Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 30 November 2023 [1]

Case C-540/22

SN and Others
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling from the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands))

(Reference for a preliminary ruling – Freedom to provide services – Articles 56 and 57 TFEU – Posting of workers – Posting of Ukrainian nationals by an undertaking established in Slovakia to carry out work in the Netherlands – Duration exceeding 90 days in a 180-day period – Obligation on posted workers to hold a residence permit in the Netherlands – Limitation of the period of validity of the residence permit – Amount of the fees relating to the application for a residence permit – Restriction of the freedom to provide services – Overriding reasons in the public interest – Proportionality)

I. Introduction

1. Ukrainian workers were posted by a Slovak service provider to carry out activities in the Netherlands. The duration of those activities was extended, such that it exceeded 90 days in a 180-day period. In such a situation, Netherlands legislation provides that third-country nationals must hold a residence permit, to which conditions are attached concerning the period of validity of that permit and the cost of obtaining it.

2. Is such legislation compatible with Articles 56 and 57 TFEU? That is, in essence, the question asked by the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands).

3. That question will prompt the Court to clarify its case-law on the rules applicable to third-country nationals posted within the European Union. While the requirement to hold a residence permit undoubtedly constitutes a restriction of the freedom to provide services, it will be necessary to examine to what extent that restriction may meet an overriding reason in the public interest and be proportionate.

[1] Original language: French.

II. Legal framework

4. Article 2(1) of the Wet arbeid vreemdelingen (Law on the employment of foreign nationals) [2] of 21 December 1994 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.'

5. 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 within the meaning of Article 6(3)(a) of the Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (Law on employment conditions for posted workers in the European Union). [3]'

6. Article 14 of the Wet tot algehele herziening van de Vreemdelingenwet (Law providing for a comprehensive review of the Law on Foreign Nationals) [4] of 23 November 2000 ('the Law of 2000 on Foreign Nationals') provides, in paragraph 1 thereof:

'The Minister 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. …'

2 Stb. 1994, No 959.

3 Stb. 2016, No 219.

4 Stb. 2000, No 495.

7. Article 3.31a(1) of the Besluit tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000) (Decree of 2000 on Foreign Nationals) [5] of 23 November 2000 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 Decree of 2022 implementing the Law on Foreign Nationals if the declaration referred to in Article 8 [of the Besluit arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (Decree on employment conditions for posted workers in the European Union)] 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].'

8. Under Article 3.4(1)(i) of the Decree of 2000 on Foreign Nationals:

'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.'

9. Article 8(1) to (3) of the Law on employment conditions for posted workers in the European Union states:

'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 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.

[5] Stb. 2000, No 497.

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, 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.'

10. Article 3(2) of the Decree on employment conditions for posted workers in the European Union provides:

'The Minister is empowered and required to provide to the Immigration and Naturalisation Service, 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 Law on employment conditions for posted workers in the European Union], including their national ID number, in so far as that information is required for purposes connected with the implementation of the Law of 2000 on Foreign Nationals.'

11. Article 11(3) of that decree provides:

'A service provider which posts a foreign national for the purposes of Article 1e of the Decree implementing the Law on the employment of foreign nationals shall provide, in addition to the information stated in Article 8(1) of that law, the end date of the period of lawful employment stated in the document on the basis of which the foreign national is authorised to carry out work as a salaried worker in the issuing Member State.'

12. Pursuant to Article 3.58(1)(i) of the Decree of 2000 on Foreign Nationals and Part B5/3.1 of the Vreemdelingencirculaire 2000 (Circular of 2000 on Foreign Nationals)[6] of 2 March 2001, in the version applicable on the date of the facts of the main proceedings, the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service, Netherlands; 'the IND') shall 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 Foreign Nationals.

13. Article 3.34 of the Voorschrift Vreemdelingen 2000 (Regulation of 2000 on Foreign Nationals)[7] of 18 December 2000 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.

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

14. The applicants, who are Ukrainian nationals, hold a Slovak temporary residence permit for the purpose of employment. They work for the Slovak company ROBI spol s. r. o., which posted them to a Netherlands client, the company Ivens NV, to carry out metallurgical activities at the port of Rotterdam (Netherlands). ROBI made an advance declaration to the Uitvoeringsinstituut werknemersverzekeringen (Employee Insurance Agency, Netherlands) of the activities that were

6 Stcrt. 2001, No 64.

7 Stcrt. 2001, No 10.

to be carried out by the applicants and the period over which they were to complete them.[8] Subsequently, ROBI informed the Netherlands authorities that the duration of those activities would exceed that provided for in Article 21(1) of the Convention implementing the Schengen Agreement,[9] under which '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) [10] and are not on the national list of alerts of the Member State concerned'.

15. In that context, ROBI lodged with the IND applications for each of the applicants to be granted a residence permit for that cross-border provision of services and for the processing of which fees were collected. The IND, acting on behalf of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary'), decided to issue the applicants with ordinary fixed-term residence permits subject to the restriction relating to the cross-border provision of services, specifying that the work in connection with those applications was not subject to the grant of a work permit. In addition, the period of validity of those residence permits was limited to the period of validity of the Slovak temporary residence permits for the purpose of employment, meaning that it was shorter than the duration of the activities for which the applicants were posted.

16. The applicants lodged objections to those decisions with the IND, which reviewed them on behalf of the State Secretary. Those objections concerned the obligation as such to apply for a residence permit for the cross-border provision of services, the period of validity of the residence permits issued and the fees payable for the processing of the applications for those permits. On 16 March 2021, the said objections were examined by the administrative hearings board of the IND. On 7 April 2021, by 44 separate decisions, the State Secretary declared the applicants' objections unfounded.

17. The applicants lodged an appeal against those decisions before the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands), the referring court. Before that court, the applicants and the State Secretary debated the obligation, on third-country workers employed by a service provider established in one Member State, to hold, in addition to a residence permit in that Member State, a residence permit to reside in another Member State in the context of a cross-border provision of services after the expiry of the 90-day period referred to in Article 21(1) of the Schengen Convention. They also discussed the fact that the duration of the residence permits issued by the Netherlands was limited to the period of

8 In its written observations, the Netherlands Government stated that, on 4 December 2019, ROBI informed the Netherlands authorities that those activities would last from 6 December 2019 until 4 March 2020.

9 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, signed at 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 amending the Convention implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa (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 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council (OJ 2013 L 182, p. 1) ('the Schengen Convention').

10 OJ 2006 L 105, p. 1.

validity of the Slovak residence permits, which was a maximum of two years, as well as the amount of the fees to be paid for the processing of the applications for residence permits in the Netherlands.

18. The referring court observes 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 submitted that, within the framework of the freedom to provide services, each service provider transfers to his employers the 'derived right' to receive a residence permit for the period needed for the provision and that the decision on the right of residence (that is to say, in that case, the grant of a visa) was purely formal in character and ought to be recognised automatically.

19. That court asks whether the freedom to provide services, as laid down in Articles 56 and 57 TFEU, does not also confer a derived right of residence on workers posted in the context of a cross-border provision of services. According to that court, it is apparent from paragraph 59 of that judgment that that is not the case since the field relating to the entry into a Member State and residence there of third-country nationals, in connection with a posting by a service provider established in another Member State, is not harmonised at EU level. Nevertheless, according to the referring court, it could be argued that the obligation arising from Article 56 TFEU to remove all obstacles to the freedom to provide services would mean that the employment, in one Member State, of third-country workers who were employed by a service provider established in another Member State, that employment being authorised in the context of the free movement of services, could not be made subject to the possession of an individual residence permit, because that obligation unnecessarily complicates the provision of services by means of the posting of third-country workers.

20. The referring court observes that, also in the case which gave rise to the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraph 20), the Commission argued, in addition, that the existence of a dual procedure (namely, in that case, that for the visa and that for the posting confirmation) itself constituted a disproportionate restriction of the freedom to provide services. In the present case, the Netherlands legislation is also characterised by the existence of a dual procedure since, first, third-country workers posted to the Netherlands by a service provider established in another Member State must be the subject of a declaration by that service provider, and, second, those workers must separately apply, on the basis of the same particulars as those provided for that declaration, for a residence permit in the Netherlands.

21. Moreover, according to that court, if the requirement of a residence permit is relevant only after the expiry of a 90-day period, such a requirement would have the effect of a prior authorisation in the event that the provision of services exceeded that period. The fact that the IND only checks whether a declaration has been made in accordance with Article 8 of the Law on employment conditions for posted workers in the European Union and does not impose any additional conditions does not mean, however, that that dual procedure does not entail a de facto restriction of the freedom to provide services. The fact that, in practice, a decision on the issuance of a residence permit is taken within a short period of time in no way alters this.

22. The referring court adds that the restrictive nature of the separate procedure to obtain a residence permit for the cross-border provision of services is borne out by the fact that the period of validity of that permit is limited by the national legislation to the duration of the

activity, up to a maximum of two years. If the provision of services takes longer than initially anticipated or the maximum period stipulated, a new application for the grant of a residence permit or for an extension of the period of validity of that permit must then be submitted.

23. Last, for each residence permit application, the applicant is required to pay the fees stipulated by the national legislation, the amount of which is equal to the fees payable for obtaining a residence permit for the purpose of employment as may be granted to third-country nationals. However, that amount is five times higher than the fees payable for the issuance of a certificate of lawful residence to an EU citizen. The amounts of those fees are adjusted periodically and, in the case of the applicants, depending on their circumstances, they came to EUR 290 or EUR 320; the amount of the fees currently stands at EUR 345.

24. In those circumstances, the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg) 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 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?'

25. Written observations have been submitted by the applicants, the Netherlands, Belgian and Norwegian Governments and the Commission. Those same parties, with the exception of the Belgian Government, also presented oral argument at the hearing held on 21 September 2023.

IV. Analysis

26. By its three questions referred for a preliminary ruling, which should be examined together, the referring court asks, in essence, whether Articles 56 and 57 TFEU must be interpreted as precluding national legislation under which, in the situation in which a service provider established in one Member State posts third-country workers to another Member State for a duration exceeding 90 days in a 180-day period, those workers are obliged to hold an individual residence permit in that second Member State, the duration of which is limited to the period of

validity of the residence and work permit granted in the first Member State and, in any event, to two years, and the grant of which is subject to the payment of fees equal to those payable for an ordinary permit for the purpose of the exercise of employment by a third-country national.

27. In the case in the main proceedings, Ukrainian workers were posted by a Slovak company to carry out metallurgical activities in the Netherlands. Netherlands legislation requires that third-country workers hold a residence permit where the activities exceed the duration provided for in Article 21(1) of the Schengen Convention, that is to say, 90 days in any 180-day period. The referring court seeks to ascertain whether that legislation, and the conditions laid down therein relating to the duration of the residence permit and the amount of the fees to be paid, are compatible with EU law.

28. As a preliminary point, I would note that, according to recital 20 of Directive 96/71/EC, [11] that directive is without 'prejudice to national laws relating to the entry, residence and access to employment of third-country workers'. In those circumstances, as the referring court has emphasised, the Netherlands legislation at issue in the main proceedings must be examined in the light of the FEU Treaty.

29. According to settled case-law of the Court, where an undertaking makes available, for remuneration, workers who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions set out in the first paragraph of Article 57 TFEU and must accordingly be considered to be a 'service' within the meaning of that provision. [12] In addition, first, the provision of services between two undertakings which are established in two separate Member States falls within the scope of Articles 56 and 57 TFEU, and, second, the fact that the workers made available are nationals of non-member countries is, in that regard, irrelevant. [13]

30. It also follows from the case-law of the Court that the freedom to provide services under Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services established in other Member States, but also the abolition of any restriction – even if it applies without distinction to national providers of services and to those from other Member States – which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where it lawfully provides similar services. [14] Moreover, it must be recalled that the matter relating to the posting of workers who are nationals of non-Member States in the framework of the cross-border provision of services has so far not been harmonised at EU level. [15] It follows that, in such matters, the Member States enjoy a margin of discretion in determining the conditions applicable to such a posting. However, according to the case-law of the Court, the control exercised by a Member State in those matters cannot affect the freedom to provide services of the undertaking which employs those nationals. [16]

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

[12] Judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 40 and the case-law cited).

[13] See judgments of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraph 39), and of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 43).

[14] Judgment of 26 February 2020, *Stanleyparma and Stanleybet Malta* (C-788/18, EU:C:2020:110, paragraph 17 and the case-law cited).

[15] Judgments of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraph 49), and of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 47). See the proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [COM (99) 3 final], which was withdrawn by the Commission.

[16] See judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595, paragraph 60 and the case-law cited).

31. Here, since the case in the main proceedings concerns Ukrainian posted workers, I consider it worthwhile to examine, beforehand, their right of entry into and residence in the European Union as things currently stand. In that regard, I note that, under Article 2 of Implementing Decision (EU) 2022/382,[17] that decision applies to 'persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date', including Ukrainian nationals residing in Ukraine before 24 February 2022, who may be granted temporary protection. However, it must be observed that, first, having regard to the date of the facts in the main proceedings, the applicants entered the European Union before the date of 24 February 2022 and, second and in any event, they are not seeking temporary protection.

32. Furthermore, it follows from Annex II to Regulation (EU) 2018/1806[18] that Ukraine is included on the list of third countries whose nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period. The case in the main proceedings, however, concerns the obligation to hold a residence permit in the Netherlands beyond that 90-day period. Consequently, it must be held that those legal instruments cannot confer a special status on the applicants in the light of that obligation to hold such a residence permit.

33. In order to answer the questions put by the referring court, I will examine the issue of the existence of a 'derived right of residence' for third-country workers posted to a Member State, before turning to the compliance with Article 56 TFEU of legislation of a Member State requiring that posted third-country workers hold a residence permit where the duration of the provision of services exceeds 90 days in a 180-day period, under the conditions provided for by that legislation.

A. The existence of a 'derived right of residence' for third-country workers posted to a Member State

34. The referring court seeks to ascertain whether the freedom to provide services guaranteed by Articles 56 and 57 TFEU includes the grant of a 'derived right of residence' for third-country workers where they are employed in one Member State by a service provider established in another Member State.

35. In that regard, it should be recalled that the Court has acknowledged, in certain cases, that third-country nationals, family members of an EU citizen, who were not eligible, on the basis of Directive 2004/38/EC,[19] for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU, under which every EU citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.[20] That consideration stems from settled case-law according to which, in essence, if no such derived right of residence were granted to such a

[17] Council Implementing Decision of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (OJ 2022 L 71, p. 1).

[18] Regulation of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2018 L 303, p. 39).

[19] Directive 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).

[20] See, inter alia, judgment of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 27 and the case-law cited).

third-country national, an EU citizen would be discouraged from leaving the Member State of which he or she is a national in order to exercise his or her right of residence under Article 21(1) TFEU in another Member State because he or she is uncertain whether he or she will be able to continue in his or her Member State of origin a family life which has been created or strengthened, with that third-country national, in the host Member State, during a genuine residence. [21]

36. That case-law cannot be applied by analogy in the field of the freedom to provide services. First of all, the derived right of residence conferred pursuant to Article 21(1) TFEU has as its basis the right of a natural person, an EU citizen, to move and reside freely within the territory of the Member States. In the present case, however, the service provider is a legal person, who does not have a right of residence in another Member State from which the right of residence of the third-country workers it employs would derive.

37. Next, the right of residence derived from the right of residence of an EU citizen concerns a well-defined category of persons, namely the members of that citizen's family with whom he or she has a personal and unique relationship. By contrast, a service provider, a legal person, does not have ties with specific persons to carry out the provision of services. It may thus hire third-country workers to begin undertaking the provision of services, and then other workers from non-Member countries to finish that provision of services, with all those workers returning to their country of origin or residence after the completion of their work. [22]

38. Last, as the referring court notes, [23] the Commission previously argued the existence of a 'derived right of residence' for third-country workers posted to a Member State in the case which gave rise to the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595). However, that approach was not adopted in that judgment. The Court in fact followed a line of reasoning which saw it examine whether the national legislation in question was consistent with Article 56 TFEU in the light of its settled case-law on the restriction of the freedom to provide services, [24] without mentioning the existence of a derived right of residence.

39. I am therefore of the view that the freedom to provide services guaranteed by Articles 56 and 57 TFEU does not include the grant of a 'derived right of residence' for third-country workers where they are employed in one Member State by a service provider established in another Member State. However, the fact that those workers do not enjoy such a derived right of residence does not preclude them from holding, on another legal basis, a residence permit in connection with a cross-border provision of services.

[21] See judgment of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 28 and the case-law cited).

[22] 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).

[23] See point 18 of this Opinion.

[24] For an earlier judgment, see judgment of 21 October 2004, *Commission* v *Luxembourg* (C-445/03, EU:C:2004:655), which concerns the requirements imposed by the host Member State on undertakings which post third-country employees to its territory.

B. The compatibility with Article 56 TFEU of legislation of a Member State requiring that posted third-country workers hold a residence permit when the duration of the provision of services exceeds 90 days in a 180-day period, under the conditions provided for by that legislation

40. The referring court emphasises that the Netherlands legislation at issue in the main proceedings is characterised by the existence of a dual procedure in so far as, first, third-country workers posted to the Netherlands by a service provider established in another Member State must be the subject of a declaration by that service provider, and, second, those workers must apply separately, on the basis of the same particulars as those provided for the declaration, for a residence permit in the Netherlands. That court has doubts as to the compatibility of that dual procedure with EU law in the light of the judgment of 21 September 2006, *Commission* v *Austria* (C-168/04, EU:C:2006:595). In that regard, a distinction should be made between, on the one hand, the obligation on the service provider to make a declaration and, on the other hand, the obligation on third-country workers to hold a residence permit in the Member State to which they are posted.

1. The obligation on the service provider to make a declaration

41. With regard to the obligation on the service provider to make a declaration, the Court has already held that, in the case of the posting of workers who are third-country nationals by a service provider established in a Member State of the European Union, national provisions which make the provision of services within the national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitute a restriction on the freedom to provide services within the meaning of Article 56 TFEU. [25]

42. The Court has clarified that an obligation imposed on a service-providing undertaking to provide the authorities of the Member State to which the workers are posted with information showing that the situation of the workers who are third-country nationals is lawful, inter alia in terms of residence, work permit and social coverage in the Member State in which that undertaking employs them, would give those authorities, in a less restrictive but just as effective a manner as the requirement for a work permit, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established. [26] In that regard, it is certainly in the interest of both the host Member State and the service provider to have, prior to the posting, the assurance that workers who are nationals of a non-Member State are posted lawfully. [27]

43. According to the Court, the obligation to provide that information might consist in a simple prior declaration which would enable the authorities of the Member State to which the workers are posted to check the particulars provided and to take the necessary measures in the event that the situation of the workers concerned is unlawful. In addition, that obligation could take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out. [28] Similarly, a measure which

[25] See judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 44 and the case-law cited).

[26] See, to that effect, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 50 and the case-law cited).

[27] Judgment of 19 January 2006, *Commission* v *Germany* (C-244/04, EU:C:2006:49, paragraph 49).

[28] See, to that effect, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 51 and the case-law cited).

would be just as effective and less restrictive than the requirement for a work permit would be an obligation imposed on a service-providing undertaking to report beforehand to the authorities of the Member State to which workers are to be posted the presence of one or more posted workers, the anticipated duration of their presence and the provision or provisions of services justifying the posting. It would enable those authorities to monitor compliance with the social legislation of that Member State during the posting, while taking account of the obligations to which that undertaking is already subject under the social legislation applicable in the Member State of origin. Such an obligation would enable the authorities, where appropriate, to take the appropriate measures at the end of the expected period of posting. [29]

44. In the present case, it is not disputed that the obligation to make a declaration provided for by the Netherlands legislation complies with the conditions set out by the case-law cited in points 42 and 43 of this Opinion. To that effect, it is apparent from the order for reference that ROBI made an advance declaration to the Netherlands authorities of the activities that the applicants had to carry out and the period during which they had to complete them. The referring court has also stated that IND simply checks whether a declaration has been made in accordance with Article 8 of the Law on employment conditions for posted workers in the European Union, without imposing additional conditions. [30] Accordingly, subject to the verifications which are for the referring court to carry out, the obligation on a service provider to make a declaration does not appear to be contrary to Article 56 TFEU.

2. The obligation on third-country workers to hold a residence permit in the Member State to which they are posted

45. As regards the obligation on third-country workers to hold a residence permit in the Member State to which they are posted, it should be observed that, in this case, on the date of the declaration made by the service provider, it was anticipated that the duration of the activities in the Netherlands would be shorter than that specified in Article 21(1) of the Schengen Convention. In accordance with that provision, being holders of a residence permit for the purpose of employment issued by the Slovak Republic, those workers could move freely for a period of no more than 90 days in any 180-day period in the territory of the other Member States, including the Netherlands. [31]

46. However, the service provider subsequently informed the Netherlands authorities that the duration of those activities was being extended, such that they exceeded 90 days. That service provider applied for a residence permit in the Netherlands for each of the applicants. It is apparent from the order for reference that the State Secretary granted those applications, restricting the period of validity of the residence permits to the period of validity of the Slovak residence permits, that is to say, for a duration shorter than that of the activities for which the applicants were posted, and charging fees for each residence permit application. The applicants have challenged, under EU law, at once the principle according to which they were obliged to apply for a residence permit, the period of validity of those permits and the amount of the fees to be paid.

[29] See, to that effect, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 52 and the case-law cited).

[30] See point 21 of this Opinion.

[31] See Opinion of Advocate General Léger in *Commission* v *Austria* (C-168/04, EU:C:2006:135, point 114), according to which workers who are nationals of non-Member States and who were posted to Austria for a maximum period of three months by a service-providing undertaking established in another Member State which is a contracting party of the Schengen Convention were not required to obtain from the Austrian authorities any visa or residence permit whatsoever in order to complete their work in the context of that posting.

47. In that regard, as the Netherlands Government acknowledges in its written observations, national provisions which make the provision of services within national territory by an undertaking established in another Member State subject to the issue of residence permits for third-country nationals constitutes a restriction on that freedom within the meaning of Article 56 TFEU. However, according to settled case-law of the Court, where national legislation falling within an area which has not been harmonised at EU level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established, and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. [32]

48. The Court has clarified that, although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and posted to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work. However, a Member State may check that an undertaking established in another Member State which posts to its territory workers from a non-member country is not availing itself of the freedom to provide services for a purpose other than the performance of the service concerned. However, such checks must observe the limits imposed by EU law, in particular those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities. [33]

49. Consequently, although a Member State must be accorded both (i) the power to check that an undertaking, established in another Member State and providing a user undertaking, established in the first Member State, with a service consisting in the making available of workers who are nationals of non-member countries, is not availing itself of the freedom to provide services for a purpose other than the provision of the service in question, and (ii) the possibility of taking the necessary control measures in that regard, the exercise of that power may not, however, allow that Member State to impose disproportionate requirements. [34] Furthermore, as is clear from the case-law cited in point 43 of this Opinion, the national authorities of the Member State to which the workers are posted are entitled to monitor compliance with social legislation during the posting, while taking account of the obligations to which that undertaking is already subject under the social legislation applicable in the Member State of origin.

50. According to the referring court, the Netherlands legislation at issue is characterised by a dual procedure, that is to say, first, the obligation to make a declaration and, second, the obligation to hold a residence permit. I do not agree with that consideration, since the declaration and the requirement to hold a residence permit occur at different stages of the posting and have separate objectives. After all, if the duration of the activities is less than 90 days in any 180-day period, all that is necessary is the advance declaration by the service provider, which consists in providing the authorities of the Member State of posting with information showing that the situation of the workers who are third-country nationals is lawful, inter alia in terms of residence, work permit

[32] Judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 46 and the case-law cited).

[33] See judgment of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraphs 51 to 53 and the case-law cited).

[34] See judgment of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraph 55).

and social coverage in the Member State in which that undertaking employs them.[35] The obligation for each third-country worker to hold a residence permit is linked solely to the exceedance of that 90-day period. To that effect, the obligation to obtain such a residence permit cannot be regarded as equivalent to a requirement of prior authorisation and it may not cause prejudicial delays for the service provider.[36]

51. In its written observations, the Netherlands Government has argued that the obligation on the service provider to make a declaration allows the Netherlands authorities to check that the freedom to provide services is not being used for purposes other than the supply of services concerned and that national social legislation is observed during the posting. However, that obligation to make a declaration does not govern the right of residence of third-country workers.

52. I would note that, in the absence of a 'derived right of residence' conferred on posted third-country nationals and in the case of a duration of stay exceeding 90 days in any 180-day period, such workers then no longer have a right of residence in the Netherlands on the basis of Article 21(1) of the Schengen Convention. According to the Netherlands Government, the obligation to obtain a residence permit in the Netherlands after a period exceeding 90 days in any 180-day period is intended to prevent those workers from staying in that Member State illegally. In that regard, recital 6 of Regulation (EU) 2016/399[37] states that 'border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat *illegal immigration* and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'.[38] In addition, as is apparent from Article 6(1) of that regulation, third-country nationals may only stay on the territory of the Schengen area for a maximum period of 90 days in any 180-day period.[39]

53. Furthermore, in the context of the application of Decision No 1/80,[40] the Court has held that the objective of preventing unlawful entry and residence constitutes an *overriding reason in the public interest*.[41] It is my view that that case-law can be applied by analogy to the matter relating to the posting of workers who are nationals of non-Member States in the framework of a cross-border provision of services, which has so far not been harmonised at EU level.[42]

54. According to the Commission, the grant of a residence permit to third-country workers posted to a Member State should constitute a declaratory act and not a constitutive act. However, I consider that, since it is for the Member States to regulate the right of residence of those workers, the Member State concerned may carry out verifications before granting an individual residence permit to the said workers.

35 See point 42 of this Opinion.

36 See, to that effect, judgment of 21 October 2004, *Commission* v *Luxembourg* (C-445/03, EU:C:2004:655, paragraph 43).

37 Regulation 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).

38 Emphasis mine.

39 See judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the port of Rotterdam)* (C-341/18, EU:C:2020:76, paragraph 58).

40 Decision of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey. The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

41 See judgment of 3 October 2019, *A and Others* (C-70/18, EU:C:2019:823, paragraph 46 and the case-law cited).

42 See point 30 of this Opinion.

55. It is apparent from the order for reference that, according to the State Secretary, the procedure for obtaining a residence permit is simple in the sense that the service provider is already in possession of the required documents and that the checks consist in verifying whether a declaration has been made and whether a work permit, residence permit and employment contract exist in the other Member State. In its written observations, the Netherlands Government argues that, in addition, the identity of the third-country worker is checked in order to determine whether the worker mentioned in the employment contract is the same person as the residence permit applicant. The national authorities also verify whether that worker represents a threat to public policy or national security.

56. It is for the referring court to examine whether those checks observe the limits imposed by EU law, in particular those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities. [43] In particular, in accordance with settled case-law of the Court, grounds of public policy may be relied only if there is a genuine and sufficiently serious threat to a fundamental interest of society and, moreover, those grounds must not serve purely economic ends. [44]

57. If those conditions are met, namely if the checks made by the Member State of posting comply with the principle of proportionality, I am of the view that Articles 56 and 57 TFEU do not preclude an individual residence permit from being required for each third-country national posted in the context of a cross-border provision of service where that provision exceeds a period of 90 days in any 180-day period and the service provider has fulfilled its obligation to make a declaration.

3. The period of validity of the residence permit

58. It is apparent from the order for reference that, according to the Netherlands legislation at issue, the period of validity of the residence permit issued to a third-country worker posted to the Netherlands is limited to the period of validity of the work and residence permit granted in the Member State in which the service provider is established and that, in any event, the period of validity of such a residence permit cannot exceed two years, regardless of the duration of the provision of services.

59. The Commission argues that the maximum duration of validity of two years which, as the Netherlands Government has confirmed in its written observations, is based on the fact that a posted worker remains subject to the social security rules of his or her Member State of origin, is disproportionate and that a less restrictive but equally effective measure would be to have the duration of the residence permit correspond to the duration of the assignment, without imposing a maximum duration. The Commission has added that, in the event of a posting of third-country workers, the validity of the residence permit could also be limited to the duration of the validity of the work and residence permits held by those workers in the Member State of origin.

60. In that regard, it should be recalled that, pursuant to settled case-law of the Court, '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. No provision of the FEU Treaty affords a means of

[43] See judgment of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraphs 51 to 53 and the case-law cited).

[44] See, by analogy, judgment of 2 March 2023, *PrivatBank and Others* (C-78/21, EU:C:2023:137, paragraph 62).

determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the FEU Treaty. [45]

61. Consequently, a provision of cross-border services, within the meaning of EU law, may last several years. [46] However, in my view, a distinction should be made between the provision of services in itself and the persons carrying it out, who, as is apparent from the Court's case-law, [47] do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work. It is true that, in the context of the proper functioning of the internal market, it is important that undertakings employ persons competent to carry out work, which may involve calling on third-country nationals. However, that is a 'temporary movement' of workers who are sent to another Member State to carry out work as part of a provision of services by their employer. [48]

62. To that effect, Article 12(1) of Regulation (EC) No 883/2004 [49] states that 'a person a 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/she is not sent to replace another posted person'.

63. As the Court has held, in order to prevent an undertaking established in a Member State from being obliged to register its workers, normally subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration, that provision of Regulation No 883/2004 allows the undertaking to keep its workers registered under the social security system of the first Member State. [50] Accordingly, EU law takes two years as a reference period, which can be taken into consideration (although it is not an obligation) by a Member State in defining the maximum duration of a residence permit.

64. Where third-country workers are assigned to a provision of services of long duration in the Member State of posting or are reassigned to another provision of services in that State, it must be considered that the movement of those workers is no longer temporary and that they are accessing the labour market of the said Member State It follows that, if the duration of the provision of services exceeds two years, the Member State concerned is entitled to oblige the service provider to avail itself of other workers, whether originating from the European Union or from a third country.

65. Furthermore, in the context of a cross-border posting, it is for the Member State in which the service provider is established to determine the duration of the right of residence under which the third-country worker has access to the territory of the European Union. In particular, that Member State must verify whether the conditions provided for in Article 6 of Regulation 2016/399 are fulfilled. It is only where that worker has the right to reside and work in that Member State that he or she may lawfully be posted to another Member State. The Member

45 Judgment of 2 September 2021, *Institut des Experts en Automobiles* (C-502/20, EU:C:2021:678, paragraph 35 and the case-law cited).

46 At the hearing, the applicants gave the example of the construction of a nuclear power plant.

47 See point 48 of this Opinion.

48 See, to that effect, judgment of 27 March 1990, *Rush Portuguesa* (C-113/89, EU:C:1990:142, paragraph 15).

49 Regulation 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).

50 See judgment of 3 June 2021, *TEAM POWER EUROPE* (C-784/19, EU:C:2021:427, paragraph 60 and the case-law cited).

State of posting is therefore entitled to limit the period of validity of the residence permit issued to the posted third-country worker to the period of validity of the work and residence permit granted in the Member State in which the service provider is established. As the Netherlands Government has noted, if that period is exceeded, the Member State of posting may no longer rely on the control carried out by the Member State of origin and should then itself carry out the control provided for in Article 6 of Regulation 2016/399, which is antithetical to the concept of 'posting'.

66. Accordingly, Article 56 TFEU does not preclude the period of validity of the residence permit in the Member State in which services are provided from being calculated based on the length of the residence permit issued by the Member State in which the service provider is established and, in any case, to two years.

4. The amount of the fees to be paid

67. With regard to the amount of the fees to be paid, it is apparent from the order for reference that that amount is equal to that of the fees to be paid for an ordinary permit for the purpose of the exercise of employment by a third-country national. That amount is five times higher than the amount of the fees to be paid for a certificate of lawful residence for an EU citizen. [51]

68. At the hearing, the applicants argued that the fees to be paid to obtain their residence permits in the Netherlands are very high and that they impede the exercise of the freedom to provide services.

69. In that regard, I note that, generally speaking, EU law does not preclude national legislation which obliges third-country workers, or their employer, to pay fees for the processing of their residence permit applications. Nevertheless, in accordance with Article 56 TFEU, administrative charges must not impede the provision of services. [52]

70. Regarding the case in the main proceedings, it appears, prima facie, that the group of third-country nationals exercising employment in the Netherlands is most easily comparable with that of posted third-country workers. It is for the national court to verify whether the amount of the fees to be paid for the issuance of a residence permit to a posted third-country worker constitutes a disproportionate restriction of the freedom to provide services enshrined in Article 56 TFEU.

71. Having regard to the foregoing, I consider that Articles 56 and 57 TFEU do not preclude national legislation under which, in the situation in which a service provider established in one Member State posts third-country workers to another Member State for a duration exceeding 90 days in a 180-day period, those workers are obliged to hold an individual resident permit in that second Member State, the duration of which is limited to the period of validity of the residence and work permit granted in the first Member State and, in any event, to two years, and the grant of which is subject to the payment of fees equal to those payable for an ordinary permit for the purpose of the exercise of employment by a third-country national, provided that that legislation does not impose disproportionate requirements.

[51] In its written observations, the Netherlands Government has however stated that, on 1 January 2019, the Kingdom of the Netherlands brought the amount of the fees to be paid for the issuance of a residence permit into line with the charge for a national identity card and that, consequently, the Commission closed the infringement procedure that it had initiated.

[52] See, to that effect, judgment of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraph 47).

V. Conclusion

72. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands) in the following manner:

Articles 56 and 57 TFEU must be interpreted as not precluding national legislation under which, in the situation in which a service provider established in one Member State posts third-country workers to another Member State for a duration exceeding 90 days in a 180-day period, those workers are obliged to hold an individual residence permit in that second Member State, the duration of which is limited to the period of validity of the residence and work permit granted in the first Member State and, in any event, to two years, and the grant of which is subject to payment of fees equal to those payable for an ordinary permit for the purpose of the exercise of employment by a third-country national, provided that that legislation does not impose disproportionate requirements.