Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 April 2018 [1]

Case C-18/17

Danieli & C. Officine Meccaniche SpA
Dragan Panic
Ivan Arnautov
Jakov Mandic
Miroslav Brnjac
Nicolai Dorassevitch
Alen Mihovic
joined party:
Arbeitsmarktservice Leoben

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Request for a preliminary ruling — Accession of new Member States — Croatia — Transitional measures — Free movement of workers — Articles 56 and 57 TFEU — Freedom to provide services — Directive 96/71/EC — Posting of workers — Scope — Posting of Croatian and third-country nationals to Austria through an undertaking established in Italy — Article 1(3) — Posting — Hiring out of manpower)

1. In the present proceedings, the Court is asked to rule on whether the Republic of Austria is entitled to require workers transferred to an Italian undertaking that provides a service in Austria to have a work permit when (i) those workers are Croatian nationals employed by a Croatian undertaking, or (ii) those workers are third-country nationals legally employed by another Italian undertaking.

2. In what follows, I shall explain why, as a matter of EU law, the Republic of Austria may require, in accordance with Articles 56 and 57 TFEU, read in conjunction with the transitional provisions laid down in Chapter 2 of Annex V to the 2012 Act of Accession, [2] the Croatian nationals transferred to an Italian undertaking providing a service in Austria to have a work permit. On the other hand, it may not do so, on the basis of Articles 56 and 57 TFEU, as regards the third-country nationals transferred to the Italian undertaking providing a service in Austria, given that those third-country nationals are legally employed in Italy.

1 Original language: English.

2 Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community of 24 April 2012 (OJ 2012 L 112, p. 21; 'the 2012 Act of Accession').

I. Legal framework

A. EU law

1. The 2012 Act of Accession

3. The conditions of accession of the Republic of Croatia to the European Union are laid down in the 2012 Act of Accession. Article 18 of that act provides that measures listed in Annex V thereto are to be applied under the conditions laid down in that annex.

4. Annex V to the 2012 Act of Accession is entitled 'List referred to in Article 18 of the Act of Accession: transitional measures'. Chapter 2 thereof deals with transitional measures relating to free movement of persons. It states:

'1. Article 45 and the first paragraph of Article 56 of the TFEU shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC, between Croatia on the one hand, and each of the [existing] Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 13.

2. By way of derogation from Articles 1 to 6 of Regulation (EU) No 492/2011 and until the end of the two year period following the date of accession, the [existing] Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Croatian nationals. The [existing] Member States may continue to apply such measures until the end of the five year period following the date of accession.

Croatian nationals legally working in [an existing] Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.

Croatian nationals admitted to the labour market of [an existing] Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

The Croatian nationals referred to in the second and third subparagraphs shall cease to enjoy the rights referred to in those subparagraphs if they voluntarily leave the labour market of the present Member State in question.

Croatian nationals legally working in [an existing] Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy the rights referred to in the second and third subparagraphs.

...

12. In order to address serious disturbances or the threat thereof in specific sensitive service sectors in the labour markets of Germany and Austria, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive 96/71/EC, and as long as they apply by virtue of the transitional provisions laid down above, national measures or those resulting from bilateral agreements on the free movement of Croatian workers, Germany and Austria may, after

notifying the Commission, derogate from the first paragraph of Article 56 of the TFEU with a view to limiting in the context of the provision of services by companies established in Croatia, the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.'

5. The list of service sectors that may be covered by the derogation laid down in paragraph 12 includes, inter alia, construction activities as defined in that provision.

2. Directive 96/71/EC[3]

6. Directive 96/71 lays down the rules governing the posting of workers in the context of the provision of services.

7. Article 1 defines the scope of the directive. It reads:

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

...

(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.'

8. Pursuant to Article 3 of the directive, Member States are to 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, as defined by law or, as the case may be, by collective agreements, regarding maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality of treatment between men and women and other provisions on non-discrimination.

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

B. National law

9. Paragraph 18 of the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals)[4] provides:

'Posted foreign nationals

Conditions for employment; posting permit

(1) For foreign nationals who are employed by a foreign employer that is not established in Austria a work permit is required, unless otherwise provided below. If such work does not exceed six months, foreign nationals require a posting permit, which may be granted for a period not exceeding four months.

...

(12) Foreign nationals who are posted to Austria by an undertaking established in another Member State of the European Economic Area for the purposes of the temporary performance of work do not require a work permit or a posting permit if:

1. They are duly authorised, for a period exceeding the length of posting in Austria, to work in the State where the place of business is established and they are legally employed in the undertaking which posts them, and if

2. The Austrian pay and work conditions … and the legal provisions relating to insurance for social security are complied with.

The central coordination office for the control of illegal employment … of the Federal Ministry of Finance must … forward immediately to the competent regional employment office a notification of the employment of foreign nationals posted to work in Austria. Following notification, the regional employment office must inform the undertaking and the employer using the services that, either, all requirements have been complied with ("EU-Posting Confirmation"), or to refuse the posting if those requirements have not been fulfilled ...'

10. Paragraph 32a of the Law on the employment of foreign nationals regarding transitional provisions on EU enlargement states:

'(1) Nationals of the Member States of the European Union which acceded to the European Union on 1 January 2007, on the basis of the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union … do not enjoy free movement for workers … unless they are relatives of a citizen of another EEA Member State with a legal right to reside under EU law …).

...

(11) On the basis of [the 2012 Act of Accession], section 1 to section 9 apply mutatis mutandis as of the accession of the Republic of Croatia for citizens of the Republic of Croatia and for employers established in the Republic of Croatia.'

4 BGBl. 218/1975, as amended by BGBl. I 72/2013.

II. Facts, procedure and the questions referred

11. The present case arises from a dispute between Danieli & C. Officine Meccaniche SpA ('Danieli'), four Croatian nationals, and a Russian and a Belarussian national (jointly 'the applicants'), on the one hand, and the Arbeitsmarktservice Leoben (Leoben regional office of the employment market service, Austria), on the other.

12. Danieli, an undertaking established in Italy, accepted a contract from an Austrian undertaking for the construction of a wire-rod mill in Austria. Danieli is part of the group of companies including DS d.o.o. established in Croatia ('the Croatian employer') and DA-S.p.A. established in Italy ('the Italian employer'). To complete the construction project, Danieli wished to deploy workforce transferred from the Croatian and Italian employers.

13. More specifically, Danieli wished to deploy four Croatian nationals, who are employed by the Croatian employer and have social security cover in Croatia. It also wished to deploy two third-country nationals, a Russian and a Belarussian, who are employed by the Italian employer and have social security cover in Italy.

14. On 18 January 2016, Danieli registered the abovementioned workers with the competent authority and applied for the confirmation of EU postings in relation to them.

15. It can be seen from the order for reference that Danieli had specified that the workers in question were not employed by Danieli, but would be transferred to it by, respectively, the Croatian employer and the Italian employer in order for it to complete the project in Austria.

16. The Leoben regional office of the employment market service rejected the applications for confirmation of the posting of foreign nationals within the EEA in accordance with Paragraph 18(12) of the Law on the employment of foreign nationals and prohibited the posting.

17. Appeals were subsequently lodged against that decision. Those appeals were dismissed by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) as unfounded. According to that court, the postings fell outside the scope of Directive 96/71. In that court's view, the directive was not applicable, given that no employment relationship existed between Danieli and the workers it wished to deploy for carrying out the project in Austria.

18. Appeals were subsequently brought against that decision before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). Entertaining doubts as to the correct interpretation of the relevant provisions of EU law, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are Articles 56 and 57 TFEU, Directive [96/71], [and Chapter 2, Free movement of persons, paragraphs 2 and 12], of Annex V to the [2012 Act of Accession], to be interpreted as meaning that Austria is entitled to restrict the posting of workers employed in an undertaking established in Croatia by requiring a work permit, where this posting takes place by means of transfer to an undertaking established in Italy so that the Italian undertaking can provide a service in Austria, and the work carried out by the Croatian workers for the Italian undertaking on the construction of a wire-rod mill in Austria is restricted to providing this service in Austria and there is no employment relationship between them and the Italian undertaking?

(2) Are Articles 56 and 57 TFEU and Directive [96/71] to be interpreted as meaning that Austria is entitled to restrict the posting of Russian and Belarussian workers employed in an undertaking established in Italy by requiring a work permit, if this posting takes place by means of transfer to a second undertaking established in Italy for the purpose of the provision by the second

undertaking of a service in Austria, and the work of the Russian and/or Belarussian workers for the second undertaking is restricted to providing its service in Austria and there is no employment relationship between them and the second undertaking?'

19. Written observations have been submitted by the applicants and the Austrian, German and Netherlands Governments and by the European Commission too. All those parties, with the exception of the Netherlands Government, presented oral argument at the hearing held on 28 February 2018.

III. Analysis

20. Before dealing with the questions referred, I shall begin with some preliminary observations pertaining to, in particular, the legal framework that governs the right of undertakings to provide services within the European Union. In that context, I shall also explain how the arrangement whereby Danieli uses, for the purposes of providing a service in Austria, Croatian and third-country nationals who are legally employed by the Croatian and Italian employers in those States, respectively ('the arrangement at issue in the main proceedings') should be defined as a matter of EU law. Indeed, as will be illustrated, that issue has a direct bearing on the assessment of, in particular, the first question referred.

A. Preliminary observations

21. In Austria, foreign nationals employed by a foreign employer not established in Austria must have a work permit. However, in the case of what are known as EU postings, that is to say, when the foreign nationals are posted to Austria by an undertaking established in another (EEA) Member State in order to perform temporary work, that requirement does not apply. That is so provided that those workers are, among other things, duly authorised, for a period exceeding the length of posting in Austria, to work in the State where the place of business is established and that they are legally employed in the undertaking which posts them. During a transitional period which ends on 30 June 2018, a work permit is however required for Croatian nationals in accordance with the relevant national rules (Paragraphs 18 and 32a of the Law on the employment of foreign nationals).

22. In this case, Danieli, an Italian undertaking, has applied for an EU posting without a work permit as regards the Croatian and third-country nationals it intends to deploy for the construction of a wire-rod mill in Austria. That request has been refused because for such workers a work permit is required.

23. The question that arises is whether that requirement is compatible with EU law, bearing in mind that the Croatian nationals and third-country nationals have been transferred temporarily to an Italian undertaking (Danieli) providing a service in Austria. The Croatian nationals are transferred to Danieli by a Croatian undertaking and the third-country nationals by an Italian undertaking.

1. The legal framework: freedom to provide services and the posting of workers

24. From the outset it should be borne in mind that the compatibility with EU law of a requirement of a work permit is in this particular case governed by the relevant Treaty rules on the freedom to provide services laid down in Articles 56 and 57 TFEU.[5] In addition, as concerns specifically Croatian nationals, account must also be taken of the special rules that the legislature has enacted that limit,

5 As a general rule, where the freedom to provide services is at stake, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) may be of relevance too. That is not the case here however. Indeed, that directive does not affect, in accordance with Article 1(6) thereof, labour law related matters. See Case C-33/17, *Čepelnik*, pending before the Court, on the labour law exception.

during a transitional period after the accession to the European Union of the Republic of Croatia, freedom of movement of workers and freedom to provide services involving temporary movement of workers, as defined in Article 1 of Directive 96/71. Those rules are contained in Chapter 2 of Annex V to the 2012 Act of Accession.

25. Directive 96/71, by contrast, is of no direct significance here. Contrary to what the questions referred and the attention afforded to the directive at the hearing might suggest, Directive 96/71 is of only peripheral importance in assessing the compatibility with EU law of the requirement of a work permit at issue in the present case.

26. Directive 96/71 is designed to protect workers by affording posted workers certain minimum rights in the particular context of the cross-border provision of services. It sets out 'a nucleus of mandatory rules for minimum protection' — related to, inter alia, minimum pay and holidays — which are to be observed in the host country by undertakings that temporarily post workers there.[6] More specifically, the host Member State must, in accordance with Article 3 of the directive, ensure that undertakings posting workers to its territory comply with the minimum terms and conditions referred to in that provision.

27. Directive 96/71 contains no rules regarding the administrative requirements that a (foreign) service-provider may be required to comply with in the host Member State. The limits to such requirements are determined by Articles 56 and 57 TFEU (and, where applicable, in the transitional provisions annexed to the 2012 Act of Accession).

28. Directive 96/71 is nevertheless relevant for the resolution of the present case for other reasons. In fact, as will be illustrated in more detail below, the Court's case-law draws a distinction between different types of posting: depending on whether an undertaking that provides a service in the host Member State does so by posting its own workers to the host Member State (traditional posting within the meaning of Article 1(3)(a) of Directive 96/71), or whether an undertaking hires out workers to an undertaking in the host Member States (making manpower available to another undertaking within the meaning of Article 1(3)(c) of Directive 96/71), the assessment of the arrangement, from the perspective of the rules governing freedom to provide services and the relevant transitional provisions, obeys a different logic.

29. More specifically, workers transferred to the host Member State, be it in the context of traditional posting or the making available of manpower, fall within the scope of the directive. However, it is settled case-law that, in contrast to workers posted by their employer within the meaning of Article 1(3)(a) of the directive, workers transferred to the host Member State within the meaning of Article 1(3)(c) of the directive are regarded as being made available on, and thus gain access to, the labour market of the host Member State.[7]

30. That difference is of particular significance in the application of the transitional provisions laid down in Chapter 2, paragraphs 2 and 12, of Annex V to the 2012 Act of Accession. In fact, the Member States enjoy more leeway in applying national rules during the transitional period in relation to the making available of labour.

31. By dint of paragraph 2, a Member State may restrict the free movement of (Croatian) workers by applying national measures during the transitional period. According to the Court, the free movement of workers encompasses both the situation where a worker seeks direct access to the labour market of the host Member State, and where a worker has been made available on the labour market of that

6 Recital 13 of Directive 96/71.

7 Judgments of 27 March 1990, *Rush Portuguesa*, C-113/89, EU:C:1990:142, paragraph 16, and of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraphs 30 and 31. See also, to that effect, judgment of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405, paragraph 28.

State within the meaning of Article 1(3)(c) of Directive 96/71.[8] On the other hand, under paragraph 12 it is possible to derogate from Article 56 TFEU and restrict traditional posting within the meaning of Article 1(3)(a) of Directive 96/71 regarding the provision of services. However, that possibility is available only in relation to undertakings established in Croatia operating in certain sensitive sectors mentioned in paragraph 12.[9]

32. That is why it has to be determined, as a preliminary point, how the arrangement at issue in the main proceedings ought to be defined as a matter of EU law.

2. How ought the arrangement at issue in the main proceedings to be understood as a matter of EU law?

33. As regards the arrangement at issue in the main proceedings, a point that should be emphasised from the outset is that the workers concerned are not directly employed by Danieli, but by other undertakings belonging to the same group of undertakings: while the Croatian nationals have an employment contract with the Croatian employer and have social security cover in Croatia, the third-country nationals have an employment contract with the Italian employer and have social security cover in Italy.

34. The workers were to be transferred to Danieli so that that undertaking could complete the construction of a wire-rod mill in Austria, a construction project for which Danieli appears to be the principal contractor. During their secondment in Austria, the workers were to perform their tasks under the direction of Danieli. Moreover, it can be understood from the order for reference that the workers have not worked for Danieli in Italy, but have been transferred directly to Austria by their employers. In other words, the Croatian nationals have not been active on the labour market in Italy. The third-country nationals, on the other hand, are legally employed in Italy where they habitually work for the Italian employer.

35. Against that background, how should the arrangement at issue in the main proceedings be construed as a matter of EU law?

36. Pursuant to Article 1(1) of Directive 96/71, the directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with Article 1(3) thereof, to the territory of a Member State.

37. On the basis of Article 1(3)(a), the directive applies where an undertaking posts workers to the territory of a Member State on that undertaking's account and under its 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.

8 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 35.

9 The question whether Danieli's activity in Austria (the installation of a wire-rod mill requiring high-tech skills in the workforce employed for the installation) is caught by paragraph 12 — an issue discussed at some length at the hearing by, in particular, Danieli — is of relevance only if the arrangement at issue in the main proceedings should be considered to constitute posting within the meaning of Article 1(3)(a) of Directive 96/71.

38. As already indicated above, Article 1(3) of the directive also deals with the transfer of manpower from one undertaking to another. Of particular relevance here is Article 1(3)(c).[10]

39. The directive applies also where, in accordance with Article 1(3)(c), a temporary employment undertaking or placement agency hires 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.

40. Put simply, the directive applies to a wide array of situations in which workers are transferred from one Member State to another in the context of cross-border provision of services.

41. At first sight, the arrangement at issue in the main proceedings seems to fit somewhat uneasily into the situations referred to in Article 1(3)(a) and (c). It therefore comes as no surprise that the parties having submitted observations disagree on whether the arrangement at issue in the main proceedings falls within the scope of Directive 96/71 and, if so, on what grounds.

42. A closer look reveals, however, that — subject to the necessary checks to be carried out by the referring court regarding the factual circumstances underlying the present case — the arrangement at issue in the main proceedings constitutes hiring out of manpower within the meaning of Article 1(3)(c) of the directive.

43. In *Vicoplus and Others*,[11] the Court was asked to rule on the compatibility with EU law of Dutch legislation that required Polish nationals to have a work permit in the case of hiring out of Polish workers to Dutch territory after Poland acceded to the European Union. The Court was asked also to provide guidance on the criteria to be employed in determining whether workers have been hired out within the meaning of Article 1(3)(c) of Directive 96/71.

44. The Court held that the hiring out of manpower is a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service and no contract of employment has been entered into with the user undertaking (first condition). Moreover, the hiring out is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services (second condition) and that that worker carries out his tasks under the control and direction of the user undertaking (third condition).[12]

45. In *Martin Meat*,[13] the Court provided further guidance on, in particular, the second condition referred to above. It clarified the elements that could indicate that the (cross-border) service provided constitutes hiring out of manpower, instead of posting within the meaning of Article 1(3)(a) of the directive. The Court held in that regard that account must be taken, in particular, of any evidence that the service provider is not liable for the consequences of a contractual performance which is

10 It can be seen from the explanatory memorandum to Directive 96/71 (Proposal for a Council directive concerning the posting of workers in the frame of the provision of services, COM(91) 231 final, p. 14) that, in contrast to Articles 1(3)(a) and 1(3)(c), Article 1(3)(b) is intended to ensure that undertakings cannot circumvent the application of the directive. It does so by including in the scope of the directive so-called intra-group mobility. Specifically, as has been explained in the literature, the provision is designed to prevent an undertaking from opening a subsidiary in another Member State purely to place some of its workers there to carry out temporary assignments and thereby to avoid the application of the directive. See Barnard, C., *EU Employment Law*, 4th edition, Oxford University Press, Oxford, 2012, p. 218. See also judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86, paragraphs 3 and 11 to 13.

11 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64.

12 Idem, paragraph 51.

13 Judgment of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405.

inconsistent with the supply of services set out in the contract. More specifically, if the service provider is required properly to perform the services stipulated in the contract, it is, in principle, less likely that there is a hiring out of workers than if the service provider is not liable for the consequences of a supply of services which is inconsistent with the terms of the contract. [14]

46. All these conditions set out in the case-law as concerns the hiring out of manpower are fulfilled by the arrangement at issue in the main proceedings. [15]

47. Firstly, it is common ground that the Croatian and third-country workers remain employed by the undertakings seconding them to Austria, that is, the Croatian and Italian employers (first condition). That remains the case irrespective of the fact that Danieli and the employer undertakings belong to the same group of undertakings.

48. Secondly, as regards the transfer itself, it was clarified at the hearing that the movement of the workers to Austria constitutes the very purpose of the arrangement between Danieli and the Croatian and Italian employers (second condition). The circumstance that the workers in question have not been working under the direction of Danieli in Italy as part of its workforce there also attests to that fact. What is yet more, in accordance with the Court's guidance in *Martin Meat*, it can be seen from the applicants' written observations that instead of the Croatian and Italian employers, Danieli is liable for the fulfilment of the contractual obligations arising from the service provided in Austria.

49. Thirdly, while transferred to Austria, the workers are to carry out their tasks under the control and direction of the user undertaking, that is to say, Danieli (third condition).

50. True, it could be objected that the Croatian and Italian employers are not temporary employment undertakings or placement agencies referred to in Article 1(3)(c) of the directive. In that regard, however, it is worth noting that the Court has attached little importance to that aspect in the case-law. In my view, it has done so for good reason.

51. As already mentioned, Directive 96/71 is designed to protect workers by affording them certain minimum rights in the particular context of transnational provision of services. In order to protect those workers, the host Member State must ensure that undertakings posting or hiring out workers to its territory ensure that certain minimum rights are observed. [16]

52. In that regard, it can be seen from the preamble to the directive that the concept of posting must be understood in a broad sense: the directive applies irrespective of whether the provision of services takes the form of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring out of workers for use by an undertaking in the framework of a public or a private contract. [17]

53. The objective of guaranteeing a certain minimum level of protection for workers would, in my view, be compromised if an arrangement such as that at issue in the main proceedings fell outside the scope of Directive 96/71 simply because the undertaking hiring out the workers in question is not principally active in the sector of the hiring of manpower to other undertakings.

14 Idem, paragraph 35 et seq.

15 In addition, as the Court has also held, the application of Article 1(3)(c) presupposes that the service, that is, the making available of manpower, is provided for remuneration. The form of that remuneration may, obviously, take different forms depending, for example, on the relationship between the service provider and the user undertaking.

16 In particular Article 3 of Directive 96/71.

17 Recital 4 of Directive 96/71.

54. Lastly, it should be emphasised that the circumstance that it is an Italian undertaking that wishes to provide a service in Austria by having recourse to workforce transferred to it from undertakings established in Croatia and Italy, respectively, should not confuse the assessment under Directive 96/71. From the perspective of the directive, what is of relevance is that the workers in question have been transferred from a Member State to a user undertaking established *or* operating in the host Member State, that is to say, Austria, in the framework of cross-border provision of services.[18] That is clearly the case here.

55. In fact, from the perspective of Directive 96/71, the arrangement at issue in the main proceedings is no different from a situation where the principal contractor for the project in Austria is, instead of Danieli, an Austrian undertaking that hires workers directly from Croatia (as far as concerns the Croatian nationals) and Italy (as far as concerns the third-country nationals). In other words, it constitutes hiring out within the meaning of Article 1(3)(c) of Directive 96/71.

56. Yet, the applicants and the Commission in particular maintain that because the employer undertakings and Danieli belong to the same group of undertakings, the arrangement at issue in the main proceedings should be regarded as posting within the meaning of Article 1(3)(a) of Directive 96/71. More specifically, they argue for a broad interpretation of the concept of 'employment relationship' referred to in that provision, given that that provision may be applied only where an employment relationship exists between the undertaking making the posting and the workers concerned.

57. In that regard, it is common ground that, in the present case, no such employment relationship exists between Danieli and the workers concerned. The interpretation advocated by the applicants and the Commission would therefore entail construing Article 1(3)(a) of the directive remarkably extensively.

58. I would advise against that approach. Firstly, such an interpretation is not warranted in the light of the need to protect the workers concerned, which constitutes the primary objective of the directive. This is because, irrespective of whether the arrangement at issue in the main proceedings falls under Article 1(3)(a) or Article 1(3)(c) of the directive, the workers in question fall within the scope of the directive. Secondly, it would also blur the distinction operated in the case-law regarding posting and the making available of labour, a distinction of particular importance in the context of the application of transitional provisions such as those at issue in the present case.

59. Keeping those considerations in mind, I shall now move on to examine the first question referred.

B. The first question referred: the compatibility with EU law of the requirement of a work permit as regards the Croatian nationals

60. The first question asks, in essence, whether Articles 56 and 57 TFEU, read in conjunction with Chapter 2, paragraphs 2 and 12, of the 2012 Act of Accession, are to be interpreted as meaning that the Republic of Austria is entitled to require Croatian nationals, used by an Italian undertaking in order to provide a service in Austria, to have a work permit.

61. In my view, that question ought to be answered in the affirmative.

62. Firstly, as explained above, the Court's case-law makes it clear that an inherent difference exists between the posting of workers and the hiring out of manpower. That is why they warrant different treatment under the applicable transitional provisions.

18 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 39.

63. That principle has already been settled in *Rush Portuguesa*,[19] a case concerning Portuguese workers sent to France by a Portuguese undertaking after the accession of Portugal to the (then) European Community. As concerns specifically the hiring out of manpower — which constitutes a service within the meaning of Article 57 TFEU in accordance with the Court's case-law[20] — the Court held that that is an activity which enables the workers hired out to gain access to the labour market of the host Member State. In such a case, according to the Court, the host Member State is, as a matter of principle, allowed to restrict — to the extent that the relevant transitional provisions of the Act of Accession so provide — the access of such workers to its labour market.[21]

64. That statement has been applied by the Court more recently in the context of transitional rules applicable after new Member States acceded to the European Union in 2004. That case-law is of particular relevance here given that the relevant transitional rules in the present case are identical in content.

65. In *Vicoplus and Others*,[22] the Court reiterated in essence the statement in *Rush Portuguesa* by holding that a worker who has been hired out pursuant to Article 1(3)(c) of Directive 96/71 is typically assigned, during the period for which he is made available, to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking.[23] For that reason, the Court considered that the requirement of a work permit imposed by the Dutch authorities in that case was to be regarded as a measure regulating access of Polish nationals to the labour market of the host State within the meaning of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession[24] compatible with Articles 56 and 57 TFEU.[25]

66. Put differently, old Member States could rely on that provision to require, during a transitional period, workers who have been hired out from a new Member State to have a work permit. That provision corresponds to Chapter 2, paragraph 2, of Annex V to the 2012 Act of Accession.

67. In that regard, the doubts entertained by the referring court as to whether the Court's statement in that case can be transposed to the arrangement at issue in the main proceedings seem to stem from the particular features of the arrangement at issue in the main proceedings, namely, that the Croatian workers are seconded to an Italian undertaking providing a service in Austria.

68. Here, it should be called to mind that, just like the relevant transitional provision in the 2003 Act of Accession, Chapter 2, paragraph 2, of Annex V to the 2012 Act of Accession regulates the access of Croatian workers to the labour market of other Member States during a transitional period. In the context of the 2004 enlargement of the European Union, the Court explained that that provision was designed to prevent, following the accession to the European Union of new Member States, disturbances on the labour market of the existing Member States due to the immediate arrival of a large number of workers who are nationals of those new States.[26] To avoid such disturbances, the transitional provisions allow Member States to restrict the movement of workers from new Member States.

19 Judgment of 27 March 1990, *Rush Portuguesa*, C-113/89, EU:C:1990:142.

20 See, for example, judgments of 17 December 1981, *Webb*, 279/80, EU:C:1981:314, paragraph 9;of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 27; and of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 37.

21 Judgment of 27 March 1990, *Rush Portuguesa*, C-113/89, EU:C:1990:142, paragraph 16.

22 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64.

23 Idem, paragraph 31.

24 The Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

25 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraphs 40 and 41.

26 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 34.

69. As the Court has made clear, it would be artificial to draw a distinction with regard to the influx of workers onto the labour market of a Member State depending on whether they gain access to it through hiring out or directly and independently.[27] In that regard, it is also irrelevant whether the workers hired out to the host Member State wish, in reality, to remain there after the work for the user undertaking has been completed or whether they return to their Member State of origin directly after the secondment. Instead, what matters according to the Court is that the workers hired out to the host Member State are assigned to a position that could have been occupied by a worker employed in the host Member State.[28]

70. In my view, it would be equally artificial to draw a distinction between a situation where an Austrian undertaking wishes to use Croatian workers hired out from the Croatian employer in order to complete a project in Austria, and a situation where, as here, the user undertaking wishing to provide a service in Austria is established in another Member State that, incidentally, has not chosen to extend the application of the transitional provisions. In both situations, Croatian workers are made available to the labour market of the host Member State.

71. In fact, such a distinction would be liable to deprive the transitional provisions regulating freedom of movement of workers of much of their effectiveness. Indeed, it should not be forgotten that, in the present case, the Croatian nationals are assigned, during the period for which they are made available, to a post in Austria under the direction of Danieli, a post which could have been occupied, at least potentially, by a person employed by that undertaking in Austria.

72. That circumstance also sets the present case apart from the situation referred to in *Rush Portuguesa*, and reiterated in Article 3(1)(a) of Directive 96/71, where a service provider moves with its own labour force to the host Member State for the duration of the work undertaken. If that had been the case, such an arrangement would, in principle, be covered by Chapter 2, paragraph 12, of Annex V to the 2012 Act of Accession.

73. Consequently, the first question referred should be answered to the effect that Articles 56 and 57 TFEU and Chapter 2, paragraph 2, of Annex V to the 2012 Act of Accession must be interpreted as meaning that the Republic of Austria is entitled to restrict the posting of Croatian workers employed in an undertaking established in Croatia by requiring a work permit, when that posting takes place by means of transfer of those workers to an undertaking established in Italy for the purpose of the provision by that Italian undertaking of a service in Austria.

C. The second question referred: the compatibility with EU law of the requirement of a work permit as regards the third-country nationals

74. The second question asks, in essence, whether Articles 56 and 57 TFEU are to be interpreted as meaning that the Republic of Austria is entitled to require third-country nationals, transferred by an Italian undertaking to another Italian undertaking wishing to provide a service in Austria, to have a work permit.

75. In my view, that question ought to be answered in the negative.

76. It must be emphasised from the outset that the third-country nationals are legally employed in Italy by the Italian undertaking and covered by the Italian social security system.

27 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 35.
28 Judgment of 10 February 2011, *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 31.

77. As far as concerns the scope of Article 56 TFEU, that provision expressly contemplates only the situation of a person providing services who is established in a Member State other than that in which the recipient of the service is established. Yet the situation underlying the second question referred concerns the hiring out of manpower from the Italian employer to Danieli, another Italian undertaking, which in turn provides a service in Austria.

78. As the Court has held, the purpose of Article 56 TFEU is to abolish restrictions on the freedom to provide services in respect of persons who are not established in the State in which the service is to be provided.[29] For that reason, the Court has adopted a broad interpretation of that provision: it is only when all the relevant elements of the activity in question are confined within a single Member State that the provisions of the Treaty on freedom to provide services may not apply.[30] Contrariwise, it can be seen from the case-law that the rules governing the freedom to provide services must apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established.[31]

79. For Article 56 TFEU to apply, it is sufficient that the *service* itself move from one Member State to another.[32]

80. Bearing in mind that the arrangement at issue in the main proceedings concerns the cross-border provision of a service (in this case: the hiring out of manpower and, by extension, the service provided by Danieli in Austria) in a Member State other than that in which the person providing the service is established, Article 56 TFEU must apply in relation to the situation underlying the second question referred.[33]

81. That having been clarified, I would next point out that it is settled case-law that a national measure that makes the posting of workers to the host Member State subject to a requirement of a work permit constitutes a restriction within the meaning of Article 56 TFEU.[34] As the Court has held, the requirement of a work permit for third-country nationals deployed to the host Member State for the purposes of providing cross-border services is, because of the formalities and procedural delays inherent in the process, liable to make it less attractive to engage in the freedom to provide services in Member States using posted workers who are third-country nationals.[35]

82. Nevertheless, the Court has accepted that a requirement of a work permit may, as a matter of principle, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established, and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.[36]

29 Judgments of 10 February 1982, *Transporoute et travaux*, 76/81, EU:C:1982:49, paragraph 14, and of 26 February 1991, *Commission* v *France*, C-154/89, EU:C:1991:76, paragraph 9.

30 Judgments of 18 March 1980, *Debauve and Others*, 52/79, EU:C:1980:83, paragraph 9, and of 26 February 1991, *Commission* v *France*, C-154/89, EU:C:1991:76, paragraph 9.

31 Judgment of 26 February 1991, *Commission* v *France*, C-154/89, EU:C:1991:76, paragraph 10.

32 Judgment of 1 July 1993, *Hubbard*, C-20/92, EU:C:1993:280, paragraph 12. See also, to that effect, judgment of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 114.

33 Opinion of Advocate General Bot in *Essent Energie Productie*, C-91/13, EU:C:2014:312, points 66 to 78, on the question of who may rely on Article 56 TFEU.

34 Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 15.

35 See, in particular, judgment of 21 October 2004, *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraphs 30 and 41.

36 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 48 and the case-law cited.

83. Despite that caveat however, the Court has generally considered requirements that go beyond a simple prior declaration disproportionate in the light of the objectives of guaranteeing, for example, the stability of the labour market in the host Member State or the protection of workers and therefore contrary to the rules on freedom to provide services. [37]

84. Recently, it did so also in the specific context of the hiring out of manpower within the meaning of Article 1(3)(c) of Directive 96/71.

85. In *Essent*, the Court was asked to rule on the compatibility with EU law of the requirement of a work permit in circumstances where third-country nationals were hired out by an undertaking established in a Member State (Germany) to a user undertaking established in the host Member State (the Netherlands). In that case, the Court explained that although the desire to avoid disturbances on the labour market constitutes an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and made available to an undertaking in another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return, in principle, to their country of origin or residence after the completion of their work. [38] Indeed, in contrast to EU nationals who may gain access to the labour market of the host State through hiring out because those nationals enjoy, as a matter of principle, the right to free movement, third-country nationals cannot move freely within the European Union.

86. In that same context, and undoubtedly because third-country nationals do not enjoy a right to free movement, the Court accepted that the host Member State may take certain measures to ensure that the undertaking relying on freedom to provide services is not doing so for another purpose and to verify that the situation of the workers concerned is lawful and that they are carrying on their main activity in the Member State in which the service provider is established. [39] Nonetheless, it held that those checks must observe the limits imposed by EU law, in particular those stemming from the freedom to provide services, which may not be rendered illusory and whose exercise may not be made subject to the discretion of the authorities. [40]

87. The exercise of that power of verification does not, in other words, allow the host Member State to impose disproportionate requirements.

88. Of particular significance for the present case is that in *Essent* the Court specifically held that a Member State retaining permanently a requirement of a work permit for third-country nationals who are made available to an undertaking established in that Member State by an undertaking established in another Member State exceeds what is necessary to safeguard the stability of the labour market. [41]

89. In that case, the statements of the Court regarding the permissibility of a requirement of a work permit for posted third-country nationals employed by an undertaking providing a cross-border service in the host Member State were explicitly extended to the hiring out of manpower.

90. I find no convincing reason why those statements should not apply in relation to the arrangement at issue in the main proceedings too: indeed, as was explained above, the arrangement at issue in the main proceedings constitutes, just as in *Essent*, hiring out of manpower within the meaning of Article 1(3)(c) of the directive.

37 Judgments of 21 October 2004, *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraph 50; of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraph 64; of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 68; and of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraphs 58 to 60.

38 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 51 and the case-law cited.

39 Idem, paragraphs 52 and 57 and the case-law cited.

40 Idem, paragraph 53 and the case-law cited.

41 Idem, paragraph 56.

91. In that regard, a point that must be emphasised is that the first and the second questions concern two inherently different situations.

92. As already explained above, the Court has considered, in the context of the application of transitional measures, that the hiring out of manpower within the meaning of Article 1(3)(c) of Directive 96/71 constitutes a form of access to the labour market of that host Member State. That is why the making available of workers may be subject to the requirement of a work permit for a transitional period following the accession to the European Union of new Member States, a period characterised by an increased risk of immediate and substantial disruption of the labour market of the host Member State.[42] To avoid such disruptions, the legislature has devised specific transitional provisions that allow Member States to interfere, where necessary, with the freedom of movement of workers and the freedom to provide services enshrined in the Treaties during a limited period. That is the situation underlying the first question referred.

93. By contrast, no similar risk can be identified in relation to third-country nationals. That is because third-country nationals do not enjoy a right to free movement and must, as a rule, have a work permit (and be legally employed) in the Member State of residence. Indeed, it should not be forgotten that the hiring out of workers may entail, as far as concerns third-country nationals, only temporary access to the labour market of the Member State where they are posted. In such circumstances, it would quite simply be disproportionate, from the perspective of freedom to provide services, to require compliance with requirements governing access to the labour market of the host Member State or, for that matter, any specific requirements pertaining to the employment of third-country nationals, issues which have not been harmonised at EU level. Indeed, it should not be forgotten that, in contrast to workers from new Member States, third-country nationals must comply with formalities pertaining to immigration and labour market access in the Member State of residence too. Additional requirements imposed by the host Member State would therefore considerably hamper the freedom of undertakings to provide a service in the host Member State by deploying third-country nationals such as those in the present case for that purpose.

94. Fundamentally, it should not be forgotten that in the present case the third-country nationals concerned are legally employed in their Member State of residence to which they return after the work in the host Member State is completed. In such a situation, it is difficult to see how retaining permanently the requirement of a work permit for third-country nationals deployed to the host Member State by an undertaking established in another Member State could be seen as a measure necessary to protect the stability of the labour market of the host Member State.

95. In any event, the Court has accepted that Member States may require information from the service-providing undertaking showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which those workers are employed.[43] In fact, such a requirement strikes an adequate balance between the legitimate interests of the host Member State and that of an undertaking established in another Member State wishing to provide a cross-border service by deploying third-country nationals in the host Member State. Such a measure arguably provides sufficient guarantees to the host Member State that the situation of the third-country nationals is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established without unduly interfering with the freedom to provide services guaranteed in the FEU Treaty.[44]

42 Opinion of Advocate General Bot in *Essent Energie Productie*, C-91/13, EU:C:2014:312, point 118.

43 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 57.

44 See, to that effect, judgments of 21 October 2004, *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraph 46; of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraph 41; of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 57; and of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 57.

96. Consequently, the second question referred should be answered to the effect that Articles 56 and 57 TFEU must be interpreted as meaning that the Republic of Austria is not entitled to restrict the posting of Russian and Belarussian workers legally employed in an undertaking established in Italy by requiring a work permit, when that posting takes place by means of transfer of those workers to a second undertaking established in Italy for the purpose of the provision by that second undertaking of a service in Austria.

IV. Conclusion

97. In the light of the foregoing, I propose that the Court answer the questions referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

(1) Articles 56 and 57 TFEU, read in conjunction with Chapter 2, paragraph 2, of Annex V to the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community of 24 April 2012 must be interpreted as meaning that the Republic of Austria is entitled to restrict the posting of Croatian workers employed in an undertaking established in Croatia by requiring a work permit, when that posting takes place by means of transfer of those workers to an undertaking established in Italy for the purpose of the provision by that Italian undertaking of a service in Austria.

(2) Articles 56 and 57 TFEU must be interpreted as meaning that the Republic of Austria is not entitled to restrict the posting of Russian and Belarussian workers legally employed in an undertaking established in Italy by requiring a work permit, when that posting takes place by means of transfer of those workers to a second undertaking established in Italy for the purpose of the provision by that second undertaking of a service in Austria.