JUDGMENT OF THE COURT (Second Chamber)

11 September 2014 (*)

(EEC-Turkey Association Agreement — Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 — Scope — Introduction of new restrictions on the freedom of establishment, the freedom to provide services and the conditions for access to employment — Prohibition — Freedom to provide services — Articles 56 TFEU and 57 TFEU — Posting of workers — Nationals of non-Member States — Requirement for a work permit for the deployment of labour)

In Case C-91/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 20 February 2013, received at the Court on 25 February 2013, in the proceedings

Essent Energie Productie BV

v

Minister van Sociale Zaken en Werkgelegenheid,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2014,

after considering the observations submitted on behalf of:

– Essent Energie Productie BV, by T.L. Badoux, advocaat,

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

– the Danish Government, by M. Wolff, acting as Agent,

– the European Commission, by J. Enegren and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 41(1) of the Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on

behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 17; 'the Additional Protocol') and of Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80'). The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, 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; 'the Association Agreement').

2 The request has been made in proceedings between Essent Energie Productie BV ('Essent') and the Minister van Sociale Zaken en Werkgelegenheid (Minister for Social Affairs and Employment, 'the Minister') concerning a fine imposed on it by the Minister for having had works carried out by nationals of non-Member States without those workers having been issued with a work permit.

Legal context

European Union law

The Association Agreement

3 According to Article 2(1) of the Association Agreement, the aim of the agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties which includes, in relation to the workforce, the progressive securing of freedom of movement for workers (Article 12 of the Association Agreement), and the abolition of restrictions on freedom of establishment (Article 13 of the agreement) and on freedom to provide services (Article 14 of the agreement), with a view to improving the standard of living of the Turkish people and facilitating the accession of the Republic of Turkey to the European Union at a later date (fourth recital in the preamble to and Article 28 of the agreement).

The Additional Protocol

4 The Additional Protocol — which, in accordance with Article 62 thereof, forms an integral part of the Association Agreement — lays down, as is stated in Article 1, the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of the Association Agreement.

5 The Additional Protocol includes Title II, 'Movement of persons and services', Chapter I of which concerns 'Workers' and Chapter II of which concerns the right of establishment, services and transport.

6 Article 41(1) of the Additional Protocol, which appears in Chapter II of Title II, provides:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

7 Article 59 of the Additional Protocol, which appears in Title IV, 'General and final provisions', is worded as follows:

'In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the [FEU Treaty].'

Decision No 1/80

8 Article 13 of Decision No 1/80 provides:

‘The Member States of the [European Union] and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.’

Netherlands law

9 Under Article 1(1)(1)(b)(1) of the Law on the employment of foreign nationals (Wet arbeid vreemdelingen), in the version applicable to the dispute in the main proceedings (‘the Wav 1994’), ‘employer’ means a person who, in the exercise of an office, occupation or business, has work carried out by another.

10 Under Article 2(1) of the Wav 1994, an employer is prohibited from having work carried out in the Netherlands by a foreign national who does not hold a work permit.

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

11 Essent is a company established in the Netherlands, which instructed BIS Industrial Services Nederland BV (‘BIS’), also established in the Netherlands, to carry out works consisting in the erection of scaffolding at its branch in Geertruidenberg (Netherlands).

12 According to a report drawn up by the labour inspectorate on 8 March 2010, during an inspection which it carried out at that establishment on 15, 19 and 20 May 2008, it was found that 33 nationals from non-Member States, 29 of whom were Turkish, took part in those works between 1 January and 20 May 2008.

13 According to that report, the workers who were nationals of non-Member States were posted to BIS by Ekinci Gerüstbau GmbH (‘Ekinci’), an undertaking established in Germany which employed them, without any work permit having been issued by the Netherlands authorities for the purposes of that posting.

14 By a decision of 11 May 2010, the Minister fined Essent EUR 264 000 for infringement of Article 2(1) of the Wav 1994 on the ground that that company had had that work carried out by foreign workers who had not been issued with work permits, even though under Netherlands legislation such permits were compulsory.

15 Essent lodged an objection to that decision.

16 By decision of 22 November 2010, the Minister rejected the objection as unfounded on the ground that the service provided by Ekinci had consisted solely of the posting of a workforce, so that Essent, as the principal contactor and employer of the foreign workers concerned, should have had work permits for those workers.

17 By judgment of 27 September 2011, the Rechtbank ‘s-Hertogenbosch (Netherlands) dismissed the appeal brought by Essent against the decision rejecting the complaint. That court held that the Minister was right to have imposed a fine on Essent, since the service provided by Ekinci consisted only of posting the foreign workers and, in that context, European Union law did not preclude legislation of a Member State requiring workers posted in the territory of that State to hold a work permit.

18 Essent appealed against that judgment to the referring court.

19 It is on that basis that the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. In a situation such as that at issue in the main proceedings, can a principal contactor which must, under Article 2(1) of the [Wav 1994], be regarded as the employer of the Turkish workers concerned rely, as against the Netherlands authorities, on the standstill rule in Article 13 of Decision No 1/80 or on the standstill rule in Article 41 of the Additional Protocol?

2. (a) Must the standstill rule in Article 13 of Decision No 1/80 or the standstill rule in Article 41 of the Additional Protocol be interpreted as precluding the introduction of a prohibition, as set out in Article 2(1) of the [Wav 1994], for principal contractors of having carried out in the Netherlands by workers who are nationals of a non-member country, in this case [the Republic of] Turkey, without a work permit, if those workers are in the employ of a German undertaking and work for the principal contractor in the Netherlands via a Netherlands user undertaking?

(b) Is it significant in that regard that an employer was already prohibited, before both the standstill rule in Article 41 of the Additional Protocol and the standstill rule in Article 13 of Decision No 1/80 entered into force, from having work carried out under a contract of employment by a foreign national without a work permit and that that prohibition was extended likewise before the standstill rule in Article 13 of Decision No 1/80 entered into force, to user undertakings to which foreign nationals are posted?’

Consideration of the questions referred

20 By its questions, which should be considered together, the national court asks, in essence, whether Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which, where Turkish workers are made available by an undertaking established in another Member State to a user undertaking established in the first Member State, which uses them to carry out work on behalf of an undertaking established in the same Member State, such making available is subject to the condition that those workers have been issued with work permits.

The applicability of Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80

21 It must be observed that it is the established case-law of the Court that Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 have direct effect. As a consequence, both those provisions may be relied on by the Turkish nationals to whom they apply before the courts or tribunals of the Member States in order to prevent the application of inconsistent rules of national law (see judgments in *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, paragraphs 58 and 59, and *Demirkan*, C-221/11, EU:C:2013:583, paragraph 38).

22 Moreover, the Court has stated that neither the Association Agreement and its Additional Protocol, nor Decision No 1/80, which concerns only freedom of movement for workers, establishes any general principle of freedom of movement of persons between Turkey and the European Union (see judgment in *Demirkan*, EU:C:2013:583, paragraphs 53).

23 In that context, the Court has repeatedly held that, unlike workers from the Member States, Turkish nationals are not entitled to freedom of movement within the European Union but can rely only on certain rights in the territory of the host Member State alone (see, in particular, *Savas*, C-37/98, EU:C:2000:224, paragraph 59; *Abatay and Others*, EU:C:2003:572, paragraph 64; and *Derin*,

C-325/05, EU:C:2007:442, paragraph 66.)

24 In the case at issue in the main proceedings, the host Member State of the workers concerned, who are Turkish nationals, is the Federal Republic of Germany, where they are legally resident and working.

25 Consequently, it is in connection with that Member State that those workers may assert their rights under Article 13 of Decision No 1/80.

26 In addition, Article 13 concerns national measures relating to access to employment and is not intended to protect Turkish nationals already integrated into a Member State's labour force (see judgment in *Sahin*, C-242/06, EU:C:2009:554, paragraph 51).

27 In addition, it is clear from the structure and purpose of Decision No 1/80 that, at the current stage of development of freedom of movement for workers under the EEC-Turkey Association, that decision is essentially aimed at the progressive integration of Turkish workers in the host Member State through the pursuit of lawful employment which should be uninterrupted (see judgment in *Abatay and Others*, EU:C:2003:572, paragraph 90).

28 The workers in question, who are Turkish nationals and who reside and work legally in their host Member State, that is to say the Federal Republic of Germany, were posted to the territory of the Netherlands for a limited period, being the time needed to carry out the work of erecting scaffolding which Essent entrusted to BIS.

29 Thus, nothing in the papers before the Court suggests that those workers intended to become part of the labour market of the Kingdom of the Netherlands as host Member State.

30 It follows that Article 13 of Decision No 1/80 cannot be applied to a situation such as that at issue in the main proceedings.

31 Concerning Article 41(1) of the Additional Protocol, it must be stated that, as is apparent from its very wording, it formulates, in clear, precise and unconditional terms, an unequivocal standstill clause, which prohibits the Contracting Parties from introducing new restrictions on freedom of establishment and freedom to provide services with effect from the date of entry into force of the Additional Protocol (see judgment in *Demirkan*, EU:C:2013:583, paragraph 37).

32 That standstill clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of the abovementioned economic freedoms on the territory of a Member State subject to stricter conditions than those which were applicable at the time when the Additional Protocol entered into force with regard to that Member State (see judgment in *Demirkan*, EU:C:2013:583, paragraph 39).

33 The Court has previously held that Article 41(1) of the Additional Protocol may be relied on by an undertaking established in Turkey which lawfully provides services in a Member State and by Turkish nationals who are lorry drivers employed by such an undertaking (see judgments in *Abatay and Others*, EU:C:2003:572, paragraphs 105 and 106, and *Demirkan*, EU:C:2013:583, paragraph 40).

34 However, as the Advocate General stated in point 55 of his Opinion, in the dispute in the main proceedings the only connection with the Republic of Turkey lies in the presence of Turkish nationals among the workers posted by Ekinci to the territory of the Netherlands. In the absence of any economic activity between the Republic of Turkey and the Kingdom of the Netherlands in the situation at issue in the main proceedings, that connecting element is not sufficient to bring that

situation within the scope of Article 41(1) of the Additional Protocol.

35 It follows from all of the above considerations that Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 do not apply to a situation such as the one at issue in the main proceedings.

Articles 56 TFEU and 57 TFEU

36 The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of European Union law does not prevent the Court from providing that court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not it has referred to those points in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of European Union law which require interpretation in view of the subject-matter of the dispute (see judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 22 and the case-law cited).

37 In that context, it must also be stated that, following the Court's settled case-law, where an undertaking makes available, for remuneration, workers who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 57 TFEU and must accordingly be considered to be a 'service' within the meaning of that provision (see judgments in *Webb*, 279/80, EU:C:1981:314, paragraph 9, and *Vicoplus and Others*, EU:C:2011:64, paragraph 27).

38 Concerning the dispute in the main proceedings, the service of making workers available is provided by an undertaking established in Germany to a user undertaking established in the Netherlands.

39 As the Advocate General stated in point 60 of his Opinion, first, the provision of such services between two undertakings which are established in two separate Member States falls within the scope of Articles 56 TFEU and 57 TFEU, and, secondly, the fact that the workers made available are nationals of non-member countries is, in that regard, irrelevant.

40 Similarly, the fact that Essent is not the direct recipient of the service of making available the workers in question in the main proceedings cannot have the effect of depriving that undertaking of the possibility of relying on Articles 56 TFEU and 57 TFEU for the purposes of challenging the penalty imposed on it by the Minister.

41 If Essent were denied that possibility, it would suffice for the Member State on whose territory the undertaking receiving that service is established to adopt a broad definition of the concept of employer, such as the one at issue in the main proceedings, in order to obstruct the application of the rules of the FEU Treaty relating to the freedom to provide services and consequently negate the prohibition of restrictions on that freedom in Article 56 TFEU.

42 Furthermore, since Essent, as the principal contractor in the chain of undertakings concerned by the provision of the service at issue in the main proceedings, was the only undertaking to be held responsible by the Netherlands authorities and to have a fine imposed on it, the question whether the provisions of the legislation at issue in the main proceedings which gave rise to the imposition of that fine are compatible with Articles 56 TFEU and 57 TFEU is directly relevant to the resolution of the dispute being heard by the referring court concerning the lawfulness of that fine.

43 Consequently, it is necessary to examine whether Articles 56 TFEU and 57 TFEU must be

interpreted as precluding legislation such as that issue in the main proceedings.

44 It should be pointed out in that regard that it is settled case-law of the Court that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services which are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services (see judgments in *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraph 20, and *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 36).

45 The Court has held, with respect to the posting of workers who are nationals of non-member countries by a service provider established in a Member State of the European Union, that national provisions which make the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitute a restriction on the freedom to provide services within the meaning of Article 56 TFEU (see judgments in *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraph 34, and *Commission* v *Austria*, EU:C:2006:595, paragraph 40).

46 Under the legislation at issue in the main proceedings, an employer is prohibited, in the framework of the transnational provision of services consisting in making workers available, from having work carried out in the Netherlands by a foreign national who does not hold a work permit.

47 Moreover, the conditions and restrictions in terms of deadlines which have to be met in order to obtain that work permit and the administrative burden involved in obtaining such a permit impede the making available of workers who are nationals of non-member countries to a user undertaking established in the Netherlands by a service-providing undertaking established in another Member State, and, consequently, the provision of services by that undertaking (see, to that effect, judgments in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 23; *Commission* v *Germany*, EU:C:2006:49, paragraph 35; and *Commission* v *Austria*, EU:C:2006:595, paragraphs 39 and 42).

48 However, where national legislation falling within an area which has not been harmonised at European Union level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established, and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see judgments in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 21; *Commission* v Germany, EU:C:2006:49, paragraph 31; and *Commission* v *Austria*, EU:C:2006:595, paragraph 37).

49 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 European Union level. That being so, it must be examined whether the restrictions on the freedom to provide services arising from the legislation at issue in the main proceedings appear to be justified by an objective in the public interest and, if so, whether they are necessary in order to pursue, effectively and by appropriate means, that objective (see judgment in *Commission* v *Austria*, EU:C:2006:595, paragraph 44 and the case-law cited).

50 When questioned on this issue at the hearing, the Netherlands Government claimed that the legislation at issue in the main proceedings was justified by the objective of protecting the national

labour market.

51 In that regard, it must be recalled that although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and posted to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work (see judgments in *Rush Portuguesa*, C-113/89, EU:C:1990:142, paragraph 15; *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 38; and *Commission* v *Austria*, EU:C:2006:595, paragraph 55).

52 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 (see judgments in *Rush Portuguesa*, EU:C:1990:142, paragraph 17; *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 39; and *Commission* v *Austria*, EU:C:2006:595, paragraph 56).

53 However, such checks must observe the limits imposed by European Union 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 (see judgments in *Rush Portuguesa*, EU:C:1990:142, paragraph 17; *Commission* v *Germany*, EU:C:2006:49, paragraph 36; and *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 40).

54 In that context, it must be stated that where an undertaking makes available, for remuneration, workers who remain in the employ of that undertaking, no contract of employment being entered into with the user, the specific nature of the activity does not prevent such an undertaking from being a service-providing undertaking which comes with the scope of Article 56 et seq. TFEU and cannot exclude such an activity from the rules on the freedom to provide services (see judgment in *Webb*, EU:C:1981:314, paragraph 10).

55 Consequently, although a Member State must be accorded both 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 the possibility of taking the necessary control measures in that regard (see judgment in *Commission* v *Germany*, EU:C:2006:49, paragraph 36), the exercise of that power may not, however, allow that Member State to impose disproportionate requirements.

56 A Member State retaining on a permanent basis a requirement for a work permit for nationals from non-members countries who are made available to an undertaking established in that Member State by an undertaking established in another Member State exceeds what is necessary to achieve the objective pursued by the legislation at issue in the main proceedings.

57 In that regard, an obligation imposed on a service-providing undertaking to provide the Netherlands authorities with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which that undertaking employs them would give those authorities, in a less restrictive but just as effective a manner as the requirement for a work permit at issue in the main proceedings, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established (see judgments in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 46, and *Commission* v *Germany*, EU:C:2006:49, paragraph 41).

58 Such an obligation might consist in a simple prior declaration which would enable the Netherlands authorities to check the particulars provided and to take the necessary measures in the event that the situation of the workers concerned is unlawful. In addition, that obligation could take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out (see judgment in *Commission* v *Germany*, EU:C:2006:49, paragraph 41).

59 Similarly, a measure which would be just as effective and less restrictive than the requirement for a work permit at issue in the main proceedings would be an obligation imposed on a service-providing undertaking to report beforehand to the Netherlands authorities the presence of one or more posted workers, the anticipated duration of their presence and the provision or provisions of services justifying the posting. It would enable those authorities to monitor compliance with Netherlands 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 (see judgments in *Commission* v *Luxembourg*, EU:C:2004:655, paragraph 31, and *Commission* v *Germany*, EU:C:2006:49, paragraph 45). Combined with the particulars provided by that undertaking relating to the situation of the workers concerned, referred to in paragraph 57 above, such an obligation would enable those authorities, where appropriate, to take the appropriate measures at the end of the expected period of posting.

60 Having regard to all of the foregoing considerations, the answer to the questions referred is that Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which, where workers who are nationals of non-member countries are made available by an undertaking established in another Member State to a user undertaking established in the first Member State, which uses them to carry out work on behalf of another undertaking established in the same Member State, such making available is subject to the condition that those workers have been issued with work permits.

Costs

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

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

Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which, where workers who are nationals of non-member countries are made available by an undertaking established in another Member State to a user undertaking established in the first Member State, which uses them to carry out work on behalf of another undertaking established in the same Member State, such making available is subject to the condition that those workers have been issued with work permits.

[Signatures]

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* Language of the case: Dutch.