

Statement for Defendant

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## 2 List of sources/authorities

### 2.1 Legislation

#### 2.1.1 EU-Legislation:

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- Consolidated version of the Treaty on the Functioning of the European Union [2012], OJ C 326, 26.10.2012, p. 47–390 (hereinafter TFEU), cited on pages 17, 21, 31-33, 35 and 37-39.
- Council Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as amended by Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 and Commission Delegated Regulation (EU) 2015/281 of 26 November 2014, [2012] OJ L351/1 (hereinafter Brussels I), cited on pages 9-10, 20 and 22-26.
- Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996], OJ L18/1 (hereinafter PWD), cited on pages 11-12, 20 and 28-30.
- Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) as amended by Corrigendum, OJ L309/87 [2008] OJ L177/6 (hereinafter Rome I), cited on pages 10-11, 20 and 26-29.
- Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288 (hereinafter TED), 18.10.1991, p. 32–35, art 2, cited on pages 9 and 30.
- Charter of the Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012, p. 391–407 (hereinafter the Charter), cited on pages 13-16 and 31-36.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 (hereinafter ECHR), cited on pages 16 and 31-33.
- Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L 319, 25.11.1988, p. 9–28, Report Jenard/Möller (hereinafter Jenard/Möller), cited on page 25.

### 2.1.2 International agreements:

- Agreement between The Government of the Republic of Poland and the Government of the Republic of Cyprus for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital of June 4th 1992 as amended by the protocol of March 22nd 2012 (hereinafter Double Taxation Agreement), cited on pages 13 and 27.

### 2.1.3 Polish legislation:

- The Polish Labour Code, 1997, (Dz. U. tłum. Gb 1998 Nr 21, poz 94) (hereinafter PLC), cited on pages 13, 16-17, 19, 21 and 36-39.

## 2.2 Case-law

### 2.2.1 European Court of Justice

- Case C 441/14 DI [Dansk Industri], acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen OJ C 421, 24.11.2014, p. 24–25 [2016] (hereinafter Ajos), cited on pages 34, 36 and 39.
- Case C-396/13 Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna (OJ C 118, 13.4.2015, p. 6–7) (hereinafter Sähköalojen), cited on page 29.
- Case C-354/13 Fag og Arbejde v. Kommunernes Landsforening, OJ C 65, 23.2.2015, p. 7–7 (hereinafter Kaltoft), cited on page 33 and the Opinion of AG Jääskinen delivered on 17 July 2014 (hereinafter Kaltoft Opinion), cited on page 35.
- C-176/12 Association de médiation sociale v Union locale des syndicats CGT and Others [2014] OJ C 85, 22.3.2014, p. 3–3 (hereinafter AMS), cited on pages 35 and 36.
- Case C-64/12 Anton Schlecker v Melitta Josefa Boedeker [2013] OJ C 325, 9.11.2013, p. 6–7 (hereinafter Schlecker), cited on page 27.
- Case C-29/10 Heiko Koelzsch v État du Grand-Duché de Luxembourg [2011] OJ C 139, 7.5.2011, p. 9-9 (hereinafter Koelzsch), cited on page 27.
- C-282/10 Dominguez v Centre informatique du Centre Ouest Atlantique [2012] ECR, 24.1.2012 (hereinafter Dominguez), cited on page 39.
- Case C-617/10 Åklagaren v Hans Åkerberg Fransson [2013] ECR (hereinafter Åkerberg), cited on page 34.
- Case C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG [2010] OJ C 79, 29.3.2008, p. 12–12 (hereinafter Küçükdeveci), cited on pages 34, 36 and 39.

- Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2007] ECR-I-11767 (hereinafter Laval), cited on page 38.
- Case C-77/04 Groupement d'intérêt économique (GIE) Réunion européenne and Others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans) [2005] ECR-I-4509 (hereinafter GIE v Soptrans), cited on page 24.
- Case C-94/04 Federico Cipolla v Rosaria Fazari [2006] ECR-I-11421 (hereinafter Cipolla), cited on page 38.
- Case C-499/04 Hans Werhof v Freeway Traffic Systems GmbH & Co. KG. (2006) ECR-I-2397 (hereinafter Werhof), cited on page 31.
- Case C-451/03 Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori [2006] ECR-I-2941 (hereinafter Servizi), cited on page 38.
- Case C-397/01 Bernhard Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV. [2004] ECR-I-8835 (hereinafter Pfeiffer), cited on page 38.
- Case C-215/01 Bruno Schnitzer v Amtsgericht Augsburg [2003] ECR-I-14847 (hereinafter Schnitzer), cited on page 37.
- Case C-60/00 Carpenter v Home Secretary [2002] ECR-I-6279 (hereinafter Carpenter), cited on page 38.
- Case C-437/00 Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio [2003] ECR-I-3573 (hereinafter Pugliese), cited on page 23.
- C-398/95 Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias [1997] ECR-I-3091 (hereinafter Syndesmos), cited on page 38.
- Case C-439/93 Lloyd's Register of Shipping v Société Campenon Bernard [1995] ECR-I-961 (hereinafter Lloyd's), cited on page 25.
- Case 189/87 Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others [1988] ECR-5565 (hereinafter Kalfelis), cited on page 24.
- Case 218/86 SAR Schotte GmbH v Parfums Rothschild SARL [1987] ECR-4905 (hereinafter SAR Schotte), cited on page 25.
- Case 266/85 Hassan Shenavai v Klaus Kreischer [1987] ECR-239 (hereinafter Shenavai), cited on page 22.
- Case 6/64 Costa v ENEL [1964] ECR-1141 (hereinafter Costa v ENEL), cited on page 39.

### 2.2.2 European Court of Human Rights

- Sigurdur A. Sigurjónsson v. Iceland (1993) 16 E.H.R.R. 462 (hereinafter Sigurdur), cited on page 32.

- Sorensen and Rasmussen v. Denmark (2006) Reports of Judgments and Decisions 2006-I (hereinafter Sorensen and Rasmussen), cited on page 32.
- Gustafsson v. Sweden (1996), Reports of Judgments and Decisions 1996-II (hereinafter Gustafsson), cited on page 32.

## 2.3 Literature

- Mankowski, Peter (ed.), European Commentaries on Private International Law: Brussels I Regulation (2nd edn, Sellier European Law Publishers 2007) (hereinafter Mankowski), cited on page 26.
- Georgiou, George Z and others, Erika C. Collins (ed), *The Employment Law Review* (4<sup>th</sup> edn, Law Business Research 2013) (hereinafter Georgiou), cited on page 13.

## 3. Statement of relevant facts:

### 3.1 The company structure

Max Staff Partners is a Polish company. Max Job is a Cypriot company with registered office in Nicosia. The two companies entered into a service agreement. The companies are independent of each other.

### 3.2 The employment relationship

The claimant was recruited by Max Staff Partners to perform work for Max Job in Cyprus.

Kazimierz Nowak introduced himself to the claimant as acting on behalf of Max Job, when signing the employment contract. The formalities were concluded in Poland.

Under the contract, the claimant worked for Max Job in Cyprus as a carpenter for two years. During his employment, the claimant frequently worked together with workers employed by other companies. As the term of the contract ended on March 31<sup>st</sup> 2015, the claimant presented to Max Job an application for a work certificate. Max Job filled out the work certificate wrongly and rejected to rectify it.

Before being dispatched to Nicosia, the claimant was an employee or self-employee at different entities in Poland.

### 3.3 Remuneration under the contract

The claimant earned 10% less than a number of other carpenters he worked with. When the claimant asked about this difference in pay, he received an official answer from Max Staff Partners.

The claimant did not receive extra wages for working over 8 hours per day, although he did so regularly.

### 3.4 Jurisdiction

Max Staff Partners was included in the action against Max Job to make it more likely that the Polish courts would acknowledge jurisdiction in the case.



## 4 Description of relevant legislation:

### 4.1 Ad jurisdiction

Matters of jurisdiction between EU Member States are governed by Brussels I.

Section 5 of Brussels I regulates jurisdiction in matters relating to individual contracts of employment.

#### **Brussels I, art 20(1)**

*“In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to art 6, point 5 of art 7 and, in proceedings brought against an employer, point 1 of art 8”*

The article does not include a definition of what constitutes an individual contract of employment. Other legislative acts, for example the TED, include the concept of “other employment relationships” in their scope, but as Brussels I does not, it is to be determined by the ECJ through case-law.

Art 21(1) determines where an employer may be sued.

#### **Brussels I, art 21(1)**

*“1. An employer domiciled in a Member State may be sued:  
in the courts of the Member State in which he is domiciled; or in another Member State:  
in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.”*

However, an employer may also be sued in another Member State according to art 7(5).

#### **Brussels I, art 7(5)**

*“A person domiciled in a Member State may be sued in another Member State:  
(5) as regards a dispute arising out of the operations of a branch, agency or other  
establishment, in the courts for the place where the branch, agency or other establishment is  
situated;”*

Finally, where a number of defendants are sued jointly, an employer may be sued according to art 8(1).

#### **Brussels I, art 8(1)**

*“A person domiciled in a Member State may also be sued:  
Where he is one of a number of defendants, in the courts for the place where any  
one of them is domiciled, provided the claims are so closely connected that it is  
expedient to hear and determine them together to avoid the risk of irreconcilable  
judgements resulting from separate proceedings;”*

#### **4.2 Ad applicable law**

In situations involving a conflict of laws in civil matters regarding contractual obligations within a Member State, Rome I applies.<sup>1</sup>

An individual employment contract shall be governed by the law determined in art 8.

#### **Rome I, art 8**

***“1. An individual employment contract shall be governed by the law chosen by  
the parties in accordance with art 3. Such a choice of law may not, however, have  
the result of depriving the employee of the protection afforded to him by provisions  
that cannot be derogated from by agreement under the law that, in the absence of  
choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this  
Article.***

***2. To the extent that the law applicable to the individual employment contract  
has not been chosen by the parties, the contract shall be governed by the law of  
the country in which or, failing that, from which the employee habitually carries***

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<sup>1</sup> Rome I, art 1(1).

*out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*

*3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.*

*4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.”*

The general rules in Rome I are supplemented by the PWD, which governs the applicable law in cases concerning posting of workers.

#### **PWD, art 1(3)**

*“This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:*

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

*(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or*

*(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.”*

#### **PWD, art 2(1)**

*“For the purposes of this Directive, 'posted worker' means 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. “*

#### **PWD, art 3(1)(c)**

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

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

*(...)*

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

### **4.3 Ad claim 1**

#### **4.3.1 EU legislation**

Regulating pay is in the Treaties left to the Member States.

#### **TEU, art 153(1) and (5)**

*“With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States”*

*(...)*

*“The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”*

#### 4.3.1 Cypriot legislation

In Cyprus, the concept of overtime pay is regulated in collective agreements and not by law.<sup>2</sup>

#### 4.3.2 Polish legislation

In Poland, the concept of overtime is regulated in art 151 of the PLC and compensation is regulated in art 151.<sup>1</sup>

#### **PLC, arts 151(1) and 151<sup>1</sup>(1)**

*“§ 1. Work performed in excess of the standard working time binding an employee, as well as work performed in excess of an extended daily working time resulting from the system and schedule of working time binding the employee, is overtime work.”*

*“§ 1. For overtime work, in addition to the regular remuneration, a bonus is due (...)”*

#### 4.3.3 Double Taxation Agreement, art 15(1)

Poland and Cyprus have concluded an agreement for the avoidance of double taxation. This bilateral agreement states what country has the right to collect taxes.

*“1. Subject to the provisions of Articles 16, 18, 19 and 20 of this Agreement, **salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment, is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.**”*

#### 4.4 Ad claim 2

The Charter states a number of fundamental rights and principles in the EU.

It is stated in the preamble of the Charter that it reaffirms and strengthens the protection of fundamental rights in EU by making those rights more visible.

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<sup>2</sup> Georgiou, 159.

The legal status of the Charter is regulated in art 6 of the TEU.

#### **TEU, art 6**

*“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, **which shall have the same legal value as the Treaties.***

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”*

The addressees of the Charter are mentioned in art 51(1).

#### **The Charter, art 51(1)**

*“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”*

The right to freedom of association is enshrined in the art 12 of the Charter.

### **The Charter, art 12**

*“1. **Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels**, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*

*2. Political parties at Union level contribute to expressing the political will of the citizens of the Union. “*

A prohibition of discrimination can be found in art 21 of the Charter.

### **The Charter, art 21**

*“Non-discrimination*

*1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

*2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”*

Art 52 lays down the scope of application of the Charter.

### **The Charter, art 52**

*“(…)*

*2. Rights recognized by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.*

*3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said*

*Convention. This provision shall not prevent Union law providing more extensive protection.*

*(...)*

*7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States. “*

The ECHR includes a provision similar to the right in the Charter on freedom of association.

#### **ECHR, art 11**

*“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

#### **4.5 Ad claim 3**

##### **4.5.1 Polish legislation**

The PLC includes provisions on work certificates.

#### **PLC, art 97**

***“Upon termination or expiry of an employment relationship, the employer is obliged to issue a work certificate to the employee immediately. The issue of the work certificate may not be depend on the previous settlement of accounts between the employee and the employer. § 2 The work certificate provides information on the period and type of the work performed, job positions held, the***



***manner of the termination or the circumstances of the expiry of the employment relationship as well as other information necessary to establish the employee's entitlements and social insurance entitlements [...]"***

**PLC, art 99(1)**

*"An employee has the right to claim for the redress of damage caused to him by through the failure of the employer to issue a work certificate in due time, or a failure to issue an accurate work certificate, § 2 The compensation referred to in § 1 amounts to the remuneration for the period of being out of work for this reason, but for not longer than 6 weeks".*

4.5.2 EU legislation

TFEU guarantees the freedom of movement for workers and the freedom to provide services.

**TFEU, art 45**

- "1. Freedom of movement for workers shall be secured within the Union.*
- 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
- 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
  - (a) to accept offers of employment actually made;*
  - (b) to move freely within the territory of Member States for this purpose;*
  - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
  - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
- 4. The provisions of this Article shall not apply to employment in the public service."*

**TFEU, art 56**

***“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.***

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.”*

## 5. Questions:

### 5.1 Ad jurisdiction and applicable law

Does the Polish court have jurisdiction in this case?

How is the employment relationship viewed under EU-law?

Which national law is applicable?

### 5.2 Ad claim 1

Does the national law oblige an employer to pay for overtime work?

Is overtime pay regulated in EU-law?

### 5.3 Ad claim 2

Is there a right to equal pay for equal work in applicable national law?

Is there a general principle of equal pay for equal work in EU-law?

Is there a general principle of non-discrimination on grounds of trade union membership in EU-law?

If yes, is the principle directly applicable in a case between private parties?

### 5.4 Ad claim 3

Does art 97 of the PLC constitute a restriction on the right to any of the free movements?

Does the principle of the primacy of EU-law allow the Polish courts to disapply art 97?

## 6. Summary of arguments

### 6.1 Ad jurisdiction

The defendants will argue that the case is to be dismissed on grounds of jurisdiction, since the claimant is employed by Max Job. Max Staff Partners is only being sued to create jurisdiction in Poland, but a suit based on an employment contract may not be brought against them in a case where they are not party to it. The court does not have jurisdiction in a case brought against Max Job, as they may only be sued in the court of their domicile Member State, or the courts of the Member State in which the claimant habitually carried out his work in performance of the contract, see Brussels I, art 21(1)(a).

### 6.2 Ad applicable law

If the case is permitted in the court of Poland the defendants will argue principally that Cypriot law is the applicable law, see Rome I, art 8(2). Subsidiary, that the PWD leads to the application of Cypriot law, see PWD, art 3(1)(c).

### 6.3 Ad claim 1

The defendants will argue that as Cypriot law contains no provisions on remuneration of overtime pay, and as overtime pay is not regulated by EU-law, no claim for overtime wages can be made.

### 6.4 Ad claim 2

The defendants will argue that the claim regarding the alleged discrimination should be dismissed since there is no principle of equal pay for equal work in Cypriot law or in EU-law. Furthermore, it will be argued that if a principle of non-discrimination on ground of trade union membership exists in EU-law, the claimant cannot rely on such a principle, as such a principle cannot be applied in a case between two private parties.

### 6.5 Ad claim 3

Principally, the defendants argue that Cypriot law applies. There are no rules about work certificates in Cypriot law and for that reason the claimant is not entitled to compensation.

Subsidiary, the defendants will argue that even though Polish law is to be applied, EU-law also applies. If the Court finds that Max Staff Partners is the employer of the claimant and that Polish law applies, the

Polish provision on work certificates constitutes an impediment to the free movement of services in EU and must therefore be disregarded, as Community law takes precedence over national law, see TFEU, art 56.

## 7 Arguments

### 7.1 Ad jurisdiction

The case is to be dismissed on grounds of jurisdiction. Max Staff Partners is being sued to create jurisdiction in Poland, therefore a case can not be brought against the. The Court does not have jurisdiction in a case brought exclusively against Max Job.

Since the dispute involves a transboundary activity, concerning a Polish national and a Cypriot undertaking, it is essential first to examine the rules of international jurisdiction in Brussels I, as to determine the country whose courts will have jurisdiction in this case.

It has not been agreed by the parties that any specific court is to have jurisdiction. For that reason, the question is to be determined on the basis of the rules on special jurisdiction in the Brussels I.

The dispute is one relating to an individual contract of employment, thus the jurisdiction is to be determined by Section 5 in Brussels I.<sup>3</sup> This section grants jurisdiction in matters relating to individual employment contracts, but it applies only to cases brought against the employer. To determine the question of jurisdiction, it must be established who the employer of the claimant is.

#### 7.1.1 Ad Max Staff Partners

Max Staff Partners is being sued in an attempt to draw the company into a dispute they are not contractually obliged in because Max Staff Partners is not the employer of the claimant.

The relationship between the claimant and Max Staff Partners does not constitute an employment relationship. The role of Max Staff Partners is merely to provide health and safety training, consulting and recruitment services. Other than this, Max Staff Partners did not play a role in the performance of the claimants' contract of employment. This is substantiated by the outlined particularities in *Shenavai*,<sup>4</sup> which amongst others include the need for a lasting bond between the parties that includes the worker in the organizational framework of the undertaking. This means that even in the event of a lasting bond, the employee must be included in the organizational framework of the undertaking, to establish an employment relationship. The link between the claimant and Max Staff Partners do not establish such a bond, as the claimant was not included in the organizational framework of Max Staff Partners.

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<sup>3</sup> Brussels I, art 20(1).

<sup>4</sup> *Shenavai*, para 18.

Art 7(5) of Brussels I<sup>5</sup> does not grant the Polish courts jurisdiction in a case against Max Staff Partners, as it only concerns suits against the principal, and as they are a legal entity in their own right, jurisdiction must be determined independently.

Art 8(1) of Brussels I can not be used to include a defendant in a suit regarding a contractual matter, when a claim against him can only stem from a non contractual obligation, thus the lacking employment relationship prevents Max Staff Partners from being included in the suit.

#### 7.1.2 Ad Max Job:

During the conclusion of the contract, Kazimierz Nowak presented himself as acting on behalf of Max Job. Doing so, both parties to the contract were properly and unambiguously identified. Therefore, Max Job is the employer of the claimant. This fact is supported by the agreement concluded between Max Staff Partners and Max Job, according to which Max Staff Partners were to provide personnel recruitment services, and not to provide personnel as such. The fact that the contract was concluded in Poland does not have any effect as to identifying the parties to the contract.

##### **7.1.2.1 By default**

As Max Job is the employer of the claimant, Max Job may be sued in the courts of the Member States identified in art 21 of Brussels I. This means that since Max Job is a Cypriot company with its registered office in Nicosia, Max Job can be sued in Cyprus.<sup>6</sup> If they are to be sued in another Member State, they may be so in the courts of the Member States where the employee habitually carried out his work in performance of the contract.<sup>7</sup>

The work was carried out by the claimant in the territory of Cyprus. This leaves no doubt as to where the claimant habitually carried out his work in fulfilment of the employment contract. In matters relating to contracts of employment, the place where the employee carried out his work is the only place of performance to be taken into consideration, when determining which court has jurisdiction.<sup>8</sup> It is undisputed that the work was performed in Cyprus alone, hence Max Job can only be sued in Cyprus. As a consequence, the case against Max Job must be dismissed from the Polish Labour Court.

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<sup>5</sup> Brussels I, art 7(5)

<sup>6</sup> Brussels I, art 21 (1)(a).

<sup>7</sup> Brussels I, art 21(1)(b)(i).

<sup>8</sup> *Pugliese, para 30.*

### 7.1.2.2 Max Job as co-defendant

If the Polish court should find that judicial proceedings against Max Staff Partners can be instituted, the possibility of suing Max Job, as a co-defendant arises. This requires a close connection between the claims.<sup>9</sup>

The fact that the claimant sues the defendants under joint and several liability is not in itself sufficient to establish that the choice of forum is justified. This is substantiated by the ruling in *GIE v Soptrans*.<sup>10</sup> In the case the mere fact that a case concerned several insurers and was based on multiple insurance, was not enough to establish that there was a sufficient connection between the original proceedings and the third-party proceedings. Neither was it sufficient to support the conclusion that the choice of forum did not amount to an abuse.

The regard paid to the claimant's interest in bringing the claim at his desired court, must be weighed against the protection of the natural forum of the claim, as it has been established above.

The action against Max Staff Partners is brought solely with the purpose to disregard the jurisdiction of the courts in which Max Job is domiciled. Community law has had a long-standing prohibition against such a purpose, which for example is seen in *Kalfelis*. The Court explicitly stated that non-contractual matters are not to be confused with contractual matters.<sup>11</sup> Claims made on non-contractual matters lodged against Max Staff Partners may not be combined with claims against Max Job, when the latter claims regard contractual matters.

The general principle is that jurisdiction is vested in the Courts of the Member State where the defendant is domiciled. In the mentioned ruling, the Court emphasized the importance of a restrictive interpretation when derogating from the general rule of jurisdiction.<sup>12</sup>

It is not possible to sue Max Job as a co-defendant, due to the sole fact, that the case against Max Staff Partners is inadmissible in Poland in the first place.

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<sup>9</sup> Brussels I, art 20(1), art 8(1).

<sup>10</sup> *GIE v Soptrans*, para 36.

<sup>11</sup> *Kalfelis*, para 18.

<sup>12</sup> *Kalfelis*, para 19.



### 7.1.2.3 Jurisdiction based on establishment

The rule on special jurisdiction in art 7(5) of Brussels I does not apply. The dispute does not arise from the operations of Max Staff Partners. Max Staff Partners does not constitute a branch, an agency or another ancillary establishment of Max Job.

The wording of the article is clear on determining when a person domiciled in a member state may be sued in another member state, this when:

*“a dispute [arises] out of the operations of a branch, agency or other establishment”.*<sup>13</sup>

This special jurisdiction is established when a defendant voluntarily has extended the range of his business through an establishment. An establishment is an entity capable of “being the principal”. In *Lloyd's*, the Court explains that the term also includes for example an exclusive interlocutor for third parties in the negotiation of contracts.<sup>14</sup> Any entity, with or without a legal personality and regardless of the link under company law, can constitute an establishment.<sup>15</sup>

Kazimierz Nowak presented himself as acting on behalf of Max Job at the time of the agreement. The protective scope of the special jurisdiction in art 7(5) of Brussels I is aimed at protecting a claimant’s defensibly gained impressions of who he or she may or may not sue. In this case the Kazimierz Nowak made it unambiguously clear that the claimant was in fact signing a contract directly with Max Job and not with Max Staff Partners as a subsidiary or branch of any kind. The criteria in *SAR Schotte* are consequently not fulfilled, as the Court ruled that the most significant factors in determining whether an establishment acted as a branch or as an independent entity, are whether the establishment is used as an extension of the principal and whether it is conducting business in its name.<sup>16</sup>

In order for Max Staff Partners to be viewed as an establishment of Max Job, Max Staff Partners must therefore be found to have acted on behalf of Max Job. None of the circumstances in the case point to that Max Staff Partners acted as such.

Furthermore, for the rule on special jurisdiction to come into effect, there has to be sufficient connection or nexus between the claim and the alleged establishment, Max Staff Partners. An attempt to hold Max Job liable in Poland does not constitute the necessary nexus. Max Staff Partners deliver, amongst other

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<sup>13</sup> Brussels I, art 7(5).

<sup>14</sup> *Lloyd's*, para 19.

<sup>15</sup> Jenard/Möller, para 43.

<sup>16</sup> *SAR Schotte*, paras 13-17.

services, a personnel recruitment service. The company is not a temporary workers agency by any means. Other than brokering carpenters, the services Max Staff Partners provide are consulting and providing health and safety training. A claim for unpaid wages following an employment relationship has no contractual nexus with the recruitment service.

Even if Max Staff Partners were to be recognized as an establishment of Max Job, the establishment would have had to have performed a role in, or taken part in, the formation or execution of the employment contract.

This follows, since Art 7(5) in Brussels I has a strict factual approach, stating that the establishment must in fact have played a role in the formation or performance of the contract in itself.<sup>17</sup> When Max Staff Partners later in the employment relationship, communicated an official answer regarding the claimant's questions on remuneration, they did so operating under the agreement to provide consulting services. This answer is therefore in no way an indication that Max Staff Partners takes part in the performance of the contract between the claimant and Max Job. On the contrary, it shows that Max Staff Partners themselves carry out their own business and contract in their own name, refuting the view that they are an establishment under the control of Max Job.

It is consequently not possible to sue in Poland pursuant to art 7(5).

## 7.2 Ad applicable law

Cypriot law is the applicable law if the case is permitted.

Since the dispute involves relations across different legal jurisdictions, it is essential to initially determine which national law is to be applied in the the case. The case involves transboundary contractual obligations, thus the applicable law is governed by Rome I. No choice of law agreement has been made.

In Rome I an individual employment contract, not covered by a choice of law agreement,

*“shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.”<sup>18</sup>*

The habitual workplace must therefore be determined.

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<sup>17</sup> Mankowski, 285.

<sup>18</sup> Rome I, art 8(2).

### 7.2.1 Ad the habitual workplace and the circumstances as a whole

The claimant had a contractual obligation to perform work in Cyprus. The concept of “habitual workplace” has been given a broad interpretation. This is seen in *Koelzsch*, wherein the Court did just that, with reference to the objective of the article, to guarantee adequate protection for the employee.<sup>19</sup> The Court also stated in the judgement that the concept is to be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, the place where he carries out the majority of his activities.<sup>20</sup>

In the case at hand, the claimant carried out his tasks in Cyprus. He organized his work from his domicile in Cyprus, and it was at that domicile the tools used for his work were kept. According to the Court’s ruling in *Koelzsch*, these are factors which must be taken into account.<sup>21</sup> It is clear from these circumstances that the habitual workplace under this contract is Cyprus.

*“When it appears from the circumstances as a whole that the contract is more closely connected to another country than that of the habitual workplace, the laws of that country are to be applied.”<sup>22</sup>*

In the employment contract relevant to this case the employee is to perform work in Cyprus working for the benefit of a Cypriot company. The employee resides in Cyprus throughout the entire period of the employment relationship and is liable to pay taxes there, regardless of his residency, as the work is carried out in its entirety in Cyprus.<sup>23</sup> His salary and his working conditions are determined by his Cypriot employer.

Among the significant factors suggestive of a connection with a particular country, account should be taken in particular to the country in which the employee pays taxes on the income from his activities. In addition, the court must also take account of the parameters relating to salary determination and other working conditions.<sup>24</sup> It should be noted, that the Court explicitly states in *Schlecker*, that the law of the country with which the contract is most closely connected is not to be interpreted so that the employee automatically is offered a better protection.<sup>25</sup>

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<sup>19</sup> *Koelzsch*, para 43.

<sup>20</sup> *Koelzsch*, para 45.

<sup>21</sup> *Koelzsch*, paras 48 and 49.

<sup>22</sup> Rome I, art 8(4)

<sup>23</sup> Double Taxation Agreement, art 15(1).

<sup>24</sup> *Schlecker*, para 41.

<sup>25</sup> *Schlecker*, para 34.

Considering these factors, the employment contract does not suggest a closer link to any other country than Cyprus and art 8(2) of Rome I apply. Thus, Cypriot national law must be applied.

#### 7.2.2 Ad applicable law specific to claim 1

Even if the court should find that the claimant is in fact employed by Max Staff Partners, the claim for overtime pay is still to be governed by Cypriot law.

If employed by Max Staff Partners, the claimant must be considered a posted worker under PWD. According to the service agreement between Max Staff Partners and Max Job, Max Staff Partners were among other services to provide recruitment services to Max Job. In the event that Max Staff Partners is found to have employed the claimant, Max Staff Partners must in this regard have acted as a temporary employment agency. In other words, they must have hired the claimant with the purpose of fulfilling their agreement with Max Job and thereby posting the claimant to work for Max Job operating in Cyprus. This is substantiated by the fact that the service agreement between the two undertakings included safety-training services in line with Cypriot requirements. This goes to support that if Max Staff Partners hired workers themselves, it was with the purpose of posting them to Cyprus. If Max Staff Partners is found to have employed the claimant, the employment relationship must have lasted throughout the posting. Furthermore the claimant fits the definition of a posted worker in the PWD, since he normally worked in Poland and is sent to work in Cyprus for just two years.<sup>26</sup>

If the claimant was a posted worker, the PWD binds the Member States to guarantee the claimant the terms and conditions concerning minimum rates of pay including overtime rates as laid down in Cypriot law and/or a Cypriot legal instruments referred to in article 3(1).<sup>27</sup> That minimum rates of pay is governed by the host Member State is also emphasized in case-law:

*“The second subparagraph of Article 3(1) of Directive 96/71 makes absolutely clear that questions concerning ‘minimum rates of pay’ within the meaning of the directive are governed, whatever the law applicable to the employment relationship, by the law of the*

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<sup>26</sup> PWD, art 2(1).

<sup>27</sup> PWD, art 3(1)(c)

*Member State to whose territory the workers are posted in order to carry out their work(...)*<sup>28</sup>

In the case at hand this means that questions concerning minimum rates of pay, including overtime rates, must be governed by Cypriot law.

It has also been established in case-law that the concept “minimum rates of pay, including overtime rates” have not been harmonized by the Directive, and that this concept is to be defined by national law and/or practice of the host Member State alone, so far as that definition does not impede on the freedom to provide services.<sup>29</sup> This means that in the absence of an agreement, and in the absence of any regulation of overtime pay in Cypriot law or practice, no overtime rate applies to the employment relationship.

Applying a provision on overtime rates from another legal system, when the PWD has already appointed a specific legal system, would deprive the PWD of its purpose. One of the objectives of article 3(1) of the Directive is to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally. This objective is reached by requiring the latter to afford their workers the same terms and conditions as laid down in the host Member State with regards to minimum rates of pay, including rates of overtime pay.<sup>30</sup> In a situation where the host Member State does not have universally applicable rules regarding overtime rates, and where it is permitted to fall back on another legal system or fall back on general choice of law rules in Rome I, the competition between national undertakings and undertakings providing services transnationally would be unfair.

It would be so, since national undertakings in the first Member State do not have to pay their workers a specific rate for overtime work, other than that agreed between the parties. Meanwhile, undertakings operating transnationally would have to pay the rate for overtime work as established in the Member State pointed to in Rome I, most likely that of their home Member State. This would distort the competition within the internal market between undertakings established in different Member States. An undertaking operating out of a Member State with a high rate for overtime pay would have little success providing the service of posting workers to a Member State with no minimum rate for overtime pay, since the posted workers would have to be paid more than national workers. Without any doubt the more attractive service provider, would be an undertaking operating out of a Member State with a low rate for overtime pay. Since

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<sup>28</sup> *Sähköalojen*, para 23

<sup>29</sup> *Sähköalojen*, paras 31,32 and 34.

<sup>30</sup> *Sähköalojen*, para 30.

this legal situation is contrary to the aim of the Treaties of the EU, this cannot have been the intent of the drafters of the PWD.

This should leave no doubt as to apply Cypriot law to the claim for overtime pay, even if Max Staff Partners is found to have employed the claimant.

### 7.3 Ad claim 1

Cypriot law contains no provisions for remuneration of overtime pay and as overtime pay is not regulated by EU-law. Consequently, the claim for overtime wages is unwarranted.

Regarding EU-law, it is noted that the competence of regulating wages is exclusively left to the Member States and it is not a matter in which the EU should interfere. This is a principle clearly demonstrated by the Treaty's art 153(1) and (5). Since there are no EU regulations regulating overtime wages, the EU can only regulate overtime wages when national regulations on pay becomes a hindrance for the fulfilments of the goals in the Treaties or general principles of the EU. As this is not the case in the matter at hand, this dispute is only governed by national law.

As established above, Cypriot law is applicable. Cypriot labour law is based on a tripartite cooperation, and most terms and conditions of employment are determined through collective bargaining. This is also the case regarding overtime pay, as it is not regulated by law. In a Cypriot employment relationship, an employer is obligated to inform the employee of the essential aspects of the contract or employment relationship.<sup>31</sup> This includes all component elements of the remuneration the employee is entitled to. Including the right to overtime pay, and of any collective agreements governing the employee's conditions of work. No agreement between the claimant and Max Job has been made to set a collective agreement into place, rendering the claimant an unorganized worker, not covered by any other agreements than those made between the two parties. Hence, there is no legal warrant, in Cypriot law obliging Max Job to pay extra wages for hours worked in exceed of 8 hours per day.

### 7.4 Ad claim 2

The claim regarding the alleged discrimination must be dismissed, as there is no principle of equal pay for equal work in Cypriot law, nor in EU-law. Even if the Court finds that such a legal basis is found within EU-

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<sup>31</sup> TED, art 2.

law, the defendants argue that such a principle cannot apply in a dispute between private parties, as it has no direct horizontal effect. The defendants argue that the claim does not fall within the scope of EU-law and furthermore, that the provisions, if found to support such a claim, are simply not by themselves sufficient to confer on individuals an individual right which they may invoke as such.

An obligation to pay the claimant 10 % more than what was agreed upon is found nowhere in national Cypriot law. It must therefore be examined whether a claim, as made by the claimant, can be based directly on a right derived from EU-law. In order to determine this, it is necessary to examine whether such a right is derived directly from a legislative act of the European Union, for instance the Treaties, a directive or the EU Charter. If this is not the case, it must be examined whether a differential treatment is prohibited by a general principle of EU-law, applicable in a dispute between private parties such as the one before the Court.

#### 7.4.1 Principle of non-discrimination on the grounds of trade union membership

A principle of non-discrimination on the grounds of trade union membership is neither encompassed in the TEU or the TFEU, nor is such a principle found in any secondary legal act of the Union. However, one could consider whether the Charter encompasses such a principle. The Charter does not clearly mention such a principle, but the open-ended wording of art 21 leaves it as a possible means of providing a prohibition of any type of discrimination. Furthermore, since the art 12 of the Charter encompasses a principle of freedom of association, one could be lead to believe that these articles, read in conjunction, might express a prohibition of discrimination on grounds of trade union membership. However, this is not the case.

One must remember that the Charter does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.<sup>32</sup> The fundamental rights of the Union are therefore continuously based only on specific legal grounds found in the Treaties.

Art 12 does not mention the right not to join a trade union, however a protection of the negative right of association can be found in EU-law, which is confirmed in *Werhof*.<sup>33</sup>

Art 12 of the Charter is modelled art 11 in the ECHR, regarding freedom of assembly and association. In the explanatory notes to the Charter, in specific those related to art 12, it is explained that paragraph 1 of the article corresponds to art 11 of the ECHR and that the meaning of the provision in art 12(1) is the same as

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<sup>32</sup> Charter, art 51(2).

<sup>33</sup> *Werhof*, para 33.

that of art 11. For this reason, art 12 of the Charter must be interpreted in light of art 11 of the ECHR and the associated case-law of the ECHR.

In *Sigurdur*, the negative freedom of association was violated when a taxi driver was forced to either join a trade union or lose his license.<sup>34</sup> A similar interpretation was applied in *Sorensen and Rasmussen*, where the Court stated that the fact that the applicants had been compelled to join a particular trade union was a clear violation of art 11.<sup>35</sup> On the contrary, the circumstances in *Gustafsson* did not constitute a violation of art 11 of the ECHR.<sup>36</sup> In that case the imposed restrictions deemed to not having “interfered significantly” with the right to freedom of association. The applicant in the case was a restaurant owner, not bound by any collective labour agreements, since he was not a member of any association of restaurant employers. The applicant refused to sign a substitute agreement and as a consequence his restaurant was placed under a blockade. The Court found that the applicant’s right to freedom of association was affected, but since it was not significantly affected, it was not a violation of art 11 of the ECHR that the State had taken no steps to prevent the blockade.

Consequently, a violation of the negative freedom of association only exists when the means interfering with this right compels or forces a worker to join a trade union or interferes significantly with the right to not join a trade union. Following this reasoning, an insignificant difference in pay of 10 %, does not amount to an infringement of art 11 of the ECHR. Neither does it infringe the right in art 12 of the Charter.

As regards art 21 of the Charter, it is important to take into account that the article prohibits discrimination on the ground of trade union membership. In fact, discrimination on any ground is prohibited. However, the Charter does not extend the competences of the European Union beyond what is defined in the Treaties.<sup>37</sup> It is general knowledge that there is not a general principle of non-discrimination.

The principle of non-discrimination appears only in very specific contexts, for instance in securing the general principle of equal pay between men and women, as seen in TFEU art 157 and in Directive 2006/54/EC, on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

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<sup>34</sup> *Sigurdur*.

<sup>35</sup> *Sorensen and Rasmussen*.

<sup>36</sup> *Gustafsson*.

<sup>37</sup> Charter, art 51(2).



Furthermore, the Court confirmed, in *Kaltoft*,<sup>38</sup> that a general principle of non-discrimination does not exist. In this case, the Court found that not all forms of discrimination in the labour market are prohibited by EU-law, hence a general principle in EU-law prohibiting all types of discrimination does not exist. The Court found that

*“EU-law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.”<sup>39</sup>*

If art 21 did in fact prohibit discrimination on any grounds, discrimination on the grounds of obesity would also be prohibited.

*Kaltoft* has shown that the article is not exhaustive. When determining how far the reach of the open-ended article extends, one must look to the explanatory notes to the provision. The explanatory notes concerning art 21 of the Charter, mentions art 19 in TFEU and art 14 in the ECHR. None of these articles mention anything about trade union membership. Furthermore, the explanatory notes mention neither art 11 nor in the ECHR art 12 of the Charter. If the drafters of the Charter intended that the provisions were to be interpreted as to prohibiting discrimination based on trade union membership, presumably they would have included a provision expressly stating it.

As such a principle prohibiting discrimination on grounds of trade union membership is not found anywhere else in EU-law, no logic suggests that such a principle is encompassed in the Charter. This conclusion seems even more clear when one takes into account the founding principles of the EU, including the principle of legal certainty and the principle of subsidiarity. To carry any legal value whatsoever and to have any effect in the legal systems of the Member states, a prohibition of discrimination on a particular ground must be clearly, precisely and unambiguously expressed in the EU-law.

In addition to all of the above, it must be remembered that the competency of wage regulation is exclusively left to the Member States. It is not an area on which the EU can interfere, a principle clearly demonstrated by the Treaty.

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<sup>38</sup> *Kaltoft*.

<sup>39</sup> *Kaltoft*, para 40.

Since there are no EU provisions regulating pay as such, the EU can only govern pay-issues when the national provisions stand in the way of the fulfilment of the goals in the Treaties or general principles of the EU. Since the subject in the case at hand is not protected by the Treaties and since the Charter does not extend the competences of the Union, a general principle of non-discrimination or a general principle of equal pay for equal work cannot be said to exist within EU-law. Whether such a principle should exist or not is up to the Member States and is a matter of their respective national law.

As a principle of non-discrimination on grounds of trade union membership can neither be found in art 12 or art 21 of the Charter, the Court must deem such a principle as simply non-existent within the laws of the EU.

Due to the lack of legal basis, the claim must be dismissed.

#### 7.4.2 Lack of applicability

Even if the court should find that a general principle of non-discrimination or a principle of non-discrimination on grounds of trade union membership exists in EU-law, such a principle cannot be applied directly in a case between private parties.

Firstly, the Charter is addressed to the institutions of the European Union and to the Member States only when they are implementing Union law. As a result, the Charter does not confer rights on individuals, on which they can rely directly in disputes between private parties. It would be completely contrary to the principles of legal certainty and the principle of subsidiarity if individuals could rely on the provisions of the Charter directly in such cases.

Secondly, in the case-law of the ECJ, the general principles of EU-law have only been found applicable in cases falling within the scope of EU-law. As the claim does not fall within the scope of EU-law, the provisions of the Charter cannot be applied directly in this case.

Both the cases *Åkerberg*<sup>40</sup> and *Küçükdeveci*<sup>41</sup> fell within the scope of EU-law, as a national legislative act implementing EU-law was at matter.<sup>42</sup> Furthermore, in *Ajos*<sup>43</sup> the court stated that the general principle of

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<sup>40</sup> *Åkerberg*, para 21.

<sup>41</sup> *Küçükdeveci*, para 23.

<sup>42</sup> *Küçükdeveci*, para 25.

<sup>43</sup> *Ajos*.

the EU-law, on non-discrimination on grounds of age, as enshrined in art 21 of the Charter, expressed in Directive 2000/78, could only be relied upon in a case between private persons, if the case fell within the scope of discrimination laid down by Directive 2000/78. It can therefore be concluded, that a case falls within the EU-law, when national legislative acts implements EU-law or if the nature of national legislation fall within areas covered by EU-law.

On the contrary, a case does not fall within the scope of EU-law, when the only EU legislation involved is the Charter itself. Citing Advocate General Jääskinen:

*“Under the case-law of the Court to date, the fact that discrimination occurs in a substantive field such as the labour market is an insufficient foundation for concluding that a Member State (...) is ‘implementing’ EU-law. Equally, where the objective of the main proceedings does not concern the interpretation or application of a rule of EU-law other than those set out in the Charter, the link will be insufficient”<sup>44</sup>*

The fact that the claimant is a Polish national working in Cyprus, exercising his right as a worker to move freely within the Union, does not bring this claim within the scope of EU-law. The claim does not stem from him being discriminated due to his nationality, the subject the protection in art 45 in TFEU. The claim is in other words not based on any positive legislative acts of the EU, besides the Charter, nor is it based on any national legislation implementing EU-law or hindering the fulfilments of the objectives in TEU. This claim does therefore not fall within the scope of EU-law, hence the Charter does not apply directly.

#### **7.4.2.1 Horizontal direct effect**

Even if the Court finds that the claim falls within the scope of EU-law, art 21 of the Charter cannot be applied directly, as the article in itself is insufficient to confer rights on individuals.

In order for a provision of the Charter to be directly applicable in a case between private parties, the provision must be sufficient in itself to confer rights on individuals.<sup>45</sup> The ruling in *Kaltoft*, as examined above, creates uncertainty as to what the extent of the open-ended wording of art 21 of the Charter is. For art 21 to be fully effective

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<sup>44</sup> *Kaltoft*, Opinion of AG Jääskinen, para 20.

<sup>45</sup> *AMS*, paras 46-48.

*“it must be given more specific expression in European Union or national law”.*

This exact phrase was used when reaching the conclusion that art 27 of the Charter was not directly applicable in a case between private parties.<sup>46</sup>

Art 21 gives expression to some of the general principles in EU-law, like the principles of non-discrimination on grounds of age, sex and nationality. The purpose of the Charter is to reaffirm the rights, freedoms and principles already recognised in the Union and to make those rights more visible.<sup>47</sup> In case-law, where art 21 has been pleaded, the article itself was not given direct horizontal effect. Instead the Court, in its rulings, referred to the relevant underlying general principle of EU-law, finding that this general principle either by itself or as expressed in secondary EU legislation was sufficient to confer rights on individuals.

In *Kücükdeveci*, a prohibition of discrimination on grounds of age was found to be a general principle of EU-law.<sup>48</sup> Throughout its reasoning the ECJ did not rely on art 21 but on the general principle as given expression by Directive 2000/78. The same was the case in *Ajos*.

Art 21 of the Charter is therefore not sufficient, by itself, to confer rights on individuals that they can rely on in cases between private parties.

## 7.5 Ad claim 3

Principally, the defendants argue that Cypriot law applies. There are no rules about work certificates in Cypriot law and for that reason the claimant is not entitled to compensation.

### 7.5.1 Impediment to the free movement of services

Subsidiary to the argument above, the defendants argue that regardless of which law is applicable, EU-law also applies. If the Court finds that Max Staff Partners is the employer of the claimant and that Polish law is applicable, then the Polish provision on work certificates constitutes an impediment to the free movement of services in EU and must therefore be disregarded, as Community law takes precedence over national law.

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<sup>46</sup> *AMS*, paras 45 and 48.

<sup>47</sup> Charter, the preamble.

<sup>48</sup> *Kücükdeveci*, para 21.

The agreement between the Polish company and the Cypriot company is a service agreement and is within the scope of art 56 of the TFEU.<sup>49</sup>

The protection in art 56 has transboundary exchanges as its scope. In this case a service agreement is concluded between Max Staff Partners, a company in Poland, and Max Job, a company in Cyprus. The necessary transboundary element is therefore present. The service agreement lasts for at least two years, but this does not prevent the application of art 56.<sup>50</sup>

#### 7.5.2 The two elements of the impediment

Restrictions fall within the scope of TFEU art 56 even though the national law regarding work certificates does not discriminate directly. The same provision on work certificates apply to all employers, regardless of nationality. A provision not formally discriminatory, is also prohibited in art 56, when it leads to a discriminatory result.

Max Staff Partners is, first and foremost, disadvantaged when concluding a service agreement with Max Job. If Max Staff Partners were in fact an employment agency, posting workers to the territory of other Member States, the company would have no access to the data needed for filling out a work certificate as envisaged in the Polish provision. They would have to rely on the information provided by the Cypriot contractor. As the Polish administration has taken no precautionary measures to remedy such a situation and has no access to sanction a foreign undertaking in the event of a wrongly filled work certificate, Max Staff Partners becomes liable for the mistakes of Max Job. Consequently, Max Staff Partners is hindered by the provision in their utilisation of the right to freely exchange services within the Union.

Subsidiary, an administrative burden of being subject to Polish labour law, having to adhere to random guidelines on formalities unknown to them, is imposed on Max Job. As the Polish provision, as stated above, constitutes a restriction of the free movement of services, the burden imposed on Max Job gives all the more reason to reach such a conclusion. The result of the Polish provision makes it very likely that a company from another Member State will hesitate before concluding a service agreement with Max Staff Partners or another Polish entity.

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<sup>49</sup> *Schnitzer*, para 30.

<sup>50</sup> *Schnitzer*, para 30.

As the restrictions are found to be discriminating, it must be determined if the restrictions are justified. Since the freedom to provide services is one of the fundamental principles of the Community, a restriction on the freedom is legal only if it pursues a legitimate objective compatible with the Treaty and justified by overriding reasons of public interest. If that is the case it must not go beyond what is necessary<sup>51</sup>. Furthermore, the restriction must be proportionate to the need to observe the rule, meaning it must be suitable or appropriate in achieving its aim. Lastly, the restriction must respect the fundamental rights protected by the Treaties, including the right in art 45 TFEU, for workers to pursue economic activities in other Member States. This last condition is outlined by the ECJ in *Carpenter*.<sup>52</sup>

If the lack of a work certificate or lack of a correct work certificate in itself is enough to exclude the worker from the labour market upon returning from a job in another Member State, the concept of the work certificate does not respect the fundamental right of the worker. That a lack of a work certificate can lead to a worker being without a job follows presumably from the associated provision on compensation for the lack of a work certificate in art 99 of PLC.<sup>53</sup> The case-law of the ECJ is interpreting very strictly when determining whether restrictions can be justified.

### 7.5.3 EU conform interpretation

As the provision in the PLC fall within the scope of art 56 in TFEU, it is for the Court to interpret the article in question, so that if it can be applied in conformity with EU-law, or failing that, to disapply the provision.

It follows from the ruling in *Pfeiffer*, that it is the responsibility of the national courts to provide the protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.<sup>54</sup>

In the case at hand, the Court must therefore look at national law as a whole, and not only the provision in question, to reach a correct interpretation. This may, for example, be done by only applying the rule to an extent where it is still in conformity with Community law, for example applying the provision only in employment relationships of an exclusively Polish nature.

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<sup>51</sup> *Laval*, para 101, *Syndesmos*, para 21, *Servizi*, para 37 and *Cipolla*, para 61.

<sup>52</sup> *Carpenter*, para 38.

<sup>53</sup> PLC, art 99.

<sup>54</sup> *Pfeiffer*, para 11.

The principle of EU conform interpretation does not oblige national courts to interpret contra legem. It is, however, as all other authorities of the Member State, obliged by the duty to ensure the result envisaged by the Treaty, in all matters which lies within their jurisdiction, as substantiated by the ruling in *Dominguez*.<sup>55</sup> Furthermore, the principle of the primacy of Community law similarly dictates that when a national provision is contradictory to that of the Community, the Community provision will have priority over the other.<sup>56</sup>

Only if the Court is unable to interpret the provision, other than in a way which would be contra legem, they can rightfully do so. Though, in the light of recent case-law, it must be added that the Court is continuously obliged to provide, within the limits of its jurisdiction, the legal protection of the Treaty and to ensure the full effectiveness of it. This obligation extends also so far as to, if necessary, to disapply any provision contrary to Community law.<sup>57</sup>

Consequently, the Court must, if not it is not able to interpret art 97 of the PLC in a manner that does not infringe the prohibition in art 56 TFEU, disapply the provision entirely.

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<sup>55</sup> *Dominguez*, para 27.

<sup>56</sup> *Costa v ENEL*.

<sup>57</sup> *Küçükdeveci*, para 51 and *Ajos*, para 35.

## 8 Pleading

The defendants deny all of the claimant's claims, including the jurisdictional grounds.