Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 8 May 2014 [1]

Case C-91/13

Essent Energie Productie BV
v
Minister van Sociale Zaken en Werkgelegenheid

(Request for a preliminary ruling from the Raad van State (Netherlands))

(EEC-Turkey Association Agreement — Article 13 of Decision No 1/80 of the Association Council — Article 41 of the Additional Protocol — Standstill clauses — Scope — Freedom to provide services — Articles 56 TFEU and 57 TFEU — Posting of workers — Nationals of non-member countries — Requirement for a work permit in order for workers to be made available)

1. The request for a preliminary ruling under consideration was made in a dispute between Essent Energie Productie BV ('Essent') and the Minister van Sociale Zaken en Werkgelegenheid (Minister for Social Affairs and Employment, 'the Minister'), concerning a fine which was imposed on Essent by the Minister for having had work carried out by workers who were nationals of non-member countries and had not been granted work permits.

2. Essent is a company established in the Netherlands which engaged BIS Industrial Services Nederland BV ('BIS'), also established in the Netherlands, to carry out works consisting in the erection of scaffolding in its branch located in Geertruidenberg (Netherlands).

3. According to a report drawn up by the Labour Inspectorate on 8 March 2010, during checks carried out by the latter on 15, 19 and 20 May 2008 at that branch, it was found that 33 nationals of non-Member States, including 29 Turkish nationals, three nationals from the former Yugoslavia and a Moroccan national, had, from 1 January to 20 May 2008, participated in carrying out those works.

4. According to that report, the foreign workers were provided to BIS by Ekinci Gerüstbau GmbH ('Ekinci'), a German undertaking established in Cologne (Germany) which employed those workers, and no work permits had been issued to that end.

5. By decision of 11 May 2010, the Minister fined Essent EUR 264 000 for contravention of Article 2(1) of the Law on the employment of foreign nationals (Wet arbeid vreemdelingen) of 21 December 1994, [2] in the version applicable to the dispute in the main proceedings ('the Wav 1994'), on the ground that that company had had those works carried out by foreign workers without their having been granted work permits, although under the Netherlands legislation this was mandatory.

6. Essent lodged an objection against that decision.

1 — Original language: French.
2 — Stb. 1994, No 959.

7. By decision of 22 December 2010, the Minister declared that objection unfounded on the ground that the service provided by Ekinci had consisted exclusively in the hiring out of workers within the meaning of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services,[3] so that Essent, as the principal contractor and employer of the foreign workers within the meaning of the Wav 1994, should have had work permits for those workers.

8. By judgment of 27 September 2011, the Rechtbank 's-Hertogenbosch (Netherlands) dismissed the application brought by Essent against that decision. That court ruled, in particular, referring to *Vicoplus and Others*,[4] that the Minister had been entitled to impose a fine on Essent, since no work permit had been issued although the service provided by Ekinci consisted solely in the hiring out of workers within the meaning of Article 1(3)(c) of Directive 96/71.

9. In reaching that conclusion, the Rechtbank 's-Hertogenbosch considered that, even though *Vicoplus and Others* (EU:C:2011:64) was concerned with the provision of a service consisting in the posting of Polish workers, it was possible to infer from it that, in a situation concerning the making available of workers who are nationals of a non-member country, Articles 56 TFEU and 57 TFEU did not preclude legislation of a Member State, in the present case Article 2(1) of the Wav 1994, requiring that those workers hold a work permit.

10. Essent appealed against that ruling to the Raad van State (Netherlands).

11. Like the Rechtbank 's-Hertogenbosch, the referring court considers that it can be inferred from *Vicoplus and Others* (EU:C:2011:64), that Articles 56 TFEU and 57 TFEU do not preclude a Member State from making the hiring out, within the meaning of Article 1(3)(c) of Directive 96/71, in its territory of workers from a non-member country subject to the obtaining of a work permit. Since, according to the referring court, the issue of the compatibility of the requirement for such a work permit with Articles 56 TFEU and 57 TFEU clearly follows from *Vicoplus and Others* (EU:C:2011:64), the referring court therefore did not consider that it was necessary to refer a question to the Court concerning that aspect.

12. It was from another perspective that it decided to refer a question to the Court, asking it to interpret, first, Article 41 of the Additional Protocol[5] to the Agreement establishing an Association between the European Economic Community and Turkey[6] and, secondly, Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of that association ('Decision No 1/80').

13. Those two articles contain a standstill rule which has the purpose of prohibiting the Member States from introducing, from their entry into force, any new restrictions on the freedom of establishment, the freedom to provide services and the freedom of movement for workers between the Republic of Turkey and the EU Member States.

3 — OJ 1997 L 18, p. 1.

4 — C-307/09 to C-309/09, EU:C:2011:64.

5 — Protocol, signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 17, 'the Additional Protocol'). For the European part of the Kingdom of the Netherlands, the Additional Protocol entered into force on 1 January 1973.

6 — Agreement signed on 12 September 1963 at Ankara by the Republic of Turkey, of the one part, and the Member States of the EEC and the Community, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

14. More specifically, Article 41(1) of the Additional Protocol, which is in Chapter II of Title II, provides:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

15. Article 13 of Decision No 1/80 is worded as follows:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

16. Pursuant to Article 16(1) of that decision, that provision is to apply from 1 December 1980.

17. The referring court asks, in particular, whether or not the concept of employer as it has been developed in Netherlands law constitutes a new restriction for the purposes of those provisions.

18. I shall consider more specifically which provisions of the Netherlands legislation are in dispute.

19. On 1 December 1980, the employment of foreign nationals in the Netherlands was governed by the Law on the employment of foreign workers (Wet arbeid buitenlandse werknemers) of 9 November 1978.[7]

20. Pursuant to Article 1(b)(1) of the Wabw, for the purpose of applying the provisions of that law or those stemming therefrom, 'employer' means any person who is bound by an employment contract to another person for the purpose of carrying out work, unless that other person is posted to a third party under the Law on the making available of workers (Wet op het ter beschikking stellen van arbeidskrachten) of 31 July 1965.[8]

21. According to Article 1(b)(3) of the Wabw, 'employer' also means any person to whom another person is posted, if the Law on the making available of workers applies to that posting.

22. Under Article 4 of the Wabw, an employer is prohibited from having work carried out by a foreign national without the issue of a permit by the competent minister.

23. Under Article 1.1(b) of the Law on the making available of workers, 'the making available of workers' means the posting of workers to another party, for remuneration, with a view to the performance in that party's undertaking, other than under an employment contract concluded with that undertaking, of work ordinarily carried out in that undertaking.

24. The version of the Wav 1994 applicable in the present case is that which was in force prior to the entry into force of the Law of 25 June 2009[9] on 1 July 2009.

25. Pursuant to Article 1(1)(b)(1) of the Wav 1994, 'employer' means anyone who, in the exercise of an office, occupation or undertaking, employs another person to work for him.

26. According to Article 2(1) of the Wav 1994, an employer is prohibited from having work carried out in the Netherlands by a foreign national without a work permit.

7 — Stb. 1978, No 737, 'the Wabw'.

8 — Stb. 1965, No 379, 'the Law on the making available of workers'.

9 — Stb. 2009, No 265.

27. That prohibition does not apply, however, with respect to a foreign national who, in the framework of the cross-border provision of services, temporarily works in the Netherlands in the employ of an employer established in an EU Member State other than the Kingdom of the Netherlands, provided that the service provided does not consist in the making available of workers.

28. Furthermore, Article 3(1)(a) of the Wav 1994 states that that prohibition does not apply to a foreign national who is not capable of being granted a work permit under the provisions of an agreement concluded with other States or a decision of an organisation governed by public international law which is binding on the Kingdom of the Netherlands.

29. It is clear from that summary of the national provisions that, before the entry into force of Decision No 1/80, an employer had to obtain a work permit under Article 1(b)(1) of the Wabw if he had work carried out by a foreign national on the basis of an employment contract, unless the foreign national was posted to a third party under the Law on the making available of workers. Under Article 1(b)(3) of the Wabw, the employer within the meaning of that law was, in that case, the person to whom the foreign national had been posted. It follows that BIS, to whom the foreign workers were posted by Ekinci, would, before the entry into force of Decision No 1/80, have been an employer required to obtain permits.

30. As the referring court points out, it is clear from the travaux préparatoires for Articles 1 and 2 of the Wav 1994 that the employer required to obtain permits is the person who actually has work carried out by a foreign national and that that employer is, at all times, responsible for ensuring that the necessary work permits are in place. The existence of an employment contract or a relationship of subordination is not relevant in that regard. The fact that work is actually carried out on the orders or in the employ of an employer is sufficient to determine the status of employer. The referring court states that that adaptation of the national legislation was necessary because, in practice, employers sought, through misuse and complex constructions, a means to avoid the requirement for a work permit in the case of employment of foreign workers. The solution chosen consisted in retaining a broad definition of the concept of employer who could be held liable for the absence of work permits for nationals of non-member countries whom he puts to work.

31. Having regard to that broad concept of employer adopted in the Wav 1994, it follows that, in a situation such as that at issue in the main proceedings, the requirement for a work permit applies not only to the user undertaking, in the present case BIS, but also to the other employers in the chain of employment, including the principal contractor, in the present case Essent.

32. The referring court explains that it is faced with the question whether the extension of the concept of employer by the Wav 1994 must be regarded as a new restriction for the purposes of the standstill rule in Article 13 of Decision No 1/80 and in Article 41 of the Additional Protocol and, therefore, whether the imposition of a fine on Essent is contrary to those articles. From Essent's standpoint, the extension, following the entry into force of those articles, of the concept of employer who may be held liable for the absence of a work permit for foreign workers whom he puts to work has the effect of restricting the access of Turkish workers to the Netherlands labour market.

33. As a preliminary to the question whether that extension of the concept of employer constitutes a new restriction contrary to Article 13 of Decision No 1/80 and Article 41 of the Additional Protocol, the referring court also asks whether Essent has the standing to rely on those articles.

34. It is on that basis that the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In a situation such as that at issue in the main proceedings, can a principal contractor which must, under Article 2(1) of the [Wav 1994], be regarded as the employer of the Turkish workers concerned rely, as against the Netherlands authorities, on the standstill rule in Article 13 of Decision No 1/80 or on the standstill rule in Article 41 of the Additional Protocol?

(2) (a) Must the standstill rule in Article 13 of Decision No 1/80 or the standstill rule in Article 41 of the Additional Protocol be interpreted as precluding the introduction of a prohibition, as set out in Article 2(1) of the [Wav 1994], for principal contractors of having work carried out in the Netherlands by workers who are nationals of a non-member country, in this case [the Republic of] Turkey, without a work permit, if those workers are in the employ of a German undertaking and work for the principal contractor in the Netherlands via a Netherlands user undertaking?

(b) Is it significant in that regard that an employer was already prohibited, before both the standstill rule in Article 41 of the Additional Protocol and the standstill rule in Article 13 of Decision No 1/80 entered into force, from having work carried out under a contract of employment by a foreign national without a work permit and that that prohibition was extended, likewise before the standstill rule in Article 13 of Decision No 1/80 entered into force, to user undertakings to which foreign nationals are posted?’

I – **My analysis**

35. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, regard being had to the subject-matter of the dispute.[10]

36. For reasons which I shall set out, I consider that Articles 13 of Decision No 1/80 and 41 of the Additional Protocol are not relevant for the purpose of resolving the dispute in the main proceedings.

37. By contrast, I am of the view that it is in the light of Articles 56 TFEU and 57 TFEU that the issues raised by the present case should be addressed.

A – *The applicable rules of EU law*

38. It is common ground that Ekinci is an undertaking established in Germany. According to the German commercial register, that undertaking’s activity is the construction, erection and hiring out of scaffolding.

39. Ekinci made workers who are nationals of several non-Member States, including the Republic of Turkey, available to BIS for the purpose of constructing scaffolding, for the period from 1 January to 20 May 2008.

10 — See, in particular, judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 22 and the case-law cited.

40. It is not disputed that the workers concerned, the majority of whom are Turkish nationals, have leave to remain in Germany and lawfully work there.

1. The non-applicability of Article 13 of Decision No 1/80

41. It is settled case-law that the standstill clause enacted in Article 13 of Decision No 1/80 prohibits generally the introduction of any new national measure having the object or effect of making the exercise by a Turkish national in national territory of the freedom of movement for workers subject to more restrictive conditions than those which applied at the time when Decision No 1/80 entered into force with regard to the Member State concerned. [11]

42. Moreover, the Court has repeatedly held that, unlike workers from the Member States, Turkish nationals are not entitled to freedom of movement within the European Union but can rely only on certain rights in the territory of the host Member State alone. [12]

43. In the present case, the host Member State of the workers who are Turkish nationals is the Federal Republic of Germany, the Member State in which they lawfully reside and work. This means that it is in relation to that Member State that those workers may assert the rights which they derive from Decision No 1/80.

44. Furthermore, Article 13 of Decision No 1/80 concerns the national measures relating to access to employment. The Court infers therefrom that that article 'is not intended to protect Turkish nationals already integrated into a Member State's labour force, but is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and, accordingly, residence under Article 6(1) of Decision No 1/80'. [13]

45. It is also important to recall the ruling of the Court in *Abatay and Others*, [14] concerning Turkish lorry drivers, employees of an undertaking established in Turkey, who were engaged in international haulage in Germany. It first pointed out that those Turkish lorry drivers 'are present on Germany territory only for very limited periods for the sole purpose of transporting and unloading there goods originating in Turkey or picking up goods there to transport them to destinations such as Turkey, Iran or Iraq'. [15] It then pointed out that, '[a]fter each assignment they return to Turkey where they live with their families and where the firm which employs and pays them is based', [16] concluding from this that '[s]uch Turkish nationals thus have no intention of becoming integrated in the employment market of the Federal Republic of Germany as a host Member State'. [17]

46. However, according to the Court, '[i]t is clear from the structure and the purpose of Decision No 1/80 that, at the current stage of the development of freedom of movement for workers under the EEC-Turkey Association …, that decision is essentially aimed at the progressive integration of Turkish workers [into the host Member State] through the pursuit of lawful employment which should be uninterrupted'. [18]

11 — See, in particular, judgment in *Demir*, C 225/12, EU:C:2013:725, paragraph 33 and the case-law cited.

12 — See, in particular, judgment in *Derin*, C-325/05, EU:C:2007:442, paragraph 66 and the case-law cited. See also judgment in *Demirkan*, C-221/11, EU:C:2013:583, paragraph 53.

13 — Judgment in *Sahin*, C-242/06, EU:C:2009:554, paragraph 51.

14 — C-317/01 and C-369/01, EU:C:2003:572.

15 — Paragraph 89.

16 — Ibid.

17 — Ibid.

18 — Judgment in *Abatay and Others*, EU:C:2003:572, paragraph 90.

47. Accordingly, Article 13 of Decision No 1/80 did not apply to a situation characterised by the temporary presence in Germany of workers who were Turkish nationals, a situation which could not therefore be regarded as reflecting a desire by those workers to integrate into the labour market of that Member State.

48. In my opinion, the same applies in this case, with respect to workers who are Turkish nationals, residing and working lawfully in Germany, which is therefore their host Member State within the European Union, who were posted to Netherlands territory for a limited period corresponding to the time necessary to construct the scaffolding for which BIS was responsible. After completing that task, the workers concerned left Netherlands territory and returned to Germany. As the Netherlands Government rightly points out, those workers therefore did not intend to be integrated into the Netherlands labour market. It follows that Article 13 of Decision No 1/80 does not apply to the Netherlands authorities in the dispute in the main proceedings.

2. The non-applicability of Article 41(1) of the Additional Protocol

49. Article 41(1) of the Additional Protocol lays down — as is apparent from its very wording — in clear, precise and unconditional terms, an unequivocal standstill clause, which prohibits the contracting parties from introducing new restrictions on freedom of establishment and freedom to provide services with effect from the date of entry into force of the Additional Protocol. [19]

50. It is the Court's established case-law that Article 41(1) of the Additional Protocol has direct effect. As a consequence, that provision may be relied on by the Turkish nationals to whom it applies before the courts or tribunals of the Member States. [20]

51. It should be noted that the standstill clause prohibits generally the introduction of any new measure having the object or effect of making the exercise by a Turkish national of those economic freedoms in the territory of a Member State subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State. [21]

52. The Court has held, in *Abatay and Others* (EU:C:2003:572), that Article 41(1) of the Additional Protocol may be relied on by an undertaking established in Turkey which lawfully provides services in a Member State and by Turkish nationals who are lorry drivers employed by such an undertaking. [22]

53. In that same judgment, the Court considered that that provision precluded the introduction into the national legislation of a Member State of a requirement, not imposed at the time of the entry into force of the Additional Protocol in that Member State, for a work permit in order for an undertaking established in Turkey and its employees who are Turkish nationals to provide services in the territory of that Member State. [23]

19 — See, in particular, judgment in *Demirkan*, EU:C:2013:583, paragraph 37 and the case-law cited.

20 — Ibid., paragraph 38 and the case-law cited.

21 — Ibid., paragraph 39 and the case-law cited.

22 — Paragraphs 105 and 106.

23 — Paragraph 117, sixth indent.

54. It is clear from its wording that Article 41(1) of the Additional Protocol forms part of the objective seeking to eliminate restrictions on the freedom to provide services between the contracting parties. [24] In particular, that provision prohibits the Member States from introducing, from the date of entry into force of the Additional Protocol, new obstacles to the provision of services by natural or legal persons established in Turkey as well as to the entry of Turkish nationals into the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey. [25]

55. In the main proceedings, the only connection with the Republic of Turkey lies in the existence of a majority of Turkish nationals among the workers posted by Ekinci to the Netherlands. That connecting factor is not, however, sufficient to bring the situation at issue in the main proceedings within the scope of Article 41(1) of the Additional Protocol.

56. To do so, it would have been necessary to demonstrate the existence of an economic activity between the Republic of Turkey and the Kingdom of the Netherlands, which would have been the case if the Turkish nationals in question had been self-employed persons providing a service in that Member State or had been workers posted by an undertaking established in Turkey.

57. Since the exercise of the freedom to provide services by a Turkish national is not at issue in the dispute in the main proceedings, the application of Article 41(1) of the Additional Protocol thus seems to me to be excluded.

3. The applicability of Articles 56 TFEU and 57 TFEU

58. We have seen that the referring court refers, in the body of its request for a preliminary ruling, to Articles 56 TFEU and 57 TFEU. It did not, however, ask the Court to rule on that aspect, considering that it clearly followed from the judgment in *Vicoplus and Others* (EU:C:2011:64) that those articles did not preclude a Member State from making the hiring out within the meaning of Article 1(3)(c) of Directive 96/71 to its territory of workers from a non-Member State subject to the obtaining of a work permit.

59. In my view, the referring court is right to envisage the application of Articles 56 TFEU and 57 TFEU. It follows from the case-law of the Court that where an undertaking makes available, for remuneration, workers who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 57 TFEU and must accordingly be considered a 'service' within the meaning of that provision. [26]

60. In the context of this case, the workers are actually made available by an undertaking established in Germany to a user undertaking established in the Netherlands. The provision of such services between two undertakings which are established in two separate Member States undoubtedly falls within the scope of Articles 56 TFEU and 57 TFEU. The fact that the posting of workers concerns nationals of non-member countries is, in that regard, irrelevant. The case-law of the Court shows, in fact, that it is indeed in the light of the rules of the FEU Treaty relating to the freedom to provide services that it is necessary to analyse the posting of workers who are nationals of non-member countries for the purpose of providing services. [27]

24 — Judgment in *Demirkan*, EU:C:2013:583, paragraph 43 and the case-law cited. The Court nevertheless pointed out, in that same judgment, that 'the objective of Article 41(1) of the Additional Protocol and the context of that provision are fundamentally different from those of Article 56 TFEU, especially in so far as concerns the applicability of those provisions to recipients of services' (paragraph 49). Accordingly, 'the notion of "freedom to provide services" in Article 41(1) of the Additional Protocol must be interpreted as not encompassing freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services' (paragraph 63).

25 — With respect to that latter situation, see judgment in *Soysal and Savatli*, C-228/06, EU:C:2009:101.

26 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 27 and the case-law cited.

27 — See, in particular, judgment in *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655.

61. The referring court is, however, wrong to take the view that the case-law of the Court already allows a clear answer to be given to the question of whether or not the Netherlands legislation, in that it requires that workers who are nationals of non-member countries who are made available between two undertakings established in two separate Member States hold work permits, is consistent with Articles 56 TFEU and 57 TFEU.

62. In particular, contrary to what is stated by the referring court, I consider that the answer to the questions raised in this case does not clearly follow from *Vicoplus and Others* (EU:C:2011:64). I shall have the opportunity below to explain how the approach adopted by the Court in that case was heavily dependent on its specific context, that is to say the application of transitional provisions following the accession to the EU of new Member States.

63. Therefore, the Court has, to date, still not provided a clear response to the main question to be resolved in this case, which justifies, in order to give the referring court an answer which is useful in resolving the dispute in the main proceedings, a reformulation by the Court of the questions raised by the referring court. The Court should, therefore, answer the question whether Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State which makes the hiring out within the meaning of Article 1(3)(c) of Directive 96/71 to the territory of that State of nationals of a non-member country subject to the obtaining of a work permit.

64. As Essent primarily argues in its observations, the Court must determine whether or not, in the circumstances of this case, namely the making available by a German undertaking of workers who are nationals of non-member countries to a user undertaking established in the Netherlands, which performs work on behalf of another undertaking also established in the Netherlands, the requirement of the Netherlands authorities for work permits is compatible with Articles 56 TFEU and 57 TFEU.

B – *Compatibility of the Netherlands legislation with Articles 56 TFEU and 57 TFEU*

65. We have seen that the situation at issue in the main proceedings falls within the scope of Articles 56 TFEU and 57 TFEU. Before considering whether or not the Netherlands legislation is compatible with those articles, it is first necessary to explain why Essent must, in my opinion, be regarded as having the standing to rely on those articles in the main proceedings.

1. The possibility of Essent relying on Articles 56 TFEU and 57 TFEU in the main proceedings

66. The context of this case is marked by the existence of a chain of undertakings. Thus, a principal contractor, in this case Essent, sub contracted to another undertaking, BIS, the construction of scaffolding at one of its establishments. To carry out that task, BIS engaged the services of an undertaking established in Germany, Ekinci, in order that Ekinci would make workers available to BIS.

67. In such a context, the Netherlands legislation developed so as to place liability on the principal contractor where work is carried out by nationals of non-member countries who do not have a work permit. That choice was motivated by the desire of the Netherlands authorities to prevent the increased number of undertakings involved in the execution of works from making it possible to circumvent the requirement for workers who are nationals of non-member countries to obtain work permits.

68. In this case, the application of the Netherlands legislation by the competent national authorities led them to impose a fine based on the lack of work permits only on the principal contractor, namely Essent, and not on BIS, as a user undertaking of the workers made available by Ekinci.

69. In that context, denying Essent, which is the only undertaking to be proceeded against by the Netherlands authorities, the possibility of relying on Articles 56 TFEU and 57 TFEU in order to challenge the fine which was imposed on it would amount to rendering ineffective the rules of the FEU Treaty on the freedom to provide services.

70. This would be to accept that, although the requirement for a work permit for posted workers who are nationals of non-member countries must, on the merits, be examined in the light of those articles, the fact that Essent is at the head of the chain of undertakings involved, and therefore is not the direct recipient of the workers made available, prevents it from relying on its only defence, that is to say Articles 56 TFEU and 57 TFEU.

71. In so far as, under the Netherlands legislation, it is the principal contractor who may be held liable for a lack of work permits for workers who are nationals of non-member countries, he is therefore the only person, where this is the case, who can effectively rely on those articles. Denying him that possibility is tantamount to accepting that the system established by the Netherlands legislation, consisting in ascending the chain of responsibility up to the principal contractor, makes it possible to retain restrictions on the freedom to provide services.

72. Limiting the possibility of relying on the rules of the FEU Treaty on the freedom to provide services solely to direct contractors would effectively disregard the fact that, as this case demonstrates, several undertakings may be involved in the chains of subcontracting. It is thus not uncommon to identify more than four intermediaries between the employees and the developer. [28]

73. It is because of that reality, a potential source of abuse and circumvention of social legislation, that the Netherlands legislation makes it possible to impose liability on the principal contractor in the event that work permits have not been requested for nationals of non-member countries working for one of its subcontractors.

74. In that respect, the Netherlands legislation is part of the trend reflected in the current debates with a view to changing EU legislation on the posting of workers, one possible development being specifically to increase the liability of the principal contractor.

75. The relatively flexible case-law which the Court has developed concerning the persons entitled to rely on the rules of the FEU Treaty on the freedom of movement for workers seems to me to support a broad approach to the possibility of relying on Articles 56 TFEU and 57 TFEU.

76. With regard to the freedom of movement for workers, the Court therefore considered that, '[w]hile it is established that the rights to freedom of movement laid down under [Article 45 TFEU] benefit workers …, there is nothing in the wording of that article to indicate that those rights may not be relied upon by others'. [29] It therefore ruled that 'Article 45 TFEU may be relied on not only by workers themselves, but also by their employers. In order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers'. [30]

28 — See Muller, F., 'L'affaire Flamanville: détachement ou fraude sociale?', *Droit social*, No 7/8, 2012, p. 675, in particular p. 685.

29 — See, in particular, judgment in *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 28 and the case-law cited.

30 — See, in particular, judgment in *Las*, C-202/11, EU:C:2013:239, paragraph 18 and the case-law cited.

77. The Court therefore dissociated the persons who fall within the scope of Article 45 TFEU from those who can rely on that article. The second category is broader in order to ensure the effectiveness of that article. [31]

78. The same logic should, in my view, apply concerning the freedom to provide services. A person to whom that fundamental freedom does not formally apply must be able to rely on it. Indeed, the freedom to provide services, like the free movement of workers, pursues an objective in the public interest of establishing an internal market. The pursuit of that objective justifies the extension of the benefit of provisions of EU law to persons other than service providers and recipients who, none the less, have a material connection with a person who has that status. [32]

79. Denying Essent the possibility of relying on Articles 56 TFEU and 57 TFEU would be tantamount to accepting that, by adopting a broad definition of the concept of employer, the Member State of destination is in a position to render nugatory the rules of the FEU Treaty on the freedom to provide services and to circumvent the prohibition of restrictions on that fundamental freedom provided for in Article 56 TFEU. [33]

80. In those circumstances, a principal contractor such as Essent must be able to rely on the rights directly granted to providers and recipients of services by Articles 56 TFEU and 57 TFEU.

81. In that regard, the fact that neither Ekinci nor BIS are parties to the main proceedings does not seem to me to be decisive. It does not eliminate the interest of Essent, as the principal contractor which has been penalised because of the lack of work permits, in obtaining a decision on the issue of the compatibility of the requirement for such permits with Articles 56 TFEU and 57 TFEU. In other words, that issue is directly relevant to the resolution of the dispute in the main proceedings relating to the lawfulness of the fine imposed on Essent.

2. The existence of an obstacle to the freedom to provide services

82. As a preliminary point, it should be borne in mind that it is settled case-law that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services. [34]

83. It has previously been held, with respect to the posting of workers who are nationals of non-member countries by a service provider established in an EU Member State, that national provisions which make the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitute a restriction on the freedom to provide services within the meaning of Article 56 TFEU. [35]

31 — In the judgment in *ITC*, C-208/05, EU:C:2007:16, the Court thus accepted that a private-sector recruitment agency which had concluded a recruitment contract with a person seeking employment could rely on the rights directly granted to European Union workers by Article 45 TFEU (paragraph 25).

32 — See, by analogy, points 19 and 21 of the Opinion of Advocate General Fennelly in *Clean Car Autoservice*, C-350/96, EU:C:1997:587.

33 — See, by analogy, judgment in *Clean Car Autoservice*, EU:C:1998:205, paragraph 21.

34 — See, in particular, judgment in *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589, paragraph 29 and the case-law cited.

35 — See, in particular, judgment in *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 40 and the case-law cited.

84. As we have already seen, according to Article 2(1) of the Wav 1994, an employer may not have work carried out by a foreign national in the Netherlands without a work permit. That prohibition does not apply, however, with respect to a foreign national who, in the framework of the cross-border provision of services, temporarily carries out work in the Netherlands in the employ of an employer established in an EU Member State other than the Kingdom of the Netherlands, provided that it is not the provision of a service consisting in making workers available.

85. The Netherlands legislation therefore singles out for special treatment the provision of a service consisting in the making available of workers who are nationals of non-member countries to an undertaking established in the Netherlands by an undertaking established in another Member State. For that type of provision of services, the requirement for a work permit for workers who are nationals of non-member countries is retained.

86. In the light of the case-law of the Court that I have referred to, it must be accepted that, because of the administrative burden which it entails, the requirement for work permits for workers who are nationals of non-member countries posted to a user undertaking such as BIS by an undertaking providing services established in another Member State, such as Ekinci, constitutes an obstacle to the freedom to provide services, in principle prohibited by Article 56 TFEU.

87. The obtaining of work permits for workers who are nationals of non-member countries who are made available to an undertaking established in the Netherlands by an undertaking established in another Member State is subject to several conditions, such as a prior check that there are no workers available on the national labour market, as well as constraints in terms of time-limits. It is therefore not a mere formality. Specifically, the requirement for work permits may therefore have the effect of discouraging an undertaking such as Ekinci from exercising its freedom to provide services, in so far as it is limited in the selection of the workforce it can readily and in a short time make available to an undertaking established in another Member State.

3. Justification for the obstacle

88. It is settled case-law that where national legislation falling within an area which has not been harmonised at EU level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, 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 he 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]

89. The posting of workers who are nationals of non-member countries in the provision of cross-border services has not been harmonised at EU level. That being so, it must therefore be examined whether the restrictions on the freedom to provide services arising from Article 2(1) of the Wav 1994 appear to be justified by an objective in the public interest and, if so, whether they are necessary in order to pursue, effectively and by appropriate means, that objective.

90. Asked about this at the hearing, the Netherlands Government relied on the objective of protecting its national labour market.

36 — See, in particular, judgment in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 45 and the case-law cited.

91. It should in this regard be borne in mind that, although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest,[37] the Court has held, on several occasions, that 'workers employed by an undertaking established in a Member State and who are posted to another Member State for the purpose of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work'.[38]

92. That being so, the Court has accepted that 'a Member State may check whether an undertaking established in another Member State and which posts in its territory workers who are nationals of a non-Member State is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service in question, for instance, that of bringing his workers for the purpose of placing them or making them available to others'.[39]

93. According to the Court, '[h]owever, such checks must observe the limits imposed by [European Union] law and in particular those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities'.[40]

94. The Court concluded, on several occasions, that the requirement for a work permit for nationals of non-member countries who are hired out 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 nationals of non-member countries.[41] Since such a requirement is disproportionate in the light of the objectives of guaranteeing, first, the stability of the labour market in the Member State of destination and, secondly, the social welfare of the posted workers, it was held to be contrary to the rules of the FEU Treaty on the freedom to provide services.

95. However, the Court has not yet found it necessary to rule specifically on whether it is compatible with Articles 56 TFEU and 57 TFEU to retain a requirement for a work permit for nationals of non-member countries whose posting is not incidental to the cross-border provision of a service, but is the exclusive purpose of such a service.

96. In order to understand the novelty and implications of the problem, it is necessary to recall the definition which the Court has given to the making available of workers.

97. In *Vicoplus and Others* (EU:C:2011:64) the Court provided clarification concerning the definition of the activity of an undertaking which, in the wording of Article 1(3)(c) of Directive 96/71, 'being a temporary employment undertaking or placement agency, hire[s] 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'.

37 — See, in particular, judgment in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 38 and the case-law cited.

38 — See, in particular, judgment in *Commission* v *Austria*, EU:C:2006:595, paragraph 55 and the case-law cited.

39 — Ibid., paragraph 56 and the case-law cited.

40 — See, in particular, judgment in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 40 and the case-law cited.

41 — Ibid., paragraph 41.

98. In that judgment, the Court held that 'the hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, 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, no contract of employment being entered into with the user undertaking. It 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 and that that worker carries out his tasks under the control and direction of the user undertaking'. [42]

99. In the light of that definition, it will be for the referring court to determine whether it is actually faced with a situation of the making available of workers satisfying the criteria established by the Court in *Vicoplus and Others* (EU:C:2011:64).

100. I would point out that, under Article 1.1(b) of the Law on the making available of workers, 'the making available of workers' means the posting of workers to another party, for remuneration, with a view to the performance in that party's undertaking, other than under an employment contract concluded with that undertaking, of work ordinarily carried out in that undertaking. That definition appears to be less comprehensive than that adopted by the Court.

101. The referring court will therefore have to make sure that the foreign workers have actually carried out their work under the direction and under the supervision of BIS, not of Ekinci.

102. If that second option were found to apply, it would be a case not of the making available of workers satisfying the criteria established by the Court in *Vicoplus and Others* (EU:C:2011:64) but of a subcontracting contract. [43] In such a situation, there is no doubt that the case-law of the Court already prohibits a requirement for a work permit for workers who are nationals of non-member countries who are posted for the purposes of providing cross-border services.

103. If, on the other hand, as appears to be the case, the service in question consists genuinely and exclusively in the making available of workers satisfying the criteria established by the Court in *Vicoplus and Others* (EU:C:2011:64), the case-law of the Court seems to be still uncertain and must therefore be clarified.

104. It follows from the case-law of the Court that the provision of services consisting in the making available of workers has always been considered as a provision of services of a special nature. [44] It has, therefore, been the subject of special treatment with legal consequences adapted to its particular nature.

105. In essence, the arguments drawn from the case-law of the Court show that the making available of workers constitutes a provision of services of a special nature, because it is characterised by its objective which is to enable workers to gain access to the labour market of the host Member State. From that point of view, while the making available of workers constitutes an economic activity which falls primarily within the scope of the rules of the FEU Treaty on the freedom to provide services, it cannot be totally isolated from the problems connected with freedom of movement for workers within the European Union.

42 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 51.

43 — See, in that regard, points 62 to 64 of my Opinion in *Vicoplus and Others*, EU:C:2010:510.

44 — I have had the opportunity to expand on that aspect in points 31 to 43 of my Opinion in *Vicoplus and Others*, EU:C:2010:510, points to which I would refer.

106. In *Vicoplus and Others* (EU:C:2011:64), the Court emphasised the special nature of the service consisting in the making available of workers. Referring to *Webb*,[45] it pointed out that 'such activities may have an impact on the labour market of the Member State of the party for whom the services are intended'.[46] According to the Court, first, 'employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of Articles 45 TFEU to 48 TFEU and the European Union regulations adopted in implementation thereof'.[47] Secondly, 'owing to the special nature of the employment relationships inherent in the making available of labour, pursuit of that activity directly affects both relations on the labour market and the lawful interests of the workforce concerned'.[48]

107. In *Vicoplus and Others* (EU:C:2011:64), the Court also pointed out that, in paragraph 16 of *Rush Portuguesa*,[49] it held that 'an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the FEU Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State'.[50]

108. According to the Court '[t]hat finding is justified by the fact 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'.[51]

109. It is in the light of those specific characteristics of the making available of workers that the Court held, in paragraph 32 of *Vicoplus and Others* (EU:C:2011:64), that legislation of a Member State which makes the hiring out, in the territory of that State, within the meaning of Article 1(3)(c) of Directive 96/71, of workers who are the nationals of another Member State subject to the obtaining of a work permit must be considered to be 'a measure regulating access of Polish nationals to the labour market of [the first] State within the meaning of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession'.[52]

110. The Court concluded from this that '[c]onsequently, that legislation, by which, during the transitional period provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, of Polish nationals in the territory of that State continues to be subject to the obtaining of a work permit, is compatible with Articles 56 TFEU and 57 TFEU'.[53]

111. Can such reasoning automatically be applied, as suggested by the referring court, to a situation such as that at issue in the main proceedings, where the requirement for a work permit concerns the hiring out within the meaning of Article 1(3)(c) of Directive 96/71 of nationals of non-member countries?

112. In my opinion, the answer to this question must be negative.

45 — 279/80, EU:C:1981:314.

46 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 28 and the case-law cited.

47 — Ibid.

48 — Ibid., paragraph 29 and the case-law cited.

49 — C-113/89, EU:C:1990:142.

50 — *Vicoplus and Others*, EU:C:2011:64, paragraph 30.

51 — Ibid., paragraph 31.

52 — 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) ('the 2003 Act of Accession').

53 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 33.

113. It must be pointed out that the conclusion which the Court reached in *Vicoplus and Others*, EU:C:2011:64, is indeed motivated by the particular nature of the service of making workers available, but also by the purpose of the transitional provision which it was asked to interpret.

114. In that regard, the Court considered that the finding which it reached also necessarily followed 'from the purpose of that provision, which is intended 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'. [54] The Court added that '[t]hat purpose is apparent from, inter alia, Chapter 2, paragraph 5, of Annex XII to the 2003 Act of Accession in so far as that paragraph provides the possibility for a Member State, in case of serious disturbances of its labour market or threat thereof, to continue to apply the measures referred to in Chapter 2, paragraph 2, until the end of the seven-year period following the date of accession of the Republic of Poland'. [55]

115. Having regard to that purpose, 'it seems artificial to draw a distinction with regard to the influx of workers on the labour market of a Member State according to whether they gain access to it by means of the making available of labour or directly and independently because in both cases that potentially large movement of workers is capable of disturbing that labour market'. [56] Accordingly, '[t]o exclude the making available of labour from the scope of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession would … be liable to deprive that provision of much of its effectiveness'. [57]

116. Accordingly, in *Vicoplus and Others* (EU:C:2011:64), the Court considered that the requirement of a work permit under Article 2(1) of the Wav 1994 for the provision of a service consisting in making workers available was a proportionate measure in the light of Articles 56 TFEU and 57 TFEU, in view of the reservation set out in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession with regard to the free movement of workers, of the particular purpose of that provision and of the need to safeguard its effectiveness.

117. Where the specific purpose of the Member State of destination of the workers made available, consisting in protecting its labour market against an immediate and potentially substantial influx of workers following the accession to the European Union of new Member States, is no longer relevant, the question must be asked whether retaining on a permanent basis the need for a work permit for workers who are nationals of non-member countries made available by an undertaking established in another Member State is proportionate to the objective of ensuring, in a general way, the stability of the labour market of the Member State of destination of the workers made available.

118. I consider that although, in that it constitutes a form of access to the labour market of that State, the making available of workers may be subject to the requirement for a work permit for a transitional period following the accession to the European Union of new Member States, a period characterised by a certain and increased risk of immediate and substantial disruption of the labour market of that State, retaining on a permanent basis the need for such a work permit for workers who are nationals of non-member countries made available by an undertaking established in another Member State has an unduly adverse effect on the freedom to provide services. In the latter situation, it is not possible to identify the same type of risk of undermining the stability of the labour market of the Member State of destination of the workers made available.

54 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 34 and the case-law cited.

55 — Ibid.

56 — Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 35.

57 — Ibid.

119. The referring court, in my opinion, draws erroneous conclusions from paragraph 37 of the judgment in *Vicoplus and Others* (EU:C:2011:64). In that paragraph, the Court recalls, referring to its previous judgments, that 'a Member State must be in a position to ascertain, subject to observance of the limits imposed by EU law, that a provision of services is not, in actual fact, intended to make available labour which is not covered by the free movement of workers'. The referring court, interpreting that judgment broadly, infers that Articles 56 TFEU and 57 TFEU do not preclude a Member State making the hiring out within the meaning of Article 1(3)(c) of Directive 96/71 in its territory of workers from a non-member country subject to the obtaining of a work permit.

120. Such an interpretation is tantamount to considering that, since the making available of workers has the effect of allowing the relevant workers who are nationals of non-member countries to access the labour market of the Member State of destination, the latter is entitled to retain in connection with those workers its national measures governing their access to that Member State's labour market.

121. I consider that this disregards a little too quickly the requirement, expressly referred to by the Court, that the power of verification available to the Member States must observe the limits imposed by EU law. I would recall that the Court has had occasion to explain that those limits include 'those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities'. [58]

122. Although, by that power of verification, Member States must be able to ascertain the true nature of a posting of workers which is carried out in their territory and to apply to it, accordingly, suitable control measures, recognition of such a power does not mean, in my opinion, that the Member States are entitled to retain, on a permanent basis, a requirement for a work permit for nationals of a non-member country who are made available in their territory by an undertaking established in another Member State. A contrary conclusion would discourage an undertaking such as Ekinci from making its workforce available to an undertaking such as BIS. It would render illusory provision of the cross-border service of making workers available where they are nationals of non-member countries.

123. Moreover, it must not be overlooked that the making available of workers, in that it constitutes a provision of services, is by its very nature temporary. [59]

124. Consequently, although it does indeed constitute a form of access to the labour market of the Member State of destination, it is in no way intended to allow nationals of non-member countries who are hired out to integrate into that Member State on a permanent basis.

125. In those circumstances, the Member State of destination cannot impose all the conditions which would be imposed in the case where the worker wished to be integrated on a stable or permanent basis into its labour market.

126. In that connection, the Court has repeatedly held that a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provide services. [60] By analogy, a Member State cannot, in my opinion, make the service of making available workers who are nationals of non-member countries subject to all the requirements governing the direct access of those workers to its labour market, and thereby deprive of all practical effectiveness the provisions of the FEU Treaty whose object is to guarantee the freedom to provide services.

58 — See, in particular, judgment in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 40 and the case-law cited.

59 — In relation to the temporary nature of the activities covered by the freedom to provide services, see, in particular, judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraphs 26 and 27.

60 — See, in particular, *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 17 and the case-law cited.

127. As the Netherlands Government acknowledges, BIS used the workers who were nationals of non-member countries only for the specific task which was to be carried out on behalf of Essent. The foreign workers were therefore in the Netherlands only in connection with that specific task. After completing that task, they left the Netherlands and returned to Germany.[61] Accordingly, the Netherlands Government itself finds that the nationals of non-member countries concerned in the main proceedings did not intend to integrate into the labour market of the Kingdom of the Netherlands.[62]

128. Although, in such a context, the retention on a permanent basis by a Member State of a requirement for a work permit for nationals of non-member countries who are made available to an undertaking established in that State by an undertaking established in another Member State seems to me to have an unduly adverse effect on the freedom to provide services, it is none the less essential, in my view, that the Member State of destination be allowed powers of control suitable to the particular nature of the service of making workers available.

129. In particular, the Member State of destination must be in a position to verify that the provision of a service consisting in the making available of workers who are nationals of non-member countries is not, in fact, used with the purpose of circumventing its national immigration law and national legislation on the employment of nationals of non-member countries. In other words, the Member State of destination must be allowed to guard against misuse of the freedom to provide services, where that freedom is used for the sole purpose of circumventing the restrictions which Member States are entitled to impose on nationals of non-member countries who wish to engage in paid employment in their territory.

130. The control measures which the Member State of destination may implement include verifying that the workers are made available in order to carry out, at an undertaking established in that State, a specific task for a limited period.

131. Moreover, the Member State of destination is entitled to implement the measures necessary to ensure the return of workers who are nationals of non-member countries to their Member State of residence at the end of their posting.

132. I would refer in this regard to the measures cited by the Court as examples which are less restrictive measures than a work permit. Thus it has referred to 'an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment'.[63] According to the Court, such an obligation 'would enable those authorities to monitor compliance with [the] social welfare legislation [of the Member State concerned] during the deployment while at the same time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin'.[64]

133. The Court has also cited as a measure less restrictive than a work permit '[a]n obligation imposed on a service-providing undertaking to provide the local authorities with information 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 that undertaking employs them'.[65] According to the Court, such an obligation 'would give those authorities, in a less restrictive but just as effective a manner as the [requirement for a work permit], a guarantee that the situation of those workers is

61 — See paragraph 25 of its observations.

62 — See paragraph 26 of its observations.

63 — See, in particular, judgment in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 31.

64 — Ibid.

65 — Ibid., paragraph 46.

lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established. Combined with the information provided by that undertaking concerning the anticipated period of deployment …, that information would enable the … authorities [of the Member State of destination] to take, as appropriate, the measures necessary at the end of that period'. [66]

II – **Conclusion**

134. In view of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Raad van State:

Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which makes the hiring out, within the meaning of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in the territory of that State of workers who are nationals of a non-member country subject to the obtaining of a work permit.

66 — Ibid.