JUDGMENT OF THE COURT (Fourth Chamber)

18 June 2015 (*)

(Reference for a preliminary ruling — Freedom to provide services — Directive 96/71/EC — Article 1(3)(a) and (c) — Posting of workers — Hiring out of workers — Act of Accession of 2003 — Chapter 1, paragraphs 2 and 13 of Annexe X — Transitional measures — Access of Hungarian nationals to the labour market of States already members of the European Union at the date of accession to the European Union of the Republic of Hungary — Requirement of a work permit for the hiring out of workers — Non-sensitive sectors)

In Case C-586/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Pesti központi kerületi bíróság (Hungary), made by decision of 22 October 2013, received at the Court on 20 November 2013, in the proceedings

Martin Meat kft

v

Géza Simonfay,

Ulrich Salburg,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe (Rapporteur), J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2014,

after considering the observations submitted on behalf of:

– Martin Meat kft, by R. Zuberecz, ügyvéd,

– Géza Simonfay and Ulrich Salburg, by V. Nagy, ügyvéd,

– the Hungarian Government, by Z. Fehér and A.M. Pálfy, acting as Agents,

– the German Government, by T. Henze and J. Möller, acting as Agents,

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

– the Polish Government, by B. Majczyna and D. Lutostańska, acting as Agents,

– the European Commission, by J. Enegren and A. Sipos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Chapter 1, paragraphs 2 and 13, of Annex X to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('the Act of Accession 2003') and 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 (OJ 1997 L 18, p. 1), read in the light of the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64).

2 The request has been made in proceedings between Martin Meat kft ('Martin Meat') and Messrs Simonfay and Salburg, who are legal advisers, concerning compensation for Martin Meat with regard to a fine which it is liable to pay for having posted Hungarian workers to Austria without having obtained a work permit for them.

Legal context

EU law

Act of Accession of 2003

3 Article 24 of the Act of Accession 2003 provides:

‘The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.’

4 Annex X to the Act of Accession 2003 is entitled ‘List referred to in Article 24 of the Act of Accession: Hungary’. Chapter 1 of that annex, entitled ‘Freedom of movement for persons’, provides, in paragraphs 1, 2, 5 and 13, as follows:

‘1. [Articles 45 TFEU and 56, first paragraph TFEU] shall fully apply only in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of [Directive 96/71] between Hungary on the one hand and Belgium, the Czech Republic, Latvia, Lithuania, Luxembourg, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 [of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968 (II), p. 475)] 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 Hungarian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.

…

5. A Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five year period indicated in paragraph 2 may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven year period following the date of accession. In the absence of such notification, Articles 1 to 6 of [Regulation No 1612/68] shall apply.

…

13. In order to address serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive [96/71], and as long as they apply, by virtue of the transitional provisions laid down above, national measures or those resulting from bilateral agreements to the free movement of Hungarian workers, Germany and Austria may, after notifying the Commission, derogate from [the first paragraph of Article 56 TFEU] with a view to limit[ing] in the context of the provision of services by companies established in Hungary, 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:

…

– Austria:

[Horticultural service activities, cutting, shaping and finishing stone, manufacture of metal structures and parts of structures, construction, including related branches, security activities, industrial cleaning, home nursing, social work activities without accommodation]

…'

5 Annex XII to the Act of Accession 2003 is entitled 'List referred to in Article 24 of the Act of Accession: Poland'. It includes, as regards the Republic of Poland, provisions which are in substance identical to the provisions concerning the Republic of Hungary.

Directive 96/71

6 Article 1 of Directive 96/71 is worded as follows:

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

…

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

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

…

or

(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.

…'

Austrian law

7 According to Paragraph 3(1) of the Law on the hiring-out of workers (Arbeitskräfteüberlassungsgesetz, BGBl. 196/1988 ('the AÜG')), the hiring-out of workers consists in making workers available to a third party in order to carry out work.

8 Paragraph 4 of the AÜG is worded as follows:

'(1) In order to establish whether the hiring-out of workers exists, the specific situation must be assessed with reference to its genuine economic nature and not its external appearance.

(2) There is also a hiring-out of workers, in particular, where those workers carry out their work in the main contractor company pursuant to a contract for services but:

1. they do not produce or contribute to the production of any works or services attributable to the subcontractor which differ or are distinguishable from the goods, services and intermediate products of the main contractor

or

2. they do not perform the work essentially with the help of materials and tools belonging to the subcontractor

or

3. they are, from a logistical point of view, integrated into the main contractor's company and are subject to its hierarchical and technical supervision

or

4. the subcontractor is not liable for the result of the works or the supply of services.'

9 Paragraph 18(1) to (11) of the Law on the employment of foreign nationals (Ausländerbeschäftigungsgesetz, BGBl. 218/1975), in the version applicable at the material time ('the AuslBG') provides for the case in which these workers must obtain a work permit or a posting permit.

10 Paragraph 18(12) of the AuslB provides:

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

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

2. the wage and working conditions of Austrian law, within the meaning of Paragraph 7b(1)(1) to (3) and 7b(2) of the Law on the amendment of employment contracts (Arbeitsvertragrechts Anpassungsgesetz, BGBl. 459/1993) and the applicable provisions of social security are complied with.’

11 Paragraph 32a(6) of the AuslBG is a transitional provision which concerns Member States having joined the European Union on 1 May 2004. It provides as follows:

‘Paragraph 18(1) to (11) shall apply with regard to the employment of citizens of the [European Union], within the meaning of Paragraph 18(1), or third country nationals posted in Austria by an employer having its place of business in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Poland, the Republic of Slovenia or the Slovak Republic, in order to perform a service on a temporary basis in a service sector for which the restrictions on the freedom to provide services laid down in Article [56 TFEU] may be instituted pursuant to paragraph 13 of the chapter concerning the free movement of persons in the Treaty of Accession (list in Annexes V and VI, VIII to X and XII to XIV, referred to in Article 24 of the Act of Accession).’

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

12 In 2007, Alpenrind GmbH (‘Alpenrind’), a company incorporated under Austrian law, which specialises in meat cutting and selling processed meat concluded a contract with Martin Meat, a company established in Hungary. Pursuant to the contract, Martin Meat was to process 25 sides of beef per week and to process that meat and package it for sale.

13 The processing and packaging operations took place at Alpenrind’s slaughterhouse in Salzburg (Austria). The premises and machines used for the purposes of those operations were rented by Martin Meat, which paid a fixed rental to Alpenrind. Alpenrind paid the operating costs related to the premises. The equipment used for those operations, such as knives, saws and protective clothing belonged to Martin Meat.

14 Those operations were performed by Martin Meat’s Hungarian employees. Alpenrind’s manager gave instructions concerning the carcasses to be processed and the manner in which they were to be processed to Martin Meat’s manager. Then, Martin

Meat's manager organised the work of those employees to whom he gave instructions. Alpenrind supervised the quality of the work.

15 The remuneration for the services provided by Martin Meat depended on the quantity of meat processed. The amount of that remuneration was reduced if the meat was of poor quality.

16 Following requests for posting permits lodged by Martin Meat with the Austrian authorities, those authorities informed it that they considered that its contractual relationship with Alpenrind did not consist in posting workers ancillary to a supply of services requiring only a posting permit, pursuant to Paragraph 18(12) of the AuslBG, but a hiring-out of workers, within the meaning of Paragraph 4 of the AÜG, for which a work permit was required, in accordance with the transitional provisions of the Act of Accession of 2003 on access to the labour market, as transposed by Paragraph 32a(6) of the AuslBG.

17 Therefore, a fine in excess of EUR 700 000 was imposed on Alpenrind. Pursuant to the contract between Alpenrind and Martin Meat, the latter is responsible for paying that fine.

18 Martin Meat decided to bring an action against its legal advisers, Messrs Simonfay and Salburg, before the referring court. The latter had indicated to it, before the conclusion of that contract, that the performance of the contract, which provided for the employment of Hungarian workers in the Austrian slaughterhouse, did not require the obtention of work permits. They had taken the view that the activities at issue in the main proceedings did not fall within the service sectors classified as sensitive by the Act of Accession 2003 and that the contractual relationship concerned did not require the hiring-out of workers.

19 In those circumstances, the Pesti központi kerületi bíróság (Pest Central District Court) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is there a hiring-out of workers according to European law, and specifically according to the definition of posting of workers contained in the judgment of the Court of Justice in the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64) where a contractor undertakes to process sides of beef, using its own workforce, in premises rented from the client in the client's slaughterhouse and packages them in market-ready packs of meat, and a price is payable to the contractor per kilogram of processed meat, and in the event that the processing is of insufficient quality the contractor has to accept a deduction from the price for meat processing, bearing in mind that in the host State the contractor supplies the service exclusively to that client and the client also monitors the quality of the meat processing work?

2. Is the chief principle established by the judgment of the Court of Justice in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64), according to which the posting of

workers can be subject to limitations while the transitional derogation from freedom of movement for workers under the Act of Accession of 2003 is in force, also applicable to the movement of workers in the course of a hiring of workers who are sent to Austria by a company established in a Member State which acceded on 1 May 2004 if such movement occurs in a sector which is not protected under the Act of Accession 2003?'

Consideration of the questions referred

The second question

20 By its second question, which must be examined first of all, the referring court asks essentially whether Chapter 1, paragraph 2 and paragraph 13, of Annex X to the Act of Accession of 2003 must be interpreted as meaning that the Republic of Austria is entitled to restrict the hiring-out of workers on its territory, in accordance with Chapter 1, paragraph 2 of that annex, even though that hiring-out did not concern a sensitive sector, within the meaning of Chapter 1, paragraph 13, thereof.

21 In that connection, it must be recalled that Chapter 1, paragraph 2, of Annex X to the Act of Accession of 2003 derogates from the freedom of movement for workers by excluding the application of Articles 1 to 6 of Regulation No 1612/68 to Hungarian nationals for a transitional period. Under that provision, for a two-year period from 1 May 2004, the Member States may apply national measures or those resulting from bilateral agreements regulating access to their labour markets by Hungarian nationals. That provision also states that Member States may continue to apply such measures until the end of the five year period following the date of accession to the European Union of the Republic of Hungary.

22 Chapter 1, paragraph 13, of Annex X to that act derogates from the freedom to provide services where that involves a temporary movement of workers. It is applicable only to the Federal Republic of Germany and the Republic of Austria and was the result of negotiations initiated by those Member States with a view to providing for a transitional scheme in respect of all the provisions of services referred to in Article 1(3) of Directive 96/71 (see, by analogy, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64). It lists the sensitive sectors for which those two Member States are entitled to limit the freedom to provide services involving a temporary movement of workers. The hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, constitutes such a supply of services.

23 In the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64, paragraph 32), the Court held, as regards measures that the Kingdom of the Netherlands had adopted with regard to Polish workers, that legislation of a Member State making the hiring-out of foreign workers subject to a work permit must be regarded as being a measure regulating access of Polish nationals to the labour market of that State within the meaning of Chapter 2, paragraph 2, of Annex XII to the Act of Accession of 2003, which as regards the Republic of Poland, a measure identical in substance to Chapter 1, paragraph 2 of Annex X to that act, applicable in the present case.

24 It followed from that finding that the right to restrict the hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, was not reserved to the Federal Republic of Germany and the Republic of Austria, which negotiated a specific derogation in that regard, but also applied to all the other Member States of the European Union at the date of access of the Republic of Poland (see, to that effect, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 40).

25 Since Chapter 2, paragraph 2, and paragraph 13, of Annex XII to the Act of Accession of 2003 is identical in substance to Chapter I, paragraphs 2 and 13 of Annex X to that act, the reasoning concerning the Republic of Poland, in the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64) is applicable by analogy to the Republic of Hungary.

26 It follows that the States which were already Members of the European Union at the date of accession of the Republic of Hungary are entitled to restrict the hiring-out of workers within the meaning of Article 1(3)(c) of Directive 96/71, on the basis of Chapter 1, paragraph 2, of Annex X to the Act of Accession of 2003.

27 The fact that the Federal Republic of Germany and the Republic of Austria have negotiated a specific derogation, set out in Chapter 1, paragraph 13, of Annex X to that act, concerning certain sensitive sectors for which those two Member States are entitled to restrict the freedom to provide services involving a movement of workers cannot, however, deprive them of the right to restrict the hiring-out of workers in accordance with Chapter 1, paragraph 2 of Annex X to that act which, unlike Chapter 1, paragraph 13 of that act is not limited to certain sensitive sectors.

28 Such a finding is consistent with the aim of Chapter 1, paragraph 2, of Annex X, which is intended to prevent, following the accession of the new Member States, disturbances on the labour markets of the existing Member States due to the immediate arrival of a large number of workers who are nationals of the new States (see, by analogy, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 34).

29 Furthermore, as the Advocate General noted, in point 34 of her Opinion, it cannot be held that the derogation negotiated by the Federal Republic of Germany and the Republic of Austria, which were among the first Member States to recommend transitional measures to protect employment markets from the anticipated influx of workers from the new Member States following the latters' accession to the European Union, leaves them less room for manoeuvre than the other existing Member States to regulate the influx of Hungarian workers on their territory.

30 Having regard to the foregoing considerations, the answer to the second question is that Chapter 1, paragraph 2, and paragraph 13, of Annex X to the Act of Accession of 2003, must be interpreted as meaning that the Republic of Austria is entitled to restrict the hiring-out of workers on its territory, in accordance with Chapter 1, paragraph 2 of that annex, even though that provision does not concern a sensitive sector, within the meaning of Chapter 1, paragraph 13, thereof.

The first question

31 It should be noted at the outset that, when the Court is requested to give a preliminary ruling, its task is to provide the national court with guidance on the scope of the rules of EU law so as to enable that court to apply the rules correctly to the facts in the case before it and it is not for the Court of Justice to apply those rules itself, *a fortiori* since it does not necessarily have available to it all the information that is essential for that purpose (judgment in *Omni Metal Service*, C-259/05, EU:C:2007:363, paragraph 15).

32 In those circumstances, the first question must be understood as meaning that the referring court asks essentially, where there is a contractual relationship such as that at issue in the main proceedings, which are the relevant factors to be taken into consideration in order to determine whether that relationship must be classified as a hiring-out of workers within the meaning of Article 1(3)(c) of Directive 96/71.

33 In that connection, it follows from the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:011:64, paragraph 51) that there is a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, where three conditions are met. First, hiring-out of workers is a service provided for remuneration in respect of which the worker who has been hired-out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. Second, it is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services. Third, in the context of such hiring-out, the employee carries out his tasks under the control and direction of the user undertaking.

34 In the first place, as regards the second condition, which requires an analysis of the very purpose of the supply of services made by the undertaking providing the services, account must be taken of any evidence indicating that the movement of the worker in the host Member State constitutes or does not constitute the purpose of that supply of services.

35 In that connection, it should be recalled that a service provider must, in principle, provide a service consistent with that set out in the contract, so that the consequences of a provision of services which does not comply with that contract must be borne by that service provider. It follows that, 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.

36 Thus, if it flows from the obligations in that contract that the service provider is required properly to perform the services stipulated therein, it is, in principle, less likely that there is a hiring-out of workers than if the service provider is not liable for the consequences of a supply of services which is inconsistent with the terms of the contract.

37 In the present case, it is for the national court to verify the extent of the respective obligations of the parties to the contract in order to identify the party who is liable for the consequences of the improper performance, given that the fact that the remuneration varies in accordance, not only with regard to the quantity of meat processed but also the quality of that meat, points to the fact that that service provider is required to supply that service strictly in accordance with the terms of the contract.

38 Furthermore, the fact that the service provider is free to determine the number of workers which it considers useful to send to the host Member State, as appears to be the case in the main proceedings, as mentioned by the defendants in the main proceedings at the hearing, indicates that the subject-matter of the supply of services at issue is not the movement of workers in the host Member State, but that that movement is ancillary to the performance of the service set out in the contract concerned and that it is therefore a posting of workers, within the meaning of Article 1(3)(a) of Directive 96/71.

39 However, in the case in the main proceedings, neither the fact that the service provider has only one client in the host Member State, nor the fact that that service provider rents the premises in which the services are performed and the machines provide any useful evidence to answer the question whether the genuine purpose of the supply of services at issue is the movement of workers in that Member State.

40 In the second place, as regards the third condition laid down by the Court in the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64, paragraph 51), it must be stated, as the Advocate General noted in point 55 of her Opinion, that a distinction must be made between control and direction over the workers themselves and verification by a client that a service contract has been performed properly. It is normal for a client to verify in one way or another that the service delivered is in conformity with the contract. Moreover, in the contest of a supply of services, a client may give certain instructions to the service provider's workers on how the service contract should be performed without entailing direction and control over the service provider's workers within the meaning of the third condition laid down in the judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 51, provided that the service provider gives them the precise and individual instructions he deems necessary for the performance of the services concerned.

41 Having regard to all of the foregoing considerations, the answer to the first question is that, where there is a contractual relationship such as that at issue in the main proceedings, in order to determine whether that contractual relationship must be classified as a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, it is necessary to take into consideration each element indicating whether the movement of workers in the host Member State is the very purpose of the supply of services on which the contractual relationship is based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue are, inter alia, the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State. By contrast, the fact that

the undertaking which receives those services checks the performance of the service for compliance with the contract or that it may give general instructions to the workers employed by the service provider does not, as such, lead to the finding that there is a hiring-out of workers

Costs

42 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 (Fourth Chamber) hereby rules:

1. **Chapter 1, paragraph 2, and paragraph 13, of Annex X to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, must be interpreted as meaning that the Republic of Austria is entitled to restrict the hiring-out of workers on its territory, in accordance with Chapter 1, paragraph 2 of that annex, even though that provision does not concern a sensitive sector, within the meaning of Chapter 1, paragraph 13, thereof.**

2. **In order to determine whether that contractual relationship must be classified as a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, it is necessary to take into consideration each element indicating whether the movement of workers in the host Member State is the very purpose of the supply of services on which the contractual relationship is based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue are, inter alia, the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State. By contrast, the fact that the undertaking which receives those services checks the performance of the service for compliance with the contract or that it may give general instructions to the workers employed by the service provider does not, as such, lead to the finding that there is a hiring-out of workers.**

[Signatures]

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* Language of the case: Hungarian.