. 3, 2010, p. 4.

¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the internal market.

¹³ CJEU, 18 December 2007, C-341/05 (*Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*). See also CJEU, 3 April 2008, C-346/06 (*Dirk Rüffert v Land Niedersachsen*); CJEU, 19 June 2008, C-319/06, (*Commission of the European Communities v Grand Duchy of Luxembourg*).

¹⁴ A New Strategy for the Single Market at the Service of Europe’s Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

¹⁵ See, among many others, R. Eklund, A Swedish perspective on *Laval*, *Comparative Labor Law & Policy Journal* 29, no. 4, 2008, p. 566; T. van Peijpe, “Collective labour law after *Viking*, *Laval*, *Rüffert*, and *Commission v. Luxembourg*”, *International Journal of Comparative Labour Law and Industrial Relations* 25, no. 2, 2009, pp. 99-100.

¹⁶ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), hereinafter “the Enforcement Directive”.

¹⁷ Articles 6 and 7 of the Enforcement Directive.

¹⁸ *Ibidem*, Article 12.

¹⁹ *Ibidem*, Article 9.

²⁰ Numerous caveats apply when it comes to the calculation of the exact number of posted workers. The most authoritative source on this point, the Report compiled annually by the researchers of HIVA-KU Leuven, is based on the number of certificates A1 (concerning the affiliation to the Home State system of social security) delivered over a given year. This can lead both to underestimating the phenomenon, for instance in case of short-term postings where a certificate was not required, and to overestimating it, as a certificate A1 must be required for each *posting*, so that the same person might be posted numerous times over the same here.

²¹ F. De Wispelaere, L. De Smet and J. Pacolet, *Posting of workers Report on A1 Portable Documents issued in 2018*, Luxembourg: Publications Office of the European Union, 2020, p. 9.

employment,²² its concentrated nature might make it extremely relevant in certain sectors and Member States. Notably, 40% of postings take place in the construction industry,²³ and it is estimated that in Member States like Belgium and Austria, posted workers represent the 20% of the total employment in this sector.²⁴

Following the continued political attention to the phenomenon, the reform of the substantive aspects of the Posting of Workers Directive (PWD) was brought back to the table by the guidelines outlined by president Juncker in his speech in front of the European Parliament of 15 July 2014,²⁵ Juncker committed to a targeted review of the PWD to ensure that “[i]n our Union, the same work at the same place should be remunerated in the same manner”. The EU Commission presented its proposal for a revision of the PWD on 8 March 2016. This was adopted after two years of negotiations.²⁶ During these negotiations, Member States were starkly divided between “importers” and “exporters” of posted workers. Germany, Austria, Belgium, France, Luxembourg, the Netherlands and Sweden supported the principle of “equal pay for equal work in the same place”, while Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Chechia, Romania and Slovakia argued against the revision, considering it “incompatible with the single market”.²⁷ Mirroring this divide, the proposal initially tabled by the Commission was met with 11 negative reasoned opinions from national parliamentary chambers.²⁸ Many of these so-called ‘yellow cards’ included an explicitly political-economic critique at the proposal, complaining about the loss of competitive advantage for posting undertakings (RO, LV, LT, HU, EE, CZ, CR, BG).

The reform intervenes on the wages that should be applied to posted workers,²⁹ replacing the reference to “minimum rates of pay” of Article 3(1)(c) of the PWD with the broader concept of “remuneration”.³⁰ The reform also makes it compulsory for Member States to publish in the single official national website the remuneration items applicable to posted workers. In case of incorrect or missing information, the circumstance “shall be taken into account [...] in determining penalties in the event of infringements”.

²² *Ibidem*, p. 10.

²³ *Ibidem*.

²⁴ F. De Wispelaere and J. Paolet, *Posting of workers - Report on A1 Portable Documents issued in 2017*, Luxembourg: Publications Office of the European Union, 2019, p. 37.

²⁵ “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, Political Guidelines for the next European Commission, 15 July 2014.

²⁶ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, hereinafter “the reform Directive” or “the reform”. On the adoption of the reform see M. Rocca, *Stepping stones over troubled waters. Recent legal evolutions and the reform of the Posting of Workers Directive*, in N. Lillie and J. Arnholtz (eds.), *Posted Work in the European Union. The Political Economy of Free Movement*, Abingdon: Routledge, 2020, pp. 167-184.

²⁷ See Proposal for a Directive of the European Parliament and of the Council amending 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 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6987_2016_INIT&from=EN, p. 5.

²⁸ These were drafted in the context of the procedure set up by Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

²⁹ See J.-P. Lhernould, *La rémunération du travailleur détaché : les enseignements de la directive n° 2018/957 modifiant la directive n° 96/71*, *Bulletin Joly Travail*, no. 3, 2018, pp. 217-222.

³⁰ A study financed by the Commission and published in 2016 had in fact highlighted the confusion engendered by the very use of the concept “minimum rates of pay”, considering that the different concept of “minimum wage” had a more widespread diffusion at national level. See *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, Luxembourg: Publications Office of the European Union, 2016.

The reform also slightly clarifies which collective agreements are applicable to posted workers. This issue was particularly contentious, following notably the *Rüffert* case. In this case, the Court had, first, denied the possibility of applying collective agreements only covering a part of a given sector (public contracts)³¹. Second, it had concluded that a country having a legal system for declaring collective agreements as universally applicable, as it was the case in Germany, cannot have recourse to different systems to ensure their applicability, such as referring to them in the awarding of public contracts³². The reform addresses this issue, by including, in the new Article 3(8), the possibility of applying generally applicable agreements or agreements concluded by the most representative organisations “in the absence of, or in addition to” universally applicable ones. The second important change on this topic concerns the extension of the applicability of collective agreements to all sectors of the economy, whereas the PWD only mandated said application for the construction sector, leaving Member States free to extend this to other sectors³³.

The reform includes a time limit of 12 months, which can be extended for further 6, after which “all the applicable terms and conditions of employment” laid down by legislation and universally / generally applicable collective agreements will be applied to the posted workers.³⁴ Also, posting of workers by a temporary work agency is now explicitly covered by the provisions on equal treatment of the relevant EU Directive.³⁵

Although the reform has been adopted, and the transposition period has elapsed,³⁶ this chapter of the posting saga is not yet closed. Both the Polish³⁷ and the Hungarian³⁸ governments initiated an action for annulment in front the CJEU against the reform Directive. The content of these actions goes beyond the scope of the present contribution. Both actions contend that the reform (or some of its parts) has been adopted in violation of its legal basis, the freedom to provide services. AG Sanchez-Bordona delivered his Opinion on these actions on 28 May 2020 and proposed to the Court to dismiss both. At the time of writing, the decision of the Court is still pending.

I will now move to the analysis of the *Dobersberger* case. This case shows how, while the opponents of the “equal treatment approach” to posted workers have, to an extent, lost a battle for the “centre” (i.e., the substantive aspects) of the PWD, the fight has now shifted to the “flanks”, and notably to the scope of application of the whole legal framework for posting of workers. When discussing the opinion of AG Szpunar in the case here at stake we will also see how an echo of the said actions for annulment made its way into the discussion.

3. Facts and Procedure

The Austrian Federal Railways (“ÖBB”) has awarded a contract for the provision of catering services on board of its trains to an Austrian company (“D”). The latter company has subcontracted this to a second Austrian company (“H”), which has, in its turn, subcontracted

³¹ *Rüffert*, §29. See F. Dorssemont, *De collectieve arbeidsvoorwaardenvorming (van het werkland) en de gedetacheerde werknemer na Rüffert en Commissie versus Luxemburg*, *Arbeidsrechtelijke Annotaties*, no. 3, 2008, pp. 67-104.

³² *Ibidem*, §27.

³³ Article 3(10) of the PWD.

³⁴ Article 1(2)(b) of the reform Directive. See on this point R. Santagata De Castro, *EU Law on Posting of Workers and the Attempt to Revitalize Equal Treatment*, *Italian Labour Law e-Journal* 12, no. 2, 160-162.

³⁵ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Article 5.

³⁶ The delay for the transposition was set at 30 July 2020.

³⁷ CJEU, C-626/18 (Poland v Parliament and Council), pending.

³⁸ CJEU, C-620/18 (Hungary v Parliament and Council), pending.

the service, for certain trains, to a Hungarian company (“Henry am Zug Hungary”). Henry am Zug Hungary performs this work on board of an international train, connecting Budapest to Salzburg and Munich, using both its own workers and (mostly) workers hired out from another Hungarian company. These workers are domiciled in Hungary, starting and ending their shifts in the Budapest station.³⁹

During a control involving these workers in Vienna Central Station, the Austrian authorities discover that Henry am Zug Hungary had not a) introduced a prior notification concerning the posting of these workers to the Austrian territory, b) retained at the workplace the documents concerning their social security registration as well as c) the documents concerning the payment of their wages translated in German. These led to administrative penalties being imposed to Mr. Dobersberger, in his capacity as managing director of Henry am Zug Hungary.⁴⁰

The procedure in front of the CJEU hence originates from the preliminary questions sent by the Supreme Administrative Court in the context of the proceedings opposing Mr. Dobersberger and the Vienna City Administration. Although the violations contested to the employer concerned the notification procedure as well as the obligation of document retention covered by the Enforcement Directive, the questions sent by the national jurisdiction focus on the interpretation of the PWD. The first of the four questions raised by the Supreme Administrative Court is the one which will retain virtually all the attention of the CJEU. In this question the national court asks whether the PWD covers a provision of services taking place on an international train travelling through both the Home State and the Host State. In questions number two and three the Supreme Administrative Court asks the CJEU to clarify the relevance, for the application of the PWD, of the lack of a direct contractual link between the recipient of the services and the posting undertaking (due to the subcontracting chain), as well as of the lack of a direct employment relationship between the posting undertaking and the workers sent to the Austrian territory (due to the hiring out from a different Hungarian company). In question number four the national jurisdiction asks the Court to consider whether the application of the legal framework for posting of workers to a situation such as the one at stake in the case would be compatible with the freedom to provide services, as protected by Article 56 TFEU.⁴¹

Two positions were presented in front of the Court, with the EU Commission striking a middle ground. The first position, supported by the representatives of Mr. Dobersberger, as well as by the Hungarian, Polish and Czech Governments, maintained that the PWD and, hence, the whole legal framework for posting of workers, should not be applicable to the case at stake. In particular, Mr. Dobersberger advanced an analogy on the basis of an addendum of a Council meeting taking place at the time when the PWD was being negotiated, which supposedly confirmed the will of the legislator to exclude the mobile staff of undertakings providing international transport of passengers or goods.⁴² Others, like the Czech government, considered that “highly mobile workers” simply do not fit with the logic of the PWD.⁴³ On the other side, the Austrian government pointed out that only the personnel of merchant navy undertakings was explicitly excluded by the scope of the PWD,⁴⁴ a situation which *a contrario* implied the inclusion of all other sectors of the economy under the scope of the Directive.⁴⁵ In its turn, the EU Commission argued that the workers in question should be covered by the PWD, while

³⁹ *Dobersberger*, §§9-11.

⁴⁰ *Dobersberger*, §§12-13.

⁴¹ *Dobersberger*, §16.

⁴² AG Opinion, §53.

⁴³ *Ibidem*, §57.

⁴⁴ Article 1(2) of the PWD.

⁴⁵ AG Opinion, §52.

being exempted from some of its requirements, notably the application of the Host State's rules on minimum rates of pay and paid annual leave.⁴⁶

4. The Opinion of AG Szpunar

The Advocate General assigned to the case, Maciej Szpunar, delivered his Opinion on 29 July 2019. In the answer he proposes to the Court, AG Szpunar pleads in favour of the non-application of the PWD to the workers of Henry Am Zug Hungary.

The first part of the Opinion is devoted to identifying the objectives of the PWD. Having provided some critical thoughts concerning the concept of “social dumping”, to which I will come back later in this section, the AG concludes that the objectives of the said Directive are to protect posted workers and to prevent social dumping.⁴⁷ AG Szpunar also seems to suggest that the very idea that the Host State should have anything to do with the protection of posted workers, is “patronising, if not overbearing”⁴⁸, in what might appear as a critique of the whole premise of the PWD. The AG then considers whether transport services are covered by the PWD, concluding for the positive answer⁴⁹ even though the legal basis for transport services (Article 91 TFEU) is not mentioned in the PWD (or the Enforcement Directive). In any case, just a few paragraphs later the AG also concludes that the services at stake in the case, catering and cleaning services onboard of an international train, are not transport services, even though they take place on a means of transport.⁵⁰

The Opinion then moves to the crucial question, which will in fact also determine the decision of the Court. The issue revolves around the “intensity” of the connection of the workers of Henry am Zug Hungary with the Austrian territory. This is because Article 1(3)(a) of the PWD states that the Directive applies to undertakings which “post workers *to the territory* of a Member State”. The AG reaches the conclusion that this connection is too weak to justify the application of the PWD: in his words “they are posted ‘to the territory’ of the train”,⁵¹ and said train departs in Budapest and comes back to Budapest⁵² where some of the work takes place.⁵³ While this specific point will not be taken up by the Court, so that it does not seem necessary to spend more time on it, it should be said that this construction of an international train as having a sort of quasi-territoriality⁵⁴ appears to be rather creative. The AG complements this view by noting that workers are subject to the cost of living in Hungary and as such do not need the protection afforded by the PWD.⁵⁵ These arguments lead AG Szpunar to suggest the Court to rule in favour of the exclusion of the whole situation from the scope of the PWD.⁵⁶

The rest of the Opinion explores issues which would only become relevant if the Courts rules instead in favour of the applicability of the PWD. In particular, the AG considers the relevance of the existence of the chain of subcontracting and of the hiring out of workers for the application of the PWD. First, he analyses whether the lack of a direct contractual relationship

⁴⁶ *Ibidem*, §45 and 62.

⁴⁷ *Ibidem*, §32.

⁴⁸ *Ibidem*, §27.

⁴⁹ *Ibidem*, §37.

⁵⁰ *Ibidem*, §42.

⁵¹ *Ibidem*, §48.

⁵² *Ibidem*, §58. On this point the AG affirms that he fails to see “how the situation of the workers of the case at issue differs from those working, say, on the Budapest tram”.

⁵³ *Ibidem*, §60.

⁵⁴ The kind of principle which would be correctly applied to a ship flying the flag of a specific state or an aircraft registered with it. See A. Aust, *Handbook of International Law*, Cambridge: Cambridge University Press, 2010, p. 43.

⁵⁵ *Ibidem*, §60.

⁵⁶ *Ibidem*, §65.

between the final recipient of the service and the posting undertaking should exclude the situation from the scope of the PWD,⁵⁷ concluding for the negative.⁵⁸ Second, the AG considers that the fact that (some) of the posted workers are not directly employed by the posting undertaking but hired out from another Hungarian company is also not relevant for the application of the PWD.⁵⁹

That being said, all the reasoning concerning questions two and three is completely superseded by the final part of the Opinion, which deals with question number four. Again, this did not make its way to the decision of the Court so I will offer only a short summary of the argument. The summary can indeed be quite short. The AG considers that in a situation where the PWD was deemed as not being applicable to the situation, *all* the obligations imposed by Austria on the service providers would be in breach of Article 56 TFEU (the freedom to provide services) and hence inapplicable.⁶⁰ As a final point, the choice of the wording for the conclusion creates some confusion. As it was just highlighted, the AG considers that the existence of the subcontracting chain and the hiring out of workers have no impact on the applicability of the PWD. However, by choosing to quote almost verbatim the question referred by the Austrian court, he includes these very two elements (subcontracting chain and hiring out) among the reasons why the said obligations are inapplicable, leaving the reader to wonder about their actual relevance for the AG's legal reasoning.⁶¹

Having highlighted the reasoning proposed to the Court by the AG, it seems also important to single out a few other passages of the Opinion. These might not be directly relevant for the case at stake but provide interesting insights for anticipating the contribution of AG Szpunar in future litigations concerning social rights in the internal market.

The well-known case law of the Court in the field of the conflict between fundamental social rights and fundamental freedoms of the internal market has often been criticised for creating what amounts to a hierarchy between these two groups of rights.⁶² In all these cases, the exercise of social rights has been interpreted by the Court as a restriction to the internal market, hence needing a justification to prove its legality. This puts social rights on the backfoot, since the exercise of fundamental freedoms does not need to undergo a similar process. A suggestion to temper this approach and introduce a “cross proportionality test”, namely considering the restrictions *to* fundamental rights entailed by the exercise of fundamental freedoms, has been put forward by AG Trstenjak in one of her Opinions⁶³ but was ignored by the Court.⁶⁴ AG Szpunar in his Opinion for the present case delivers a stark reminder of the said unbalance and his allegiance to the hierarchy between social rights and market freedoms. In the Opinion we

⁵⁷ *Ibidem*, §72.

⁵⁸ *Ibidem*, §75.

⁵⁹ *Ibidem*, §83.

⁶⁰ *Ibidem*, §104.

⁶¹ *Ibidem*.

⁶² See among many others F.W. Scharpf, The asymmetry of European integration, or Why the EU cannot be a ‘Social Market Economy’, *Socio-Economic Review*, no. 8, 2010, pp. 211–250; C. Joerges and F. Rödl, Informal politics, formalised law and the social deficit of European integration: reflections after the judgments of the ECJ in Viking and Laval, *European Law Journal* 15, no. 1, 2009, 1–19; F. Dorssemont, The right to take Collective action versus fundamental economic freedoms in the aftermath of Laval and Viking. Foes are forever, in M. De Vos (ed.), *European Union Internal Market and Labour Law: Friends or Foes?*, Antwerp: Intersentia, 2009, pp. 45–104.

⁶³ Opinion of AG Trstenjak in CJEU, 15 July 2010, C-271/08 (*European Commission v Federal Republic of Germany*), §§190.

⁶⁴ See P. Syrpis, Reconciling economic freedoms and social rights – The potential of *Commission v. Germany* (Case C-271/08, Judgment of 15 July 2010), *Industrial Law Journal* 40, no. 2, 2011, pp. 222–229; M. Rocca, Case C-271/08, *Commission v. Germany* [2010], *European Labour Law Journal*, no. 2, 2011, 76–79.

read that the objectives of promoting the transnational provision of services and guaranteeing the respect of workers' rights are "diametrically opposed": workers' rights, in the words of the AG, *are* a restriction to the transnational provision of services, which can, at best, be justified by an overriding reason relating to the public interest.⁶⁵

Referring to his own Opinion in a different case, AG Szpunar also completes his vision of the said hierarchy by stating that the internal market "constitutes no less than the central organisational principle of the Treaties".⁶⁶ As such, the PWD is considered as a sort of exogenous intervention on the "natural state",⁶⁷ represented by the freedom to provide services, seeking to "mitigate some of the (*normal*) consequences" (my emphasis) of its application, leading to a "*natural tension*" (again, the emphasis is ours) with Article 56 TFEU. In a different part of his Opinion, the AG does in fact push this "tension" to its extreme consequences, by affirming that the "application of Directive 96/71 in the light of Article 56 TFEU *could* lead to none of the directive's provisions being applied" (my emphasis).⁶⁸ Although formulated as a possibility ("could lead"), this statement reads in fact as a message in a bottle sent in the direction of two other cases pending (at the time of writing) in front of the CJEU. Indeed, the actions for annulment brought by the Polish and Hungarian government against the reform of the PWD, which I mentioned before, invoke precisely the incompatibility of (some, important, parts of) the new Directive with the legal basis of the PWD, that is, the freedom to provide services.

Finally, AG Szpunar weighs in on the debate concerning "social dumping". He notes that the Court in *Laval* has accepted the protection against social dumping as an overriding reason of public interest justifying the restriction of the freedom to provide services.⁶⁹ However, he goes on to consider that the concept has not been sufficiently defined by the Court itself and should be interpreted narrowly.⁷⁰ Now, while it is true that the Court in *Laval* does not explicitly define this concept, its reasoning on "unfair competition" might offer some insights as what might constitute "social dumping".⁷¹ Notably, the Court considered that "by applying to their workers the terms and conditions of employment in force in the Member State of origin" posting undertakings "would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher".⁷²

That being said, the following part of the Opinion is more troubling. Having professed his attachment and support for the "need to protect workers in the context of the freedom to provide services", an objective that he "would not call this into question in any way",⁷³ the AG goes on to state that "what is 'social dumping' for some is, quite simply, 'employment' for others". Since AG Szpunar himself did not clearly define what he means by "social dumping" it is somewhat difficult to pinpoint exactly the meaning of such a statement. However, from the perspective of labour law, the sentence reads as the revindication of a right to "self-

⁶⁵ AG Opinion, §23.

⁶⁶ AG Opinion, §21.

⁶⁷ On the reification of internal market rationality see M. Bartl, Internal market rationality: In the way of re-imagining the future, *European Law Journal*, no. 24, 2018, pp. 106-108.

⁶⁸ AG Opinion, §64.

⁶⁹ AG Opinion, §29.

⁷⁰ *Ibidem*, §30.

⁷¹ *Laval*, §75. See on the point see J. Malmberg and T. Sigeman, Industrial action and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice, *Common Market Law Review*, no. 45, 2008, pp. 1136-1137.

⁷² *Laval*, §75.

⁷³ AG Opinion, §30.

exploitation”,⁷⁴ under which the access to a job, any job, would be more important than the application of labour regulations. This reasoning is a slippery slope. By following it one might conclude that what is ‘undeclared work’ for some is, quite simply, ‘employment’ for others.⁷⁵ Once this is accepted, why would an unemployed person in the Host state not be allowed to resort to the same argument? In legal terms, this argument clashes against the essence of EU social policy, grounded on the ideal of the harmonisation of working and living conditions “while the improvement is being maintained”.⁷⁶

5. The Decision of the Court

Having confirmed the admissibility of the questions, the Court goes on to analyse together the first three of those, focusing in particular on the first. The whole analysis occupies a mere twelve paragraphs, while three more are devoted to the fourth and, as we will see in a moment, irrelevant one.

In the first part of its reasoning the Court concurs with the position of the AG, and confirms that services such as those operated by the workers of Henry am Zug Hungary fall outside the notion of “transport services”. As such, these services are covered by the general provisions on the freedom to provide services.⁷⁷

The Court then engages with the core of the issue, namely the inclusion of these workers under the PWD. The reasoning of the Grand Chamber is quite straightforward on this point. It starts by pointing out that a worker cannot be considered to be posted “if the performance of his or her work does not have a sufficient connection” with the territory of the Host State.⁷⁸ This, states the Court, stems from the “scheme” of the PWD and by reading it in light of the exception provided by Article 3(2) (and also mentioned in Recital 15). This exception excludes posting of up to 8 days from the application of minimum paid annual holidays⁷⁹ and minimum rates of pay⁸⁰ when they involve the “initial assembly and/or first installation of goods” and are “carried out by the skilled and/or specialist workers of the supplying undertaking”.

Having concluded in this sense from the point of view of the law, the Court decides that the fact at stake in *Dobersberger* entail that the workers of Henry am Zug Hungary do not present the said “sufficient connection” with the Austrian territory. This is because these workers “carry out a significant part of their work” in the Home State, and in particular “all activities falling within the scope of that work with the exception of the on-board service provided during the train’s journey” while beginning and ending their shifts in the Home State.⁸¹

As the workers of Henry am Zug Hungary are now excluded from the scope of application of the PWD, the CJEU states that the existence of the subcontracting chain and the hiring out of

⁷⁴ M. Houwerzijl and A. Schrauwen, *From Competing to Aligned Narratives on Posted and Other Mobile Workers within the EU?*, in C. Rijken and T. de Lange (eds.), *Towards a Decent Labour Market for Low Waged Migrant Workers*, Amsterdam: Amsterdam University Press, 2018, p. 104; A. Viscomi, *Immigrati extracomunitari ed autonomia collettiva: un breve appunto su parità e differenza*, *Diritto delle relazioni industriali*, no. 2, 1992, p. 120.

⁷⁵ The reader can of course choose the terms he or she prefers to test the dangers of this proposition and appreciate how the very existence of labour law is at stake when the right to self-exploitation is invoked.

⁷⁶ On this point, in the context of the early posting of workers cases, see W. Däubler, *Posted Workers and freedom to supply services*, directive 96/71/EC and German Courts, *Industrial Law Journal*, no. 27, 1998, p. 266.

⁷⁷ *Dobersberger*, §26-27.

⁷⁸ *Ibidem*, §31.

⁷⁹ Article 3(1)(b) of the PWD.

⁸⁰ Article 3(1)(c) of the PWD. The mention of “minimum rates of pay” has now been replaced by “remuneration” by the reform Directive.

⁸¹ *Dobersberger*, §33.

workers are not relevant for the issue at stake.⁸² Also, this conclusion makes it superfluous to answer the fourth question, as all the rules whose compatibility with Article 56 TFEU the national court asked to assess are now inapplicable to the activities at stake in the case.⁸³ This stems from the fact that all the Austrian legislation at stake constituted the national implementation of the PWD and the Enforcement Directive.

6. Analysis of the decision: the legal reasoning

As we have seen in the previous section, the main grounding of the reasoning of the Court in the actual legal text comes from the interpretation of the Directive in light of Article 3(2) (and Recital 15 which expresses the same concept).⁸⁴ However, if one stops for a moment to consider the actual content of the exception, the reasoning delivered by the Court appears to be flawed. This is particularly problematic as Article 3(2) is the only legal underpinning that we can find in the 15 paragraphs devoted by the Grand Chamber to analysing the issue. As a reminder, the end point of the reasoning is the denial of the application of the entire PWD and of the Enforcement Directive. These workers, says the Court, are not posted workers.

Now, Article 3(2) is construed as an exception to the PWD rules, exempting workers employed for the said initial assembly/first installation of goods from the application of minimum paid annual holidays and minimum rates of pay. This construction entails that all *other* parts of the PWD are applicable to these workers and, more importantly for the case at stake, that these workers *are* posted workers. Indeed, the legal text of this exception states that this is applicable “if the *period of posting* does not exceed eight days” (the emphasis is ours). Therefore, the interpretation to be drawn from the *ratio* of such a provision seems to be diametrically opposed to the conclusion reached by the Court: even workers having a very limited connection with the Host State are covered by the PWD, although some exemptions might apply when it comes to the working conditions applicable to them.

Further to this, the shaky nature of the grounding provided by Article 3(2) is also confirmed by the object of this exception. Again, referring to the legal text of the paragraph, it is apparent that the focus of the provision is the supply of *goods*. The provision of services, represented by the initial assembly/first installation, is hence construed as an ancillary part of the contract and should be “an integral part of a contract for the supply of goods”. In a way, the exception is better understood as a guarantee of the free movement of goods, and should therefore be kept separated from considerations dealing with the free provision of services.⁸⁵ In *Dobersberger* the overarching reason that brings the workers in question to operate on the Austrian territory is, as confirmed by the Court,⁸⁶ a contract for *services*. Thus, it is the provision of goods (notably, food and drinks) that is to be understood as ancillary to the service in the case at stake, and not the other way around as it would be required by the exception of Article 3(2).

The conclusion favouring the applicability of the legal framework for posting of workers also to short term postings is confirmed by the history of the PWD and the evolution of the negotiations surrounding its adoption. Although AG Szpunar did briefly engage with the search for the intention of the legislator in the context of his Opinion,⁸⁷ he did so only regarding the issue of the applicability of the PWD to workers operating on means of transportation. If instead one were to look at the actual negotiations taking place between 1991 and 1996, he or

⁸² *Ibidem*, §34.

⁸³ *Ibidem*, §§36-38.

⁸⁴ *Ibidem*, §31.

⁸⁵ On the differences between the fundamental freedoms of the internal market see in general C. Barnard, *Substantive law of the EU*, Oxford: Oxford University Press, 2016, p. 25.

⁸⁶ *Dobersberger*, §§9-11.

⁸⁷ *Ibidem*, §§53-54.

she might be better equipped to embark on the ever-challenging mission of identifying the intention behind the legal text. In this sense it is important to note that the issue of a threshold or “grace period” during which some parts of the PWD would not be applicable, was directly (and hotly) debated by the European legislator.⁸⁸ Indeed, finding traces of this debate is as simple as looking back to the first two drafts of the PWD, submitted respectively in 1991⁸⁹ and 1993.⁹⁰ In the first draft, postings lasting less than 3 months over a 1-year period would be excluded from the application of minimum paid holidays and minimum rates of pay. In the second this was reduced to one month. As it is known, the final text of the Directive did not include any generally applicable “grace period”, opting instead for the application from “day 0”. Marco Biagi, one of the architects of the compromise leading to the adoption of the Directive, recognised that “to some extent” the final text “represents a victory for the ‘zero threshold’ supporters”.⁹¹ Hence, we argue, the issue of the legal regulation of short-term postings was thoroughly considered and debated by the legislator, and the final intention of including all postings under the PWD could not be clearer. In fact, even the Practical Guide on Posting published by the Commission and updated in the occasion of the reform of the PWD explicitly states that “Directive 96/71/EC applies to all postings, irrespective of their duration”.⁹² As a final, further, confirmation of this point, Article 3(5) allows Member States, if they so decide, to grant certain exemptions to postings where “the amount of work to be done is not significant”. Therefore, it seems clear that even postings which only entail a limited amount of work to be performed in the Host State fall under the scope of the Directive.

Considering the relevance of this point, which, as we highlighted before, is the single legal underpinning of the decision delivered by the Grand Chamber, it is somewhat surprising that the Court chose not to engage with its own precedent dealing with “high frequency” posting. Of course, the *Mazzoleni* case⁹³ was decided before the end of the transposition period of the PWD, but the facts in the case make it particularly interesting for the issue being debated in *Dobersberger*. *Mazzoleni* dealt with security guards, employed by a French company and residing in France, working in various shopping malls situated in France and Belgium.⁹⁴ As such, these workers would, on a daily basis, spend a part of their working time in France and a (varying) part in Belgium.⁹⁵ Applying a reasonable degree of simplification, the legal issue at stake was the application of the Belgian minimum wage to the hours worked in Belgium. The Court concluded that the application of the freedom to provide services “does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State”.⁹⁶ In doing so the Court referred to its case law on (*ante litteram*) posting of workers.⁹⁷ Therefore, although the Court added in *Mazzoleni* that

⁸⁸ See M. Biagi, Fortune smiles on the Italian EU Presidency: Talking half-seriously about the Posted Workers and Parental leave directives, *The International Journal of Comparative Labour Law and Industrial Relations* 12, no. 2, 1996, pp. 97–109.

⁸⁹ COM(91) 230 final — SYN 346.

⁹⁰ COM(93) 225 final - SYN 346.

⁹¹ Biagi 1996, p. 176.

⁹² European Commission, Practical Guide on Posting, 2019, available at <https://ec.europa.eu/social/BlobServlet?docId=21472&langId=en>.

⁹³ CJEU, 15 March 2001, C-165/98 (Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL).

⁹⁴ *Mazzoleni*, §8.

⁹⁵ *Mazzoleni*, §9.

⁹⁶ *Mazzoleni*, §29.

⁹⁷ See CJEU, 3 February 1982, C-62/81 (*Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité*).

such an application should undergo a proportionality test,⁹⁸ it did not at any time consider these workers to be intrinsically different from other situations of posting. By failing to engage with its own most closely related precedent the Court adds to the uncertainty surrounding such an important deviation from the logic of the legal framework from posting of workers.

It should also be mentioned that, in order to shore-up this interpretation, the Court chooses to represent the facts of the case in a rather peculiar way. In particular, the Court affirms that the lack of sufficient connection with the Host State is testified by the fact that the workers of Henry am Zug Hungary would carry out in the Home State “all activities falling within the scope of that work *with the exception of the on-board service provided during the train’s journey*” (the emphasis is ours).⁹⁹ However, as accepted by the Court itself, the very object of contract at stake is “the provision of services consisting of the operation of the dining cars or the on-board services”¹⁰⁰. In light of this, any reader would be excused for failing to grasp why the operations which are ancillary to the actual provision of services at stake in the case should be awarded such an important role in the reasoning. As an early observer highlighted, the name of the company, Henry am Zug (Henry on the train) is now a little misleading and should be amended to “Henry before and after the train”.¹⁰¹

Moreover, it is not clear that the same workers which would then operate the on-board services would have been the ones engaging in the loading and unloading activities in Budapest, as highlighted by the concerned letter sent by the president of the Austrian Trade Union Federation (ÖGB) to the President of the EU Commission Ursula von der Leyen following the *Dobersberger* decision.¹⁰² Also, while the Court stresses how these workers would begin and end their shifts in Hungary,¹⁰³ one only has to consult the timetables for the trains running between Budapest and Salzburg¹⁰⁴ to appreciate how the majority of the journey would take place in the Austrian territory, the impact of this being in fact doubled because of the return journey to Budapest. The finding would be reinforced in case of services provided on trains with Munich as their destination. Potentially, as again suggested by the letter from the Austrian Trade Union Federation,¹⁰⁵ these workers would have had to stay overnight in Austria, depending on their schedule. None of this is even cursorily taken into account by the Court in order to ascertain whether these workers have “a sufficient connection” with the Host State. Considering how this issue is central for the reasoning of the Court, it is in itself surprising that the Grand Chamber did not leave it for the national court to ascertain this purely factual considerations.

7. Analysis of the decision: risks of spill-over and new challenges

After all the critiques expressed in the previous section, one cannot avoid feeling a certain degree of sympathy for the Court. Although it is a bit trite, the quote “hard cases make for bad

⁹⁸ *Mazzoleni*, §30.

⁹⁹ *Dobersberger*, §33. See also §11: “all the work at issue in the main proceedings, *with the exception of that carried out on the trains*, took place in Hungary” (the emphasis is ours).

¹⁰⁰ *Ibidem*, §9.

¹⁰¹ Walter Gagawczuk, “Henry am Zug” – oder doch nicht? Eine überaus merkwürdige Entscheidung des EuGH, A&W Blog, 12 February 2020, available at <https://awblog.at/henry-am-zug-oder-doch/>.

¹⁰² ECJ Judgment C-16/18 – *Dobersberger* undermines Posting of Workers Directive, p. 2, available at https://www.oegb.at/cs/Satellite?blobcol=urldata&blobheadname1=content-type&blobheadname2=content-disposition&blobheadvalue1=application%2Fpdf&blobheadvalue2=inline%3B+filename%3D%22Brief_.pdf%22&blobkey=id&blobnocache=false&blobtable=MungoBlobs&blobwhere=1342708350820&ssbinary=true&site=S06.

¹⁰³ *Dobersberger*, §10.

¹⁰⁴ Available here <https://www.oebb.at/dam/jcr:21c69cd4-78f6-472e-a907-637f9ee11a08/folder-go-west.pdf>.

¹⁰⁵ ECJ Judgment C-16/18 – *Dobersberger* undermines Posting of Workers Directive, p. 2.

law” seems most appropriate for the situation at hand. Indeed, the decision in *Dobersberger* reads like the attempt of the judges of the Grand Chamber to provide an answer to a situation, repeated short-term postings, which is difficult to reconcile with the policy choices operated by the European legislator.¹⁰⁶ Though this is not a legal argument, the administrative burden entailed by the different obligations at stake, such as the need to provide a prior notification for each single posting, was surely present in the minds of the judges all through this case. Since the issue arose from the administrative requirements, the only possibility for the Court to reach its own policy objective, that is, to provide relief to the employer against the said burden, was to completely exclude these workers from the scope of posting. As we have seen in the previous section, simply finding that they fell under one of the exceptions provided by the PWD would have entailed an exemption from the application of some of the provisions related to working conditions but not, crucially, of the said administrative requirements.

Read in this light, the whole decision emerges as the reckless pursuit of such a policy. A pursuit which led the Court to pick and choose the facts which would confirm the preferred conclusion and to deliver an interpretation of the PWD which, as we have seen, is, at best, shakily grounded in the actual legal text or in the will of the legislator. Faced with such a decision, the immediate reflex for the reader is to consider the potential for wider implications. One option is evidently to try and interpret it narrowly. The operative part of the decision surely lends itself to a restrictive reading, as it includes several conditions, notably the requirements to i) operate in the railway sector, ii) on an international train, iii) carry out a significant part of the work in the Home State, and iv) begin and end the working shifts in the Home State.¹⁰⁷ If the Court were to uphold all these conditions in the future, the impact would be “limited” to the most easily outsourced professions (like catering and cleaning) on international trains crossing a border with significant differentials in terms of wages and/or social security contributions.

However, authoritative calls for a narrow reading of the impact of a CJEU decision were also put forward after the *Laval* decision,¹⁰⁸ referring to the specific aspects of the Swedish system of industrial relations at stake in that case, and we have seen how the Court has subsequently elevated that case as the standard to assess collective actions in the field of a transnational provision of services.¹⁰⁹ Therefore, one should also anticipate the challenges of an expansive reading of the decision which might ultimately be pursued by both the CJEU and national Court, even more so considering that we are dealing with a decision from the Grand Chamber. In particular, the logic of *Dobersberger* might spill-over to other sectors, leaving behind conditions i) and ii). In such a scenario, more activities carried out in the context of a transnational provision of services might be considered as falling outside the scope of the PWD, notably when some ancillary activity in the Home State can be proven and workers go back to this state at the end of their shift.¹¹⁰ The impact of such a reading would be particularly felt in border regions characterised by important differentials in wages and/or social security contributions. A simplified example of this would be construction works carried out in such a

¹⁰⁶ The issue of the administrative burden for very short-term postings has, for instance, been brought to the attention of the European legislator by the employers’ association for the live performance sector (PEARLE*). See PEARLE*, Call to the EU to address disproportionate administrative burdens and legal gaps in context of posting of workers, p. 2, available at <https://www.pearle.eu/positionpaper/call-to-the-eu-to-address-disproportionate-administrative-burdens-and-legal-gaps-in-context-of-posting-of-workers>.

¹⁰⁷ *Dobersberger*, §35.

¹⁰⁸ C. Barnard, Viking and Laval: an introduction, Cambridge Yearbook of European Legal Studies, no. 10, 2008, p. 491.

¹⁰⁹ CJEU, 8 July 2014, C-83/13 (Fonnship A/S v Svenska Transportarbetareförbundet and Facket för Service och Kommunikation (SEKO) and Svenska Transportarbetareförbundet v Fonnship A/S), §41.

¹¹⁰ As a side note, this might lead employers to restructure their posting practices in order to include repeated daily trips from the Home State and back, thus increasing the environmental impact of the whole operation.

border area, with the employer organising the activities so that workers would load up the building materials and tools in the Home State, drive to the building site, and come back after a day of work.

If one were to look for a silver lining in this decision, the exclusion of the relevance of the subcontracting chain and of the hiring-out of workers¹¹¹ might be considered as such. This choice is particularly visible as the absence of a service contract “between the undertaking making the posting and the recipient of the services” as well as the fact that “the posted worker is not in an employment relationship with the undertaking making the posting” featured in the answer to the fourth question proposed by AG Szpunar.¹¹² Considering how easy it is for a company to create a subcontracting chain (even completely “in house”, as we will see in moment) and/or to have recourse to the hiring-out of workers, according any significance to the presence of these elements for the application of the PWD would have provided a loophole through which most if not all posting practices could have passed.

Could the Court have pursued a different line of reasoning to provide relief to the employer without frustrating the intention of the legislator and bending the legal text of the PWD out of shape? A possibility in this sense could have been offered by the *Maksimovic*¹¹³ / *Čepelnik*¹¹⁴ line of cases, where the Court declared the incompatibility of certain sanctions, enacted by national authorities for violations of posting rules, with the freedom to provide services following a proportionality test. Doing so the Court might have “saved” the employer for its past behaviour while keeping the situation under posting of workers rules.

Looking forward, national courts, labour inspectors and lawyers wanting to reduce the impact of the present decision should insist on a strict interpretation of the conditions set out by the Court. First by pushing back against the application of the “*Dobersberger* exception” outside an international train operation. Second, by focusing on the factual requirements set out in the decision, notably the presence of a “*significant* part of the work inherent in those services” carried out in the Home State and the fact that workers have to begin and end their shifts in the Home State.

What is certain is that the decision in *Dobersberger* creates a whole new grey area for posting. Adding to this, the choice of entirely excluding these workers from the application of the PWD (and, hence, of the Enforcement Directive) has also the effect of excluding the whole situation from the competence of the newly created European Labour Authority. This is because the scope of activities of the Authority has been delimited by referring to specific legislative instruments, such as the two posting Directives.¹¹⁵ In an hypothetical future scenario, this would make it harder to justify the organisation of a joint inspection to, for instance, allow the Austrian authorities, with the help of their Hungarian counterparts, to ascertain the extent of the activities carried out by the workers of Henry am Zug Hungary at the Budapest station.¹¹⁶

¹¹¹ *Dobersberger*, §34.

¹¹² AG Opinion, §104.

¹¹³ CJEU, 12 September 2019, C-64/18 (*Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*).

¹¹⁴ CJEU, 19 December 2018, C-33/17 (*Čepelnik d.o.o. v Michael Vavti*).

¹¹⁵ See Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, Article 1(4).

¹¹⁶ Leaving aside for a moment the fact that the organisation of such a joint inspection would first require the agreement of the Hungarian authorities.

Although some, like AG Szpunar in his Opinion, would try and present the exclusion of this portion of workers from the protection afforded by the PWD as opening employment opportunities for workers in the Home State, the reality appears quite different. The effect of this decision is in fact to allow a company in the *Host* State to reduce labour costs and increase its profitability, “importing”¹¹⁷ lower wages and worse working conditions in its own state of establishment through a subcontracting chain.¹¹⁸ What is more, this chain is a purely legal construction, set up by an Austrian company for the benefit of an Austrian user undertaking operating (for the most part) on the Austrian territory. Indeed, DO&CO, the Austrian company operating the contract for services for the catering on the ÖBB trains,¹¹⁹ has then subcontracted this activity to one of the “Henry” companies established in Austria, whose shares are 100% in the hands of DO&CO, which in its turn has subcontracted it to Henry am Zug Hungary, another company fully owned by DO&CO.¹²⁰ This is the kind of business model enabled by the decision of the Court, and only time will tell how many more will flourish, all across the borders between Member States characterised by steep differentials in wages and/or social security contributions, while labour inspections see their work made more difficult by the vast area of uncertainty created by the present decision.

A second, less immediate effect, is the impact on the “agenda setting” for future interventions by the legislator in the field of posting. Rulings by the Court tend to create an “inertia” in favour of the new “status quo”¹²¹ and the European legislator often shows an important degree of deference for these rulings, which are sometimes directly referred to in legislation.¹²² In the opening of his seminal book, Otto Kahn-Freund stated that “on a number of vitally important occasions Parliament had to intervene to redress the balance which had been upset by court decision capable of exercising the most injurious influence on the relations between capital and labour”.¹²³ Transferred in the European stage, the difficulty for the legislator to intervene to redress the imbalances created by the Court is well known. This is particularly true for situations where the Court interprets primary legislation, such as the freedom to provide services, in what has been identified as a condition of “over-constitutionalisation” of EU law which reduces the role of majoritarian decisions.¹²⁴ Interestingly, this is not the case for the present decision. As we saw before, the reasoning of the Court starts and ends with the interpretation of the PWD in light of one of the exceptions contained therein, without drawing inspiration for this reading from the legal basis of the instrument, namely the freedom to

¹¹⁷ See L. Berntsen and N. Lillie, *Breaking the Law? Varieties of social dumping in a panEuropean labour market*, in M. Bernaciak (ed.), *Market Expansion and Social Dumping in Europe*, Abingdon: Routledge, 2015, pp. 50-56.

¹¹⁸ See Opinion of AG Szpunar, §71.

¹¹⁹ See *Der Standard*, *Do & Co klagt ÖBB wegen Henry am Zug auf vier Millionen Euro*, 3 January 2020, available at <https://www.derstandard.at/story/2000112890972/doco-klagt-oebb-wegen-henry-am-zug-auf-vier-millionen>.

¹²⁰ See the 2019/2020 annual financial report of DO&CO, available here <https://www.doco.com/wp-content/uploads/2020/06/DOCOFinancialReportFY1920.pdf>, p. 104.

¹²¹ F. W. Scharpf, *The joint-decision trap revisited*, *Journal of Common Market Studies*, no. 44, 2006, pp. 845–864.

¹²² See for instance Recital 6 of the Reform of the PWD. See also A. Lubow and S. K. Schmidt, *A hidden champion? The European Court of Justice as an agenda-setter in the case of posted workers*, *Public Administration*, 2020, p. 10, mentioning the attempts to include reference to the *Laval* case in the same piece of legislation.

¹²³ O. Kahn-Freund, *Labour and the Law*, London: Stevens & Sons Ltd, pp. 1-2.

¹²⁴ On this point see in general S. K. Schmidt, *The European Court of Justice and the policy process: The shadow of case law*, Oxford: Oxford University Press, 2018, pp. 93-125; D. Grimm, *The constitution of European democracy*, Oxford: Oxford University Press, 2017, pp. 81-104.

provide services, as it had done in the impactful cases of 2007-2008.¹²⁵ This leaves more leeway for future legislators.

It has been argued in the past that legislation, thanks to its democratic imprimatur, influences the Court even beyond its actual legally binding effect.¹²⁶ One would be hard pressed to find signs of such a deference in *Dobersberger*. After all, the decision comes after the adoption of an important new piece of legislation, the reform of the PWD, which has gone in the direction of broadening the scope of posting rules, by extending the application of universally / generally applicable collective agreements to all sectors of the economy, while the previous text only mandated the inclusion of the construction industry.¹²⁷ The will behind the new legislation has also been widely publicised as ensuring that “the same work at the same place should be remunerated in the same manner”¹²⁸, a principle which is openly frustrated by the decision here at stake. For those among the (future) European legislators wanting to correct the course set by the Court, this is an important lesson. When political conditions allow for reforms to be enacted, legislators should show the same amount of deference (or, rather, lack thereof) for the case law of the Court, particularly in case of decisions not dealing with the interpretation of primary law. As a side note, the most stubborn optimist might find some comfort in considering that, having now restricted the scope of application of the PWD, some of the judges of the Court might be more inclined than before to confirm its compatibility with its legal basis, namely, the freedom to provide services, in the annulment action brought by the Hungarian and Polish governments.¹²⁹

At the end of the day, while the seemingly eternal battle for posting goes on in Brussels and Luxembourg, the consequence for the concrete situation at stake in *Dobesberger* is that two classes of workers are now operating shoulder to shoulder on the same train and, for an important part of their working time, in the same country. Purely because of the said legal construction, one of these classes of workers is entitled to a wage which is roughly a third of the other,¹³⁰ as round and round they go, between Budapest and Salzburg.

¹²⁵ For a discussion of the relevance of the legal basis of the PWD in the context of the Ruffert decision see P. Davies, Case C-346/06, *Rüffert v Land Niedersachsen* [2008] Irlr 467 (ECJ), *Industrial Law Journal* 37, no. 3, 2008), pp. 293–295.

¹²⁶ C. Kilpatrick, *Internal Market architecture and the accommodation of labour rights: as good as it gets?*, *European Journal of Social Law*, no. 1, 2012, p. 7.

¹²⁷ Cfr. the old text of Article 3(1) which referred to activities listed in Annex 1 to the Directive.

¹²⁸ See for example J.C. Juncker, “A new start for Europe”, Opening Statement in the European Parliament Plenary Session in front of the Plenary Session of the European Parliament, 14 July 2014, p. 8.

¹²⁹ CJEU, C-626/18 (*Poland v Parliament and Council*), pending and CJEU, C-620/18 (*Hungary v Parliament and Council*), pending.

¹³⁰ See *Der Standard*, *Niedriglöhne für Ungarn beim ÖBB-Catering waren rechtens*, 23 December 2019, available at <https://www.derstandard.at/story/2000112595286/niedrigloehne-fuer-ungarn-beim-oebb-catering-waren-rechtens?ref=article>.