Further, the encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social and employment policies, in particular where access by young people to a profession is involved (*Fuchs and Köhler, C-159/10 and C-160/10*). Similarly, the Court has held that the objective of giving access to young people to the labour market in order to promote their integration or ensure their protection can be regarded as legitimate for the purposes of Article 6(1) of the Directive (*de Lange, C-548/15*).

In view of these precedents, the Court decided that facilitating the recruitment of younger workers by increasing flexibility in staff management constituted a legitimate aim (see also *Kücükdeveci, C-555/07*).

Appropriate and necessary means

As regards the appropriateness of the Italian provision, the Court found that a measure enabling employers to make flexible contracts can be considered appropriate, as this supports the overall flexibility of the labour market. Employers will find this less onerous and costly than the usual kind of contract and this should encourage them to respond favourably to job applications from young workers. The court felt that in tough economic times, it was preferable for workers under 25 to have access at some level to the labour market than to be unemployed. Therefore, it was reasonable for the Italian legislature to have adopted a provision such as Article 34(2) of Legislative Decree No 276/2003.

Ruling

Article 21 of the Charter of Fundamental Rights of the EU and Articles 2(1), 2(2)(a) and 6(1) of Council Directive 2000/78/EC must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

ECJ 18 July 2017, case C 566/15 (Erzberger), Free movement of workers

Konrad Erzberger – v – TUI AG, German case

Summary

The exclusion of employees of a group, employed outside of Germany, from the right to vote and stand as candidates in elections of employee representatives on the supervisory board of the German parent company, is not contrary to the free movement of workers.

Facts

Mr Erzberger is a shareholder of TUI, which is the parent company of a group of companies (the 'TUI group'), operating in the tourist sector. Within the EU, the TUI group employs around 50 000 people, of whom slightly more than 10,000 work in Germany. TUI falls within the scope of the German Law on employee participation (the Gesetz über die Mitbestimmung der Arbeitnehmer, 'MitbestG'). In accordance with this law, TUI is managed by two boards, namely the management board, responsible for running the company, and the supervisory board, whose task is to oversee the management board, with the participation of workers. The supervisory board has 20 members. Half of it consists of shareholder representatives and the other half of representatives appointed by the workers.

Mr Erzberger felt that TUI's supervisory board was not properly constituted and infringed Article 18 TFEU because it discriminated on grounds of nationality, as those located outside Germany were unlikely to be German citizens. Moreover, as a person's membership of the supervisory board was lost if he or she transferred to another Member State, this tended to dissuade workers from exercising their right to free movement throughout the EU, provided for by Article 45 TFEU. Since TUI disputed Mr Erzberger's view, he brought an action before the courts.

Note that most legal advisers were of the view that the concept of 'worker' for the purposes of the MitbestG, only covers those working in organisations located in Germany. According to that view, workers in a subsidiary of a group located outside Germany, including in another EU Member State, have no right to vote or stand as candidates in elections for representatives to the supervisory board. Thus, any worker in the TUI group who is on the supervisory board must give that up if he or she takes a job in a subsidiary outside Germany. That

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approach is based, not on the terms of the MitbestG, but on the 'principle of territoriality', according to which the German social order cannot extend to the territory of other States.

National proceedings

The *Landgericht Berlin* (Berlin Regional Court, Germany) dismissed Mr Erzberger's action. It found neither discrimination on grounds of nationality nor any restriction on the freedom of movement of workers, since the loss of the right to vote in the case of a transfer would not be a deciding factor for them in the decision as to whether to take a job in another Member State.

On appeal, the *Kammergericht* (Berlin Higher Regional Court, Germany) found that there might have been an infringement of EU law. According to that court, it was possible that the German law on employee participation was discriminatory against employees based on nationality and restricted freedom of movement of workers. The *Kammergericht* decided to stay proceedings and refer a question to the ECJ for a preliminary ruling.

Questions put to the ECJ

Is it compatible with Article 18 TFEU and Article 45 TFEU for a Member State to grant the right to vote and to stand as a candidate in an election as a workers' representative on the supervisory body of a company, only to those workers who are employed in establishments of the company or in affiliated companies that are within national territory?

ECJ's findings (taken from the Court's press release)

The ECJ distinguished two situations.

As regards the employees of the TUI group employed in a subsidiary in a Member State other than Germany, the Court explained that their situation should be analysed not on the basis of the general prohibition on discrimination on grounds of nationality, but based on free movement of workers, as this is a specific anti-discrimination rule based on nationality in respect of employment conditions. However, the Court went on to note that the situation of the employees at issue did not fall within the scope of free movement of workers. The rules relating to the free movement of workers do not apply to workers who have never exercised their freedom to move within the EU and who do not intend to do so. The fact that the subsidiary which employed the employees in the case at hand was controlled by a parent company established in another Member State (Germany), was not relevant.

As regards employees in the TUI group who were employed in Germany and left their jobs to work in a subsidiary in the same group in another Member State, the Court noted that their situation did fall within the scope of the free movement of workers. Therefore, in their case, it is not necessary to analyse their situation based on the general prohibition against discrimination on grounds of nationality.

However, the loss of the right to vote and stand as a candidate in elections of workers' representatives to the supervisory board of the German parent company and loss of the right to act or to continue to act as a representative on that board do not constitute an impediment to the free movement of workers.

The EU guarantee of free movement of workers does not provide that moving to a Member State other than the Member State of origin will be neutral in terms of social security. The move may be more or less advantageous for the person concerned in that regard. Therefore, free movement of workers does not grant the right to rely, in the host Member State, on the same conditions of employment enjoyed in the Member State of origin.

The Court found that EU law did not prevent a Member State from providing that its law only applies to workers employed by organisations located within its borders. Therefore, Germany was entitled to have a participation mechanism that was limited to workers employed by organisations within Germany, as this was based on an objective and non-discriminatory criterion.

As regards the loss of membership of the supervisory board, the Court felt that this was simply the consequence of Germany's legitimate choice to limit application of its national law in the field of worker participation to those employed in Germany.

Ruling

Article 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the workers employed in the establishments of a group located in the territory of that Member State are deprived of the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group, which is established in that Member State, and as the case may be, of the right to act or to continue to act as a representative on that board, where those workers leave their employment in such an establishment and are employed by a subsidiary belonging to the same group established in another Member State.

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