SUMMARY

ECJ 10 February 2011, cases C-307 through 309/09 (Vicoplus SC PUH, BAM Vermeer Contracting Sp.zoo and Olbek Industrial Services Sp. zoo, Work and residence permit

<p>Articles 56 and 57 TFEU do not preclude a Member State from making the hiring-out of workers from the Member States that acceded to the EU in 2004 subject to a work permit requirement during the relevant transitional period. Cross-border hiring-out of workers is characterised by the fact that the movement of workers to the host Member State constitutes the very purpose of the services provided by the workers’ employer.</p>

Facts

Dutch law requires companies to have a work permit in order to employ non-EU nationals. There is an exception to this rule where a European company performs services in The Netherlands and for that purpose makes use of a non-EU national who is entitled to work in that company's home country. This exception was introduced in order to comply with Articles 56 and 57 TFEU (formerly Article 49 EC), as interpreted by the ECJ in a number of cases, including Rush Portuguesa (C-113/89) and Van der Elst (C-43/93). Article 56 TFEU prohibits restriction of freedom to provide services within the EU. Article 57 TFEU defines "services" broadly. However, the exception in relation to the Dutch work permit requirement does not apply to temporary employment agencies. This exception to the exception is referred to below as "the Temporary Agency Exception". In the course of 2005 and 2006, the Dutch Labour Inspectorate discovered that Polish "temps" were performing work in a number of companies.

These Polish workers were employed by Polish temporary agencies, which had hired them out to the Dutch user companies. The Polish temporary agencies (and, presumably, the Dutch user companies) were fined. At that time, although Poland was already a Member State, having acceded to the EU in 2004, a number of transitional provisions were still in place. One of these (paragraph 2 of Chapter 2 of Annex XII to the 2003 Act of Accession, "Para 2(2) Annex XII") provided that the freedom of movement pursuant to Regulation 1612/68 would not apply to Polish workers for a certain period of time. For this reason, Polish workers were equated to non-EU nationals for the purpose of free movement and therefore Dutch companies wishing to employ Polish workers needed a work permit.

National proceedings

The Polish temporary agencies appealed against the fines they were ordered to pay. They lost in two instances. They took their case to the highest administrative court, where they argued that what they did, i.e. making their workers available to other companies, was a service that falls within the scope of Article 56 TFEU and that the Temporary Agency Exception is incompatible with the freedom to provide cross-border services within the EU. The government countered that a situation where a non-EU (or, in this case, a Polish) temporary agency hires out workers to a user company in an EU country is not covered by the rules regarding freedom to provide services, but by the rules in respect of free movement. The court referred two questions to the ECJ. The first was whether the Temporary Agency Exception was covered by Para 2(2) Annex XII, in other words, whether temporary agency work is governed by the rules in respect of free movement and not by those in respect of freedom to provide services. The second was how to define "hiring out".

ECJ's findings

1. The ECJ begins by recalling its previous rulings (including Webb, C-279/80) that, where an undertaking hires out staff who remain in its employment, no contract of employment being entered into with the user, its activities constitute an occupation that qualifies as a "service" within the meaning of Articles 56/57 TFEU (§ 27).

2. However, the ECJ has acknowledged that such activities may have an impact on the receiving Member State and that "temps" may in certain circumstances be covered by Articles 45/48 TFEU in respect of free movement. In Rush Portuguesa, the ECJ held that a temporary employment agency, although a supplier of services within the meaning of the TFEU, carries on activities that are specifically intended to enable workers to gain access to the job market of the host Member State. A "temp" typically occupies a post within the user company that would otherwise have been occupied by a person employed by that undertaking. It follows that

legislation such as the Temporary Agency Exception must be considered to be a measure regulating access of Polish nationals to the job market of (in this case) The Netherlands. Therefore, the Temporary Agency Exception is compatible with Articles 56 and 57 TFEU (§ 28-33).

3. This finding follows from the purpose of Para 2(2) Annex XII, which was intended to prevent disturbances in the job market of the existing Member States (§ 34). It is artificial to draw a distinction between the influx of workers on that job market and whether they gain access to it as a "temp" or directly and independently as an employee of a user company, because in both cases a potentially large influx of workers is capable of disturbing the job market (§ 35).

4. The fact that Annex XII to the 2003 Accession Agreement allows Germany and Austria to derogate temporarily from Article 56 TFEU in respect of Polish workers does not preclude other Member States from applying their national measures in respect of the hiring out of Polish workers (§ 38-40).

5. The hiring out of "temps" falls within the scope of Article 3 of the Posting Directive 96/71, which gives definitions of several forms of posting. As these definitions make clear, there is a distinction between, on the one hand, the posting of workers by their employer to another Member State as a measure ancillary to a provision of services (Article 1(3)(a)) and, on the other hand, a movement of workers to another Member State constituting the very purpose of a trans-national provision of services, as in the case with "temps" (Article 1(3)(c)). A "temp" remains in the employment of the temporary employment agency during the period of posting, but he or she works for and under the control of the user company (§ 42-48).

6. The ECJ does, however, note that situations that at first sight resemble hiring out can in fact constitute the provision of a service and vice-versa (§ 50).

Ruling

Articles 56 and 57 TFEU do not preclude a Member State from making the hiring-out of workers from the Member States that acceded to the EU in 2004 subject to a work permit requirement during the relevant transitional period. Cross-border hiring-out of workers is characterised by the fact that the movement of workers to the host Member State constitutes the very purpose of the services provided by the workers' employer.

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