Posted Workers and Freedom to Supply Services

Directive 96/71/EC and the German Courts

1. INTRODUCTION

National labour law applies to all persons working as employees on the national territory. This is the traditional approach of international labour law in numerous countries, normally termed the principle of territoriality. Referring to employment contracts, article 6 §2 of the Convention on the Law Applicable to Contractual Obligations ('Rome Convention' (OJ 1980, L 266/1), which has been ratified by all the Member States, confirms it as the general rule. Article 6 §1 states that even agreement between the parties to the employment contract to choose a different legal order may not deprive the employee of the protection guaranteed by this law.

If this rule would be applied without any exceptions, there would be no reason to establish special rules for posted workers. In the same way as migrant workers they would be subject to the law of the country where they fulfil their duties. Article 6 §2 of the Rome Convention, however, provides for an exception. If the employee is 'provisionally' sent to another country, the lex loci laboris continues to apply. As article 6 refers only to employment contracts, public labour law, such as health and maternity protection, follows even today the principle of territoriality. If work on Sundays is forbidden in the host country, the employer and the posted worker have to comply with this rule. In a way the legal situation of the employee is thus mixed up between two different legal orders, a situation likely to generate a lot of legal problems in litigation.

Obviously, the authors of the posted workers directive (OJ 1997, L 18/1, noted by Davies (1997) 34 CMLR 571) did not really bear in mind the Rome Convention. Their main idea was to make a 'hard core' of labour law rules of the host country applicable to posted workers. The catalogue established in article 3 of the directive seems to be quite impressive. In reality, most of the subjects belong to public law and would apply in any case (see Däubler, (1993) 4 *Europäische Zeitschrift für Wirtschaftsrecht* 370). There are only three exceptions which merit mention:

- Equality of treatment between men and women and 'other provisions on non-discrimination'. The Commission's first draft (the text of which can be found in A. Byre, *EC Social Policy and 1992*, 1992, p 109) had mentioned the prohibition of discrimination on the grounds of colour, race, religion, opinions, national origin and social background. Whereas equality between men and women is guaranteed by Community law, the other anti-discrimination rules cannot be derived in the same clear way from EC Law.
- Minimum paid holidays. The working time directive (OJ 1993, L 307/18) provides for four weeks but national law may be more protective for workers.

— Minimum rates of pay, including overtime rates and allowances, but excluding private pension schemes.

The minima will normally be laid down in statutes or regulations of the Member State. In the building industry, defined in the annex of the posted workers directive, collective agreements are included especially when they are generally binding ('effect erga omnes'). (See Davies, op cit, p 580). These provisions are the heart of the 'hard core' and the real object of discussion even if authors refer to the whole directive.

2. THE GERMAN SITUATION AND THE DECISION OF THE LABOUR COURT OF WIESBADEN

The German Act on posted workers (*Entsendegesetz* — BGBl 1996, Part I, p 227) dates from 26 February 1996, thus partly anticipating the provisions of the directive. It is confined to the building sector and extends collective agreements on the minimum wage and paid holidays to posted workers if those agreements are generally binding.

In the construction industry there is a so-called 'common fund' (*Gemeinsame Einrichtung*), established by the social partners, which is financed by all employers and from which is paid the wages during workers' holidays. Under the general law workers are not entitled to paid holidays if they have not worked for at least six months with one employer. As building workers often change their employment relationship, they would often fail to qualify. On the other hand, it would be unjust to put the burden wholly on the one employer who unfortunately is on contract in July or August. The legal basis of the system is a collective agreement which is declared to be generally binding and which is renewed regularly.

In accordance with the provisions of the *Entsendegesetz*, a foreign employer sending workers to Germany was asked to pay contributions to the common fund, as other employers do. Upon his refusal, the representatives of the fund complained at the local labour court of Wiesbaden, which on 2 February 1998 asked the ECJ for a preliminary ruling. (See *Neue Zeitschrift für Arbeitsrecht, Rechtsprechungs-Report*, 1998, p 217; the reference to the ECJ is C-68/98.) In the opinion of the court, the German rules as well as the directive infringe the freedom to provide services under article 59 of the Treaty. The extension of the collective agreement renders the activities of a service provider established outside the Federal Republic less advantageous. In the court's view, this restriction cannot be justified by overriding requirements of public interest. It seems to be doubtful whether the protection against competition based on lower wages could meet this condition at all. Even if one did accept it, the applied means would be inadequate because the posted worker (as protected persons) would not be able to ask for holiday pay if returned into their country of origin.

3. SHOULD THE ECJ's CASE-LAW BE CHANGED?

The labour court of Wiesbaden avoids a clear statement whether its opinion is in contradiction to the ECJ's previous rulings or not. As far as one can see, the European

Court of Justice has three times stated that Member States are entitled to extend their legislation or collective labour agreements to any person 'who is employed, even temporarily, within their territory, no matter in which country the employer is established'. (See Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417; Case C-43/93, *Vander Elst* [1994] ECR I-3818; Case C-272/94, *Guiot* [1996] ECR I-1915.) In the *Vander Elst* judgment this was explicitly termed 'case-law of the Court' (para 23). *Vander Elst* and *Guiot* referred to minimum wages whereas the *Rush Portuguesa* judgment aimed at all working conditions.

In the three cases the Court had to examine whether the freedom to provide services was infringed by additional disadvantages imposed on the foreign employer. *Rush Portuguesa* and *Vander Elst* dealt with the requirement of a working permit and *Guiot* with the obligation to pay contributions to the social security fund of the host Member State in addition to the contribution paid 'at home'. The extension of minimum conditions as such was not considered to create problems under article 59. This is especially interesting because of the fact that in *Vander Elst* and in *Guiot* the Court had emphasised in an earlier paragraph that article 59 requires not only the elimination of all discriminations 'but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States' (*Vander Elst* at para 14; *Guiot* at para 10). The statement that the pure extension of minimum working conditions constitutes no restriction can be explained by article 60 §2 of the Treaty which describes the freedom to provide services as a right to do it 'under the same conditions as are imposed by the (host) Member State on its own nationals'. If this is not considered to be a sufficient reasoning, one should refer to the special principles the Treaty has established referring to competition based on social costs.

Article 48 §2 of the Treaty provides for equal treatment of migrant workers involving remuneration and other conditions of work and employment. The Treaty itself, therefore, prohibits competition between employees in the sense that a migrant worker would offer poorer conditions in order to get a job or to keep it. A behaviour which is elementary in the field of commodities is excluded in the field of (migrant) persons. This corresponds with article 117 of the Treaty stressing the 'need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'. A competition based on wages being 50% or 30% of those which are normally paid in the host country is just the contrary of 'maintaining the improvement'.

The fact that the posted workers do not seek access to the labour market of the host country (which would lead to equal treatment according to article 48 §2) does not preclude their presence influencing in a massive way the employment conditions of the workforce in the host country. Competition based on better performance and competition based on worse working conditions are two different things in reality in the meaning of the Treaty; they are not on an equal footing. The first one is a fundamental principle of the Community, the second one is potentially in contradiction with legal principles of the EC and therefore a 'revocable' phenomenon. The Court, therefore, has no reason to change its case-law under the present conditions.

As to the questions raised by the labour court of Wiesbaden, the answer should be clear. There is no 'double taxation', as in the *Guiot* case, but just equality between

foreign and German employers. The fact that foreign employees will get the holiday payment only if working for a longer period in Germany (which is not excluded by article 59) does not constitute a discrimination against the foreign employer.

4. ADDITIONAL REMARKS

In its *Guiot* judgment, the Court has stated that even an additional financial burden imposed on the foreign employer may constitute an overriding requirement justifying such a restriction because of specific conditions in the construction industry (at para 16). The Court does therefore consider the restrictive rule not only as a means of protecting the posted workers; its scope is much larger, encompassing the interests of the workers in the host country not to be unemployed or not to suffer bad working conditions. One may choose a more general view in the sense that the functioning of collective autonomy and of industrial relations should be maintained, which is threatened by the 'importation' of a low-paid work-force.

Would such an approach not be characterised as being protectionist? The question should be examined more in detail if the directive or national law were to extend the whole of labour law, including wages, working hours and other working conditions, to posted workers. Such a return to the traditional principle of strict territoriality would indeed create a certain obstacle to the establishment of a free market of services. Neither the directive nor national laws have ever gone so far. They just guarantee 'minimum' wages and 'minimum' conditions, not equal treatment. In Germany, the minimum wage fixed by collective agreement in the building industry is about 14 DM per hour, whereas German construction workers earn between 18 and 22 DM per hour. The comparative advantage of enterprises using low-paid workforce is thus reduced, but not eliminated, even in the wage sector. (See Barnard, *EC Employment Law*, revised edn, 1996, para 6.66; Moreau, (1996) *Journal du Droit International* 892.) Other fields like shift work, protection against dismissal, housing etc. are even not dealt with. Finally, the position of the Labour Court of Wiesbaden would put in danger traditional parts of public labour law like maximum working hours or maternity protection which would need to be justified by specific arguments.

5. A SHORT GLIMPSE INTO REALITY

Seen from the German experience, the discussion about the directive and its compatibility with article 59 of the Treaty seems to be a very academic one. As far as we know, posted workers coming from Portugal, Ireland or the United Kingdom normally never go to court in Germany; nor do those coming from Middle and Eastern Europe. In the construction sector they normally are in a position much inferior to other employees. They do not know how to go to a tribunal or join a German union, they are not informed about their rights, they fear to be treated as being disloyal in asking for wages higher than

those fixed in the employment contract. The main problem is to take articles 5 and 6 of the directive seriously and provide for sufficient implementation procedures and a competent court in the host state. This could finally lead to a reduction in the gap between normal workers and their foreign colleagues doing the same job — and so establish a small piece of equality. To put away the directive would mean to open the single market to what one may call unlimited social dumping.

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