Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 November 2018*

(Reference for a preliminary ruling — Accession of new Member States — Republic of Croatia — Transitional measures — Freedom to provide services — Directive 96/71/EC — Posting of workers — Posting of Croatian and third-country nationals to Austria through the intermediary of an undertaking established in Italy)

In Case C-18/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 13 December 2016, received at the Court on 16 January 2017, in the proceedings

Danieli & C. Officine Meccaniche SpA,

Dragan Panic,

Ivan Arnautov,

Jakov Mandic,

Miroslav Brnjac,

Nicolai Dorassevitch,

Alen Mihovic

v

Regionale Geschäftsstelle Leoben des Arbeitsmarktservice,

THE COURT (Third Chamber),

composed of M. Valaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen (rapporteur), M. Safjan and D. Šváby, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 February 2018,

* Language of the case: German.

after considering the observations submitted on behalf of:

– Danieli & C. Officine Meccaniche SpA and Panic, Arnautov, Mandic, Brnjac, Dorassevitch and Mihovic, by E. Oberhammer, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the German Government, by T. Henze and D. Klebs, acting as Agents,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the European Commission, by M. Kellerbauer and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 57 TFEU, of Chapter 2, paragraphs 2 and 12 of Annex V to the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, (OJ 2012 L 112, p. 21) ('the Act of Accession of Croatia'), and 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 (OJ 1997 L 18, p. 1).

2 The request was made in the context of a dispute between, on the one hand, Danieli & C. Officine Meccaniche SpA ('Danieli'), an Italian company, and six workers of Croatian, Russian and Belarussian nationality; and, on the other hand, the Regionale Geschäftsstelle Leoben des Arbeitsmarktservice (Leoben regional office of the employment market service, Austria), an authority of the Federal Minister for Employment, Social Matters and Consumer Protection, concerning the posting of those workers.

Legal context

European Union law

The Act of Accession of Croatia

3 Article 18 of the Act of Accession of Croatia states:

'The measures listed in Annex V shall apply in respect of Croatia under the conditions laid down in that Annex'.

4 Annex V to the Act of Accession of Croatia is entitled 'List referred to in Article 18 of the Act of Accession: transitional measures', and Chapter 2 of that annex, headed 'Free movement of persons', provides in paragraphs 1, 2, and 12:

'(1) Article 45 and the first paragraph of Article 56 [TFEU] shall fully apply only, in relation to the free 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 present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 13.

(2) By derogation from Articles 1 to 6 of Regulation (EU) No 492/2011 [of the European Parliament and of the Council of 5 April 2011 on free movement for workers within the Union (OJ 2011 L 141, p. 1),] and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Croatian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.

…

(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 transnational 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 [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.

The list of service sectors which may be covered by this derogation is as follows:

…

– in Austria:

Sector NACE (*) code, unless otherwise specified

…

Construction, including related branches

45.1 to 45.4, Activities listed in the Annex to Directive 96/71/EC

[…]

(*) NACE: see 31990 R 3037: Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community [(OJ 1990 L 293, p. 1)].

…

The effect of the application of the present paragraph shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Croatia which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.'

5 NACE codes 45.1 to 45.4 are as follows:

' — 45			Construction
	45.1		Site preparation
		45.11	Demolition and wrecking of buildings; earth moving
		45.12	Test drilling and boring
	45.2		Building of complete constructions or parts thereof; civil engineering
		45.21	General construction of buildings and civil engineering works
		45.22	Erection of roof covering and frames
		45.23	Construction of highways, roads, airfields and sport facilities
		45.24	Construction of water projects
		45.25	Other construction work involving special trades
	45.3		Building installation
		45.31	Installation of electrical wiring and fittings
		45.32	Insulation work activities
		45.33	Plumbing
		45.34	Other building installation
	45.4		Building completion
		45.41	Plastering
		45.42	Joinery installation
		45.43	Floor and wall covering
		45.44	Painting and glazing
		45.45	Other building completion'

Directive 96/71

6 Article 1 of Directive 96/71 provides:

'(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 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.

(4) Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.'

7 The Annex to Directive 96/71 provides:

'The activities mentioned in Article 3(1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

1) excavation

2) earthmoving

3) actual building work

4) assembly and dismantling of prefabricated elements

5) fitting out or installation

6) alterations

7) renovation

8) repairs

9) dismantling

10) demolition

11) maintenance

12) upkeep, painting and cleaning work

13) improvements.'

Austrian law

8 Paragraph 18 of the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals, BGBl., 218/1975), in its version applicable to the dispute in the main proceedings (BGBl I, 72/2013; 'the AuslBG'), is worded as follows:

'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 6 months, foreign nationals require a posting permit, which may be granted for a period not exceeding 4 months.

…

(12) Foreign nationals who are posted to Austria by an undertaking established in another Member State of the European Economic Area [(EEA)] 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 provided for by Austrian law, for the purposes of Paragraph 7b(1) Subparagraph 1 to Subparagraph 3, and Paragraph 2 of the Arbeitsvertragsrechts-Anpassungsgesetz [(Law amending the law on employment and the legal provisions relating to insurance for social security, BGBl., 459/1993)] and the legal provisions relating to insurance for social security are complied with.

The central coordination office for the control of illegal employment under [the AuslBG] and the Law amending the law on employment contracts of the Federal Ministry of Finance must immediately notify the employment of posted foreign nationals in accordance with Paragraph 7(b)(3) and (4) of the Law amending the law on employment contracts to the relevant regional office of the employment market service. Following notification, the regional employment 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. Notwithstanding the notification requirement under Paragraph 7b(3) and (4) of the Law amending the law on employment contracts, provided the requirements are fulfilled activity may commence without an EU-Posting Confirmation.'

9 Paragraph 32a of the AuslBG provides:

‘Transitional provisions on EU enlargement

(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 [between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania,] concerning the accession of the Republic of Bulgaria and Romania to the European Union [(OJ 2005 L 157, p. 11)], do not enjoy free movement for workers, within the meaning of the first sentence of Paragraph 1(2) unless they are relatives of a citizen of another EEA Member State with a legal right to reside under community law, in accordance with Paragraph 52(1)(1) to (3), of the Niederlassungs- und Aufenthaltsgesetz (Law on establishment and residence).

…

(11) Pursuant to the Treaty [between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia] concerning the accession of the Republic of Croatia to the European Union (OJ 2012 L 112, p. 10)], 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.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Danieli accepted an order from an Austrian undertaking for the construction of a wire rod mill in Austria. That Italian company wished to employ, in particular, four Croatian workers, together with a Russian and a Belarusian worker, for the fulfilment of that order.

11 That company was part of a group of companies that also included a Croatian company, Danieli Systec d.o.o., the employer of those Croatian workers, and another Italian company, Danieli Automation SpA, the employer of the Russian and Belarusian workers.

12 The Croatian workers were hired out to Danieli but remained the employees of the Croatian company and continued to have social security cover in Croatia. As to the Russian and Belarusian workers, they were hired out to Danieli whilst remaining employees of Danieli Automation SpA, and continued to have social security cover in Italy for the duration of their posting to Austria.

13 On 18 January 2016, pursuant to Paragraph 18(12) of the AuslBG, Danieli registered those workers with the Zentrale Koordinationsstelle für die Kontrolle illegaler Beschäftigung (Central coordination office for the control of illegal employment, Austria) and applied for confirmation of the EU postings.

14 In a subsequent letter, Danieli stated that it was not the employer of that workforce, but that the latter had been made available by the abovementioned Croatian and Italian companies, for the purposes of completing the construction of a wire-rod mill in Austria.

15 The Leoben regional office of the employment market service rejected the applications for confirmation of those postings made in accordance with Paragraph 18(12) of the AuslBG, and did not authorise the posting of the workers concerned.

16 The actions brought against the decisions rejecting those applications were dismissed by the Bundesverwaltungsgericht (Federal Administrative Court, Austria). It noted that Article 1(3)(a) of Directive 96/71 requires 'an employment relationship between the undertaking making the posting and the worker during the period of posting'. The court held that such a relationship was lacking in the case at hand, since those workers were not employed by Danieli.

17 Danieli and the workers concerned brought an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) against the decision of the Bundesverwaltungsgericht (Federal Administrative Court).

18 In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the provisions of Articles 56 and 57 TFEU, Directive [96/71], and Paragraphs 2 and 12 of Chapter 2[, entitled "Free movement of persons",] of Annex V to [the Act of Accession of Croatia], 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 a company established in Italy so that the Italian company can provide a service in Austria, and the work carried out by the Croatian workers for the Italian company 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 company?

(2) Are Articles 56 and 57 TFUE and Directive [96/71] to be interpreted as meaning that [the Republic of Austria] is entitled to restrict the posting of Russian and Belarusian workers employed by a company established in Italy by requiring a work permit, if this posting takes place by means of a transfer to a second company established in Italy for the purpose of the provision by the second company of a service in Austria, and the work of the Russian and/or Belarusian workers for the second company is restricted to providing its service in Austria and there is no employment relationship between them and the second company?'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Articles 56 and 57 TFEU, Chapter 2, paragraphs 2 and 12 of Annex V to the Act of Accession of Croatia, and Directive 96/71 must be interpreted as meaning that the Republic of Austria is entitled to restrict, by requiring a work permit, the posting of Croatian workers employed by a company whose registered office is in Croatia, where the posting of those workers involves their hiring-out to an undertaking established in Italy and there being no employment relationship between them and that undertaking, with a view to that Italian undertaking providing services in Austria.

20 As a preliminary point, it must be borne in mind that, in the situation giving rise to the first question, Danieli, an Italian company, applied to the regional office of the employment market service for confirmation of the posting, without work permits, of four Croatian workers transferred to that company by a Croatian undertaking, who it intended to allocate to the construction of a wire-rod mill in Austria. That application was rejected on the ground that a work permit was required in respect of those workers.

21 The question that arises is whether European Union law precludes the requirement to obtain such a work permit.

22 In that connection, it should be noted than an undertaking such as Danieli, which is established in a Member State, in this case the Italian Republic, and which is tasked with the construction, against payment, of a wire-rod mill for an undertaking in another Member State, namely the Republic of Austria, provides a service within the meaning of Articles 56 and 57 TFEU.

23 Under Chapter 2, paragraph 1 of Annex V to the Act of Accession of Croatia, 'Article 45 and the first paragraph of Article 56 [TFUE] 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], between Croatia on the one hand and each of the present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 13.'

24 In order to determine whether those transitional provisions are, as the case may be, applicable, it is necessary to verify whether the service provided by Danieli, in so far as it involves the temporary use of Croatian workers hired out to that undertaking by a Croatian undertaking, constitutes a provision of services involving the temporary movement of workers, such as is mentioned in Article 1 of Directive 96/71, between Croatia, on the one hand, and another Member State on the other hand, within the meaning of Chapter 2, paragraph 1 of Annex V to the Act of Accession of Croatia.

25 Pursuant to Article 1(3)(c) of Directive 96/71, that directive applies where, in the context of a transnational provision of services, an undertaking, which is a temporary employment undertaking or placement agency established in one Member State, hires out a worker, to a user undertaking established or operating in the territory of another Member State, provided there is an employment relationship between the undertaking making the posting and that worker during the period of posting.

26 Article 1(3)(c) of Directive 96/71 may thus apply, in particular, to an operation, such as that which Danieli intended to use in the case in the main proceedings, whereby, for the purposes of performing a contract for the provision of services entered into with an undertaking in another Member State, an undertaking established in one Member State posts workers who have been hired out to it by an undertaking established in a third Member State, provided that that operation satisfies the conditions laid down in that provision.

27 According to the case-law of the Court, workers are posted through their hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, when three conditions are satisfied. First, the hiring-out of manpower is a service provided for remuneration in respect of which the worker remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. Secondly, that 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. Thirdly, in the context of such hiring-out, the employee carries out his tasks under the control and direction of the user undertaking (see, to that effect, judgment of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405, paragraph 33 and the case-law cited).

28 In particular, in order to determine whether the subject matter of the provision of services is the posting of the worker in the host Member State, account must be taken, in particular, of any evidence to indicate that the service provider is not liable for the consequences of a contractual performance which is inconsistent with the supply of services set out in the contract (judgment of 18 June 2015, *Martin Meat*, C-586/13, EU:C:2015:405, paragraph 35).

29 As the Advocate General notes in points 46 to 49 of his Opinion, those conditions are satisfied by the transaction envisaged in the procedure at issue in the main proceedings, as recalled in paragraph 26 of the present judgment.

30 In the first place, it is apparent from the information before the Court that the Croatian workers concerned were to remain bound by an employment relationship to the Croatian undertaking posting them to Danieli against payment, without their entering into a contract of employment with that Italian undertaking.

31 In the second place, it is also apparent from the same information that the very purpose of the provision of services agreed between the Croatian undertaking and Danieli was to effect the posting of the Croatian workers to Austria, for the purposes of performing the contract for the construction of the wire-rod mill, entered into with the Austrian undertaking, and that Danieli remained solely liable for the performance of that contract.

32 In the third place, it is common ground that, during their posting to Austria, the Croatian workers hired out to Danieli by the Croatian undertaking were to carry out their tasks under the control and direction of the user undertaking, namely Danieli.

33 It follows that the operation envisaged in the procedure at issue in the main proceedings, in so far as it involves the temporary posting of Croatian workers hired out to Danieli by a Croatian undertaking, constitutes a provision of services involving the temporary movement of workers, as referred to in Article 1(3)(c) of Directive 96/71, between Croatia, on the one hand, and a Member State, on the other hand, within the meaning of Chapter 2, paragraph 1 of Annex V to the Act of Accession of Croatia.

34 That hiring-out of manpower also comes within the scope of Chapter 2, paragraph 2 of Annex V to the Act of Accession of Croatia, under which, by derogation from Articles 1 to 6 of Regulation No 492/2011 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Croatian nationals. To exclude the hiring-out of manpower from the scope of Chapter 2, paragraph 2 of Annex V to the Act of Accession of Croatia would be liable to deprive that provision of much of its effectiveness (see, by analogy, judgment of 10 February 2011, *Vicoplus and Others*, Cases C-307/09 to C-309/09, EU:C:2011:64, paragraph 35).

35 By contrast, that hiring-out of manpower does not come within the scope of Chapter 2, paragraph 12 of Annex V to the Act of Accession of Croatia if, as is argued by Danieli and the Commission, it becomes evident that the construction of the wire-rod mill at issue in the main proceedings involves only the assembly, installation and putting into service of an industrial machine in an existing structure, which is a matter for the referring court to verify. Such operations do not in fact feature amongst those covered, with regard to Austria, by the derogations applicable to the sectors known as 'Construction, including related branches' and identified by NACE codes 45.1 to 45.4.

36 In the present case, it should be noted that the legislation of a Member State under which, during the transitional period provided for in Chapter 2, paragraph 2 of Annex V of the Act of Accession of Croatia, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, of Croatian nationals in the territory of that Member State continues to be subject to the obtaining of a work permit as a measure regulating access by Croatian nationals to the labour market of that Member State, within

the meaning of Chapter 2, paragraph 2 of Annex V to the Act of Accession of Croatia, is compatible with Articles 56 and 57 TFEU (see, by analogy, judgment of 10 February 2011, *Vicoplus and Others*, Cases C-307/09 to C-309/09, EU:C:2011:64, paragraphs 32 and 33).

37 The legislation at issue in the main proceedings satisfies all the conditions set out in the preceding paragraph of the present judgment.

38 In the light of the foregoing, the answer to the first question is that Articles 56 and 57 TFEU, together with Chapter 2, paragraph 2 of Annex V to the Act of Accession of Croatia must be interpreted as meaning that a Member State is entitled to restrict, by the requirement of a work permit, the posting of Croatian workers who are employed by an undertaking which has its registered office in Croatia, when the posting of those workers involves their hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, to an undertaking established in another Member State, with a view to that latter undertaking providing services in the first of those Member States.

The second question

39 By its second question, the referring court asks, in essence, whether Articles 56 and 57 TFEU must be interpreted as meaning that a Member State is entitled to require that third-country nationals, who are hired out by an undertaking established in another Member State to an undertaking also established in that Member State with a view to the provision of services in the first Member State, have work permits.

40 It is settled 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 to be a 'service' within the meaning of that provision (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 37).

41 As regards the dispute in the main proceedings, the service of hiring out manpower is provided by an undertaking established in Italy to a user undertaking also established in that Member State which, however, uses that manpower only in Austria with a view to carrying out its provision of services.

42 Since the provisions of Article 56 TFEU must apply to all cases where a service provider offers services in the territory of a Member State other than that in which it is established, wherever the recipients of those services may be established (see, to that effect, judgment of 26 February 1991, *Commission* v *France*, C-154/89, EU:C:1991:76, paragraph 10), it must be held that such a service of hiring out manpower between two undertakings established in the same Member State, where that service is provided in the territory of a Member State other than that in which the user undertaking is established, comes within the scope of Articles 56 and 57 TFEU.

43 The fact that the workers hired out are third-country nationals is, in that regard, irrelevant (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 39).

44 As regards the posting of workers who are third-country nationals by a service provider established in a Member State of the European Union, the Court has already held 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 (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 45).

45 That is the case, by virtue of the legislation at issue in the main proceedings, for the cross-border provision of services consisting in the hiring out, in Austria, of manpower from third countries.

46 However, where national legislation falling within an area which has not been harmonised at European Union 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 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 (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 48).

47 The matter relating to the posting of workers who are third-country nationals in the framework of the cross-border provision of services has so far not been harmonised at European Union level. That being so, it must be examined whether the restrictions on the freedom to provide services arising from the legislation at issue in the main proceedings 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 (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 49).

48 In that regard, it must be recalled that although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and posted to 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 to their country of origin or residence after the completion of their work (judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 51).

49 A Member State retaining on a permanent basis a requirement for a work permit for third-country nationals who are hired out to an undertaking operating in that Member State by an undertaking established in another Member State goes beyond what is necessary to achieve the objective consisting in preventing disturbances on the labour market (see, to that effect, judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 56).

50 In that regard, an obligation imposed on a service-providing undertaking to provide the Austrian authorities with information showing that the situation of the workers who are third-country nationals is lawful, inter alia in terms of residence, work permit and social coverage in the Member State in which that undertaking employs them, would give those authorities, in a less restrictive but just as effective a manner as the requirement for a work permit at issue in the main proceedings, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established (see, to that effect, judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 57).

51 Such an obligation might consist in a simple prior declaration which would enable the Austrian authorities to check the particulars provided and to take the necessary measures in the event that the situation of the workers concerned is unlawful. In addition, that obligation could take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out (see, to that effect, judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 58).

52 Similarly, a measure which would be just as effective and less restrictive than the requirement for a work permit at issue in the main proceedings would be an obligation imposed on a service-providing undertaking to report beforehand to the Austrian authorities the presence of one or more posted workers, the anticipated duration of their presence and the provision or provisions of services justifying the posting. It would enable those authorities to monitor compliance with Austrian social

legislation during the posting, while taking account of the obligations to which that undertaking is already subject under the social legislation applicable in the Member State of origin. Combined with the particulars provided by that undertaking relating to the situation of the workers concerned, referred to in paragraph 50 above, such an obligation would enable those authorities, where appropriate, to take the appropriate measures at the end of the expected period of posting (see, to that effect, judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 59).

53 In the light of the foregoing, the answer to the second question is that Articles 56 and 57 TFEU must be interpreted as meaning that a Member State is not entitled to require that third-country nationals, who are hired out by an undertaking established in another Member State to an undertaking also established in that Member State with a view to the provision of services in the first Member State, have work permits.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Articles 56 and 57 TFEU, together 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 the Treaty establishing the European Atomic Energy Community must be interpreted as meaning that a Member State is entitled to restrict, by the requirement of a work permit, the posting of Croatian workers who are employed by an undertaking which has its registered office in Croatia, when the posting of those workers involves their 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, to an undertaking established in another Member State, with a view to that latter undertaking providing services in the first of those Member States.**

2. **Articles 56 and 57 TFEU must be interpreted as meaning that a Member State is not entitled to require that third-country nationals, who are hired out by an undertaking established in another Member State to an undertaking also established in that Member State with a view to the provision of services in the first Member State, have work permits.**

[Signatures]