EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/51 A closer look at punitive sanctions law and the freedom of service provision (NL)

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The highest administrative court in the Netherlands has delivered a razor-sharp ruling on the intra-community service provision set out in Articles 56 and 57 of the Treaty on the Functioning of the European Union). This concerns 'new' EU-nationals who are still under transitional measures with regard to access to the labour markets of 'old' EU Member States. The judgment was preceded by a request from the Chairman to a State Councillor Advocate General to deliver his opinion on various aspects of punitive administrative law practice in the Netherlands. Both the opinion and the judgment are a welcome clarification and addition (or even correction) on the practice.

Facts

A shipyard established in the Netherlands ('employer I' – within the meaning of the Dutch Foreigners (Employment) Act) had been commissioned by foreign clients to build two ships. Part of this task, the building of the hull of the fore, was outsourced to a Dutch subcontractor ('employer II' – within the meaning of the Dutch Foreigners (Employment) Act), which in turn had outsourced parts of the work to a Romanian 'sub-subcontractor' ('employer III' – within the meaning of the Dutch Foreigners (Employment) Act – and also the formal employer of the Romanian nationals in question).

The work of the 66 Romanian nationals (later adjusted to 64) took place at the site of the subcontractor in the Netherlands in 2013. At this time, Romanian (and Bulgarian) nationals were still covered by the transitional measures that the Netherlands had applied for, for the maximum period of seven years.

This was found lawful by the European Commission, in a letter of 19 July 2016 regarding complaint CHAP(2016)00052: "The Government of the Netherlands on 22 December 2011 notified the Commission of its decision to apply national measures during the third stage transitional period accompanied with supporting evidence. It noted a deteriorating state of the Dutch labour market and of the economy due to the crisis, the threat of an increased inflow of BG and RO workers, with low-skilled characteristics of the potential migrants from these countries and its possible impact on low-skilled persons active on the Dutch labour market, as well as a high number of workers who entered the Dutch labour market in recent years. The Commission came to the conclusion that the conditions required by the Act of Accession to continue to apply restrictions after December 2011 were fulfilled. The same conclusion was taken in respect of all Member States which sent their notifications. We do not see any legal ground nor any possibility or purpose to review this position now."

The concept of 'employer' in the Dutch Foreigners (Employment) Act is interpreted very broadly. Because of this, heavy fines were imposed on all three companies by the Dutch Inspectorate SZW (the 'Inspectorate', which falls under the Ministry of Social Affairs and Employment) for alleged illegal employment, that is, violation of Section 2(1) of the Dutch Foreigners (Employment) Act (illegal employment). In the first instance, this was € 792,000.00 per company but it was adjusted to € 768,000.00 after objections and then reduced to € 512,000.00 per company by the Court, following the decision of the Administrative Jurisdiction Division of the Council of State ('the Division') on 7 October 2015.

ECLI:NL:RVS:2015:3138, by means of which the standard fine amounts were reduced from € 12,000.00 to € 8,000.00 per violation (so, also per 'employer in the chain') of Section 2(1) of the Dutch Foreigners (Employment) Act.

According to the Inspectorate, work permits were required because it concerned the 'posting of workers' within the meaning of Article 1(3)(c) of the Posting of Workers Directive (Directive 96/71/EC, OJEU L018, 21 January 1997) rather than 'contracting for work' under paragraph 3(a) of that Article. Statements that the Romanian employees of employer III had made in the presence of the inspectors of the Inspectorate apparently showed that they had worked under the control and direction

Here, the exact wording of the ECJ in – amongst other rulings – the Vicoplus ECJ-ruling is used; one might also say: 'under management and supervision' or similar.

Judgment

The Court of first instance held that this was an 'impure' intra-community service provision, and largely upheld the fines. In Dutch law, this is often referred to as a posting of workers to work under the control and direction of a 'user undertaking'.

Again, the wording of the ECJ.

The appeal court in this case, the Division, did, however, correctly refer to the ECJ cases of Vicoplus (C-307/09 – C-309/09) and Martin Meat (C-586/13). It held that even though at some point work had been performed under the control and direction of employer II, the Vicoplus case states that three cumulative criteria must be satisfied for there to be an impure service provision (as a result of which there should have been Dutch work permits for the Romanian nationals involved). One of these is the 'objective criterion', which was considered in more detail by the Martin Meat judgment, and in the Vicoplus case it gave the parties involved the benefit of the doubt and resulted in the fines being dropped.

Commentary

Punitive administrative law in the Netherlands

What was significant about these cases is that they were preceded by a request from the Chairman of the Division to State Councillor Advocate General L.A.D. Keus to deliver his opinion. This is a special procedure within the meaning of Section 8:12a of the Dutch General Administrative Law Act. The opinion was delivered on 12 April 2017.

ECLI:NL:RVS:2017:1034.

Since the Dutch Traffic Regulations (Administrative Enforcement) Act from 1989, the enforcement of violations through administrative law (and consequently the decriminalisation of numerous violations) has increased in the Netherlands. Almost every

administrative law or law with administrative components now includes this. Examples include the enforcement of the Dutch Placement of Personnel by Intermediaries Act, the Dutch Working Hours Act, the Dutch Aliens Act or the Dutch Foreigners (Employment) Act, as well as numerous environmental and building acts. With such a high degree of enforcement and such high fines, one may wonder whether all this enforcement without involving a court would withstand scrutiny by the European Court of Human Rights (the 'ECtHR') in terms of compliance with the European convention on Human Rights (The ECHR'). Of course, the government finds this administrative approach more efficient – and the Advocate General acknowledges this in his opinion – but it effectively turns the system on its head – whereas the state initiates criminal proceedings, in administrative cases, first a fine is imposed and then the fined party takes the matter to court.

For a long time, punitive administrative law has been out of step with criminal law, along with the law of criminal procedure and its safeguards. Nevertheless, an administrative fine is punitive in nature and is therefore a criminal sanction within the meaning of Article 6 of the ECHR (see the Öztürk judgment of the ECtHR

ECLI:NL:XX:1984:AC9954.

Things frequently go wrong at the Dutch Inspectorate and the Ministry of Social Affairs and Employment, especially when evidence is concerned. The words 'plausible' and 'plausibility' are frequently used in decisions imposing fines and decisions in respect of objections – entirely incorrectly. But this is also seen in Dutch legislation. An example is the sanctionable violation under administrative law of Section 18(b)(3) in conjunction with (2) of the Dutch Minimum Wage and Minimum Holiday Allowance Act in which the employer is regarded as 'the person in or for the benefit of whose business, company or organisation a person performs or has performed work or of which on the basis of facts and circumstances there is a reasonable suspicion that a person performs or has performed work. In that case, the person referred to in the first sentence will be regarded as employee for the application of the second subsection. The provisions of the first sentence will apply subject to proof to the contrary.' This violates the presumption of innocence and the division of the burden of proof, especially if this would lead to an administrative fine or another sanction. This provision should therefore be declared to have no binding effect for this ground alone, or should not be applied in a particular case. The full burden of proof lies with the state and with nobody else. Or, as stated in criminal law and the law of criminal procedure: the state must legally and convincingly prove the charges, failing which acquittal follows irrevocably. So, improvements must be made in the collection and production of evidence in cases involving administrative fines, where the Minister has failed to satisfy the burden of proof, and the fined parties have been given the benefit of the doubt.

The Advocate General also discussed numerous questions from the Chairman of the Division. These were on issues such as (i) whether a telephone interpreter may be used and whether they should be sworn in; (ii) the signing of any statements made; (iii) cautions (including in relation to the ECHR and the interpretation by the ECtHR given in Chambaz – v – Switzerland from 2012

ECLI:CE:ECHR:2012:0405JUD001166304.

15 July 2015, W03.15.0138/II.

The freedom to provide services

The case at hand also concerned the freedom to provide services under Articles 56 and 57 of the Treaty on the Functioning of the European Union (the 'TFEU') with the deployment of EU citizens who are not yet free on the national labour market of an 'old' Member State, in this case, the Netherlands. That is because the Romanian employees were still under transitional measures and the Netherlands also enforced these transitional measures in or upon the Accession Treaty at the time. (See Annexes VI and VII to the Accession Treaty regarding Romania and Bulgaria,

OJEU L157, 21 June 2005.

OJEU L112, 24 April 2012.

In a previous article for another legal journal, I referred to these EU citizens as 'Vicoplus nationals', after the Vicoplus judgment of the ECJ from 2011. In the Rush Portuguesa judgment from 1990 (C-113/89), the ACJ had already ruled that the freedom to provide services is not much use within the EU if your employees are not allowed to work in an 'old' EU Member State (back then, it concerned Portuguese nationals who, at the time, had a more or less similar status to that which Croatian nationals currently have in the Netherlands and that Romanian and Bulgarian nationals had up to 1 January 2014 in the Netherlands). Fairly soon after that, in 1994, in the Vander Elst judgment (C-43/93), the ECJ gave an opinion that was essentially similar with respect to third-country national service providers admitted to other EU Member States (see below).

The transitional measures provide, among other things, that nationals of newly admitted EU Member States (without a work permit, of course) may be banned from the labour markets of the existing EU Member States for a period of 2 + 3 + 2 years (i.e. a maximum of seven years) but only in respect of paid employment. Paid employment (i.e. labour as an employee in a European-law sense,

An ‘employee’ is anyone who performs real and actual work, to the exclusion of work of such limited extent that it is merely marginal and accessory. According to this case law, the characteristic of the employment relationship is that someone performs paid work for a fixed period of time for someone, under their authority.

However, under the instructions of the ECJ, this obligation to have a work permit does not apply in the case of intra-community service provision: as Vicoplus showed that the ECJ had stated from the beginning that service provision may not involve the posting of workers (see item 16 of Rush Portuguesa). It was in Vicoplus that the ECJ mentioned ‘effectiveness’

Vicoplus, point 35: “As the Advocate General stated at point 51 of his Opinion, it seems artificial to draw a distinction with regard to the influx of workers on the labour market of a Member State according to whether they gain access to it by means of the making available of labour or directly and independently because in both cases that potentially large movement of workers is capable of disturbing that labour market. To exclude the making available of labour from the scope of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession would therefore be liable to deprive that provision of much of its effectiveness
.”

- the posted worker is and remains employed by the company that provides the service, and no employment contract is formed with the hiring company (the services recipient);

- the movement of the worker to the host Member State constitutes the purpose of the provision of services effected by the undertaking providing the services;

- the worker carries out his tasks under the control and direction of the user undertaking.

These criteria were later – in 2015 – specified and set out in more concrete terms in Martin Meat.

That set the standard, and as a result only the ‘pure provision of services’ (i.e. the provision of services within the meaning of Article 1(3)(a) of the Posting of Workers Directive) with EU citizens who are still covered by the transitional measures was released from the work permit obligation.

Please refer to Article 1e of the Dutch Foreigners (Employment) Act Implementation Decree in conjunction with §4 of the Implementing Regulations to the Dutch Foreigners (Employment) Act.

Please refer to Section 2a of the Dutch Foreigners (Employment) Act in conjunction with Article 3(1) opening words and (a) of the Reporting Regulations to the Dutch Foreigners

(Employment) Act.

The Minister and the Division, however, followed the Vicoplus regime in respect of all foreign nationals – including third-country nationals (non-EU/non-EEA citizens and non-Swiss nationals) employed by an employer (the service provider) in another EU Member State, who were employed in the Netherlands without a work permit in the context of the freedom services. This means that if there was an impure provision of services and no work permits, this constituted illegal employment. The ECJ ended this practice in the Essent judgment (C-91/13).

It recently became public that the Minister nevertheless refuses to pay back the fines to another party in that chain of 'employers within the meaning of Dutch Foreigners (Employment) Act' who did not continue litigation up to the highest national instance, which, for that matter, was even justified by the Division in its decision of 7 June 2017, ECLI:NL:RVS:2017:1507.

It remains remarkable that a third-country national who performs services from another EU Member State – an 'Essent national' therefore – in a particular case has greater options to provide services in another EU Member State than an EU citizen who is a Vicoplus national. How about a Croatian national (by now free on the German labour market because Germany no longer applies transitional measures) who comes from Germany to the Netherlands to provide impure services together with their Turkish colleague? In that case, the remarkable situation would occur that a third-country national is working legally in the Netherlands while an EU citizen is not. And how about a Russian national who resides and works legally in Croatia, who comes to the Netherlands to provide impure services together with his Croatian colleague? Likewise. I have already pointed this out to the Court in a case that led to the judgment of Zeeland-West-Brabant of 18 January 2016,

ECLI:NL:RBZWB:2016:456.

ECLI:NL:RVS:2017:1149. In this judgment, the Division also tested along the lines of these judgments. Please note that it was recently confirmed to me by the Dutch government that Croatian nationals who perform services from a Member State other than Croatia (where they may work legally) and third-country nationals who perform services from Croatia (where they may work and reside legally) are all regarded as Vicoplus nationals. That position is evidently wrong in light of Community law, but it is still the official Dutch position.

"(...) not only must the same conditions that apply to third-country nationals for access to the labour market of the Member States apply, but they also enjoy preferential treatment

compared to third-country nationals."

The judgment of the Court

Following this long introduction, I will discuss the matters at hand in more detail. This concerned Vicoplus nationals who performed welding and iron work in the Netherlands in the period from February to 6 June 2013 inclusive. Because the parties were of the opinion that this constituted a pure intra-Community provision of services, no work permits had been applied for. The consequences go without saying: hefty fines from the Inspectorate. A considerable amount of money, and as far as I could verify in the judgment of the Court and the decision of the Division, employer I (the Dutch shipyard) and employer III (the Romanian sub-subcontractor) continued litigation (as stated above, one of the parties went into liquidation in the meantime). In that respect, the (lawyers of the) fined parties adopted a multiple-pronged approach, including a reliance on the principle of preference in the transitional measures to the Accession Treaty in relation to the Sommer judgment.

More about this in the articles of J. Luscuere in the journal on Dutch immigration law A&MR 2015/7, 'Japanese nationals are almost Dutch nationals. Consequences of the Japanese Trade Treaty of 1912' and of E.T.P. Scheers and B.J. Maes in A&MR 2016/5, 'On most-favoured nation clauses and principles of preference. What do new EU citizens and Japanese nationals have in common?'

The Court does comment with respect to the freedom to provide services that the three cumulative Vicoplus criteria listed above must have been met. However, the second and third criterion are often mixed up. That was also the case here, where the Court held that employer III (the sub-subcontractor) merely provided labour and that employer II (the subcontractor) arranged the material and accommodation: "The Romanian nationals only came here to work and earn money." Why else would they come here, you might wonder. And why is that relevant in the context of the Vicoplus criteria?

And then you see that the Court does indeed stumble over the second criterion – which I already referred to as the 'objective criterion' above – and disposes of it with a few meaningless platitudes: 'facts and circumstances that follow from the fine reports', 'statements made' that allegedly showed that 'the sub-subcontractor only provides labour' and 'various foreign nationals who stated that they have been hired out to the subcontractor'. All completely irrelevant in the context of the Vicoplus criteria, including the objective criterion. After all, it is not relevant whether labour was provided, but whether workers were provided – and that that was also demonstrably the objective of the service provision. Next to the

objective criterion, the government must also prove that work has been provided not under the control and direction of the formal employer, being the service provider. So, all three criteria must cumulative be proved, one by one, without mixing those up and/or deriving proof of one criterion to prove or establish the other criterion.

I should point out that at the time of this judgment, the Vicoplus criteria had already been set out in more concrete terms in Martin Meat, in which the ECJ ruled:

"In order to determine whether that contractual relationship must be classified as a hiring-out of workers, within the meaning 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, it is necessary to take into consideration each element indicating whether the movement of workers in the host Member State is the very purpose of the supply of services on which the contractual relationship is based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue are, inter alia, the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State. By contrast, the fact that the undertaking which receives those services checks the performance of the service for compliance with the contract or that it may give general instructions to the workers employed by the service provider does not, as such, lead to the finding that there is a hiring-out of workers."

Nor was the Court just a little bit wrong. The judgment is full of assumptions, as opposed to evidence – and the parties concerned are not given the least benefit of the doubt. All in all, a judgment to forget.

The judgment of the Division (the highest national administrative court for these cases)

The parties concerned therefore rightly lodged an appeal to the Division, where they have fortunately already adopted a multiple-pronged approach. Apparently, this was sufficient reason for the (Chairman of the) Division to request the above opinion of the advocate general. They apparently got down to business, because from legal ground six onwards the Division deals extensively with service provision, in which the Martin Meat judgment fortunately was involved in the assessment. The Division rightly noted that the European Court of Justice distinguishes between the monitoring and management of the employees and

the verification by a customer that a service provision agreement has been properly performed:

"After all, it is customary for a service provision that a customer checks whether the service has been performed in accordance with the agreement. In addition, in case of a service provision, a customer may give certain general directions to the service provider's employees, without this constituting the exercising of supervision and management of those employees within the meaning of the specified criterion, to the extent that the service provider gives the employees the specific and individual directions that they deem necessary for the performance of the service in question, according to the Court of Justice."

This is followed by the explanation of the Division of the objective criterion along the lines stated by the ECJ in the Martin Meat judgment. The Division comes to the conclusion that the Court rightly held that the Romanian nationals in question have worked under the control and direction of the subcontractor – employer II (and therefore not merely under the control and direction of their formal employer, the service provider – employer III), but gives the parties the benefit of the doubt in terms of the objective criterion on the basis of the list of indicators submitted by the fined parties, which all show that it concerned a pure, rather than an impure provision of services. The Division therefore draws a razor-sharp dividing line between the second and third Vicoplus criterion. In doing so, the Division attaches most importance to the guarantees and the fixed contract price in the fixed-price contract between employer II (the Dutch subcontractor) and employer III (the Romanian sub-subcontractor), and the circumstance that the Romanian company, in addition to the employees, also moved the necessary steel to the Netherlands, after first processing it at its Romanian yard. The Division therefore comes to the following conclusion:

"In light of all that is considered above, the Division is of the opinion that there is such doubt as to the question whether the movement of foreign nationals was the objective in itself of the service provision by [company D] to [company C], it must be concluded that the minister failed to satisfy the burden of proof to this extent."

The fines were therefore irrevocably dismissed. By the narrowest margin therefore – but a margin indeed. The parties and their lawyers in these cases did some outstanding work and have shown a large degree of perseverance.

This is therefore not really a ground-breaking judgment in itself, but more of a summary and confirmation of a trend that was already more or less applied by the Division. What makes this case special is the prior opinion of the Advocate General and the clarity with which the Division re-explains it, particularly with respect to the burden of proof that is explicitly and rightly placed on the state: in cases where there is doubt, the employer (within the meaning of the Dutch Foreigners (Employment) Act) must be given the benefit of the doubt. The Minister did not satisfy the burden of proof in this case and in future cases, the task of proving the objective criterion will continue to be particularly difficult for the Inspectorate and the Minister. But the ECJ, particularly in the Martin Meat judgment, was absolutely clear about this, and the Inspectorate and the Minister will just have to live with it.

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