OPINION OF ADVOCATE GENERAL BOT

delivered on 9 September 2010[1]

1. These references for a preliminary ruling submitted to the Court by the Raad van State (Netherlands) concern the interpretation of Articles 49 EC and 50 EC and of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. [2]

2. The references were made in the course of appeals brought by Vicoplus SC PUH ('Vicoplus'), BAM Vermeer Contracting sp. zoo ('BAM Vermeer') and Olbek Industrial Services sp. zoo ('Olbek') against the Minister van Sociale Zaken en Werkgelegenheid (Minister for Social Affairs and Employment) in respect of fines imposed on them for posting Polish workers to the Netherlands without having work permits. [3]

3. In this opinion, I shall propose that the Court focus its analysis on the interpretation of the transitional provision in Chapter 2, paragraph 2, of Annex XII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded. [4] That transitional provision allowed the Kingdom of the Netherlands, at the time of the events in the main proceedings, to derogate, in its relations with the Republic of Poland, from Articles 1 to 6 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [5]

4. I shall maintain that, in the light of its purpose and in order to preserve its effectiveness, the aforementioned transitional provision is

1 — Original language: French.

2 — OJ 1997 L 18, p. 1.

3 — It should be pointed out that there are two other cases currently pending before the Court which have been suspended pending the judgment to be given in the present cases, namely Case C-158/10 *Johan van Leendert Holding* and Case C-241/10 *Jung and Hellweger*.

4 — OJ 2003 L 236, p. 33, 'the 2003 Act of Accession.'

5 — OJ, English Special Edition 1968 (II), p. 475.

to be interpreted as including within its scope the hiring-out of manpower.

5. I shall then set out the criteria which, in my view, serve to identify the hiring-out of manpower for the purposes of applying the transitional provision in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession. Accordingly, I shall explain that the hiring-out of manpower is characterised, first, by the continuance of the employment relationship between the undertaking which makes the worker available and that worker, secondly, by the fact that the worker hired out to the user undertaking carries out his tasks under the supervision and direction of the user undertaking, and, thirdly, by the fact that the posting of workers constitutes the sole objective of the provision of services.

I — Legal framework

A — *European Union law*

6. Article 24 of the 2003 Act of Accession refers, in so far as concerns the Republic of Poland, to a list of transitional measures contained in Annex XII thereto.

7. Chapter 2 of that Annex, headed 'Freedom of movement for persons', provides:

'...

1. Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71... between Poland on the one hand, and Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland, Sweden and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation... No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The

present Member States may continue to apply such measures until the end of the five year period following the date of the accession.

…

13. In order to address serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive 96/71..., and as long as they apply, by virtue of the transitional provisions laid down above, national measures or those resulting from bilateral agreements to the free movement of Polish workers, Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Article 49 of the EC Treaty with a view to limit, in the context of the provision of services by companies established in Poland, the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.

…'

8. Article 1 of Directive 96/71, headed 'Scope', provides, in its paragraph 3:

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

…

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

or

…

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.'

B — *National law*

9. Under Article 2(1) of the Law on the employment of foreign nationals (Wet arbeid vreemdelingen), [6] an employer is prohibited from employing a foreign national in the Netherlands without a work permit.

10. Article 1e(1) of the Decree on the implementation of the Wav (Besluit uitvoering Wav), [7] as amended by the Decree of 10 November 2005, [8] is worded as follows:

'The prohibition set out in Article 2(1) of the Wav does not apply to a foreign national temporarily employed within the framework of the transnational provision of services in the Netherlands by an employer established outside the Netherlands in another Member State of the European Union, provided that:

(a) the foreign national is entitled to perform work as a person employed by that employer in the country where the employer is established,

(b) the employer has notified the Centrale Organisatie voor werk en inkomen (Central Employment and Income Agency) in writing before the work in the Netherlands begins, and

(c) the service provided does not consist in the posting of workers.'

II — The main proceedings and the questions referred for a preliminary ruling

A — *Case C-307/09*

11. During a check carried out by the Labour Inspectorate, it was found that three Polish nationals employed by Vicoplus were working at Maris, a Netherlands company which reconditions pumps for other companies. Under a contract concluded by Maris with another company, the work of the Polish nationals was to be carried out during the period between 15 August and 30 November 2005.

B — *Case C-308/09*

12. According to a report drawn up by inspectors from the Labour Inspectorate on 31 July 2006, two Polish nationals had been working since 10 January 2006 as fitters in the garage of Flevoservice en Flevowash BV. They

6 — Stb. 1994, No 959, 'the Wav'.
7 — Stb. 1995, No 406.
8 — Stb. 2005, No 577, 'the Implementing Decree'.

were employed by BAM Vermeer, which had concluded a contract with that Netherlands company for the repair and adaptation of trucks and trailers.

C — *Case C-309/09*

13. On 15 November 2005, Olbek's predecessor company concluded a contract with HTG Nederveen BV for the purposes of supplying it with personnel to carry out waste-processing services during a period of several months. An inspection of the offices of HTG Nederveen BV revealed the presence of 20 Polish nationals carrying out that work. According to Polish registers, that predecessor company was active both in the field of steel construction and as a temporary employment agency.

14. Following the discovery of the aforementioned Polish nationals, the three appellants in the main proceedings were fined for infringement of Article 2(1) of the Wav, on the ground that they arranged employment in the Netherlands for Polish nationals without having obtained work permits.

15. Rejecting the objections lodged against those fines, the Minister van Sociale Zaken en Werkgelegenheid (and, in Case C-307/09, the Staatsecretaris van Sociale Zaken en Werkgelegenheid (State Secretary for Social Affairs and Employment)) held that the provision of services by Vicoplus, BAM Vermeer and Olbek respectively consisted in the posting of workers within the meaning of Article 1e(1)(c) of the Implementing Decree. To reach that conclusion, he considered, in particular, that the work of those nationals had been carried out under the supervision and responsibility of the Netherlands company in question, using its resources and materials, and was not one of the main activities of those Polish undertakings.

16. Since the Rechtbank 's-Gravenhage dismissed their appeals against those decisions, the appellants in the main proceedings all lodged an appeal before the referring court.

17. The referring court considers that it is apparent from the judgments in *Rush Portuguesa*,[9] *Vander Elst*,[10] *Commission* v *Luxembourg*,[11] *Commission* v *Germany*[12] and *Commission* v *Austria*,[13] that a restriction of the freedom to provide services, such as that at issue in the main proceedings, may be justified, inter alia, by the general interest objective of protecting the domestic labour

9 — C-113/89 [1990] ECR I-1417.
10 — C-43/93 [1994] ECR I-3803.
11 — C-445/03 [2004] ECR I-10191.
12 — C-244/04 [2006] ECR I-885.
13 — C-168/04 [2006] ECR I-9041.

market, where the aim of the posting of the worker concerned is, other than is necessary for the purpose of temporary posting, to enable him to enter the labour market of the Member State of employment or to circumvent the restrictions on the free movement of workers. That situation does not, in the referring court's view, generally arise where an employment relationship exists between the posted worker and the service provider, the worker undertakes his main activity in the Member State of origin and returns to that Member State after the service has been provided.

18. The referring court points out, however, that the Court did not reaffirm paragraph 16 of the judgment in *Rush Portuguesa* in those later judgments. It wonders therefore whether, in the circumstances of the main proceedings, European Union (EU) law now precludes the posting of workers from being subject to the obtaining of a work permit, while pointing out that, in those later cases, the nature of the provision of services at issue was not specified and the matters related not to nationals of a new Member State during the transitional period but to nationals of a non-member State. Moreover, the scope of the concept of 'making available' in the judgment in *Rush Portuguesa* is not clear.

19. Consequently, the referring court wonders whether, with a view to protecting the domestic labour market, the requirement of a work permit under Article 2(1) of the Wav for the provision of a service consisting in making workers available is a proportionate measure in the light of Articles 49 EC and 50 EC, in view also of the reservation made in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession.

20. If so, the referring court raises the question of the scope of the concept of hiring out workers and, in particular, of the significance to be attached to the nature of the main activity which the service provider in question carries on in the State of establishment.

21. In those circumstances, the Raad van State decided to stay proceedings and to refer to the Court for a preliminary ruling the following questions, which are worded in identical terms in the three cases C-307/09, C-308/09 and C-309/09:

'1. Must Articles 49 EC and 50 EC be interpreted as precluding a national arrangement, as set out in Article 2 of the [Wav], read in conjunction with Article 1e(1)(c) of the [Implementing Decree], under which a work permit is required for the hiring-out of workers as referred to in Article 1(3)(c) of Directive 96/71...?

2. On the basis of what criteria should it be determined whether workers have been hired out within the meaning of Article 1(3)(c) of Directive 96/71...?'

22. Written observations have been lodged by Vicoplus, BAM Vermeer and Olbek, the Netherlands, Czech, German, Austrian and Polish Governments, and by the Commission. Those same intervening parties, minus Vicoplus, but plus the Danish Government, presented oral argument at the hearing held on 8 July 2010.

III — Appraisal

23. In the present cases, the main problem is to decide in what circumstances the activity of hiring out manpower, although it constitutes a provision of services within the meaning of Articles 49 EC and 50 EC may, in the context of the transitional provisions in the 2003 Act of Accession, also concern freedom of movement for workers.

24. The particular feature of these cases lies in the fact that, at the time of the events in the main proceedings, the transitional provisions in the 2003 Act of Accession were applicable which, with regard to the Polish workers, contained a derogation from the freedom of movement for workers but not, as regards the Kingdom of the Netherlands, from the freedom to provide services involving the temporary movement of workers, as defined in Article 1 of Directive 96/71.

25. In that context, I consider that the first question raised by the referring court should be reformulated in order to focus the interpretation on the transitional provisions in the 2003 Act of Accession. I therefore take the view that the Court should examine whether the hiring-out of manpower falls within the scope of the derogation referred to in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession. Only if that were not the case would it be necessary to examine whether the measures contained in Netherlands law constitute a justifiable restriction on the freedom to provide services.

26. In order to reply to the first question as I have just reformulated it, I shall explain that, although the hiring-out of manpower constitutes a provision of services within the meaning of Articles 49 EC and 50 EC, the special nature of that provision of services necessarily leads to interactions with the rules relating to freedom of movement for workers.

A — *The hiring-out of manpower, a provision of services within the meaning of Articles 49 EC and 50 EC*

27. Under the first paragraph of Article 50 EC, services are to be considered to be 'services' where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. The second paragraph of Article 50 EC lists, by way of example, certain activities covered by the concept of 'services'.

28. In that regard, the Court pointed out, in its judgment in *Webb*, [14] 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 satisfies the conditions laid down in the first paragraph of Article 50 EC. Accordingly they must be considered a 'service' within the meaning of that provision. [15]

29. That explains, for example, that it was in the light of the EC Treaty rules concerning the freedom to provide services that a provision of German law – which required temporary employment agencies established in other Member States to communicate in writing to the competent German authorities not only the start and end dates of the placement of a worker with a user of his services in Germany, but also the place of employment of that worker and any changes in that place, while similar undertakings established in Germany were not required to fulfil this supplementary obligation which was always imposed on the user undertakings – was declared incompatible. [16]

30. None the less, the Court has on several occasions emphasised the special nature of this type of provision of services.

B — *The hiring-out of manpower, a provision of services of a special nature*

31. We have seen that, in its judgment in *Webb*, the Court included the hiring-out of workers within the scope of the Treaty rules concerning the freedom to provide services. However, in that same judgment, it twice acknowledged the special nature of this kind of provision of services.

14 — Case 279/80 [1981] ECR 3305.

15 — See, also, concerning the activity of employee recruitment, Joined Cases 110/78 and 111/78 *van Wesemael and Others* [1979] ECR 35, paragraph 7, and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 54.

16 — Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraphs 83 to 89.

32. First, the Court accepted that employees of agencies for the supply of manpower may in certain circumstances be covered by the Treaty provisions relating to freedom of movement for workers and the regulations adopted in implementation thereof. [17]

33. Secondly, when examining the justification for a measure under which a Member State required an undertaking established in another Member State to have a licence to hire out manpower on its territory, the Court stated that it must be noted that the provision of manpower is a particularly sensitive matter from the occupational and social point of view. It explained that, owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned. [18]

34. In its judgment in *Rush Portuguesa*, the Court also emphasised the special nature of the hiring-out of manpower. That case raised the problem of the relationship between the freedom to provide services, as guaranteed by Articles 49 EC and 50 EC, and the derogations from the freedom of movement for workers laid down in Article 215 et seq. of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, [19] with regard to the hiring-out of Portuguese workers as part of a provision of services carried out in France by an undertaking established in Portugal, in that case for the carrying-out of works for the construction of a railway line in the west of France.

35. By that judgment, the Court held that Articles 49 EC and 50 EC precluded a Member State from prohibiting a service provider established in another Member State from moving freely on its territory with all its staff and precluded that Member State from making the movement of the staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit.

36. Since Article 216 of the 1985 Act of Accession postponed the application of Articles 1 to 6 of Regulation No 1612/68 until 1 January 1993, the Court had to explain the impact of that transitional provision in that case. It pointed out, in that regard, that Article 216 of the 1985 Act of Accession was intended to prevent disturbances on the employment market following Portugal's accession, both in Portugal and in the other Member States, due to large and immediate movements of workers, and that for that purpose it introduced

17 — *Webb*, paragraph 10.
18 — Ibidem, paragraph 18.
19 — OJ 1985 L 302, p. 23, 'the 1985 Act of Accession'.

a derogation from the principle of freedom of movement for workers laid down in Article 39 EC. The Court added that the derogation must be interpreted in the light of that purpose. [20]

37. The Court stated that the derogation applied when access by Portuguese workers to the employment market of other Member States and the entry and residence arrangements for Portuguese workers seeking such access and for members of their families were at issue. According to the Court, the application of that derogation was in fact justified since in such circumstances there is a risk that the employment market of the host Member State may be disrupted. [21]

38. The Court then held that the situation is different in a case where there is a temporary movement of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer. According to the Court, in fact, such workers return to their State of origin after the completion of their work without at any time gaining access to the labour market of the host Member State. [22]

39. It was at that stage of its reasoning that the Court expressed a reservation owing to the special nature of the activity of making labour available.

40. Accordingly, the Court stated that, since the concept of the 'provision of services' as defined by Article 50 EC covers very different activities, the same conclusions are not necessarily appropriate in all cases. In particular, the Court considered that it must be acknowledged that an undertaking engaged in making labour available, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. The Court held that, in such a case, Article 216 of the 1985 Act of Accession would preclude the making available of labour from Portugal by an undertaking providing services. [23]

41. The Court thus drew a distinction between the posting of workers being ancillary to a provision of services and the actual purpose of the provision of services being to enable workers to gain access to the labour market of the host Member State. It is only in this latter case that the transitional provision which suspends application of the rules

20 — *Rush Portuguesa*, paragraph 13 and the case-law cited.

21 — Ibidem, paragraph 14.

22 — Ibidem, paragraph 15.

23 — Ibidem, paragraph 16.

on freedom of movement for workers may be invoked.

42. More generally, and therefore even apart from any transitional provision, the Court continues to differentiate the hiring-out of workers from other provisions of services. Accordingly, it acknowledges that, subject to compliance with the principle of proportionality, a Member State may check that an undertaking established in another Member State, which deploys on the territory of the first-mentioned Member State workers from a non-member State, is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service concerned, for instance, that of bringing its workers for the purpose of placing them or making them available to others. [24]

43. These arguments drawn from the case-law show that the hiring-out of manpower constitutes a provision of services of a special nature, because it is characterised by its objective which is to enable workers to gain access to the labour market of the host Member State. From that angle, the hiring-out of workers, even if it constitutes an economic activity which falls primarily within the scope of the Treaty rules on the freedom to provide services, cannot be totally isolated from the problems connected with freedom of movement for workers within the EU. [25]

44. It is now necessary to ascertain whether, owing to its special nature and by analogy with the reservation expressed by the Court in paragraph 16 of its judgment in *Rush Portuguesa*, the hiring-out of workers may be regarded as falling within the scope of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession.

45. In my view, consideration of the purpose of this transitional provision and the need to safeguard its effectiveness call for a positive reply.

C — *Consideration of the purpose of the transitional provision relating to freedom of movement for workers and the need to safeguard its effectiveness*

46. It is settled case-law that a transitional provision, as a derogation from the principle that the provisions of EU law apply immediately and fully to new Member States, must

24 — See, in particular, *Commission* v *Austria*, paragraph 56 and the case-law cited.

25 — For another example of interaction between the freedom to provide services and freedom of movement for workers, see the judgment in *ITC* in which the Court examines the compliance of national legislation concerning the placement of manpower in the light of those two freedoms.

be interpreted strictly and in such a way as to facilitate achievement of the objectives of the Treaty and application in full of its rules. [26]

47. For that reason, since this is a transitional provision which suspends, for a certain length of time, the application of Articles 1 to 6 of Regulation No 1612/68 and which temporarily authorises the Member States to regulate access by Polish nationals to their employment market, I think it is necessary to examine what is the purpose of this transitional provision in order to determine its scope.

48. It is apparent, in that regard, from the judgment in *Rush Portuguesa*, that a transitional provision which suspends application of the EU law rules on freedom of movement for workers is intended to prevent disturbances on the employment market following the accession of a new Member State, both in that new State and in the other Member States, due to large and immediate movements of workers.

49. In the Court's view, such a derogation must be interpreted in the light of that purpose. [27]

50. Since, as the Court points out, the purpose of the hiring-out of manpower is to enable workers to gain access to the employment market of the host Member State, a teleological interpretation of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession necessarily means that that activity is included within the scope of that transitional provision.

51. In the light of the purpose of the transitional provision, I consider it artificial to draw a distinction according to whether a worker gains access to the employment market of the host Member State directly and independently or through an undertaking which hires out manpower. In both cases, in fact, there are potentially large movements of workers which, following new accessions, risk disturbing the employment market of the Member States. Therefore, to exclude the hiring-out of manpower from the scope of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession would, in my view, run counter to the objective pursued by that transitional provision and deprive it of much of its effectiveness.

52. I therefore suggest that the Court accept an interpretation of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession which not only corresponds to its purpose

26 — See, in particular, Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 18 and the case-law cited.

27 — *Rush Portuguesa*, paragraph 13 and the case-law cited.

but also preserves its effectiveness, by holding that this transitional provision includes within its scope the hiring-out of manpower.

53. I do not share the doubts expressed by the referring court as to whether the reasoning of the Court of Justice in paragraph 16 of its judgment in *Rush Portuguesa* was confirmed in the aforementioned later judgments in *Commission* v *Luxembourg*, *Commission* v *Germany* and *Commission* v *Austria*, since the lack of express reference to the paragraph concerned is explained by the particular circumstances of those actions for failure to fulfil obligations, namely that they related to nationals of non-Member States and that no transitional measure concerning freedom of movement for workers was at issue. Accordingly, there is nothing to indicate that the Court departed from its case-law according to which the purpose of an undertaking's activity of hiring-out manpower is to enable workers to gain access to the employment market of the host Member State.

54. Moreover, I do not think that, by adopting Directive No 96/71, in particular Article 1 thereof, the Community legislature intended to undermine the power of the States which were already members of the EU to control or limit the access of workers from new Member States to their employment market in order to avoid disturbances due to large and immediate movements of workers.

55. Admittedly, Directive 96/71, which was adopted after the judgment in *Rush Portuguesa*, and which has as its legal basis the Treaty rules on the freedom to provide services, appears to refer, in Article 1(3)(c), to that special form of posting constituted by the hiring-out of manpower. However, I think that it is consistent with one of the objectives pursued by that directive, namely the protection of workers, for the Community legislature to have intended to include within the scope of that directive as broad a range as possible of situations characteristic of the posting of workers as part of a provision of services, in order to enable the maximum number of workers to benefit from the rules laid down by Directive 96/71. In my view, the inclusion of the hiring-out of manpower within the scope of the directive therefore does not preclude the possibility of that type of activity also falling within the scope of the transitional provision in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, having regard to the different objectives which those two measures are intended to achieve.

56. Several intervening parties have also pointed out that Annex XII to the 2003 Act of Accession refers to Article 1 of Directive 96/71 and provides for an express derogation, as regards the provisions of services mentioned therein, only for the Federal Republic of Germany and the Republic of Austria. They submit that it may be inferred that, if the whole of Article 1 of that directive is covered

by Chapter 2, paragraph 13, of Annex XII to the 2003 Act of Accession, a paragraph which relates only to the Federal Republic of Germany and the Republic of Austria, that means that the hiring-out of workers within the meaning of Article 1(3)(c) of that directive cannot fall within the scope of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, which concerns freedom of movement for workers.

57. I do not share that analysis. In my view, the purpose of the reference to Article 1 of Directive 96/71 in the transitional provision in Chapter 2, paragraph 13, of Annex XII to the 2003 Act of Accession is to make clear that the Federal Republic of Germany and the Republic of Austria negotiated not only the suspension of the rules on freedom of movement for workers but also the suspension of the rules on the freedom to provide services in certain sensitive sectors *for all kinds of provisions of services involving the movement of workers*. I do not consider that, in the absence of an express exception in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, such a reference is intended to exclude the power of the Member States to make the hiring-out of manpower on their territory conditional on having a licence during a transitional period.

58. Since I consider that the hiring-out of manpower does fall within the scope of the transitional provision in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, it is now necessary, in order to give the referring court a reply which helps it to determine the cases pending before it, to decide which are the main criteria for identifying this special category of provision of services.

D — *The main criteria for identifying the hiring-out of manpower*

59. Secondary legislation provides us with guidelines for defining the hiring-out of manpower.

60. We have already referred to Article 1(3)(c) of Directive 96/71, which applies to cases in which an undertaking decides, 'being a temporary employment undertaking or placement agency, [to] 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'.

61. A first criterion emerges from this definition, namely that, in the hiring-out of manpower, the employment relationship between the undertaking which makes the worker available and the worker is continued. In other words, the hiring-out of manpower to a user undertaking does not involve the conclusion of a contract of employment between that undertaking and the worker made available.

62. None the less, the absence of the statement, which appears in Article 1(3)(a) of Directive 96/71, that the posting of a worker is on the account and under the direction of the undertaking posting that worker suggests that the undertaking which hires out a worker has no authority over the way in which he carries out the tasks entrusted to him.

63. That is the second criterion for identifying the hiring-out of manpower, namely the effective subordination of the worker to the user undertaking as regards the organisation, fulfilment and conditions of work. In other words, the situation in which an employer concludes with a user undertaking a contract under which the former delegates to the latter its authority as employer for the fulfilment of the tasks entrusted to the worker characterises, in my view, the hiring-out of manpower.

64. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [28] confirms that analysis. It is apparent from Article 1(1) of the directive that it applies 'to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction'. [29] This last characteristic makes it possible to distinguish the hiring-out of manpower from subcontracting. In subcontracting relationships, the two undertakings retain control of their staff, there is no transfer of authority with regard

28 — OJ 2008 L 327, p. 9.

29 — I may also cite Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19), as amended by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21), which provides, in Article 1(2), that it applies 'to temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his services'.

to the fulfilment of the tasks entrusted to the workers.

65. A third criterion is based on the purpose of the provision of services. In order to establish the existence of a hiring-out of manpower, it is important to ascertain whether the purpose of the provision of services is solely to make workers available to a user undertaking or whether the posting of workers is ancillary to services which an undertaking established in State A has bound itself to provide to an undertaking established in State B. I consider, for example, that the situation in which an undertaking specialising in the installation of computer software binds itself contractually to send its engineers into an undertaking in order to develop the latter's computer system is not simply a hiring-out of manpower. The main element here is the provision of computer services by workers from an undertaking specialising in the computer field, where those workers provide the services under the supervision of that undertaking. In such a situation, the posting of workers is only the necessary consequence of implementing know-how which is a speciality of the undertaking providing the services.

66. I therefore infer from those considerations that, for the purposes of applying the transitional provision in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, the hiring-out of manpower is characterised, first, by the continuance of the employment relationship between the undertaking which makes the worker available to the user undertaking, secondly, by the fact that the worker made available to the user undertaking carries out his tasks under the supervision and direction of the user undertaking and, thirdly, by the fact that the posting of workers constitutes the sole purpose of the provision of services. It is for the referring court to ascertain whether, in each of the cases before it, those criteria are satisfied.

67. On the other hand, other factors do not appear to me to constitute reliable criteria for identifying the hiring-out of workers.

68. Accordingly, as regards the significance to be given to the nature of the main activity which the service provider carries out in its State of establishment, I consider that this is only an indication for determining whether the third criterion is satisfied, that is to say, whether the purpose of the provision of services is exclusively to make workers available to a user undertaking or whether the posting of workers is ancillary to a provision of services of another kind, corresponding, for

example, to the area of activity of the undertaking which provides the workers.

69. I also consider that the fact that the workers return to their Member State of origin at the end of their assignment is not relevant in characterising the hiring-out of manpower. What matters, in my view, is that workers have been, even temporarily, assigned to jobs effectively offered by an undertaking situated in the host Member State and have therefore gained access during a certain period to the employment market of that State.

70. During the hearing, the Commission explained that, in its view, a hired-out worker does not gain access to the employment market of the host State because no employment contract is concluded between that worker and the user undertaking. I cannot subscribe to that argument since it takes no account either of the special nature of the hiring-out of manpower or of the impact it may have on the employment market of the host Member State.

71. The hiring-out of manpower involves splitting the employment relationship in two. As I have already pointed out, the worker continues to be bound to his initial employer, but, at the same time, the actual work is provided by the employer situated in the host Member State for the needs of its own undertaking, and it is carried out under its supervision and direction. The hired-out worker is recruited as a local worker would be and, consequently, is in direct competition with local workers on the employment market of the host Member State, which necessarily has an impact on that market. Therefore, the sudden influx of hired-out workers which may be the consequence of the accession of a new Member State necessarily risks destabilising the employment market of the host Member State, which is precisely what transitional provisions such as those at the centre of the present cases are designed to prevent.

IV — Conclusion

72. In the light of the foregoing considerations, I suggest that the Court of Justice give the following reply to the questions referred for a preliminary ruling by the Raad van State:

'(1) Chapter 2, paragraph 2, of Annex XII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, is to be interpreted as meaning that it includes within its scope the hiring-out of manpower.

(2) For the purposes of applying that transitional provision, the hiring-out of manpower is characterised, first, by the continuance of the employment relationship between the undertaking which makes the worker available to the user undertaking, secondly, by the fact that the worker made available to the user undertaking carries out his tasks under the supervision and direction of the user undertaking and, thirdly, by the fact that the posting of workers constitutes the sole purpose of the provision of services.

It is for the referring court to ascertain whether, in each of the cases before it, those criteria are satisfied.'