SUMMARY

ECJ 18 June 2015, case C-586/13 (Martin Meat kft – v – Géza Simonfay, Ulrich Salburg), Free movement

Facts

In 2007, the Austrian meat packing company Alpenrind concluded a contract with the Hungarian company Martin Meat. The contract required Martin Meat to process 25 sides of beef per week. Martin Meat performed this work in Alpenrind's slaughterhouse in Austria, using its own Hungarian workers. Martin Meat rented the premises and the machinery from Alpenrind, but used its own equipment. Alpenrind's manager gave general instructions to Martin Meat's manager. The latter organised the work of the employees to whom he gave instructions.

Martin Meat took the position that its contractual relationship with Alpenrind was one of supply of services and that it posted its workers to Austria in order to perform those services. The Austrian authorities, on the other hand, took the position that Martin Meat actually hired out workers to Alpenrind, an activity that in 2007 (three years after Hungary's accession to the EU) required a work permit. Accordingly, Alpenrind was fined over € 700,000. Alpenrind claimed this sum from Martin Meat, which in turn claimed it from its lawyers, who had advised it that its contractual relationship with Alpenrind was not one of manpower supply.

National proceedings

The Central District Court in Pest (Hungary) referred two questions to the ECJ. The first question related to the nature of the contract between Alpenrind and Martin Meat: was it a

contract for the provision of services (contracting out) or was it the hiring-out of workers (manpower supply)? The second question was whether Austria was entitled to restrict the hiring-out of Hungarian workers on its territory in 2007. Both questions referenced the ECJ's 2011 ruling in Vicoplus (C- 307/09). In that case, the ECJ provided a definition of hiring out workers within the meaning of Posting Directive 96/71. It also held that Articles 56 and 57 TFEU (freedom to provide cross-border services) do not preclude a Member State from making, during the transitional period following the accession of ten new Member States in 2004, the hiringout of workers from those Member States subject to the obtaining of a work permit, given that hiring out temporary workers involves the movement of workers, not the freedom to provide services. The ECJ drew a distinction between (i) "a temporary movement of workers who are sent to another Member State to carry out work there as part of a provision of services by their employer" and (ii) a hiring-out of workers where "the movement of workers to another Member State constitutes the very purpose of a transnational provision of services".

ECJ's findings

Germany and Austria negotiated a specific derogation from the 2003 Act of Accession which entitled them to restrict the freedom to provide services by companies from the new Member States in certain sensitive sectors for a number of years. That derogation does not restrict Germany and Austria from regulating the influx of Hungarian workers on their territory further than if the derogation had not existed. Consequently, if the service at issue qualified as the hiring-out of workers, as defined in Vicoplus, Austria was allowed to require work permits (§20-30).
Which are the relevant factors to be taken into consideration in order to determine whether a contractual relationship must be classified as a hiring-out of workers within the meaning of the Posting Directive? (§31-32).
There is a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71 where three conditions are met. First, hiring-out of workers is a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. Second, it is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services. Third, in the context of such hiring-out, the employee carries out his tasks under the control and direction of the user undertaking (§ 33).
If it flows from the obligations in a contract that the service provider is required properly to perform the services stipulated therein, it is, in principle, less likely that there is a hiringout of

workers than if the service provider is not liable for the consequences of a supply of services inconsistent with the terms of the contract. In the present case, it is for the national court to verify the extent of the respective obligations of the parties in order to identify the party liable for the consequences of improper performance. A relevant circumstance in that regard is that Martin Meat's remuneration varies in accordance, not only with the quantity of meat processed, but also with the quality of that meat (§ 36-37).
Furthermore, the fact that Martin Meat was free to determine the number of workers it considered useful to send to Austria indicates that the subject matter of the supply of services at issue is not the movement of workers in the host Member State, but that that movement is ancillary to the performance of the service set out in the contract concerned and that it is therefore a posting of workers, within the meaning of Article 1(3)(a) of Directive 96/71 (§ 38).
However, in the case in the main proceedings, neither the fact that the service provider has only one client in the host Member State, nor the fact that that service provider rents the premises in which the services are performed and the machines, provide any useful evidence to determine whether the genuine purpose of the supply of services at issue is the movement of workers in that Member State (§ 39).
A distinction must be made between control and direction over the workers themselves and verification by a client that a service contract has been performed properly. It is normal for a client to verify in one way or another that the service delivered is in conformity with the contract. Moreover, in the context of a supply of services, a client may give certain instructions to the service provider's workers on how the service contract should be performed without entailing direction and control over the service provider's workers within the meaning of the third condition laid down in the judgment in Vicoplus, provided that the service provider gives them the precise and individual instructions it deems necessary for the performance of the services (§ 40).

Ruling

Annex C to the Act concerning the conditions of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, must be interpreted as meaning that the Republic of Austria is entitled to restrict the hiring-out of workers on its territory, even though that provision does not concern a sensitive sector.
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, 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 ENTWORK PERMIT) Facts 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.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-06-18
Case number: C-586/13