Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

20 June 2024*

(Reference for a preliminary ruling – Freedom to provide services – Articles 56 and 57 TFEU – Posting of third-country workers by an undertaking of one Member State to carry out works in another Member State – Duration exceeding 90 days in a 180-day period – Obligation for the posted third-country workers to be holders of residence permits in the host Member State in the event that services are provided for more than three months – Limitation of the period of validity of the residence permits issued – Amount of the fees relating to the application for a residence permit – Restriction on the freedom to provide services – Overriding reasons in the public interest – Proportionality)

In Case C-540/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands), made by decision of 11 August 2022, received at the Court on 11 August 2022, in the proceedings

SN and Others

v

Staatssecretaris van Justitie en Veiligheid,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, Z. Csehi, M. Ilešič, I. Jarukaitis and D. Gratsias, Judges,

Advocate General: A. Rantos,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2023,

after considering the observations submitted on behalf of:

– SN and Others, by B.J. Maes and D.O. Wernsing, advocaten,

– the Netherlands Government, by M.K. Bulterman, A. Hanje and J.M. Hoogveld, acting as Agents,

* Language of the case: Dutch.

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents,

– the Norwegian Government, by I. Collett, E. Eikeland and S. Hammersvik, acting as Agents,

– the European Commission, by L. Armati, A. Katsimerou, P.-J. Loewenthal and M. Mataija, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 57 TFEU.

2 The request has been made in proceedings between, on the one hand, SN and other third-country workers, who were made available to a Netherlands company by a Slovak company, and, on the other, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) ('the State Secretary') concerning the obligation for those workers to obtain Netherlands residence permits and the conditions for the grant of such a permit.

Legal context

European Union law

The CISA

3 The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1), and by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the CISA'), defines, in Article 1 thereof, the concept of 'alien' as 'any person other than a national of a Member State of the European Communities'.

4 Article 21(1) of that convention provides:

'Aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Member States, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [(OJ 2006 L 105, p. 1)] and are not on the national list of alerts of the Member State concerned.'

The Schengen Borders Code

5 Article 6 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1) ('the Schengen Borders Code'), entitled 'Entry conditions for third-country nationals', which replaced Article 5 of Regulation No 562/2006, provides, in paragraph 1 thereof:

'For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria:
   (i) its validity shall extend at least three months after the intended date of departure from the territory of the Member States. In a justified case of emergency, this obligation may be waived;
   (ii) it shall have been issued within the previous 10 years;

…

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

…

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.'

Directive 96/71/EC

6 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) states, in recital 20 thereof:

'Whereas this Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services; whereas this Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers'.

7 Article 1(1) of that directive provides:

'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.'

Regulation (EC) No 1030/2002

8 Article 1 of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157, p. 1) states:

'1. Residence permits issued by Member States to third-country nationals shall be drawn up in a uniform format and provide sufficient space for the information set out in the Annex hereto. … Each Member State may add in the relevant space of the uniform format information of importance regarding the nature of the permit and the legal status of the person concerned, in particular information as to whether or not the person is permitted to work.

2. For the purpose of this Regulation,

(a) "residence permit" shall mean any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally on its territory …'

9 Article 2(1) of that regulation provides:

'Additional technical specifications for the uniform format for residence permits … shall be established in accordance with the procedure referred to in Article 7(2)'

Regulation (EC) No 883/2004

10 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EU) No 465/2012 [of the European Parliament and of the Council of 22 May 2012] (OJ 2012 L 149, p. 4), provides, in Article 12(1) thereof:

'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he is not sent to replace another person.'

Directive 2004/38/EC

11 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) provides, in Article 3(1) thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

12 Article 9(1) of that directive provides:

'Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.'

Directive 2006/123/EC

13 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) provides, in Article 17 thereof, entitled 'Additional derogations from the freedom to provide services':

'Article 16 [giving concrete expression to the right of providers to provide services in a Member State other than that in which they are established] shall not apply to:

…

(9) as regards third-country nationals who move to another Member State in the context of the provision of a service, the possibility for Member States to require visa or residence permits for third-country nationals who are not covered by the mutual recognition regime provided for in Article 21 of [the CISA] or the possibility to oblige third-country nationals to report to the competent authorities of the Member State in which the service is provided on or after their entry;

…'

Directive 2009/52/EC

14 Recitals 1 to 3 of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L 168, p. 24) state:

'(1) The European Council meeting of 14 and 15 December 2006 agreed that cooperation among Member States should be strengthened in the fight against illegal immigration and in particular that measures against illegal employment should be intensified at Member State and EU level.

(2) A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal stay should therefore include measures to counter that pull factor.

(3) The centrepiece of such measures should be a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU, accompanied by sanctions against employers who infringe that prohibition.'

15 In accordance with point (b) of Article 2 of that directive, for the specific purposes of the directive, 'illegally staying third-country national' means 'a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State'.

16 Article 3(1) of Directive 2009/52 states:

'Member States shall prohibit the employment of illegally staying third-country nationals.'

Directive 2011/98/EU

17 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1) provides, in Article 1(1) thereof:

'This Directive lays down:

(a) a single application procedure for issuing a single permit for third-country nationals to reside for the purpose of work in the territory of a Member State, in order to simplify the procedures for their admission and to facilitate the control of their status …

…'

18 Article 3(2) of that directive states:

'This Directive shall not apply to third-country nationals:

…

(c) who are posted for as long as they are posted;

…'

19 Article 6 of Directive 2011/98, entitled 'Single permit', provides:

'1. Member States shall issue a single permit using the uniform format as laid down in [Regulation No 1030/2002] and shall indicate the information relating to the permission to work in accordance with point (a)7.5-9 of the Annex thereto.

Member States may indicate additional information related to the employment relationship of the third-country national (such as the name and address of the employer, place of work, type of work, working hours, remuneration) in paper format, or store such data in electronic format as referred to in Article 4 of [Regulation No 1030/2002] and in point (a)16 of the Annex thereto.

2. When issuing the single permit Member States shall not issue additional permits as proof of authorisation to access the labour market.'

20 Article 7 of that directive, entitled 'Residence permits issued for purposes other than work', provides:

'1. When issuing residence permits in accordance with [Regulation No 1030/2002] Member States shall indicate the information relating to the permission to work irrespective of the type of the permit.

Member States may indicate additional information related to the employment relationship of the third-country national (such as the name and address of the employer, place of work, type of work, working hours, remuneration) in paper format, or store such data in electronic format as referred to in Article 4 of [Regulation No 1030/2002] and point (a)16 of the Annex thereto.

2. When issuing residence permits in accordance with [Regulation No 1030/2002], Member States shall not issue additional permits as proof of authorisation to access the labour market.'

Directive 2003/109/EC

21 Article 3(2)(e) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) states:

'This Directive does not apply to third-country nationals who:

…

(e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited'.

Directive 2014/67/EU

22 Article 9 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2014 L 159, p. 11), entitled 'Administrative requirements and control measures', provides, in paragraphs 1 to 3 thereof:

'1. Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and [Directive 96/71], provided that these are justified and proportionate in accordance with Union law.

For these purposes Member States may in particular impose the following measures:

(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State, containing the relevant information necessary in order to allow factual controls at the workplace, including:
   (i) the identity of the service provider;
   (ii) the anticipated number of clearly identifiable posted workers;
   (iii) the persons referred to under points (e) and (f);
   (iv) the anticipated duration, envisaged beginning and end date of the posting;
   (v) the address(es) of the workplace; and
   (vi) the nature of the services justifying the posting;

(b) an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document within the meaning of Council Directive 91/533/EEC [of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32)],

including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;

(c) an obligation to deliver the documents referred to under point (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;

(d) an obligation to provide a translation of the documents referred to under point (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State;

(e) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be;

(f) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which the services are provided. That person may be different from the person referred to under point (e) and does not have to be present in the host Member State, but has to be available on a reasonable and justified request;

2. Member States may impose other administrative requirements and control measures, in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient to ensure effective monitoring of compliance with the obligations set out in [Directive 96/71] and this Directive, provided that these are justified and proportionate.

3. Nothing in this Article shall affect other obligations deriving from the Union legislation, including those deriving from Council Directive 89/391/EEC [of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)] and [Regulation No 883/2004], and/or those under national law regarding the protection or employment of workers provided that the latter are equally applicable to undertakings established in the Member State concerned and that they are justified and proportionate.'

Netherlands law

Law on the employment of foreign nationals

23 Article 2(1) of the Wet arbeid vreemdelingen (Law on the employment of foreign nationals) of 21 December 1994 (Stb. 1994, No 959) states:

'An employer shall be prohibited from having work performed in the Netherlands by a foreign national who does not hold a work permit or who does not hold a single permit to work for that employer.'

Decree implementing the Law on the employment of foreign nationals

24 The first paragraph of Article 1e of the Besluit uitvoering Wet arbeid vreemdelingen (Decree implementing the Law on the employment of foreign nationals), in the version applicable on the date of the facts in the main proceedings, provides:

'The prohibition laid down in Article 2(1) of the Law on the employment of foreign nationals shall not apply to a foreign national who, in the context of a cross-border provision of services, temporarily carries out work in the Netherlands for an employer established outside the Netherlands, in another Member State of the European Union, another State party to the Agreement on the European Economic Area or Switzerland, provided that:

a. the foreign national satisfies all the residence, work permit and social security conditions to carry out work as a salaried worker of the employer in the country in which the latter is established;

b. the foreign national carries out work similar to that which he is authorised to carry out in the country in which the employer is established;

c. the foreign national is merely the replacement for another foreign national who has carried out similar work where the total duration of the agreed provision of services is not exceeded; and

d. the employer actually pursues substantial activities …'

Law on employment conditions for posted workers in the European Union

25 Under Article 8(1) to (4) of the Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (Law on employment conditions for posted workers in the European Union) of 1 June 2016 (Stb. 2016, No 219) ('the WagwEU'):

'1. A service provider which posts a worker to the Netherlands shall be required to make a declaration concerning that posting, in writing or electronically, to [the Minister van Sociale Zaken en Werkgelegenheid (Minister for Social Affairs and Employment, Netherlands)] before the activity begins. The declaration by the service provider shall include:

a. its identity;

b. the identity of the recipient of the services and that of the posted worker;

c. the contact person referred to in Article 7;

d. the identity of the natural or legal person responsible for the payment of salaries;

e. the nature and anticipated duration of the activity;

f. the address of the place of work; and

g. the contributions to the applicable social security schemes.

2. Where a service provider posting a worker to the Netherlands provides, before the activity begins, a written or electronic copy of the declaration provided for in paragraph 1 to the recipient of the services, that declaration shall include, at least, information relating to its identity and to that of the posted worker, the address of the place of work and the nature and duration of the activity.

3. The recipient of the service shall verify whether the copy of the declaration referred to in paragraph 2 includes the information stated in that paragraph and shall notify [the Minister for Social Affairs and Employment], in writing or electronically, of any inaccuracy or of the non-receipt of the copy, no later than five working days after the activity begins.

4. Data processed by [the Minister for Social Affairs and Employment] under this Article shall be communicated to administrative and supervisory bodies in so far as those data are necessary for the performance of their duties relating to the transnational provision of services.'

Decree on employment conditions for posted workers in the European Union

26 Article 3(2) of the Besluit arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (Decree on employment conditions for posted workers in the European Union) is worded as follows:

'[The Minister for Social Affairs and Employment] is empowered and required to provide to the Immigratie- en Naturalisatiedienst [(Immigration and Naturalisation Service, Netherlands; 'the IND')], on request and free of charge, information relating to the service providers, service recipients, contact persons, persons responsible for the payment of salaries and posted workers which have been processed in connection with Article 8 of [the WagwEU], including their national ID number, in so far as that information is required for purposes connected with the implementation of the Vreemdelingenwet 2000 [(Law of 2000 on Foreign Nationals)].'

27 Under Article 11(3) of that decree, the service provider is to provide, in addition to the information stated in Article 8(1) of the WagwEU, the end date of the period of lawful employment.

Law of 2000 on Foreign Nationals

28 Article 14(1)(a) and (3) of the Law of 2000 on Foreign Nationals states:

'1. [The Minister van Justitie en Veiligheid (Minister for Justice and Security, Netherlands)] shall be authorised:

a. to approve, reject or indeed not to consider applications for the grant of fixed-term residence permits;

….

3. The grant of a fixed-term residence permit shall be subject to restrictions relating to the objective for which the residence is authorised. Further conditions relating to the permit can also be laid down. Rules relating to granting, amendment and renewal *ex officio*, restrictions and conditions may be laid down by or pursuant to a general administrative measure.'

Decree of 2000 on Foreign Nationals

29 Article 3.31a(1) of the Vreemdelingenbesluit 2000 (Decree of 2000 on Foreign Nationals) of 23 November 2000 (Stb. 2000, No 497), in the version applicable to the dispute in the main proceedings, is worded as follows:

'An ordinary fixed-term residence permit may be issued subject to a restriction linked to the activity carried out in the context of the cross-border provision of services laid down in Article 4.6 of the Besluit uitvoering Wet arbeid vreemdelingen 2022 [(Decree of 2022 implementing the Law on Foreign Nationals)] if the declaration referred to in Article 8 of [the WagwEU] has been made, providing the information required in that article and in Article 11(3) of [the Decree on employment conditions for posted workers in the European Union].'

30 Under Article 3.4(1)(i) of the Decree of 2000 on Foreign Nationals, in the version applicable to the dispute in the main proceedings:

'The restrictions referred to in Article 14(3) of the [Law of 2000 on Foreign Nationals] are linked to:

…

i. the cross-border provision of services.'

31 Under Article 3.58(1)(i) of that decree and Part B5/3.1 of the Vreemdelingencirculaire 2000 (Circular of 2000 on Foreign Nationals) of 2 March 2001 (Stcrt. 2001, No 64), in the version applicable at the time of the facts in the main proceedings, the IND is to issue the residence permit for a cross-border provision of services for a period of validity equal to the duration of the activity referred to in the second paragraph of Article 1e of the Decree implementing the Law on the employment of foreign nationals, in the version applicable at the time of the facts in the main proceedings. That period may not exceed two years.

Regulation of 2000 on Foreign Nationals

32 Article 3.34 of the Voorschrift Vreemdelingen 2000 (Regulation of 2000 on Foreign Nationals) of 18 December 2000 (Stcrt. 2001, No 10) states that a foreign national who does not hold a valid temporary residence permit for the objective specified in the application for residence is to be liable to fees in connection with the processing of an application for the grant, amendment or renewal of a residence permit for the cross-border provision of services.

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

33 The applicants in the main proceedings, who are Ukrainian nationals, are holders of temporary residence permits issued by the Slovak authorities and valid until 21 November 2020 inclusive. They work for ROBI spol s.r.o., a company governed by Slovak law, which posted them to Ivens NV, a company governed by Netherlands law, in order to carry out work in the port of Rotterdam (Netherlands).

34 To that end, on 4 December 2019 ROBI declared the nature of the activity for which the applicants were posted and the duration of that activity – initially scheduled from 6 December 2019 to 4 March 2020 – to the competent Netherlands authorities. By declaration of 28 February 2020, ROBI informed those authorities that that activity was being extended until 31 December 2021.

35 In so far as the anticipated duration of that activity exceeded the duration of the right of circulation – 90 days in a 180-day period – enjoyed by a foreign national who holds a residence permit issued by a Member State under Article 21(1) of the CISA, on 6 March 2020 ROBI applied to the Netherlands authorities, in the name and on behalf of each of the applicants in the main proceedings, for the issue of an ordinary fixed-term residence permit. Processing each of those applications entailed the payment of fees the amount of which was, depending on the individual situation of each of those applicants, EUR 290 or EUR 320.

36 The IND, acting in the name of the State Secretary, issued the residence permits applied for. The period of validity of those residence permits was, however, limited to the period of validity of the Slovak temporary residence permits issued to the applicants in the main proceedings, that is to say, a period shorter than the duration of the activity for which those applicants were to be posted to the Netherlands.

37 On a date not specified by the referring court, the applicants in the main proceedings lodged objections to each of the decisions granting them residence permits. When lodging those objections, they challenged both the obligation to obtain a residence permit for the cross-border provision of services and the period of validity of the residence permits issued and the fees payable for the processing of the applications for those permits.

38 Following the examination of those objections on 16 March 2021 by the administrative hearings board of the IND, the State Secretary, by decisions of 7 April 2021, dismissed the objections as unfounded.

39 On 7 May 2021, ROBI lodged new applications with the Netherlands authorities for residence permits in the name and on behalf of some of the applicants in the main proceedings, in support of which it relied on the fact that new residence permits, valid until 31 March 2022, had been granted to those applicants by the Slovak authorities.

40 The IND, acting in the name of the State Secretary, granted those applications and issued the applicants concerned with residence permits valid until the end date of the activity declared by ROBI to the Netherlands authorities, namely 31 December 2021.

41 In addition, on 20 May 2022, ROBI again lodged applications for residence permits for some of those applicants with a view to assigning them to another activity in the Netherlands.

42 At the same time, the applicants in the main proceedings brought an action before the referring court for annulment of the decisions of 7 April 2021, on the ground of infringement of Articles 56 and 57 TFEU.

43 Before that court, the applicants in the main proceedings challenge the obligation, in the context of a cross-border supply of services, for a third-country worker employed by a service provider established in a Member State to hold, in addition to a residence permit in that Member State, a residence permit in the Member State in which the supply is carried out after the expiry of the 90-day period referred to in Article 21(1) of the CISA. They maintain that such an obligation

duplicates the declaration procedure preceding the cross-border provision of services. They submit that the fact that the period of validity of the residence permits which have been issued to them by the Netherlands authorities is limited to the period of validity of their Slovak residence permits and to a maximum of two years constitutes an unjustified restriction on the freedom to provide services guaranteed by Articles 56 and 57 TFEU. Lastly, they argue that the amount of the fees to which applications for the grant of residence permits in the Netherlands are subject is not consistent with EU law, in so far as that amount is higher than the amount claimed for certificates of lawful residence issued to citizens of the Union. The State Secretary disputes all the arguments relied on by the applicants in the main proceedings.

44 In that context, the referring court emphasises that, in the case which gave rise to the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraphs 31 and 32), the European Commission had argued that, within the framework of the freedom to provide services, each service provider transfers to its employees the 'derived right' to receive a residence permit for the period needed for the provision, that the decision relating to the right of residence was purely formal in character and that that right should be recognised automatically. However, the Court of Justice found, in that case, that the Republic of Austria had failed to fulfil its obligations under Article 49 EC, now Article 56 TFEU. Therefore, the referring court questions whether the right to the freedom to provide services, as laid down in Articles 56 and 57 TFEU, confers a 'derived right of residence' on workers posted in the context of a cross-border supply of services.

45 In any event, the referring court questions whether the obligation, derived from Article 56 TFEU, to remove any restriction on the freedom to provide services precludes the possibility of requiring third-country workers who are employees of a service provider established in a Member State to hold individual residence permits in order to be posted to another Member State when, as in the present case, national legislation already requires the posting of third-country workers by an employer established in another Member State to be the subject of a declaration containing the same information as is necessary for the grant of a residence permit in the host Member State. Although the requirement for a residence permit does not apply until the expiry of a 90-day period, the fact remains that such a requirement could be considered the equivalent of a prior authorisation; a procedure which may constitute a restriction on the freedom to provide services.

46 Lastly, assuming that such a residence permit may be required, the referring court questions whether, first, the period of validity of that permit may be limited by the Netherlands legislation to the period of validity of the work and residence permit in the Member State in which the service provider is established, while not being able to exceed a maximum duration of two years, and, second, whether the person applying for that residence permit may be required to pay fees the amount of which is five times higher than the amount of the fees payable for the issuing, to a citizen of the Union, of a certificate of lawful residence.

47 In those circumstances the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the free movement of services guaranteed by Articles 56 and 57 TFEU include a right derived therefrom of residence in a Member State for third-country workers who may be employed in that Member State by a service provider established in another Member State?

(2) If not, where the duration of the provision of services exceeds three months, does Article 56 TFEU preclude an application having to be made for a residence permit for each individual worker in addition to a simple obligation to declare on the part of the service provider?

(3) If not, does Article 56 TFEU preclude:
(a) a provision of national law [stating] that the period of validity of such a residence permit may not exceed two years, irrespective of the duration of the provision of services?
(b) the limitation of the period of validity of such a residence permit to the period of validity of the work and residence permit in the Member State in which the service provider is established?
(c) charging a fee per (renewal) application which is equal to the fee payable for a regular work permit for a third-country national, but five times higher than the fee payable for proof of lawful residence for a Union citizen?'

The first question

48 By its first question, the referring court asks, in essence, whether the freedom to provide services, guaranteed by Articles 56 and 57 TFEU, is to be interpreted as meaning that third-country workers who are posted to a Member State by a service provider established in another Member State must automatically be recognised as having a 'derived right of residence'.

49 In that regard, it is apparent from the request for a preliminary ruling that the referring court is using the concept of 'derived right of residence' by reference to a right of residence of posted third-country workers which would be created by their employer exercising its right to the freedom to provide services and the existence of which was relied on by the Commission in the case which gave rise to the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595).

50 However, while, in that judgment, the Court of Justice upheld the action for a failure to fulfil obligations brought by the Commission, it did not enshrine the existence of such a right of residence. Indeed, in order to find that the Member State concerned had failed to fulfil its obligations under the right to the freedom to provide services, the Court noted – adopting its usual approach – that, first, certain aspects of the legislation at issue gave rise to restrictions on the freedom to provide services and, second, that those restrictions went beyond what was necessary to achieve the objectives of general interest relied on by that Member State.

51 It is true that, as is emphasised by the Advocate General in point 35 of his Opinion, the concept of 'derived right of residence' refers, more generally, to the case-law of the Court according to which, regarding citizenship, third-country nationals who are family members of a citizen of the Union and who are not eligible, on the basis of Directive 2004/38, for a right of residence in the Member State of which that citizen is a national may, in certain cases, be accorded a 'derived right' on the basis of Article 21(1) TFEU (see, to that effect, judgments of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 23, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 27 and the case-law cited).

52 However, it should be borne in mind that such a solution is based on the consideration that, if no derived right of residence were granted to that third-country national, the citizen of the Union would be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is

uncertain whether he will be able to continue in his Member State of origin the family life which he has created or strengthened, with that third-country national, in the host Member State, during a genuine residence (see, to that effect, judgment of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 28 and the case-law cited).

53 It follows that the basis of the derived right of residence referred to in that case-law is the right, enshrined in Article 21(1) TFEU, of a natural person who is a citizen of the Union to move and reside freely within the territory of the Member States. However, as is noted by the Advocate General in point 36 of his Opinion, that right does not concern undertakings, which may rely on the freedom of establishment or the freedom to provide services enshrined in Articles 49 and 56 TFEU respectively.

54 In addition, as is emphasised, in essence, by the Advocate General in point 37 of his Opinion, the relationship between first-degree members of the same family or between persons who have created or strengthened similar relations, all of whom benefit from the fundamental right to respect for private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, is not comparable to the relationship between an undertaking and its employees. Accordingly, it cannot be deduced, even by analogy, from the case-law referred to in paragraph 51 of the present judgment that, in a situation such as that at issue in the main proceedings, every third-country worker who is sent by an undertaking to another Member State in order to provide services in that undertaking's name in that State must automatically be recognised as having a right of residence in that Member State for the duration of that provision.

55 Having regard to all of the foregoing, the answer to the first question is that Articles 56 and 57 TFEU must be interpreted as meaning that third-country workers who are posted to a Member State by a service provider established in another Member State must not automatically be recognised as having a 'derived right of residence', either in the Member State where they are employed or in the Member State to which they are posted.

The second question

56 By its second question, the referring court asks, in essence, whether Article 56 TFEU is to be interpreted as precluding a piece of legislation of a Member State which provides that, where an undertaking established in another Member State carries out, in that first Member State, a supply of services the duration of which exceeds three months, that undertaking is obliged not only to declare the supply of services to the authorities of that first Member State, but also to obtain a residence permit for each third-country worker which it intends to post to that Member State.

57 It should be recalled at the outset that, as is apparent from the answer to the first question, the exercise, by an employer established in one Member State, of its right to the freedom to provide services does not give rise, for the third-country workers posted by that employer to another Member State for that purpose, to a right, specific to them, to stay in the territory of that Member State. Consequently, it is necessary to examine that second question taking into account only the effects which a piece of legislation, such as that at issue in the main proceedings, is likely to have on the right to the freedom to provide services enjoyed by that employer.

58 In addition, although, in its question, the referring court has made reference not only to the obligation, for the service provider, to apply, in respect of each worker it intends to post, for a residence permit, but also to an obligation, on the part of the undertaking concerned, to declare the supply of services, it is apparent from the request for a preliminary ruling that the referring court's doubts concern the compatibility with Article 56 TFEU not of that second obligation, taken in isolation, but of the obligation to obtain a residence permit in so far as that obligation is combined with the obligation to declare the supply of services.

59 In that regard, it should be borne in mind that the freedom to provide services guaranteed by Articles 56 and 57 TFEU, like the other freedoms of movement, applies only to matters which have not been the subject of exhaustive harmonisation (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 57 and the case-law cited). Accordingly, in order to answer the question put by the referring court, it is necessary to begin by examining whether a piece of legislation such as that referred to by the referring court in its question relates to a matter which has been the subject of exhaustive harmonisation or, at least, to an aspect of a matter which has been the subject of such harmonisation.

60 In the present case, the piece of national legislation at issue in the main proceedings concerns the right of residence of employees who are third-country nationals and who are legally employed in one Member State but are posted to another Member State in order to carry out a supply of services. Therefore, inasmuch as it is addressed to employees posted to the territory of another Member State, that piece of legislation is capable of falling within the scope of Directive 96/71 and Directive 2006/123 and, inasmuch as it concerns the right of residence of third-country nationals, the scope of Regulation No 1030/2002, Directive 2003/109 and the CISA.

61 However, regarding, first of all, Directive 96/71, although that directive is capable of applying to posted third-country workers in respect of the rights provided for therein, the fact remains that, according to recital 20 thereof, that directive is without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

62 Next, as regards Directive 2006/123, it is true that, according to settled case-law, where a supply of services falls within the scope of that directive, there is no need to examine the national measure in question in the light of Article 56 TFEU (see, to that effect, judgment of 21 December 2023, *AUTOTECHNICA FLEET SERVICES*, C-278/22, EU:C:2023:1026, paragraph 55). However, it follows from Article 17(9) of Directive 2006/123 that that directive does not apply to third-country nationals who move to another Member State in the context of the provision of a service.

63 Furthermore, although Regulation No 1030/2002 has introduced a uniform format for residence permits for third-country nationals, it is apparent from the wording of Article 1(2)(a) of that regulation that permits thus issued by a Member State are valid only on the territory of that Member State.

64 Similarly, Article 3(2)(e) of Directive 2003/109 expressly states that that directive is not addressed to third-country nationals who reside solely on temporary grounds such as workers posted by a service provider for the purposes of cross-border provision of services.

65 Lastly, as regards Article 21(1) of the CISA, it provides that a foreign national who holds a valid residence permit issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the

other Member States, provided that that foreign national fulfils the entry conditions referred to in Article 6(1)(a), (c) and (e) of the Schengen Borders Code and is not on the national list of alerts of the Member State concerned. By contrast, stays of more than 90 days in a 180-day period continue to fall solely within the competence of the Member States (see, to that effect, judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraphs 44 and 51).

66 It follows that the entry to, and residence in, the territory of a Member State by third-country nationals in connection with a posting by a service provider established in another Member State is a matter which has not been the subject of harmonisation at EU law level, and that, accordingly, a piece of legislation such as that at issue in the main proceedings is capable of being assessed in the light of the provisions of Article 56 TFEU (see, by analogy, judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraphs 59 and 60).

67 Under Article 56 TFEU, restrictions on freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. In particular, national legislation which entails additional administrative or economic burdens or which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see, to that effect, judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraphs 135 and 136 and the case-law cited), and which, on that basis, is likely to render less attractive the activities of service providers established in other Member States where they lawfully supply their services, constitutes such a restriction.

68 By contrast, according to Article 57 TFEU, the right to the freedom to provide services gives rise to the right, for the person providing a service, in order to do so, to temporarily pursue its activity in the Member State where the service is provided under the same conditions as are imposed by that State on its own nationals. As a result, measures which affect in the same way the provision of services between Member States and the provision of services within one Member State and the only effect of which is to increase the cost of the provision in question irrespective of the person providing the service are not, in principle, covered by the concept of restriction (see, to that effect, judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 137 and the case-law cited).

69 That being said, in order not to deprive Article 56 TFEU of its effectiveness, the legislation of a Member State applicable to service providers established in that Member State cannot be similarly applied in its entirety to cross-border activities (see, to that effect, judgments of 17 December 1981, *Webb*, 279/80, EU:C:1981:314, paragraph 16; of 25 July 1991, *Säger*, C-76/90, EU:C:1991:331, paragraph 13; and of 24 January 2002, *Portugaia Construções*, C-164/99, EU:C:2002:40, paragraph 17).

70 Consequently, measures affecting the provision of services in the territory of a Member State which, although they apply without distinction, do not take into account the requirements to which the activities of service providers established in another Member State, where they lawfully provide similar services, are already subject in that State, and which, on that basis, are such as to prohibit, impede or render less attractive the activities of those service providers in that territory, must be regarded as constituting restrictions on the freedom to provide services within the Union.

71 In the present case, it is true that the piece of legislation at issue, which affects the provision of services in the national territory, must be regarded as applying without distinction given that it makes not only service providers established in another Member State, but also those established in the national territory, subject to the obligation to ensure that the third-country workers which they employ hold residence permits.

72 However, the fact remains that, where the duration of the provision of services performed by the undertakings established in another Member State exceeds three months, that piece of legislation requires those undertakings to meet formal requirements in addition to those to which, pursuant to Directive 2009/52, they are already made subject by the Member State in which they are established, in order that they may employ, for the purposes of their activity, third-country nationals.

73 Having, thus, the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, such a piece of legislation must be regarded as introducing a restriction on the freedom to provide services for the purposes of Articles 56 and 57 TFEU, even if service providers established in the national territory would also be obliged to apply for residence permits in order to employ third-country workers for the purpose of carrying out a similar supply of services in that territory.

74 According to settled case-law, a piece of national legislation which applies without distinction may, despite the restrictive effect produced thereby in respect of the freedom to provide services, be justified if it pursues an overriding reason in the public interest (see, to that effect, judgment of 24 January 2002, *Portugaia Construções*, C-164/99, EU:C:2002:40, paragraph 19).

75 Such a justification cannot, however, be accepted unless the interest which the piece of legislation in question seeks to protect is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established (judgments of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 48; of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 100; and of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 46).

76 In addition, in accordance with the principle of proportionality, that piece of legislation must be appropriate for attaining the objective which it pursues, which means that it must genuinely reflect a concern to attain that objective in a consistent and systematic manner (judgment of 14 November 2018, *Memoria and Dall'Antonia*, C-342/17, EU:C:2018:906, paragraph 52), and must not go beyond what is necessary in order to attain that objective (judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 37).

77 In the present case, it is apparent from the file before the Court that four grounds have been highlighted by the Netherlands Government, which relate to (i) the need to protect access to the national labour market, (ii) the need to verify whether a service provider established in a Member State other than that in which the supply is carried out is using the freedom to provide services for a purpose other than that of performing that supply, (iii) respect for the right of the posted workers to legal certainty, inasmuch as the grant to those workers of a residence document would enable them to prove that they are not staying illegally on the territory of the Member State to which they are posted, and (iv) the need to check that the posted worker does not represent a threat to public policy.

78 As regards, in the first place, the protection of access to the national labour market, the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest (see, to that effect, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 48 and the case-law cited), provided that that desire is expressed with regard not to workers of the Member States, who enjoy, pursuant to Article 45(3)(c) TFEU, the right – subject to limitations justified on grounds of public policy, public security or public health – to stay in another Member State for the purpose of employment, but to third-country workers.

79 However, it should be noted that a piece of national legislation which applies not only with regard to third-country nationals who are posted, on a temporary basis, in order to perform, in the context of the placement of workers or of making workers available, the tasks with which they are entrusted under the supervision and authority of an undertaking based in the host Member State, but also, as in the case in the main proceedings, with regard to third-country nationals who are posted by a service provider undertaking established in another Member State with a view to their carrying out, under the supervision and authority of that undertaking, a supply of services other than the loan of manpower, cannot, in any event, be regarded as pursuing such an objective in a consistent manner.

80 Indeed, although the workers concerned by a placement or by a making available of manpower are active on the labour market of the Member State where they are posted for that purpose, workers who are posted in order to carry out, under the supervision and authority of their employer, a service other than the loan of manpower do not purport to gain access to that market, because the tasks they perform are carried out under the supervision and authority of their employer and they return to their country of origin or residence after the completion of their work (see, to that effect, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 48 and the case-law cited).

81 In those circumstances, the restriction on the freedom to provide services noted in paragraph 73 of the present judgment cannot be justified by the overriding reason in the public interest of avoiding disturbances on the labour market.

82 As regards, in the second place, the need to verify whether undertakings established in a Member State other than that in which they supply their services are using the freedom to provide services for a purpose other than that of performing that supply, the Court has already conceded that a Member State may check whether such undertakings are availing themselves of the freedom to provide services for a purpose other than the accomplishment of the service in question, for instance, that of bringing their workers for the purpose of placing them or making them available to others (judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 56), even though freedom of movement for workers, as guaranteed in Article 45 TFEU, applies only with regard to workers of the Member States.

83 However, the national legislation at issue in the main proceedings already requires service providers established in another Member State to declare the provision of services to the national authorities and, at that time, as is apparent from the file before the Court, to declare the identity of the workers they intend to post, as well as the nature and the duration of the activity. Such a requirement, which, if needed, could be combined with the obligation to provide other information, provided that, in accordance with Article 9(1) of Directive 2014/67, this is justified and proportionate, already offers those authorities guarantees as regards the lawfulness of the presence, on their territory, of workers who are posted there and, accordingly, of the exercise by

the undertakings concerned of their right to the freedom to provide services, in a way that is less restrictive than, and just as effective as, a requirement for a residence permit (see, by analogy, judgments of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 52, and of 14 November 2018, *Danieli & C. Officine Meccaniche and Others*, C-18/17, EU:C:2018:904, paragraph 50).

84 Consequently, the restriction on the freedom to provide services noted in paragraph 73 of the present judgment also cannot be justified by the overriding reason in the public interest consisting of verifying whether undertakings established in a Member State other than that in which they supply their services are using the freedom to provide services for a purpose other than that of performing that supply.

85 As regards, in the third place, ensuring that posted workers have legal certainty by enabling them more easily to establish that they are posted lawfully in the territory of the Member State in which the service is being provided and, accordingly, that they are staying there legally, it must be conceded that such an objective constitutes an overriding reason in the public interest (see, to that effect, judgment of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraphs 47 to 49).

86 It should also be noted, regarding the proportionality of such a measure, that obliging service providers established in a Member State other than that in which they supply their services to apply for a residence permit for each third-country worker that those service providers intend to post, in order that those workers may physically have a secure document, constitutes a measure appropriate for attaining the objectives of increasing legal certainty for posted workers. That permit, which must be drawn up, pursuant to Article 1(1) and Article 2(1) of Regulation No 1030/2002, in line with the uniform format provided for by that regulation and the additional technical specifications established in accordance with the procedure provided for by that regulation, ensures recognition by the public authorities of the right of a foreign national who has attained the age of majority to reside in the national territory and proves that posted workers have a right of residence in the host Member State.

87 It is true that those workers already have, in principle, a single permit within the meaning of Directive 2011/98, issued in the uniform format provided for by Regulation No 1030/2002, which includes, in accordance with Article 6(1) of that directive, information concerning the permission to work from which they benefit in the Member State where their employer is established. Failing that, they have a residence permit issued for purposes other than work, provided for in Article 7(1) of that directive, issued pursuant to Regulation No 1030/2002, in which reference is made to the fact that they are permitted to work in the Member State where their employer is established. It follows from Article 2 of that regulation that documents issued in the uniform format provided for by that regulation meet enhanced anti-forgery, counterfeiting and falsification standards.

88 However, given that the EU legislature has expressly provided, in Article 3(2)(c) of Directive 2011/98, that that directive does not apply to third-country nationals who are posted for as long as they are posted and, in Article 1(2) of Regulation No 1030/2002, that residence permits issued pursuant to that regulation are valid only in respect of the territory of the Member State which issued them, the other Member States cannot be criticised for requiring a posted third-country worker to obtain a secure document issued by their own services. Moreover, the fact that a third-country worker has a residence permit and permission to work in one Member State does not necessarily mean that that worker may stay in another Member State, even though he has

been posted there for the purposes of a supply of services, as that other Member State may make that posting subject to meeting certain requirements, so long as the conditions recalled in paragraphs 74 to 76 of the present judgment are satisfied.

89 In addition, the legislation at issue in the main proceedings does not appear to go beyond what is necessary for the purpose of attaining the objective identified in paragraph 85 of the present judgment. According to the statements made by the referring court, that legislation merely requires service providers, for the purpose of obtaining residence permits for third-country workers that they intend to post for more than three months, to have previously declared the supply of services in question to the competent authorities and to have communicated to those authorities the residence permits which those workers have in the Member State where they are established, as well as their employment contracts.

90 The obligation to declare the supply of services beforehand is among the obligations compliance with which may be required by a Member State where a service provider intends to exercise its right to the freedom to provide services, while the obligation to communicate the residence permits and employment contracts of posted workers is necessary for the purpose of verifying whether the workers concerned can be regarded as being posted lawfully and, on that basis, as participating in the supply of services in question.

91 In particular, the Court has already had occasion to rule that a Member State may require service providers based in another Member State to declare to that first Member State the supplies of services which they intend to carry out in its territory and to provide it, at that time, with the documents needed to verify that the situation of the workers they intend to post at that time is lawful, in particular with regard to the conditions of residence, authorisation to work and social security cover, in the Member State where the undertaking concerned employs those workers (see, to that effect, judgment of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraphs 40 and 41 and the case-law cited).

92 Accordingly, a piece of national legislation, such as that at issue in the main proceedings, may be justified by the objective of increasing legal certainty for posted workers and of facilitating administrative checks and must be regarded, in view of the conditions for granting residence permits as described by the referring court, as being proportionate.

93 As regards, in the fourth place, the justification based on the need to check that the worker concerned does not represent a threat to public policy, first, it can be noted that Article 52(1) TFEU, to which Article 62 TFEU refers, makes express reference to the protection of public policy as a ground capable of justifying a restriction on the freedom to provide services.

94 It is true that, according to settled case-law, grounds of public policy may not be relied on against a person unless there is a genuine and sufficiently serious threat to a fundamental interest of society and, moreover, those grounds must not serve purely economic ends (see, by analogy, judgment of 2 March 2023, *PrivatBank and Others*, C-78/21, EU:C:2023:137, paragraph 62).

95 However, the fact remains that it must be possible for Member States to carry out such checks. Accordingly, the objective consisting in the need to check that the worker concerned does not represent a threat to public policy must be regarded as capable of justifying a restriction on the freedom to provide services.

96 As regards whether a measure consisting of obliging an undertaking established in another Member State to apply for and obtain a residence permit for each third-country worker that it intends to post to the host Member State for the purpose of carrying out a supply of services the duration of which is longer than three months is consistent with the principle of proportionality, not only does such an obligation appear appropriate for attaining that objective, it cannot be regarded as going beyond what is necessary for that purpose, provided that it entails refusing residence only to persons who represent a genuine and sufficiently serious threat to one of the fundamental interests of society (see, to that effect, judgments of 21 January 2010, *Commission* v *Germany*, C-546/07, EU:C:2010:25, paragraph 49, and of 14 February 2019, *Milivojević*, C-630/17, EU:C:2019:123, paragraph 67).

97 That interpretation is not undermined either by the possible existence of similar requirements in the Member State where the service provider is established or by the possibility, emphasised in the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraph 66), to check that there is no threat to public policy on the basis of the information obtained during the declaration procedure.

98 It is true that the grant of residence permits to third-country nationals may already have been subject, in the Member State in which the undertaking which intends to post them is established, to a check that there is no risk of a threat to public policy. However, as the assessment of the threat which a person may represent for public policy may vary from one country to another and from one moment to another (see, to that effect, judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 34), the fact that such a check exists cannot render irrelevant the carrying out, by the Member State in which the supply of services is to be carried out, of a check that the stay of the person concerned in its territory does not give rise to a risk of a threat to its own public policy, even though, pursuant to Article 21(1) of the CISA, such a check takes place only after a three-month period.

99 As regards the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraph 66), it is true that, at the time of that judgment, the Court held that the protection of public policy cannot justify a rule making it impossible to regularise the situation of posted third-country workers who have entered the territory of the host Member State unlawfully, because, from the information provided in the declaration prior to the posting, it is already possible for the competent national authorities to take, in each case, the necessary measures should it become apparent that a third-country worker in respect of whom posting is envisaged represents a threat to public policy or public security before that worker arrives in the national territory.

100 However, in that judgment, the Court did not find that the requirement for the posted worker to have a residence permit issued by the host Member State was, in itself, contrary to EU law. Indeed, such a requirement, inasmuch as it may enable a Member State to gather or verify information which could not be gathered or verified during the declaration procedure, retains a specific interest in the light of the objective of preventing risks of threats to public policy, which is intended, inter alia, to fulfil various positive obligations incumbent on the public authorities and likely to result from the rights guaranteed by the Charter of Fundamental Rights of the European Union.

101 In particular, unlike the declaration procedure, which is based on checks based on information received or already possessed, the residence permit procedure, inasmuch as it requires the person concerned to report to the premises of a competent authority in person, may enable the identity of that person to be verified in detail, which, in the sphere of combating risks of threats to public policy, is of particular importance.

102 Consequently, it must be held that the objective of protecting public policy is capable of justifying a Member State requiring service providers who are established in another Member State and who wish to post third-country workers to obtain – after a three-month period of residence in the first Member State – a residence permit for each of those workers, and of justifying that first Member State, at that time, making the issuing of such a permit subject to verifying that the person concerned does not represent a threat to public policy or public security, provided that the checks carried out to that end could not be reliably carried out on the basis of the information the communication of which is required or could have reasonably have been required by that Member State during the declaration procedure, which it is for the referring court to verify.

103 Having regard to all of the foregoing, the answer to the second question is that Article 56 TFEU must be interpreted as not precluding a piece of legislation of a Member State which provides that, where an undertaking established in another Member State carries out, in that first Member State, a supply of services the duration of which exceeds three months, that undertaking is obliged to obtain in the host Member State a residence permit for each third-country worker which it intends to post to that first Member State, and which provides that, in order to obtain that permit, that undertaking is to declare beforehand the supply of services in respect of which those workers are to be posted and is to communicate to the authorities of the host Member State the residence permits which those workers hold in the Member State where it is established, as well as their employment contracts.

The third question

Admissibility

104 The Netherlands Government notes that, in the case at issue in the main proceedings, the service provider obtained residence permits which were valid until the end date of the supply of services at issue, namely 31 December 2021. Accordingly, that government questions the extent to which the referring court genuinely needs an answer to the third question in order to decide the dispute at issue in the main proceedings.

105 In that regard, it should be borne in mind that, according to settled case-law, in the context of the procedure referred to in Article 267 TFEU, which is based on a clear separation of functions between national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which that dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgments of 7 August 2018, *Banco Santander and Escobedo Cortés*, C-96/16 and C-94/17, EU:C:2018:643, paragraph 50, and of 24 November 2022, *Varhoven administrativen sad (Repeal of the disputed provision)*, C-289/21, EU:C:2022:920, paragraph 24).

106 It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases (see, to that effect, judgment of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 30). Thus, the Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paragraph 62).

107 In the present case, it must be noted at the outset that the doubts expressed by the Netherlands Government concern only the relevance, for the purpose of deciding the dispute in the main proceedings, of one of the characteristics of the piece of legislation envisaged by the referring court in its question, which relates to the fact that the period of validity of residence permits may not exceed two years.

108 In that regard, it is true that the IND, acting in the name of the State Secretary, issued the applicants in the main proceedings concerned with residence permits which were valid until the end date of the activity in question as declared to the competent authorities, namely 31 December 2021. That being said, it is common ground that the applicants in the main proceedings are challenging the duration of their residence permits. In addition to the fact that it is not for the Court to give a ruling on the conditions for admissibility of such actions under Netherlands law, it is apparent from the case file that their employer then had to carry out another supply of services in the Netherlands and that, to that end, new applications for permits had to be lodged, in respect of which administrative fees were once again requested.

109 Given that, if the applicants in the main proceedings had obtained residence permits with a longer duration, it cannot be excluded that the payment of such fees could have been avoided, it is not quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or to its purpose or that the problem is hypothetical.

110 As the Court also has before it all the factual and legal material necessary to give a useful answer to the question submitted to it, it must be held that the third question is admissible in its entirety.

Substance

111 By its third question, the referring court asks, in essence, whether Article 56 TFEU precludes a piece of national legislation of a Member State pursuant to which (i) the period of validity of the residence permit which may be granted to a third-country worker posted to that Member State may not, in any event, exceed a period determined by the piece of national legislation in question, which may thus be shorter than the period needed to perform the service for which that worker is posted, (ii) the period of validity of that residence permit is limited to the period of validity of the work and residence permit held by the person concerned in the Member State in which the service provider is established, and (iii) the issuing of the residence permit requires the payment of fees in an amount greater than the amount of the fees payable for the issuing of a certificate of lawful residence to a Union citizen.

112 In that regard, concerning, first of all, the fact that the period of validity of the residence permits which may be granted may not exceed a period fixed by the piece of national legislation in question, it is apparent from the case-law of the Court that ‘services’ within the meaning of the FEU Treaty may cover services varying widely in nature, including services which an economic

operator established in one Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States (judgment of 2 September 2021, *Institut des Experts en Automobiles*, C-502/20, EU:C:2021:678, paragraph 35 and the case-law cited). Accordingly, it cannot be excluded that the supply of services in one Member State, carried out by a provider established in another Member State with staff posted from that other Member State, may continue beyond the maximum period of validity provided for by national legislation which may be assigned to a residence permit.

113 That being said, the fact remains that, in order to be covered by the freedom to provide services guaranteed in Article 56 TFEU, the service provider who moves staff under the freedom to provide services may do so only on a temporary basis (judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 36 and the case-law cited) and that, consequently, Member States must be able to assign a period of validity to the residence permits which they grant to third-country workers posted to their territory.

114 It is true that Article 9(1) of Directive 2014/67 provides that Member States may require service providers established in another Member State to declare the supply of services to the national authorities and, at that time, to declare the identity of the workers they intend to post, as well as the nature and duration of the activity. Accordingly, that provision offers those authorities, at the time of that declaration, the possibility of assessing the tasks to be performed during that posting and the time needed to complete them.

115 However, even where a Member State has availed itself of that possibility, the fact of providing that the period of validity of the residence permits granted may not, in any event, exceed a certain duration, which is determined by the piece of national legislation in question, does not in itself appear to be contrary to EU law, even if that period may thus be shorter than the period needed to carry out the service for which those workers are posted. Indeed, it is settled case-law that a national measure the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and indirect for it to be regarded as being capable of hindering that freedom, does not contravene the prohibition laid down in Article 56 TFEU (judgment of 27 October 2022, *Instituto do Cinema e do Audiovisual*, C-411/21, EU:C:2022:836, paragraph 29).

116 The fact of providing that the period of validity of permits granted by the host Member State may not, in any event, exceed a certain duration is not intended to regulate the conditions for exercising the right of undertakings established in another Member State to the freedom to provide services, as such a limit is also applicable to the undertakings of that Member State who employ third-country nationals, and is not such as to prohibit, impede, or render less attractive the exercise, by the employer, of its right to the freedom to provide services in a way that is sufficiently certain and direct unless that initial period of validity is manifestly too short to meet the needs of the majority of service providers or, in any event, it is not possible to renew that period of validity without meeting excessive formal requirements.

117 As regards, next, the fact that the period of validity of residence permits which may be granted, by a Member State, to third-country workers posted to that Member State by a service provider established in another Member State may not be greater than the period of validity of the work permits held by the persons concerned in that other Member State, it should be borne in mind that the freedom to provide services guaranteed in Article 56 TFEU may be relied on only by

service providers established in a Member State other than that in which the service is to be provided, where they lawfully provide similar services (see, to that effect, judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 98).

118 As a service provider cannot lawfully provide its services in the Member State in which it is established and, accordingly, benefit from the freedom to provide services, except to the extent that the workers employed by that service provider are employed in accordance with the law of that Member State, the fact, for a Member State, of limiting the period of validity of the residence permits which it issues to third-country workers posted to its territory to the period of validity of the work permits which those workers hold in the Member State where that provider is established cannot be regarded as a breach of that provider's right to the freedom to provide services.

119 As regards, lastly, the fact that the fees payable for the grant of a residence permit to a third-country worker posted to one Member State by an undertaking established in another Member State, while being in an amount equal to the fees payable for an ordinary residence permit for the purposes of the employment of a third-country national, are greater than the amount of the fees payable for the grant of a certificate of residence to a Union citizen, it is settled case-law that, in accordance with the principle of proportionality, in order for a measure requiring the payment of fees in exchange for the issuing, by a Member State, of a residence permit to be capable of being regarded as compatible with Article 56 TFEU, the amount of those fees cannot be excessive or unreasonable (see, by analogy, judgment of 22 January 2002, *Canal Satélite Digital*, C-390/99, EU:C:2002:34, paragraph 42).

120 That being said, the fact remains that the excessive or unreasonable and, accordingly, disproportionate nature of the amount of the fees payable must be assessed in the light of the costs which are generated by the processing of that application and which must thus be borne by the Member State concerned.

121 Consequently, the fact that the fees requested for the issuing of a residence permit to a posted third-country worker are greater than those requested for a certificate of residence for a Union citizen cannot, in principle, be sufficient to establish, in itself, that the amount of those fees is excessive or unreasonable and, accordingly, is in breach of Article 56 TFEU, but may constitute a compelling indication of the disproportionate nature of that amount if the tasks which the administrative authorities must complete in order to grant such a residence permit – having regard to, inter alia, the conditions laid down by the piece of national legislation in question to that end, as well as the costs of producing the corresponding secure document – are equivalent to those needed for the grant of a certificate of residence to a Union citizen, which it is for the referring court to determine.

122 Having regard to all of the foregoing, the answer to the third question is that Article 56 TFEU must be interpreted as not precluding a piece of legislation of a Member State pursuant to which (i) the period of validity of the residence permit which may be granted to a third-country worker posted to that Member State may not, in any event, exceed a period determined by the piece of national legislation in question, which may thus be shorter than the period needed to perform the service for which that worker is posted, (ii) the period of validity of that residence permit is limited to the period of validity of the work and residence permit held by the person concerned in the Member State in which the service provider is established, and (iii) the issuing of the residence permit requires the payment of fees in an amount greater than the amount of the fees payable for the issuing of a certificate of lawful residence to a Union citizen, provided that: first of

all, the initial period of validity of that permit is not manifestly too short to meet the needs of the majority of service providers; next, it is possible to renew the residence permit without having to meet excessive formal requirements; and, lastly, that amount approximately corresponds to the administrative costs generated by the processing of an application for such a permit.

Costs

123 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

1. **Articles 56 and 57 TFEU must be interpreted as meaning that third-country workers who are posted to a Member State by a service provider established in another Member State must not automatically be recognised as having a 'derived right of residence', either in the Member State where they are employed or in the Member State to which they are posted.**

2. **Article 56 TFEU must be interpreted as not precluding a piece of legislation of a Member State which provides that, where an undertaking established in another Member State carries out, in that first Member State, a supply of services the duration of which exceeds three months, that undertaking is obliged to obtain in the host Member State a residence permit for each third-country worker which it intends to post to that first Member State, and which provides that, in order to obtain that permit, that undertaking is to declare beforehand the supply of services in respect of which those workers are to be posted and is to communicate to the authorities of the host Member State the residence permits which those workers hold in the Member State where it is established, as well as their employment contracts.**

3. **Article 56 TFEU must be interpreted as not precluding a piece of legislation of a Member State pursuant to which (i) the period of validity of the residence permit which may be granted to a third-country worker posted to that Member State may not, in any event, exceed a period determined by the piece of national legislation in question, which may thus be shorter than the period needed to perform the service for which that worker is posted, (ii) the period of validity of that residence permit is limited to the period of validity of the work and residence permit held by the person concerned in the Member State in which the service provider is established, and (iii) the issuing of the residence permit requires the payment of fees in an amount greater than the amount of the fees payable for the issuing of a certificate of lawful residence to a Union citizen, provided that: first of all, the initial period of validity of that permit is not manifestly too short to meet the needs of the majority of service providers; next, it is possible to renew the residence permit without having to meet excessive formal requirements; and, lastly, that amount approximately corresponds to the administrative costs generated by the processing of an application for such a permit.**

[Signatures]