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POSTING OF TEMPORARY WORKERS IN GERMANY WILL THE END OF TRANSITIONAL PERIOD REALLY HELP?

TEREZA KUNERTOVÁ, MARTIN ŠTEFKO

Abstract:

As of May 1, 2011 the last two member states of the European Union, Austria and Germany, have opened their job markets to the new member states joining the European Union in 2004 (incl. Czech Republic). From now on workers coming from the new member states are entitled to enter the job markets in Germany without a need to apply for any kind of work permit. However, it does not apply on the employers who would like to temporarily post their workers on the German labor market. Therefore, the aim of the article is to illustrate weather and how the end of the transitional period has influenced the German legislation on temporary work agencies. Further, as work agencies represent a service in the union sense, the European law perspective is analyzed.

Key words:

transitional period, temporary work agencies, posting of workers, free movement of workers

1. Introduction

As of May 1, 2011 the last two member states of the European Union, Austria and Germany, have opened their job markets to the new member states joining the European Union in 2004. Even though, it is quite early to make any conclusions on impact the opening might have, we would like to focus on certain concerns the employers and employees may deal with - in particular within the context of the temporary work agencies in Germany.

2. The Transitional Period

During the negotiations preceding the accession of ten new member states (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia), it had been agreed that for the period of 7 years (based on 2+3+2 formula) “old” member states are entitled to leave their job markets closed for workers coming from the new member states. Such an agreement meant that any citizen from new member states willing to participate on

the job market of a former member state had to apply for a work permit almost under the same conditions as any third country citizen was obliged to.¹ From the beginning, the transitional period did not apply to Malta and Cyprus due to their geographic remoteness. United Kingdom, Ireland and Sweden had been the first member states who opened their markets as of the onset of the transitional period. The rest of the old member states imposed labor-market restrictions to workers coming from the new member states mainly out of fear of benefit tourism and a fall of wages due to the spread of cheap Eastern European labor². Even though according to the Commission of the EU,³ the fear did not prove its roots, Austria and Germany have kept on declaring their aim to leave their markets closed until the last possible term. The Czech Republic itself has not imposed any restrictions on the free movement of workers coming from other member states.⁴

The transitional period aimed for the restriction on free movements of workers, however, was not applying to any worker who already had entered the respective market prior the accession or to the self-employed or other categories of EU citizens.⁵ The ending of the transitional period presupposes that any citizen from the new member state is entitled to enter the job market of other member state without a need to request for the work permit and/or fighting any obstacles such procedure might bring. One could question the approach of Austria and Germany, however, only following the opening of their labor markets we are able to monitor whether any of the low wages fears come true. Regarding our citizens it is a bit of query whether they will notice any improvement whatsoever as Czech Republic is traditionally one of the countries with so far rather low intra-EU mobility rate.⁶

Nevertheless, in context with the end of the transitional period one might ask on the impact it will or won't bring to the work agencies wishing to temporarily post their workers on the labor market in Germany.

¹ See VAVREČKOVÁ, J., et. al., *Migrace odborníků do zahraničí a potřeba kvalifikovaných pracovních sil*. VÚPSV 5/2006, p. 72

² See BARNARD C., *The substantive law of the EU: the four freedoms*. Oxford, Oxford University Press 2010, p. 264-265

³ See Commission, *The impact on the free movement of workers in the context of EU enlargement - Report on the first phase (1 January 2007 – 31 December 2008) of the transitional arrangements set out in the 2005 accession treaty and as requested according to the transitional arrangement set out in the 2003 accession treaty*. COM(2008) 765

⁴ See ZUKAL, J., *Volný pohyb pracovníků: přechodná období jsou zbytečná*. Veřejná správa, 15/2006, p. 24

⁵ See *Volný pohyb osob v rozšířené EU, Informace z Evropy*, Řada A-Evropská unie, 4/ 2004, p. 1

⁶ See *Volný pohyb pracovníků v EU*. Národní pojištění, 1/2011, p. 29

3. Without End

The termination of the transitional period really has an impact on the agency workers' position, yet a different one than would be expected by the Czech-based work agencies. From 1st May 2011 Czech citizens do no longer need a work permit (German term: Arbeitserlaubnis-EU) in order to enter the German labor market. Until April 30, 2011, Czech citizens were not able to get the Order concerning a work permit for foreign workers⁷ due to the regulation of § 284 subs. 1 pt. 3 SGB III⁸ in connection with the regulation of § 6 subs. 1, if they were the so-called agency workers. Thus, German employers could not employ Czech workers, if they were sent via agencies. With the end of the transitional period, this barrier will cease to exist. Czech citizens will be able to apply for work freely (by themselves) on the German labor market, and this will newly count also for the agency workers.

Yet for the Czech-based work agencies, it is vital, that the Act on Agency Work has not been changed (German: „Arbeitnehmerüberlassungsgesetz“, abbrev. „AÜG“),⁹ not even by the Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes – Verhinderung von Missbrauch der Arbeitnehmerüberlassung (the First Act Amending the AÜG – To Hinder the Misuse of Temporary Agency Work, hereinafter “the First Act Amending the AÜG”) that implemented Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.¹⁰ Though this act does not expressly state that it would be referring to the assignment of workers from abroad (i.e. from the Czech Republic in our case), we can deduce this from the regulation of § 3 subs. 2 AÜG. The German doctrine deduces its applicability also from the territoriality principle.¹¹ Also the German Federal Labor Court (German abbrev.: BAG) concluded that a foreign-based employer (a foreign-based work agency) has the duty to get a work permit for agency work. This was found in the court's decision from March 22, 2011 - 7 ABR 34/98.

It can also be deduced from § 1 subs. 1 par. 1 AÜG that prior to assigning workers to a client, the Czech-base work agency first has to obtain a permit to operate as a work agency on

⁷ German term: Verordnung über die Arbeitsgenehmigung für Ausländische Arbeitnehmer, German abbrev. ArGV.

⁸ Third Book of the Social Code (German term: „Sozialgesetzbuch Drittes Buch“, „SGB III“).

⁹ Gesetz zur Regelung der gewerbsmäßigen Arbeitnehmerüberlassung (Arbeitnehmerüberlassungsgesetz - AÜG). Arbeitnehmerüberlassungsgesetz ve znění z 3. února 1995 (BGBl. I S. 158), last amendment: Art. 2 of this Act, from 24th October 2010 (BGBl. I S. 1417 (2329)).

¹⁰ Bundesgesetzblatt Teil 1 (BGB 1), number: 18, Publication date: 29/04/2011, Page: 00642-00644, Entry into force: 01/12/2011. the First Act Amending the AÜG comes into force in the majority of its provisions on 1 December 2011. Compare <http://www.arbeitsagentur.de/zentraler-Content/A08-Ordnung-Recht/A083-AUEG/Publikation/pdf/Arbeitnehmerueberlassung-Aenderungen-ab-Dez-2011.pdf> (Cited: 22.10.2011).

¹¹ It is a public regulation. Further information can be found in Lorenz: Individualrecht mit kollektivrechtlichen Bezügen (Individual Law with Collective Law Impacts), NOMOS 2008, Germany, p. 683 ff.

the German labor market. The fact that this agency had already obtained the permit to procure workers from the Czech Republic to abroad has no effect upon this fact. The reason for this is that the permit for relocating workers abroad (issued by the Czech Ministry of Labor and Social Affairs), according to § 60 subs. 1 par. c) of Act No. 435/2004 Sb., on employment as amended, does not substitute the permit issued according to German Public Law regulations (like the AÜG). Therefore, a Czech-base work agency has to bear extra costs in order to obtain the respective German permit. The National Court for Social Affairs in Northern Rhineland-Palatinate concluded in its very much disputed decision from July 02,2010, file No. L 1 AL 158/10 B ER that in such a case, a work agency cannot rely upon the freedom to provide services since this freedom has to give way to the limits of the freedom of movement for workers in such a case. However, the transitional limits of the freedom of movement for workers have ended as of May 1, 2011.

Consequently, the basic threat for the Czech employer (work agency) coming out of the approach shown above is that he is being suspected of illegal agency work. Yet we have to mention that in such a case, like in the Czech Republic, the German authorities would primarily sanction the German (i.e. domestic) user.

There are two basic criteria used to distinguish between the work performed by the contractor's (supplier's) employees on the orderer's premises and the work performed by agency workers relocated to the user. It is the latter if the posted contractor's (supplier's) employees have been incorporated during their work performance into the organizational structure of the ordering company and are working according to the orderer's instructions.¹² In case of a conflict between the contract and reality, German courts focus on how the contracting parties are carrying out their contract (i.e. reality). Below, you can find important subcriteria for identifying illegal (i.e. unauthorized) agency work:

- a) the orderer gives instructions to the assigned workers relating to Labor Law (e.g. The tasks are assigned by an orderer's employee; the orderer decides when the contractor's or supplier's workers are going to have their shifts or vacation),
- b) cooperation with the orderer's employees,
- c) the assigned employees overtake and fulfill tasks that have previously been fulfilled by the orderer's employees,

¹² Compare e.g. the BAG's decision from 06. 08. 2003, file No. 7 AZR 180/03

- d) the orderer distributes working cloths and material to the assigned worker, in order to fulfill their tasks,
- e) the tasks to be fulfilled have been agreed upon between the contractor (supplier) and the orderer only on a general level (as a framework),
- f) there is no contractor (supplier) supervision present during the fulfillment of the tasks,
- h) due to personal and equipment matters, the contractor (supplier) is not able to fulfill the tasks that have been agreed.

Prior to assigning workers, we would also recommend paying attention to the Bundesagentur für Arbeit's (Federal Employment Agency) interpretation (an institution similar to the Czech Labor Office that is currently being reformed) which can be found on www.arbeitsagentur.de or arbeits-und-arbeitsrecht.de/downloads. The Agency prefers the following criteria:

- a) the contractor (supplier) retains his dispositive freedom to act (i.e. the assigned workers are still being directed by the contractor or supplier),
- b) the entrepreneurial risk is being carried by the contractor (supplier),
- c) personal and material equipment provided by the contractor (supplier),
- d) own instruments used by the contractor (supplier).

The employment contract or the agreement to perform work¹³ agreed upon by a Czech work agency and an agency worker would be null and void because of § 9 pt. 1 AÜG. This would mean that such an agreement would be regarded as invalid according to German Law. The German user would *de iure* become the employer of the given (agency) worker. The

¹³ Due to history, the Czech labour law recognizes three types of employment contract, such as employment contract itself and two work performance agreements (in Czech Dohody o pracích konaných mimo pracovní poměr). Contrary to the contract of employment, both work performance agreements provide more room for both parties to manoeuvre within the contract. To a substantial extent, an employer may free himself from many obligations that adhere to the employment relationship established by the contract of employment – in particular those concerning working hours, payments, and termination of employment. Furthermore, the relationships of superiority and subordination are also weaker. Thus, an employee performing work based on a work performance agreement may act in a relatively independent way and he or she is bound only by the results of his or her work. Due to the weaker status of such an employee, the law restricts the extent of work which may be performed in such a way. The agreement of work may be concluded only if the work does not exceed 150 hours for one calendar year (the limit concerns one employer and since 2012 is extended to 300 hours). The agreement concerning working activity is limited by the maximum number of working hours which may be agreed to. An employee shall not work for an employer more than 20 hours in a work week.

regulation of § 9 AÜG is being regarded as a mandatory norm, which always applies, regardless of the possibly different will of the contracting parties. It is an absolutely mandatory norm that one cannot deviate from even by choosing another governing law. Otherwise, the German user would be burdened both by the duty to make social security contributions and to pay taxes for this employer, plus there would of course be further sanctions linked with late payments of this kind.

A (relatively) secure protection for the German employer would only be, if the member of the Czech pensions and sickness insurance scheme (i.e. belonging to the respective Czech organizations OSSZ or ČSSZ) would hand in a A1 confirmation form (or – the old E 101 form). Through this confirmation, the respective employer's would declare his membership in the Czech pensions and sickness security scheme. Still, the German user would not be freed from his duty to pay contributions for his employee, he'd only pay them into the Czech public social insurance systems.

In such a case, the German authorities must, according to set practice, assume the truthfulness of the issued confirmations and cannot invalidate them themselves. They could be invalidated only by Czech authorities (ČSSZ and possibly, OSSZ, PSSZ or MSSZ Brno, i.e. the nationwide, departmental social security authorities or their counterparts in Prague and Brno).

In the case of illegal (i.e. unauthorized) agency work on German territory, a work agency may be sanctioned according to § 15 AÜG, yet this sanction method is very disputable. The provision does allow sanctioning those who assign an employee without a permission to work for an employer. Yet one of the conditions of administrative responsibility is the fact that the assigned worker does not have a residence permit.¹⁴ This means that Czech citizens, who will have been assigned as agency workers, will not fulfill this condition as of May 01, 2011 onwards.

Further sanctions could result from a (commercial) contract agreed upon between a Czech work agency and a German user. The user may secure himself that way for the case of his responsibility according to German law. As far as the controls from German authorities are

¹⁴ Translation of the German original: „A person who in spite of § 1 posts an alien to a third party, in spite of the alien not having the necessary residence permit according to the Aufenthaltsgesetz (Residence Permit Act) § 4 Subs. 3, neither a temporary residence permit nor an acceptance, which would allow the performance of the employment; nor does this alien have an approval according to § 284 subs. 1 of the Third Volume of the Social Code, then this person shall be punished with a prison sentence of up to free years or a fine.“

concerned, it is generally known that Germany is very much afraid of illegal employment of aliens on its territory. That is why the country tries to carry out preliminary controls. Furthermore, it has even (in the past) conditioned the people's entry with the acquisition of a work permit, thus trying to make a stay of these people on its territory impossible. Yet, the European Court of Justice stated in its ruling *Commission vs. Germany*, that a simple prior declaration about lawful employment of the respective employees is sufficient in such a case.¹⁵

An already proven method, which is also tolerated by the German authorities, can be found in the provision of § 1 subpar. 3 pt. 2 AÜG. According to this provision, agency work is not subject to a permit if it is carried out in a holding company, and if the agency worker does not carry out his work on his employer's (i.e. his permanent employer's) premises temporarily. The transitional character of work for another employer pertaining to the same holding company has to be a result of a temporarily limited character of the tasks the worker has been assigned with by this different employer. On the other hand, there has to be a guarantee for the agency worker for his return to the former place (i.e. his working place at his permanent employer's). This exception also affects international holding companies.¹⁶ From April 30, 2011, there is a ban on reinstatement of dismissed employees to the same or affiliated employers as a temporary workers (so called *Drehtürklausel*).¹⁷ The First Act Amending the AÜG added that an agency worker shall not be in such a case hired because of temporary agency work.

The German Federal Labor Court opened another possibility. Owned to the scope of the AÜG (the law limits only business activities in the field of agency work),¹⁸ there are, from the definition, work agencies who do not follow profit reasons in their activities and relocate temporary workers only occasionally.¹⁹ The Federal Labor Court ruled that such cases are excluded from the permit's duty (e.g., the first relocation of a temporary worker to the user for a short period of time motivated by an overload of orders from clients). However, this exception shall not apply according to the opinion of the Federal Employment Agency to the

¹⁵See ESD decision C- 244/04, *Commission v. Germany*.

¹⁶ For further information in specialist literature, see e.g. Zürn: AuA 10/09, str. 590 ff.; Schüren, Hamann, Hamann: AÜG, 4th edition, 2010, commentary to k § 1 No. 491; or lately: Zimmermann, A.: *Internationaler Arbeitseinsatz in AuA 9/10*, p. 515.

¹⁷See <http://www.ad-hoc-news.de/drehtuerklausel-gegen-missbrauch-der-leiharbeit--/de/News/22074273> (Cited 22.10.2011).

¹⁸ In German are those activities described as "gewerbsmäßig".

¹⁹ See BAG issued on June 2, 2010, file number 7 AZR 946/08, Rn. 19, 26.

interstate relocations. In addition, the legislation reacted and in the First Act Amending the AÜG enlarged again numbers of those who are under obligation of a permit to operate as a work agency on the German labor market. Said act exchanged the current word interpreted by the Federal Labor Court “as a business” (gewerbsmässig) to “any economic activity”.

4. The European Law Perspective

As previously outlined, the end of the transitional period does not assume any improvement in respect of the work agencies. The work agencies represent a service in the union sense. The European Court of Justice²⁰ has stated in several decisions that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”.²¹ In general, this shall mean that the agency employers shall favor from the free movement of services as long as any justifiable restriction does not exist.

In accordance with the posting of workers the ECJ has already declared that “...by providing in its legislation that construction undertakings established in other Member States ...may not contract out workers from another country to other construction undertakings unless they have their seat or at least an establishment in Germany employing their own staff and, as members of a German employers' association, are covered by framework and social-welfare collective agreements ... the Federal Republic of Germany has failed to fulfill its obligations under Articles 43 and 49 of the EC Treaty²²”.²³ From this point of view forcing the work agency to set up a brand in other member state if wishing to post its workers in this host member state does present an unjustifiable restriction on free movement of services. Nevertheless, this ruling does not provide any closer observations how the ECJ proceeds in case of the national requirement for obtaining a specific license also by the work agencies validly registered in other member states.

²⁰ Upon the Lisbon Treaty came into force, the new designation being the “Court of Justice of the European Union” is used. For the purpose of this article the original term European Court of Justice or ECJ will be kept.

²¹ See Case C- 19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I - 1663, paragraph 32; C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I - 04165, paragraph 37

²² Currently Articles 49 and 56 of the Treaty on the Functioning of the European Union

²³ See Case C-493/99 *Commission of the European Communities v Federal Republic of Germany* [2001] ECR I - 08163

The recently adopted and “thoroughly discussed” directive 2006/123/EC of the European parliament and of the Council on services in the internal market shall not apply on the services of temporary work agencies and therefore cannot bring any absolution in this matter.²⁴ In respect of the temporary agency work, the directive 2008/104/EC of the European Parliament and of the Council on temporary agency work was adopted, for which the implementation period lapses on December 5, 2011. According to this directive “prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labor market functions properly and abuses are prevented”.²⁵ Nevertheless, the same Article declares that the respective paragraph “shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies”.²⁶

Conclusion

In the consequence of what stated above one may understand reasons behind the license procedure in Germany for posting of workers by work agencies set up in different member states. On the other hand it is at least still a question whether the general principle of the “country of origin” shall not be of any concern in this matter. One may argue that in case the work agency is validly set up in one member state in accordance with its legislative requirements, its existence and right to post workers in the host member state shall not be disputed by this host member state unless any individual reason in an ad hoc case arises. Let leave with this argument as a question mark for the future disputes in this matter, if ever occurred...

²⁴ Article 2(2)(b) of the Directive 2006/123/EC on services in the internal market

²⁵ Article 4(1) of the Directive 2008/104 on temporary agency work

²⁶ Article 4(4) of the Directive 2008/104 on temporary agency work