JUDGMENT OF THE COURT (Third Chamber)

3 December 2014 (*)

(Reference for a preliminary ruling — Freedom to provide services — Articles 56 TFEU and 57 TFEU — Directive 96/71/EC — Article 3(1) and (10) — Directive 2006/123/EC — Article 19 — National legislation requiring the person to whom posted employees or trainees are deployed to declare those who are unable to submit the acknowledgement of receipt of the declaration which should have been made to the host Member State by their employer established in another Member State — Criminal penalty)

In Case C-315/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg te Mechelen (Belgium), made by decision of 28 November 2012, received at the Court on 7 June 2013, in the criminal proceedings against

Edgard Jan De Clercq,

Emiel Amede Rosa De Clercq,

Nancy Genevieve Wilhelmina Rottiers,

Ermelinda Jozef Martha Tampère,

Thermotec NV,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Edgard De Clercq, Mr Emiel De Clercq and Ms Rottiers, by S. Bouzoumita, advocaat,

– the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and by S. Rodrigues and I. Majumdar, avocats,

– the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

– the French Government, by R. Coesme and D. Colas, acting as Agents,

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

– the European Commission, by F. Wilman, J. Enegren and H. Tserepa-Lacombe, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU and 57 TFEU, Article 3(1) and (10) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) and Article 19 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in criminal proceedings brought against, first, Mr Edgard De Clercq, Mr Emiel De Clercq, Ms Rottiers and Ms Tampère, Belgian citizens, and, secondly, Thermotec NV, a company incorporated under Belgian law (together, 'the defendants'), inter alia for having infringed, on several occasions between 1 April 2007 and 18 November 2008 inclusive, an obligation to make a declaration in respect of posted workers imposed by national legislation.

Legal context

EU law

Directive 96/71

3 Article 1 of Directive 96/71, entitled 'Scope', provides:

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

…

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

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

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

...'

4 Article 3 of Directive 96/71, entitled 'Terms and conditions of employment', states:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex [namely, all building work relating to the construction, repair, upkeep, alteration or demolition of buildings];

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; …

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

…

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

– terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

5 Article 5 of that directive, entitled 'Measures', provides:

'Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.'

Directive 2006/123

6 Article 16 of Directive 2006/123, entitled 'Freedom to provide services', states in its paragraph 2:

'Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

…

(g) restrictions on the freedom to provide the services referred to in Article 19.'

7 Article 19 of Directive 2006/123, which features in Chapter IV, Section 2, thereof, relating to rights of recipients of services in the context of the free movement of services, is entitled 'Prohibited restrictions'. That article provides:

‘Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;

…’

8 In accordance with the first subparagraph of Article 44(1) thereof, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2006/123 before 28 December 2009.

Belgian law

The Law on economic readjustment of 4 August 1978

9 The Law on economic readjustment of 4 August 1978 (*Belgisch Staatsblad* of 17 August 1978, p. 9106) provided in Article 69:

‘(1) Any person for whom work is performed, directly or through subcontracting, by third-party workers who remain subject to the social security system of a Member State … other than Belgium must make a declaration to the Social Inspection Service of the Ministry of Social Security, on the first day of the presence of those workers, of the names of those who are unable to submit evidence that they remain so subject by the presentation of the certificate of posting provided for by Article 11 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972(I), p. 160), as well as the name or the designation and address of their employers.

…

(2) …

The criminal penalties referred to in Articles 35 and 39 of the [Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers] shall be applicable to persons who fail to comply with the requirements of paragraph (1).’

10 Article 69 was repealed by Article 149 of the Programme Law (I) of 27 December 2006 (*Belgisch Staatsblad* of 28 December 2006, p. 75178) (‘the Programme Law’).

The Programme Law

11 Section 1 of Chapter VIII of Title IV of the Programme Law, which includes Articles 137 and 138 thereof, defines the scope of that chapter and sets out a number of definitions. Article 137 of the Programme Law states:

‘For the purposes of the present Chapter and its implementing decrees, the following definitions shall apply:

(1) “employed workers”: persons who perform work in return for remuneration and under the authority of another person;

(2) “posted workers”: persons referred to in point (1) who perform work temporarily or partially in Belgium and, either,

(a) normally work in the territory of one or more countries other than Belgium,

(b) have been employed in a country other than Belgium;

(3) “employers”: natural or legal persons who employ the workers referred to in paragraph 2;

(4) “trainees”: persons who undertake compulsory or voluntary vocational training in the context of a programme of studies or professional training in order to obtain a diploma or certificate or practical experience;

(5) “posted trainees”: persons referred to in paragraph 4 who carry out a foreign programme of studies or professional training or part of vocational training within Belgian territory;

(6) “institution at which the trainee pursues his studies or undergoes his vocational training”: the undertaking, the private or public educational establishment or any other establishment for which the training is pursued;

…’

12 Under Article 138 of the Programme Law:

‘This Chapter shall apply:

– to posted workers and their employers;

– to posted trainees and, as the case may be, to the institutions at which they pursue their studies or undergo their vocational training;

…’

13 Chapter VIII of Title IV of the Programme Law is entitled ‘Prior declaration for posted employed and self-employed workers’. That chapter, which entered into force on 1 April 2007, establishes a prior declaration system for posted employed and self-employed workers known as the ‘Limosa declaration system’, that obligation to make a declaration having been introduced as part of a wider project known as the ‘Limosa’ system, an acronym of ‘Landenoverschrijdend Informatiesysteem ten behoeve van Migratieonderzoek bij de Sociale Administratie’ (cross-border information system for the investigation of migration by the social security administration).

14 Section 2 of Chapter VIII, which comprises Articles 139 to 152 of the Programme Law, is entitled ‘The prior declaration for posted workers’. In its version applicable at the time of the events in the main proceedings, Article 139 of the Programme Law provided as follows:

‘Prior to the employment of a posted worker within Belgian territory, his employer, or its servant or agent, must make, to the National Office for Social Security, a declaration by electronic means, drawn up in accordance with Article 140 and with the detailed rules determined by the King.

Prior to the commencement of his training within Belgian territory, the posted foreign trainee or the institution where he follows his studies or undergoes his vocational training must make, to the National Office for Social Security, a declaration by electronic means, drawn up in accordance with Article 140 and with the detailed rules determined by the King.

…

As soon as the declaration referred to in the previous paragraphs has been completed, the declarant shall receive an acknowledgement of receipt …

…’

15 According to Article 140 of the Programme Law, ‘[T]he King shall determine the groups of data which must appear in the prior declaration referred to in Article 139’ and ‘[t]he National Office for Social Security shall determine the content of those groups of data’.

16 Article 141 of the Programme Law, which is included in Section 2(2) in Chapter VIII of Title IV of the Programme Law, relating to the obligation of end-users or sponsors of posted workers, provides:

‘Any person for whom work is performed directly or through subcontracting by persons referred to in Article 137(2) and (5) must by electronic means, prior to the commencement of the employment or training of those persons, make a declaration of the data for identifying those persons who are unable to submit the acknowledgement of receipt issued in accordance with the fourth paragraph of Article 139 of this Chapter, to the National Office for Social Security, in accordance with the detailed rules determined by the King.

As soon as the declaration referred to in the preceding subparagraph has been made, the declarant shall receive an acknowledgement of receipt. …

…’

17 In Section 4 of Chapter VIII, entitled ‘Supervision and penalties’, Article 157 of the Programme Law provided for the penalty applicable in the event of an infringement of the obligation to make a declaration referred to in Article 139 thereof. Article 158 of the Programme Law, which is in the same section, referred to, inter alia, the declaration provided for in Article 141 thereof and was worded as follows:

‘Without prejudice to Articles 269 to 274 of the Criminal Code, any person who fails to comply with the provisions of Article 141 … shall incur a fine of EUR 250 to 2 500; the fine shall be applied as many times as there are posted employees or self-employed workers in respect of whom an infringement has been committed, on condition, however, that the total amount of the fines may not exceed EUR 125 000.’

The Social Criminal Code and the Criminal Code

18 Article 2 of the Law of 6 June 2010 (*Belgisch Staatsblad* of 1 July 2010, p. 43712), which entered into force on 1 July 2011, established the Social Criminal Code. Article 109(55) of that Law repeals, inter alia, Article 158 of the Programme Law.

19 Article 183 of the Social Criminal Code, entitled ‘The obligations of end-users or sponsors’, provides:

‘A level-3 penalty shall be used to penalise:

1. Any person for whom work is performed, directly or through subcontracting, by posted workers or posted trainees, contrary to Chapter VIII of Title IV of the Programme Law … and its implementing decrees, who, prior to the commencement of the employment or training of those persons, has not made, by electronic means and in accordance with the detailed rules determined by the King, a declaration of the data for identifying the persons who are unable to submit an acknowledgement of receipt to the National Office for Social Security.

…

With regard to the infringements referred to in the first subparagraph, the fine shall be multiplied by the number of workers, trainees, self-employed workers or self-employed trainees at issue.’

20 According to Article 101 of the Social Criminal Code, ‘the level-3 penalty shall consist of either a fine under criminal law of EUR 100 to 1 000 or an administrative fine of EUR 50 to 500’. Article 102 of that Code provides that the additional 10% surcharges provided for in the first paragraph of Article 1 of the Law of 5 March 1952 concerning additional 10% surcharges on fines under criminal law (*Belgisch Staatsblad* of 3 April 1952, p. 2606), as amended by the Law of 28 December 2011 on miscellaneous provisions in the field of justice (II) (*Belgisch Staatsblad* of 30 December 2011, p. 81669), are applicable to both those fines under criminal law and those

administrative fines. The effect of the application of those 10% surcharges is to multiply by six the amount of those fines.

21 The second paragraph of Article 2 of the Criminal Code provides that '[w]here the penalty established at the time of the judicial decision differs from that applied at the time of the infringement, the lower penalty shall be applied'.

The Royal Decree

22 Chapter VIII of Title IV of the Programme Law was supplemented by the Royal Decree of 20 March 2007 adopted in implementation of that Chapter (*Belgisch Staatsblad* of 28 March 2007, p. 16975), as amended by the Royal Decree of 31 August 2007 (*Belgisch Staatsblad* of 13 September 2007, p. 48537) ('the Royal Decree').

23 Article 7 of the Royal Decree provides:

'The declaration referred to in Article 141 … of the Programme Law … shall contain the following data:

(1) Data to identify the declarer. If he already has an enterprise number or a social security number, in the case of a natural person without the status of undertaking within the meaning of the Law of 16 January 2003 referred to above, that number shall suffice;

(2) Data to identify the posted worker … or the posted trainee. If he already has an identification number of the National Register or Number of the Banque-Carrefour referred to in Article 8 of the Law of 15 January 1990 referred to above, that number shall suffice;

(3) Data to identify the employer of the posted worker or the institution with which the trainee completes his work experience or vocational training. If he already has an enterprise number or a social security number, in the case of a natural person without the status of undertaking within the meaning of the Law of 16 January 2003 referred to above, that number shall suffice'.

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

24 The order for reference states that Thermotec NV is a company incorporated under Belgian law which is involved in the production of industrial cooling systems. The four natural persons being prosecuted in the main proceedings are, or were, the directors of that company. A sister company, Thermotec sp. z o.o., was established in Poland. It carries out the same activity as Thermotec NV.

25 During an inspection carried out on 5 May 2008 at the headquarters of Thermotec NV, the social inspection services noted the presence of four Polish workers, three of whom were employed by Thermotec sp. z o.o. No E 101 forms could be produced for those workers. Thermotec sp. z o.o. was also unable to produce the acknowledgement of receipt issued following the pre-posting declaration referred to in Article 139 of the Programme Law ('the acknowledgement of receipt') and Thermotec NV, the end-user of the services, had not forwarded to the competent Belgian service the data for identifying the posted workers who were unable to submit the acknowledgement of receipt.

26 It became apparent upon examination that, even with respect to the prior periods of employment of Polish workers or trainees, no E 101 forms had been requested by Thermotec sp. z o.o. Furthermore, with respect to the period prior to 1 April 2007, the defendants had not forwarded the names of those workers or the names and addresses of their employers to the social inspection service on their first working day. With respect to the period after that date, the data for identifying the persons who had been unable to submit the acknowledgement of receipt had not been forwarded.

27 On 3 October 2008, the Labour Auditor initiated a judicial enquiry. In the context of that enquiry, a search was conducted on 18 November 2008. On 21 November 2008, E 101 forms with retroactive validity were delivered by the Polish social inspection service.

28 A report was drawn up of the infringements committed by Thermotec sp. z o.o. Furthermore, by decision of 17 February 2012, Thermotec NV and the four persons being prosecuted in the main proceedings were referred to the referring court to answer two charges. The first relates to acts carried out between 27 June 2004 and 31 March 2007 inclusive and consists in the infringement of the first subparagraph of Article 69(1) and of the second subparagraph of Article 69(2) of the Law on Economic Readjustment of 4 August 1978. The second relates to acts carried out between 1 April 2007 and 18 November 2008 inclusive and consists in the infringement of Article 141 of the Programme Law. Those two infringements are punishable by financial sanctions of a criminal nature.

29 The referring court states that the defendants are being prosecuted not because they failed to make the pre-posting declaration which is required of employers of posted workers, but because, as end-users or contractors, they failed to forward the data for identifying persons who were unable to submit the acknowledgement of receipt.

30 Before the referring court, Mr Edgard De Clercq, Mr Emiel De Clercq and Ms Rottiers claim that the obligation to make a declaration laid down in Article 141 of the Programme Law ('the obligation to make a declaration at issue') constitutes a disproportionate restriction on the freedom to provide services. They point out that account has to be taken of the fact that, in addition to that obligation, the foreign service provider also has an obligation to make a declaration under Article 139 of the Programme Law, and they refer also to Article 19(a) of Directive 2006/123.

31 The referring court notes that, according to the Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-577/10, EU:C:2012:477, point 54), Directive 2006/123 may not be relevant to the present case, as the facts alleged occurred prior to 2 October 2009. The referring court considers that it is, however, necessary to take Directive 96/71 into consideration.

32 That court notes that the obligation on the part of users and contractors to forward to the Belgian authorities the data for identifying posted workers not declared to those authorities by their employers is liable to be classified, for users of service providers established in a Member State other than the Kingdom of Belgium, as a restriction on the freedom to provide services. That court states, however, that various grounds of justification may be envisaged in the present case, such as the protection of posted workers and the need to possess the information which makes it possible to ensure effective compliance with Belgian legislation applicable to those workers, the prevention of unfair competition, including combating social dumping, the safeguarding of the financial equilibrium of social security and the need to prevent fraud and combat abuse. The referring court raises the question, however, whether the obligation to make a declaration at issue and the penalty imposed in the event of non-compliance with that obligation (hereinafter, together, 'the national rules at issue') do not go beyond what is necessary in order to attain those objectives.

33 The referring court notes, moreover, that, on the date on which it adopted the order for reference, the Court of Justice had not yet given judgment in Case C-577/10 *Commission* v *Belgium*, which also concerns the Programme Law. It notes, however, that that case relates to self-employed workers, whereas the present case relates to the obligations of end-users in a situation in which employed workers and trainees are posted. The present case therefore concerns provisions of the Programme Law which differ from those at issue in *Commission* v *Belgium*.

34 It was in those circumstances that the rechtbank van eerste aanleg te Mechelen (Court of First Instance, Mechelen) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the provisions of Articles 56 TFEU and 57 TFEU (previously Articles 49 EC and 50 EC) and Article 3(1) and (10) of [Directive 96/71], whether or not read in conjunction with Article 19 of [Directive 2006/123], be interpreted as precluding Article 141 of the [Programme Law] under which a person for whom work is performed, either directly or through subcontracting, by posted employees or posted trainees is placed under an obligation to make a declaration to the National Office for Social Security by electronic means (or failing that, by fax or by letter), prior to the commencement of the employment or training of those persons, of the data for identifying those

persons who are unable to submit the [acknowledgement of receipt], in conjunction with Article 157 of the [Programme Law] and Article 183(1)(1) of the Social Criminal Code, which penalises non-compliance with that obligation by criminal penalties?'

The question referred for a preliminary ruling

35 A preliminary point to note is, first, that, in its question, the referring court makes reference to Article 157 of the Programme Law. That article provided, inter alia, for the penalty applicable to employers of posted workers who infringe the obligation to make a declaration imposed on them under Article 139 of the Programme Law. As is apparent from the order for reference, what is at issue in the main proceedings is the penalty applicable to recipients of services who do not comply with the obligation to declare workers not declared previously by their employer. That penalty was provided for in Article 158 of the Programme Law. That article was replaced on 1 July 2011 by Article 183 of the Social Criminal Code, the latter provision being, as pointed out by the referring court, applicable in the main proceedings in accordance with the second paragraph of Article 2 of the Criminal Code. Secondly, although, as is apparent from the order for reference, the defendants were brought before the national court to respond to two infringements, that court seeks guidance from the Court of Justice only in relation to the alleged infringement of Article 141 of the Programme Law.

36 Moreover, it must be stated at the outset that, although, in its question, the referring court refers to both workers and trainees posted to Belgian territory, the national provisions applicable to them are, *mutatis mutandis*, identical. Therefore, the reasoning which follows with regard to posted workers also applies to trainees, since their training period is completed under the conditions of a genuine and effective activity as an employee (see, to that effect, judgments in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 22, and *Bernini*, C-3/90, EU:C:1992:89, paragraphs 14 and 15).

37 In those circumstances, it must be considered that, by its question, the referring court is asking, in essence, whether Articles 56 TFEU and 57 TFEU, and Article 3(1) and (10) of Directive 96/71, whether or not read in conjunction with Article 19 of Directive 2006/123, must be interpreted as precluding legislation of a Member State under which the recipient of services performed by workers posted by a service provider established in another Member State is required to forward to the competent authorities, before those workers begin to work, the data identifying those persons in the case where they have been unable to submit proof of the declaration which their employer should have made to the competent authorities of that host Member State prior to the commencement of that provision of services.

38 The Belgian, Danish and French Governments submit, in essence, that the national rules at issue cannot be classified as amounting to a restriction on the freedom to provide services and that, in any event, those rules are, first, justified by overriding reasons in the public interest relating in particular to the protection of workers, the prevention of unfair competition and the combating of fraud and, secondly, are necessary for the purpose of achieving those objectives. Those Governments also take the view that, in this case, it is not necessary to interpret either Directive 96/71 or Directive 2006/123.

39 The Austrian Government considers, in essence, that the national rules at issue address Article 5 of Directive 96/71, according to which Member States are required to take appropriate measures in the event of failure to comply with that directive.

40 Mr Edgard De Clercq, Mr Emiel De Clercq and Ms Rottiers claim, by contrast, that those rules constitute a disproportionate restriction on the freedom to provide services, contrary to Articles 56 TFEU and 57 TFEU. They add that Directive 2006/123 expressly precludes Member States from imposing an obligation to make a declaration in order to be able to receive a service furnished by a service provider established in another Member State.

41 The European Commission contends that, in the light of the Court's case-law, there is, in this case, no need to interpret Article 3(1) and (10) of Directive 96/71 and maintains that Directive 2006/123 is

not applicable *ratione temporis* to the facts of the main proceedings. The Commission also takes the view that the national rules at issue constitute a restriction of the freedom to provide services. While those rules, according to the Commission, are capable of being justified, it is for the referring court to establish and assess specifically and precisely the objective pursued by those national rules and to determine whether they are proportionate.

The applicability of Article 3(1) and (10) of Directive 96/71

42 According to its title, Article 3 of Directive 96/71 relates to the '[t]erms and conditions of employment' of posted workers.

43 Thus, Article 3(1) provides that Member States are to ensure that, whatever the law applicable to the employment relationship, undertakings established in a Member State which, in the framework of a transnational provision of services, post workers to the territory of another Member State guarantee the latter the terms and conditions of employment which, in the Member State in whose territory the work is performed, are laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards in so far as they concern certain activities in the construction sector listed in the annex to that directive, and which relate to, inter alia, maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay and health, and safety and hygiene at work.

44 In a similar manner, Article 3(10) of Directive 96/71 provides that Member States may also impose on national undertakings and undertakings of other Member States, on a basis of equality of treatment and in compliance with the TFEU, terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) in the case of public-policy provisions, and terms and conditions of employment laid down in collective agreements or arbitration awards concerning activities other than those referred to in the annex to Directive 96/71.

45 Article 3(1) and (10) of Directive 96/71 seeks, therefore, to ensure that the rules of the host Member State for minimum protection as regards the terms and conditions of employment relating to the matters mentioned in Article 3(1) thereof and, as the case may be, those specified by the Member States in accordance with Article 3(10) thereof will be applied to posted workers while they work on a temporary basis in the territory of that host Member State (see, to that effect, the judgment in *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 76).

46 In the present case, it is clear from the information provided by the referring court that the national rules at issue do not directly concern the terms and conditions of employment referred to in those provisions but, rather, are intended to guarantee the effectiveness of the monitoring which may be carried out by the Belgian authorities in order to ensure compliance with those terms and conditions of employment.

47 The Court has already held that such monitoring measures do not fall within the scope of Directive 96/71 and that they are not harmonised at EU level, since Directive 96/71 seeks to coordinate the substantive national rules on the terms and conditions of employment of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored. Those measures may, therefore, be freely defined by the Member States, in compliance with the Treaty and the general principles of EU law (see, to that effect, the judgment in *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589, paragraphs 25 to 27).

48 Consequently, a situation such as that at issue in the main proceedings is not covered by Article 3(1) and (10) of Directive 96/71.

The applicability of Article 19 of Directive 2006/123

49 Article 16(2)(g) of Directive 2006/123 provides that the Member States may not restrict the freedom to provide services, in the case of a provider established in another Member State, by imposing the restrictions on the freedom to provide services referred to in Article 19 of that directive. However, as Mr Edgard De Clercq, Mr Emiel De Clercq and Ms Rottiers maintain, it follows from a combined

reading of Article 16(2)(g) and Article 19(a) of Directive 2006/123 that the Member States may not impose on a recipient of services requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the obligation to make a declaration to their competent authorities.

50 However, it should be noted that it is apparent from the order for reference that the defendants are being prosecuted in relation to facts which occurred between 1 April 2007 and 18 November 2008, that is to say, before the date of expiry of the period set for transposing Directive 2006/123, which is laid down in Article 44(1) thereof as 28 December 2009. That directive is, therefore, not applicable *ratione temporis* to the dispute in the main proceedings.

51 In those circumstances, no account should be taken of Article 19 of Directive 2006/123 in the examination of the question referred.

Articles 56 TFEU and 57 TFEU

52 First of all, it should be noted that, as is apparent from the order for reference, the main proceedings concern recipients of services performed by an undertaking established in one Member State which has posted its own workers for a fixed period with an undertaking in the same group established in another Member State for the purpose of providing services in the latter. Since Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services, such a factual situation is covered by Articles 56 TFEU and 57 TFEU (see, to that effect, judgments in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 28 and the case-law cited, and in *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 26 and the case-law cited).

The existence of a restriction on the freedom to provide services

53 It follows from the Court's settled case-law that Article 56 TFEU requires not only the elimination of all discrimination against service providers on grounds of nationality or of the fact that they are established in a Member State other than that in which the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national service providers and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services (see, inter alia, judgments in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 29 and the case-law cited; in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 38, and in *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 44 and the case-law cited).

54 Moreover, as was noted in paragraph 52 of the present judgment, Article 56 TFEU confers rights not only on the provider of services himself but also on the recipient of those services.

55 In the present case, it is apparent from Article 141 of the Programme Law that the obligation to make the declaration at issue entails, for end-users or sponsors with whom or for whom posted workers work either directly or through subcontracting, that they check, prior to the beginning of the provision of services, whether those posted workers are able to submit the acknowledgement of receipt. If the acknowledgement of receipt cannot be submitted, those end-users or sponsors are under an obligation to make a declaration by electronic means to the competent Belgian authorities.

56 According to Article 7 of the Royal Decree, that declaration must set out the data which will identify the declarer, which may, where appropriate, be restricted to a business number or a social security number, the data to identify the posted worker who was unable to submit the acknowledgement of receipt, which may be, where appropriate, a National Register identification number or 'Number of the Banque-Carrefour', and the data to identify the employer of the worker, which may also, where appropriate, be a business number or a social security identification number.

57 Under Articles 101 and 183 of the Social Criminal Code, non-compliance with the obligation to make a declaration is punishable by either a fine under criminal law of between EUR 100 and

EUR 1 000 or a fine under administrative law of between EUR 50 and EUR 500, the additional 10% surcharges being applicable, and the fine being multiplied by the number of workers concerned.

58 The national rules at issue thus require the recipients of services provided by workers posted by an employer established in a Member State other than the Kingdom of Belgium not only to check, prior to the beginning of the provision of the service, whether the employer of those workers has himself fulfilled the obligation to make the declaration imposed on him by Article 139 of the Programme Law, but also, where appropriate, to collect from those workers, also prior to the beginning of the provision of the service, their identification data and those of their employer and forward it, together with their own, to the competent Belgian authorities.

59 It must therefore be held that rules which impose such obligations, non-compliance with which may attract a criminal sanction, are liable to make less attractive, to recipients of services established in Belgium, services furnished by service providers established in other Member States and, accordingly, to dissuade those recipients from having recourse to service providers resident in other Member States.

60 Consequently, those rules amount to a restriction on the freedom to provide services, as defined in Article 57 TFEU, which is in principle prohibited by Article 56 TFEU.

61 That conclusion cannot be brought into question by the Belgian Government's argument that, in essence, the effects of those rules are negligible, on the ground that only the disclosure of a limited amount of information is requested, that the obligation to make the declaration at issue is purely declaratory and that it comes into play only as an alternative. In that regard, it should be noted that, in any event, a restriction on a fundamental freedom is, in principle, prohibited by the Treaty even if it is of limited scope or minor importance (judgments in *Corsica Ferries (France)*, C-49/89, EU:C:1989:649, paragraph 8, and in *Strojírny Prostějov and ACO Industries Tábor*, EU:C:2014:2011, paragraph 42).

Justification for the restriction on the freedom to provide services

62 According to the Court's settled case-law, 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 relating to 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 he 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 (judgments in *Arblade and Others*, C-369/96 and C-376/96, EU:C:1999:575, paragraphs 34 and 35; in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 45 and the case-law cited; and in *Commission* v *Belgium*, EU:C:2012:814, paragraph 44).

63 Furthermore, the Court has already held that, as regards the ability of the authorities of the Member State in whose territory services are provided to carry out checks seeking to ensure respect for the rights which the legislation of that Member State confers on workers in its territory, undertakings established in the Member State in whose territory the provision of services takes place and those established in another Member State and posting workers to the first Member State to provide a service there are in objectively different situations (see, to that effect, the judgments in *Finalarte and Others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraphs 63, 64 and 73, and in *Commission* v *Belgium*, EU:C:2012:814, paragraph 48).

64 In the present case, the referring court is of the opinion that the national rules at issue are capable of being justified by the protection of posted workers and the need to be able to monitor effectively compliance with the Belgian legislation applicable to those workers, the prevention of unfair competition, including combating social dumping, the safeguarding of the financial equilibrium of social security and the need to prevent fraud and combat abuse. The Belgian Government contends

also that the national legislation at issue is justified by the objectives of protecting workers, preventing unfair competition and combating fraud.

65 In this regard, it should be noted that the Court has already held that overriding reasons relating to the public interest capable of justifying a restriction on the freedom to provide services include the protection of workers (judgment in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 47 and the case-law cited), the prevention of unfair competition on the part of undertakings which pay their workers at a rate less than the minimum rate of pay, in so far as that objective includes protecting workers by combating social dumping (see, to that effect, judgment in *Wolff & Müller*, C-60/03, EU:C:2004:610, paragraphs 35, 36 and 41), and combating fraud, in particular social security fraud, and preventing abuse, in particular combating undeclared work, in so far as that objective can form part of the objective of protecting the financial balance of social security systems (see, to that effect, judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 42 and the case-law cited).

66 Similarly, the Court has recognised that the Member States have the power to verify compliance with the national and European Union provisions in respect of the provision of services, and it has accepted that overriding reasons relating to the public interest which justify the substantive provisions of a Member State's legislation may also justify measures necessary to monitor compliance with it (see, to that effect, the judgments in *Arblade and Others*, EU:C:1999:575, paragraph 38 and the case-law cited, and in *dos Santos Palhota and Others*, EU:C:2010:589, paragraph 48).

67 In that context, it should be noted that, with regard to the prior declaration requirement imposed, essentially, by Article 153 of the Programme Law on self-employed service providers lawfully established in a Member State other than the Kingdom of Belgium and who wish to provide services in Belgium on a temporary basis, the Court has held that the Kingdom of Belgium was entitled to rely, as a justification for the restriction on the freedom to provide services resulting from that provision, on the objective of combating fraud, in particular social security fraud, preventing abuse and protecting workers (see, to that effect, judgment in *Commission* v *Belgium*, EU:C:2012:814, paragraph 45).

68 In the present case, it is evident from the file before the Court that the obligation to make a declaration at issue is imposed on the recipient of the services and that it supplements the prior declaration requirement already imposed on the employer of the posted workers. Furthermore, it should be noted that, in particular in the field of employment law, workers posted to Belgian territory by their employer established in another Member State enjoy in principle, inter alia by reason of Directive 96/71, certain social rights which the national rules at issue seek to ensure are respected.

69 It follows that the objectives of protecting posted workers and combating fraud, invoked in this case by the Belgian Government, are capable of justifying also the national rules at issue and that those rules, in so far as they constitute a control measure necessary to ensure compliance with those overriding reasons relating to the public interest, within the meaning of the case-law referred to in paragraphs 65 and 66 of the present judgment, are, a priori, appropriate for ensuring the attainment of those objectives.

70 In those circumstances, it is for the referring court to determine whether those rules are proportionate to the attainment of the objectives identified, having regard to all the relevant factors (see, to that effect, judgments in *Finalarte and Others*, EU:C:2001:564, paragraph 49, and in *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 84).

71 For the purposes of that assessment, it must be noted that the Court has already held that an obligation imposed on an employer established in another Member State to report beforehand to the host Member State authorities on the presence of one or more deployed workers would be an effective and proportionate measure which would enable those authorities, first, to monitor compliance with the social welfare and wages legislation of the host Member State during the

deployment while at the same time taking account of the obligations by which that employer is already bound under the social welfare legislation applicable in the Member State of origin and, secondly, to combat fraud (see, to that effect, the judgment in *dos Santos Palhota and Others*, EU:C:2010:589, paragraphs 51, 53 and 54 and the case-law cited).

72 As the Belgian Government points out, the national legislation at issue, in so far as it involves monitoring the obligation to make a declaration imposed on the employer of workers posted temporarily to Belgian territory, may be regarded as being the corollary of such an obligation and as necessary in order to attain the objectives pursued by the Limosa system.

73 It may also be pointed out that the imposition of penalties, including criminal penalties, may be considered to be necessary in order to ensure compliance with national rules, subject, however, to the condition that the nature and amount of the penalty imposed is in each individual case proportionate to the gravity of the infringement which it is designed to penalise (see, to that effect, judgments in *Louloudakis*, C-262/99, EU:C:2001:407, paragraphs 69 and 70, and in *Commission* v *Greece*, C-156/04, EU:C:2007:316, paragraph 72).

74 In the light of the foregoing, it appears that the national legislation at issue is capable of being proportionate to the objectives stated by the referring court and the Belgian Government, this, however, being a matter for the national court to determine.

75 Having regard to all of the foregoing, the answer to the question referred is that Articles 56 TFEU and 57 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the recipient of services performed by workers posted by a service provider established in another Member State is required to declare to the competent authorities, before those workers begin to work, the data identifying those workers who are unable to submit proof of the declaration which their employer should have made to the competent authorities of that host Member State prior to the commencement of that provision of services, since such legislation is capable of being justified as safeguarding an overriding ground of public interest, such as the protection of workers or the combating of social security fraud, on condition that it is established that that legislation is appropriate for ensuring the attainment of the legitimate objective or objectives pursued and that it does not go beyond what is necessary to achieve them, these being matters for the referring court to determine.

Costs

76 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 (Third Chamber) hereby rules:

Articles 56 TFEU and 57 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the recipient of services performed by workers posted by a service provider established in another Member State is required to declare to the competent authorities, before those workers begin to work, the data identifying those workers who are unable to submit proof of the declaration which their employer should have made to the competent authorities of that host Member State prior to the commencement of that provision of services, since such legislation is capable of being justified as safeguarding an overriding ground of public interest, such as the protection of workers or the combating of social security fraud, on condition that it is established that that legislation is appropriate for ensuring the attainment of the legitimate objective or objectives pursued and that it does not go beyond what is necessary to achieve them, these being matters for the referring court to determine.

[Signatures]

* Language of the case: Dutch.