OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 15 January 2015 (1)

Case C-586/13

Martin Meat
v
Géza Simonfay
and
Ulrich Salburg

(Request for a preliminary ruling from the Pesti Központi Kerületi Bíróság (Hungary))

(Freedom to provide services — Posting of workers —Act of Accession 2003 — Transitional measures — Access of Hungarian nationals to the labour market of States which were already Member States of the European Union at the time of the accession of the Republic of Hungary — Requirement for a work permit for the hiring-out of workers — Directive 96/71/EC — Article 1(3) — Transitional measures concerning freedom of movement for persons in Austria)

1. In proceedings before the Pesti Központi Kerületi Bíróság (Pest Central District Court) (Hungary) ('the referring court'), Martin Meat Kft ('Martin Meat'), a Hungarian company specialising in meat processing, seeks to establish the civil liability of its legal advisers, on the basis that the latter failed to advise Martin Meat that its contract with Alpenrind GmbH ('Alpenrind'), a slaughterhouse established in Austria, constituted a hiring-out of Hungarian workers in Austria and that, consequently, those workers could not be employed in that Member State without obtaining a work permit. The referring court seeks guidance from the Court on the interpretation of Chapter 1 of Annex X to the Act of Accession 2003, (2) which sets outs transitional measures concerning freedom of movement for persons in the context of Hungary's accession to the European Union.

2. First, the referring court asks whether Martin Meat's workers were 'hired out' in Austria (which would mean, on the basis of the judgment in *Vicoplus and Others*, (3) that Austria was entitled to require them to hold work permits in accordance with Chapter 1, paragraph 2, of Annex X (4)) or whether they were rather 'posted' in that Member State. The Court is thus

invited to clarify further the criteria for distinguishing between 'hiring out' and 'posting' of workers.

3. Secondly, the national court asks whether the specific regime of transitional limitations to the freedom to provide services involving temporary movement of workers in Austria and Germany in certain sensitive sectors, laid down in Chapter 1, paragraph 13, of Annex X, affects the scope of Chapter 1, paragraph 2, of that annex. The referring court wonders whether the mere existence of that specific regime implies that in other sectors (such as meat processing) Austria was not entitled to limit, on the basis of paragraph 2, the hiring-out of Hungarian workers on its territory during the five-year transitional period following the accession.

EU law

Act of Accession 2003

4. Annex X to the Act of Accession 2003 sets out transitional measures applicable in the context of Hungary's accession to the European Union. Paragraph 1 of Chapter 1 in that annex, which concerns freedom of movement for persons, provides essentially that, in relation to freedom of movement for workers and freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC, (5) the provisions of what are now Article 45 TFEU and the first paragraph of Article 56 TFEU are to apply fully, as between Hungary and the other Member States (with the exception of Cyprus and Malta), subject only to the transitional provisions laid down in paragraphs 2 to 14.

5. Paragraphs 2 and 5, which concern the free movement of workers, provide in particular: (6)

'2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 [(7)] and until the end of the two year period following the date of accession, the [old] Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Hungarian nationals. The [old] 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 (EEC) No 1612/68 shall apply.'

6. Paragraph 13 concerns the freedom to provide services involving temporary movement of Hungarian workers in Austria and Germany, in the sensitive sectors listed therein. (8) That paragraph provides:

'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/EC, 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.

…'

7. The list of service sectors which may be covered by this derogation in Austria is as follows: horticultural service activities; cutting, shaping and finishing of stone; manufacture of metal structures and parts of structures; construction, including related branches; security activities; industrial cleaning; home nursing and social work activities without accommodation.

Directive 96/71

8. Recital 3 in the preamble to Directive 96/71 points out that the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed.

9. Pursuant to Article 1(1), Directive 96/71 applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to the territory of another Member State. Article 1(3) provides that the directive applies to the extent that those undertakings 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.'

10. Article 2(1) of Directive 96/71 defines a 'posted worker' as 'a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.

Austrian law

11. Under Paragraph 3(1) of the Arbeitskräfteüberlassungsgesetz (Law on the hiring-out of workers, 'the AÜG'), hiring-out of workers consists in making workers available to a third party in order to carry out work. Paragraph 4(1) of the AÜG states that, in order to establish whether such hiring-out exists, the genuine economic nature of a given situation rather than its appearance needs to be taken into consideration. Paragraph 4(2) of the AÜG sets out criteria for identifying when workers are hired out.

12. According to the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals), which applied to workers from new Member States who were subject to transitional measures concerning free movement of workers, these workers needed only to obtain a confirmation of posting if they wer posted from other EU Member States in the

context of a service contract. By contrast, if they were hired out within the meaning of the AÜG, they needed to have work permits.

Facts, procedure and questions referred

13. Martin Meat concluded a contract with Alpenrind in 2007 ('the 2007 contract'). Under the 2007 contract, Martin Meat was to process 25 sides of beef per week, and package the beef as finished cuts of meat, in Alpenrind's Salzburg slaughterhouse and in premises which Martin Meat rented from Alpenrind. Martin Meat was to perform the 2007 contract by using its own personnel, namely Hungarian workers.

14. Martin Meat's remuneration was based on the quantity of meat processed. Alpenrind was entitled to reduce that remuneration if the processed meat was of poor quality. Martin Meat provided part of the equipment and tools necessary for the processing, but its workers also used Alpenrind's machines.

15. Martin Meat was moreover responsible for organising work and its manager gave individual instructions to the workers. Alpenrind's manager directed Martin Meat's manager as to what meat was to be processed and how.

16. Martin Meat sought legal advice from Géza Simonfay and Ulrich Salburg ('the legal advisers') on whether the movement of Martin Meat's workers to Austria to perform the 2007 contract was subject to transitional restrictions in that Member State and, in particular, whether those workers needed work permits.

17. The legal advisers told Martin Meat that, because the meat processing and packaging activities did not concern the protected sectors listed in Chapter 1, paragraph 13, of Annex X to the Act of Accession 2003 and the 2007 contract involved posting workers rather than hiring them out, its workers were already entitled to work in Austria without work permits prior to 1 May 2011 (the end of the seven year period following the date of Hungary's accession to the European Union). (9)

18. The Austrian authorities took the view, however, that the 2007 contract involved the hiring-out of workers in Austria and that, as a consequence, those workers needed work permits to work in Salzburg. A fine of EUR 700 000 was thus imposed on Alpenrind, which Martin Meat had to bear pursuant to the 2007 contract. Alpenrind's challenges in Austria against that fine were rejected, including at last instance by the Verwaltungsgerichtshof (Supreme Administrative Court).

19. In the main proceedings, Martin Meat now seeks to obtain damages from the legal advisers before the Hungarian courts for the losses caused by what it regards as incorrect legal advice. In that context, the referring court has requested a preliminary ruling on the following questions:

'1. Is there a hiring-out of workers according to [EU] law, and specifically according to the definition of hiring-out contained in [*Vicoplus and Others*] where a contractor undertakes to process sides of beef, using its own personnel, 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 [in *Vicoplus and Others*], according to which the hiring-out of workers can be subject to limitations while the transitional derogation from freedom of movement for workers under the Accession Treaties for the [new] Member States which acceded to the European Union on 1 May 2004 is in force, also applicable to movement of workers in the course of a hiring-out of workers who are sent to Austria by a company established in a [new] Member State if such movement occurs in a sector which is not protected under the Accession Treaty?'

20. Written observations have been submitted by the legal advisers, Austria, Germany, Hungary, Poland and the European Commission, all of whom, together with Martin Meat, made oral submissions at the hearing on 9 October 2014.

Analysis

Preliminary remarks

21. Article 1(1) of Directive 96/71 describes all situations covered by Article 1(3), including both subparagraphs (a) and (c) thereof, as 'posting'. In this Opinion, however, I shall refer to the situation covered by Article 1(3)(a) of Directive 96/71 as a 'posting (of workers)', and to the situation covered by Article 1(3)(c) as a 'hiring-out (of workers)'. Also, for clarity, I shall refer to the 'service provider' and the 'client' in the context of a posting and to the 'personnel provider' and the 'user undertaking' in the context of a hiring-out.

22. Although this is not a question raised by the referring court, it is necessary to examine as a preliminary issue whether Martin Meat, which specialises in meat processing, falls within the scope of Article 1(3)(c) of Directive 96/71 if it hires out workers within the meaning of that provision. That question arises because the English version of Article 1(3)(c) refers to actions taken by 'a temporary employment undertaking or placement agency', thereby suggesting that only undertakings specialising in the hiring-out of workers are covered. However, several other of the official language versions in which Article 1(3)(c) was adopted in 1996 use broader wording, suggesting that that provision applies to all undertakings hiring out workers in a Member State (including those which do not specialise in hiring-out). (10)

23. According to settled case-law, the need for a uniform interpretation of the provisions of European Union law makes it impossible for the text of a provision to be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages. (11) When there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (12)

24. Against that background, it seems clear that Article 1(3)(c) of Directive 96/71 does not apply exclusively to undertakings specialising in the hiring-out (or placement) of workers. The purpose of that directive was, as is clear from recitals 6 and 13 in its preamble, to address problems arising from the transnationalisation of the employment relationships by coordinating the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there. (13) That objective would be undermined if those mandatory rules were not applicable to the employment relationship between an undertaking and workers which it hires out in a host Member State simply because that undertaking does not specialise in hiring-out (but rather hires out personnel, for instance, to an undertaking active in the same sector as itself but established in another Member State). Likewise, that would render largely inoperative the distinct regimes of transitional limitations to freedom of movement for persons in the context of posting and hiring-out, laid down in several annexes to the Act of Accession 2003.

25. Lastly, I should emphasise that Chapter 1 of Annex X to the Act of Accession 2003 establishes different phases in the transitional limitations to the free movement of workers. The first is the period from 1 May 2004 to 30 April 2006, the second is between 1 May 2006 and 30 April 2009 and the last is between 1 May 2009 and 30 April 2011. The present reference, which concerns cross-border movements in 2007, involves the second period of transitional measures (thus Chapter 1, paragraph 2, of Annex X), during which old Member States might apply measures regulating access to their labour markets by Hungarian nationals, and therefore derogate from Articles 1 to 6 of Regulation No 1612/68, (14) without having to prove any (threat of) serious disturbances of their labour markets.

The guidance provided by the case-law

26. In *Vicoplus and Others*, the Court clarified both the scope of transitional limitations to the free movement of workers in the context of the accession of the Republic of Poland to the European Union and the criteria for distinguishing between hiring out workers and posting workers. The Court's reasoning in that case applies by analogy in the context of the accession of the Republic of Hungary to the European Union, the provisions in Chapter 1 of Annex X to the Act of Accession 2003 corresponding in substance to those contained in Chapter 2 of Annex XII. (15)

27. The Court first recalled its case-law that where an undertaking hires out, for remuneration, staff who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which must in principle be considered a 'service' within the meaning of Article 57 TFEU. (16) I interject in this context that, pursuant to settled case-law, Article 56 TFEU precludes a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers. (17)

28. The Court went on to explain that an undertaking that hires out workers, although a supplier of services within the meaning of the TFEU, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. (18) Even while remaining in such an undertaking's employment, a worker who has been hired out in the circumstances set out in Article 1(3)(c) of Directive 96/71 is typically assigned, during the period for which he is hired out, to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking. (19)

29. Therefore, measures adopted by the old Member States with a view to limit the hiring-out of workers who are nationals of the new Member States must be considered to be measures *regulating access of those nationals to the labour market* of the old Member States in question. In the context of Hungarian (rather than Polish) accession, this means that such measures are governed in particular by Chapter 1, paragraph 2, of Annex X to the Act of Accession 2003. (20) As a result, during the five-year transitional period following the accession, old Member States are entitled to make the hiring-out of Hungarian workers on their territory subject to obtaining a work permit. (21) By contrast, posting workers in the context of a service contract does not concern access to labour markets in the old Member States. It thus cannot be subject there to transitional limitations, on the basis of those provisions.

30. That conclusion is in line with the purpose of Chapter 1, paragraph 2, of Annex X, which (just like Chapter 2, paragraph 2, of Annex XII as regards Poland's accession) is to prevent, following the accession, disturbances on the employment market of the old Member States due to the immediate arrival of a large number of Hungarian workers. (22) A hired-out worker is in direct competition with local workers on the employment market of the host

Member State. (23) It would thus be artificial to draw a distinction according to whether the worker in question gains access to the employment market of the host Member State indirectly via a contract for the hiring-out of labour or directly and independently. In both cases the (potentially large) movement of workers is capable of disturbing the employment market in the host Member State. If the hiring-out of workers were excluded from the scope of Chapter 1, paragraph 2, of Annex X to the Act of Accession 2003, that would be liable to deprive that provision of much of its effectiveness. (24)

31. In *Vicoplus and Others*, the Court defined the hiring-out of workers as a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the personnel provider, no contract of employment being entered into with the user undertaking (*first criterion*); which 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 personnel provider (*second criterion*); and where the worker carries out his tasks under the control and the direction of the user undertaking (*third criterion*). (25) By contrast, the Court held that whether the worker returns to his Member State of origin at the end of the posting, and whether there is correspondence between the activities carried out by the worker in the host Member State and the main activity of his employer, are not decisive criteria. (26)

Question 2: Was Austria entitled to limit the hiring-out of Hungarian workers on its territory in all sectors in 2007?

32. I shall address the second question first. The legal advisers argue in substance that, unlike other old Member States (apart from Germany), Austria could not limit the hiring-out on its territory of Hungarian workers during the five-year period following accession (thus on the basis of Chapter 1, paragraph 2, of Annex X), unless the movement of workers concerned one of the sensitive sectors listed in Chapter 1, paragraph 13, of Annex X. In their view, it would be incompatible with the specific regime under paragraph 13 to permit Austria to impose restrictions on the hiring-out of workers in all sectors. If the legal advisers' view is correct, it is immaterial whether the 2007 contract constituted a hiring-out of workers. Austria was not in any event entitled to require work permits from Martin Meat's workers on the basis of Chapter 1, paragraph 2, of Annex X. If, however, the legal advisers' view is wrong and the 2007 contract involved a posting of workers rather than a hiring-out, paragraph 13 of that Annex is of no help, since meat processing is not among the sensitive sectors covered by that provision.

33. Unlike the legal advisers, I see no reason why paragraph 13, which exclusively concerns *freedom to provide services* in certain sensitive sectors in Austria and Germany, would limit the general possibility which those two Member States derive from Chapter 1, paragraph 2, of Annex X to regulate movements of Hungarian workers on their territory during the five year period following accession. (27) It seems to me that the two paragraphs simply have distinct scopes of application.

34. That conclusion is consistent not only with the structure of Chapter 1 (28) and the text of paragraph 2 (which makes no distinction amongst the 15 old Member States), but also the latter provision's purpose. As the Court made clear in *Vicoplus and Others*, both decisions by individual workers to take up a new job and the hiring-out of workers can disturb employment markets in the old Member States. (29) Austria and Germany were, furthermore, early supporters of 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. (30) It seems implausible that they would have accepted arrangements that meant that, during the five year period which followed that accession, Austria and Germany enjoyed *less* room for manoeuvre than the other old Member States to regulate the influx of

Hungarian workers on their territory; and I see no compelling reason to read the text in that way.

35. The answer to the second question, as I have rephrased it, is therefore 'yes'.

Question 1: Which parameters are relevant when assessing whether workers have been hired out?

36. As I have already indicated, the Court set out three cumulative criteria in *Vicoplus and Others* for identifying a hiring-out of workers. (31)

37. The *first criterion* does not help to distinguish a hiring-out of workers from a posting of workers. Both presuppose that there is an employment relationship between the workers concerned and the undertaking posting them or hiring them out. I shall therefore focus on the *second* and *third criteria*.

38. I say at the outset that whether a given situation falls within the scope of Article 1(3)(a) or (c) of Directive 96/71 cannot turn exclusively on the terms of the service contract. One must examine the way in which that contract is performed in the light of all relevant circumstances. Otherwise, astute contractual arrangements might enable contracting parties to circumvent transitional limitations to the freedom of movement for workers adopted on the basis of the Act of Accession 2003.

39. As regards the *second criterion*, the Court distinguished in *Vicoplus and Others* between 'on the one hand, the [hiring-out] of workers and, on the other, a temporary movement of workers who are sent to another Member State to carry out work there as part of a provision of services by their employer …, a movement for those purposes being referred to … in Article 1(3)(a) of Directive 96/71'. The Court pointed to the fact that, in the latter case, 'the posting of workers by their employer to another Member State is *ancillary to* a provision of services undertaken by that employer in that State', whereas in the context of hiring-out, 'the movement of workers to another Member State *constitutes the very purpose* of a transnational provision of services'. (32)

40. The starting point is thus whether, in any given instance, the emphasis is on the provision of a service *other than* the hiring-out of workers to a user undertaking. (33) An essential element when examining the contract's 'very purpose' is whether that contract aims at a specific result which can be distinguished from the hiring-out of workers and whether the remuneration of the service provider is based on that result. Of course, the price of certain services is based essentially on the amount of work (reflecting, in some cases, the number of workers) necessary to deliver them. That however does not necessarily imply that there has been a hiring-out of workers, even when the service contract (or the estimate) refers to that information. What matters is whether the price which the client accepts to pay is the counterpart of a service clearly distinct from the hiring-out of personnel.

41. In his Opinion in *Vicoplus and Others*, Advocate General Bot gave the example of a service contract whereby an undertaking specialising in the installation of computer software (A) established in one Member State engages itself to send its engineers into an undertaking (B) located in another Member State in order to develop B's computer system. Although such a contract involves a transnational movement of workers, its purpose is to deliver computer services (possibly combined with supplying electronic equipment). It therefore involves a posting of workers. (34) Suppose instead that A engages itself to send personnel to spend one year working inside an undertaking specialising in the development of electronic games (C), in order to help with the development of a new game. A receives a fee from C every month, calculated on the basis of a flat rate per employee and per working day. The purpose

of such a contract is clearly to make specific personnel available to C. Provided the workers seconded carry out their tasks under C's control and direction, (35) this clearly constitutes a hiring-out of workers.

42. Was the 2007 contract a contract to process (and package) meat or a contract to hire out workers?

43. On the basis of the available information, there is little doubt in my mind that it was the former. Martin Meat bound itself to process 25 sides of beef on a weekly basis for Alpenrind, and to package the beef as finished cuts of meat. The legal advisers submitted at the hearing that Martin Meat freely determined how many workers were needed to perform the 2007 contract. Martin Meat's remuneration depended moreover on the quantity of processed meat. Alpenrind was entitled to reduce the remuneration if the meat was of poor quality. All those elements tend to confirm that the movement of Hungarian workers in issue in the main proceedings was not the 'very purpose' of the 2007 contract. It was ancillary to the provision of meat processing and packaging services to Alpenrind.

44. The Commission, supported at the hearing by the Hungarian Government, argues in essence that one should distinguish between the hiring-out and the posting of workers on the basis of who bears the*economic risk* under the contract. (36) In its view, where those risks are borne mainly by the service provider, that tends to indicate that the contract involves a posting rather than a hiring-out.

45. As I see it, however, that cannot be a decisive parameter.

46. It is true that the service provider usually carries the risk associated with failing to perform in whole or in part the contract or for performing it inadequately. As the Polish Government correctly submits, nevertheless, the nature of the economic risks incurred in the context of a service contract and the way in which they are shared between the parties are less indicative of whether or not there has been a hiring-out of workers than of the market for the service in question and the specific terms on which parties agree in each contract.

47. Thus, on the one hand, an undertaking hiring out workers might nevertheless bear part of the risks related to the performance of the contract. For example, the contract might stipulate that the personnel provider is to replace a hired-out worker absent from work (for instance on health grounds) at its own cost or alternatively compensate the user undertaking. That detail would have no bearing on the contract's purpose, which is the hiring-out of workers.

48. On the other hand, substantial economic risks related to the performance of a service contract may be borne by the client. For instance, the 2007 contract might have provided that Alpenrind bore the risk of a possible delay to production caused by the temporary unavailability of Martin Meat's workforce, or that Alpenrind had to buy and insure all the equipment necessary for processing and packaging the meat. (37) The mere circumstance that the client accepts to bear certain economic risks would not alter the contract's purpose, however, which — as far as I can see — was the delivering of a service distinct from the hiring-out of personnel.

49. Similarly, whether the contract is performed in the client/user undertaking's premises, whether in that event rent is paid, whether the client/user undertaking provides training to the workers concerned, and whether it is the only client/user undertaking in the host Member State, are not decisive parameters for the purpose of distinguishing between a hiring-out and a posting. The presence or absence of each such factor will depend on the market for the service in question and the terms of the contract.

50. Although workers hired out to a user undertaking often work in the latter's premises and use its equipment, that may not necessarily always hold good. Suppose that Martin Meat's remuneration had been based on a fee per worker and per working day and that its workers had been placed under Alpenrind's control and direction, so that Martin Meat's workers had been hired out to Alpenrind. That finding would not be undermined if the workers concerned carried out their work for Alpenrind in premises belonging to Martin Meat. Conversely, it is not unusual for the posted workers of a service provider to work in the client's premises and to use its tools and equipment.

51. Likewise, the fact that the client/user undertaking provides training to the workers concerned is not decisive. Its relevance will depend on the activity in question and the terms of the contract. For instance, parties to a service contract involving a posting of workers may plausibly agree that the client provides training on health and safety measures at the working place or on its history and commercial strategy. Similarly, both a hiring-out and a posting are conceivable scenarios when the service/personnel provider has only one client/user undertaking in the host Member State, as this may result from, inter alia, the service/personnel provider's capacities, the nature of the services concerned, or simply the fact that the service/personnel provider is not (yet) known in the host Member State.

52. The *third criterion* concerns whether the worker 'works under the control and direction' of the user undertaking. (38)

53. In the context of hiring-out, it is the user undertaking that organises work, gives the workers concerned instructions on how they should carry out their tasks and controls whether they abide by those instructions. (39) The Court made clear in *Vicoplus and Others* (40) that '[t]hat is the corollary of the fact that such workers do not carry out their work in the context of a provision of services undertaken by their employer in the host Member State'.

54. As can be inferred from that statement, the second and third criteria are closely related. The contract's purpose usually provides useful guidance as to who exercises control and direction over the worker(s) concerned. If the remuneration is based in essence on the amount of work carried out by each worker rather than on a service clearly distinct from the hiring-out of workers, the user undertaking will most probably avail itself of the possibility to give precise instructions to those workers on how they should carry out their tasks and also to monitor compliance with those instructions. By doing so, the user undertaking simply seeks to make the best possible use of the hired-out personnel. If by contrast the remuneration is calculated by reference to a service distinct from the hiring-out of personnel, it is very likely that the workers will remain under the service provider's control and direction. There, it is the service provider rather than the client which has an interest that its workers are used in the most efficient way with a view to delivering the service in question.

55. It is essential in that context to distinguish between control and direction over the workers themselves and verification by a client that a service contract has been performed properly. As the legal advisers rightly point out, it is normal for a client to verify in one way or another that the service delivered is in conformity with the contract. Moreover, depending on the circumstances, a client may give certain instructions to the service provider's workers on how the service contract should be performed. That however does not entail 'direction' and 'control' over the service provider's workers. The workers remain subordinated to the service provider, which alone is competent to take measures which it deems appropriate regarding those workers if they have not performed their tasks as they should have.

56. In the main proceedings, it appears in particular from the order for reference and from Martin Meat's oral submissions that Alpenrind's manager gave directions to Martin Meat's

manager as to which meat had to be processed and how, and verified whether the packs of meat produced were in conformity with those instructions. It also seems that Alpenrind provided information on health and safety rules which had to be observed by Martin Meat's workers while carrying out their tasks. Martin Meat explained at the hearing that it remained responsible for organising work, its manager distributing tasks between the workers concerned, giving them individual instructions in Hungarian on how to process and package the meat (in accordance with Alpenrind's directions) and monitoring compliance with those directions. It has not been suggested that Alpenrind was able to take individual measures regarding Martin Meat's workers. The information available to the Court tends to indicate that Alpenrind's instructions were without prejudice to Martin Meat's control and direction over its workers.

57. Ultimately, the facts are for the national court to judge. That said, on the basis of the material before the Court, I have little hesitation in concluding that the movement of workers in issue in the main proceedings constituted a posting (Article 1(3)(a) of Directive 96/71), rather than a hiring-out (Article 1(3)(c)).

58. If the Court endorses the view that I have reached, and the national court confirms on the facts that the 2007 contract involved a posting, rather than a hiring-out, of workers by Martin Meat to Alpenrind, the consequences bear exploring. I have suggested that the legal advisers were wrong to conclude that the existence of paragraph 13 of Annex X to the Act of Accession 2003 precluded Austria from relying on paragraph 2 of that Annex in respect of economic activities falling outside the sensitive sectors listed in paragraph 13. They nevertheless gave correct legal advice in informing Martin Meat that the Austrian authorities were not entitled to require Martin Meat's Hungarian personnel to hold work permits in order to perform the 2007 contract with Alpenrind. It would presumably follow — since the conclusion reached in the legal advice (no work permits required) was correct, even if part of the reasoning supporting that conclusion may perhaps have been erroneous — that the legal advisers will not incur liability.

59. Alpenrind was nevertheless fined EUR 700 000 by the Austrian authorities because Martin Meat's personnel did not have work permits: a fine that, under the terms of the 2007 contract, was borne by Martin Meat. Alpenrind's challenges to the fine were unsuccessful. In particular, the Austrian Supreme Administrative Court, hearing the appeal at last instance, did not make a reference to this Court under Article 267 TFEU. Presumably it thought that the point of European Union law was *acte clair* against Alpenrind (and, by association, Martin Meat).

60. The outcome is deeply unfortunate. A reference from the Supreme Administrative Court in accordance with the spirit of Article 267(3) TFEU would have produced the necessary timely guidance to resolve the issue in Alpenrind's favour and the fine would have been quashed. As it is, Martin Meat has been left paying a substantial fine which, on this basis, should never have been levied because the requirement for Martin Meat's personnel to hold work permits was in breach of Annex X to the Act of Accession 2003. Martin Meat may now have to take appropriate legal advice in Austria to examine what may be its chances of establishing Austria's non-contractual liability before the Austrian courts, bearing in mind the factors identified in the Court's case-law concerning Member State liability for damage caused to individuals by an infringement of European Union law committed by a national court adjudicating at last instance. (41)

Conclusion

61. In the light of all the foregoing considerations, I propose that the Court answers the questions referred by the Pesti Központi Kerületi Bíróság as follows:

(1) The freedom to provide services and the definition of 'services' in (respectively) Articles 56 and 57 TFEU did not preclude the Republic of Austria, during the transitional period provided for in Chapter 1, paragraph 2, of Annex X to the Act of Accession 2003, from making the hiring-out on its territory, within the meaning of Article 1(3)(c) of Directive 96/71/EC, of workers who are Hungarian nationals subject to the obtaining of a work permit.

(2) When ascertaining whether a service involving temporary movement of workers constitutes a hiring-out of workers within the meaning of Article 1(3)(c) of Directive 96/71 or a posting of workers within the meaning of Article 1(3)(a) thereof, on the basis of the criteria identified by the Court in its judgment in *Vicoplus andOthers* (C-307/09 to C-309/09, EU:C:2011:64), national authorities have to take into account, in particular, whether the contract aims at a specific result which can be distinguished from the hiring-out of workers, whether the remuneration is based on that result, and who effectively organises work, gives the workers concerned instructions on how they should carry out their tasks and checks whether they are working in conformity with those instructions.

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1 – Original language: English.

2– 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 ('the Act of Accession 2003') (OJ 2003 L 236, p. 33). I shall use the phrase 'old Member States' to designate States that were already Member States of the European Union at the time of that accession, and 'new Member States' to designate States which joined the European Union on 1 May 2004.

3– Judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64.

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4 – See point 29 below.

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5 – 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).

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6 – Paragraphs 3, 4, 6 to 12 and 14 are not relevant to the present proceedings.

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7 – Of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475). That regulation was repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1). The latter regulation is however not relevant to the main proceedings *ratione temporis*.

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8 – That regime is distinct from the specific limitations to freedom to provide services in Chapter 2 of Annex X, concerning Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ 1997 L 84, p. 22) and Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1). Again, that chapter is not relevant to the present proceedings.

9 – Since the legal advice itself does not appear to form part of the national file deposited with the Court, I have based my narrative on the order for reference and the observations submitted by the legal advisers.

10 – See, for example, the French version ('détacher, en tant qu'entreprise de travail intérimaire ou en tant qu'*entreprise qui met un travailleur à disposition* …'), the Dutch version ('als uitzendbedrijf of als *onderneming van herkomst*, een werknemer ter beschikking stellen van een ontvangende onderneming …'), the German version ('als Leiharbeitsunternehmen oder als *einen Arbeitnehmer zur Verfügung stellendes Unternehmen* einen Arbeitnehmer in ein verwendendes Unternehmen entsenden …'), the Italian version ('distacchino, in quanto imprese di lavoro temporaneo o in quanto *imprese che effettuano la cessione temporanea di lavoratori* …'), or the Swedish version ('I egenskap av företag för uthyrning av arbetskraft eller *företag som ställer arbetskraft till förfogande* …') (emphasis added).

11 – See, for example, judgment in *Profisa*, C-63/06, EU:C:2007:233, paragraph 13 and case-law cited.

12 – Judgment in *Profisa*, EU:C:2007:233, paragraph 14 and case-law cited.

13 – See to that effect judgment in *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 59.

14 – Those provisions, which are in Part I, Title I, of Regulation No 1612/68 ('Eligibility for employment'), concern access to the employment market itself. Articles 7 to 9 (Title II) are about equality of treatment between national workers and migrant workers. Articles 10 to 12 (in some, but not all versions labelled as 'Title III') concern workers' families. Articles 7 to 12 were not covered by the transitional regime in Chapter 1 of Annex X and were thus applicable to Hungarian workers as from 1 May 2004. See by analogy, concerning transitional measures following the accession of the Portuguese Republic to the Community, the judgment in *Lopes da Veiga*, 9/88, EU:C:1989:346, paragraphs 9 and 10.

15 – The same conclusion applies as regards movements of workers from the Czech Republic (Chapter 1 of Annex V), Estonia (Chapter 1 of Annex VI), Latvia (Chapter 1 of Annex VIII), Lithuania (Chapter 2 of Annex IX), Slovenia (Chapter 2 of Annex XIII) and Slovakia (Chapter 1 of Annex XIV).

16 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 27 and case-law cited.

17 – Judgments in *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 26, *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraph 24, and *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 40.

18 – Judgments in *Rush Portuguesa*, C-113/89, EU:C:1990:142, paragraph 16, and *Vicoplus and Others*, EU:C:2011:64, paragraph 30.

19 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 31.

20 – Judgments in *Rush Portuguesa*, EU:C:1990:142, paragraphs 14 and 16, and *Vicoplus and Others*, EU:C:2011:64, paragraph 32.

21 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 41.

22 – Judgments in *Lopes da Veiga*, EU:C:1989:346, paragraph 10, and in *Vicoplus and Others*, EU:C:2011:64, paragraph 34 and case-law cited.

23 – Opinion of Advocate General Bot in *Vicoplusand Others*, C-307/09 to C-309/09, EU:C:2010:510, point 71.

24 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 35. See also the Opinion of Advocate General Bot in *Vicoplusand Others*, EU:C:2010:510, point 51.

25 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 51.

26 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraphs 49 and 50.

27 – See judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 41.

28 – See points 4 to 7 above.

29 – See point 30 above.

30 – Currie, S., *Migration,Work and Citizenship in the Enlarged European Union*, Ashgate, Farnham, 2008, pp. 21-22.

31 – See point 31 above.

32 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 46 (emphasis added).

33 – That service may, as in the main proceedings, consist of performing tasks leading up to the production of goods.

34 – Opinion of Advocate General Bot in *Vicoplus*, EU:C:2010:510, point 65.

35 – See on this issue points 52 to 56 below.

36 – There is a degree of uncertainty in the parties' submissions as to whether this might constitute an additional (fourth) criterion or whether this forms part of the second criterion identified in the judgment in *Vicoplus and Others*(EU:C:2011:64).

37 – I am not speculating as to whether the 2007 contract did or did not contain any such terms. I do not know, and in any event all findings of facts are for the national court to make. I am merely using these examples to illustrate my reasoning.

38 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraphs 47 and 48. See also Article 1(1) and Article 3(1)(c) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

39 – As Advocate General Bot put it in his Opinion in *Vicoplusand Others* (EU:C:2010:510, point 63), there must be 'effective subordination of the worker to the user undertaking as regards the organisation, fulfilment and conditions of work'.

40 – Judgment in *Vicoplus and Others*, EU:C:2011:64, paragraph 47.

41 – See, inter alia, the judgments in *Köbler*, C-224/01, EU:C:2003:513, paragraphs 53 to 56, and in *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 32.