ECJ 18 December 2019, case C-447/18 (UB), Social insurance

UB – v – Generálny riaditeľ Sociálnej poisťovne Bratislava, Slovakian case

Summary

Additional benefits paid to high-level sportspersons who have represented a Member State or its legal predecessors are not 'old-age benefits' within the meaning of Article 3(1)(d) of Regulation 883/2004, but Article 7(2) of Regulation 492/2011 preclude that they are made conditional of having the nationality of that Member State.

Question

Are Article 1(w) and Articles 4 and 5 of Regulation No 883/2004, read in conjunction with Article 34(1) and (2) of the Charter, to be interpreted as precluding legislation of a Member State which makes receipt of an additional benefit introduced for certain high-level sportspersons who have represented that Member State or its legal predecessors in international sporting competitions conditional upon, in particular, the person applying for the benefit having the nationality of that Member State?

Ruling

1. Article 3(1)(d) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems must be interpreted as meaning that an additional benefit paid to certain high-level sportspersons who have represented a Member State or its legal predecessors in international sporting competitions is not covered by the 'old-age benefit' referred to in that provision and, consequently, falls outside the scope of that regulation.
2. Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as precluding legislation of a Member State which makes receipt of an additional benefit introduced for certain high-level sportspersons who have represented that Member State or its legal predecessors in international sporting competitions conditional upon, in particular, the person applying for the benefit having the nationality of that Member State.

ECJ 19 December 2019, case C-16/18 (Dobersberger), Private international law, posting of workers

Michael Dobersberger – v – Magistrat der Stadt Wien, Austrian case

Summary

On-board services on international trains do not fall under the scope of Directive 96/71/EC concerning the posting of workers if most of the work is performed in one Member State.

Legal background

Directive 96/71 contains rules on the international posting of workers from one Member State to another. According to Article 1(3)(a), its scope *inter alia* shall apply to the situation where undertakings post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting. If this is the case, such posted workers should be entitled to a 'hard core' of minimum employment conditions, stipulated in Article 3.

Austria implemented Directive 96/71 into the *Arbeitsvertragsrechts-Anpassungsgesetz*. The implementation legislation also contains registration requirements. Breach of these requirements will lead to sanctions.

Facts

Österreichische Bundesbahnen (ÖBB) entered into a service contract for on-board services for some trains to D, a company with its registered office in Austria. However, that contract was performed by Henry am Zug Hungary (H. Kft.), a company governed by Hungarian law and established in Hungary, via a series of subcontracts involving H. GmbH, which also has its head office in Austria. H. Kft. provided services on certain ÖBB trains from Budapest (Hungary) to either Salzburg (Austria) or Munich (Germany) as the station of departure or destination. It used workers domiciled in Hun-

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gary, most of them hired out to H. Kft. by another company, while H. Kft. employed others directly.
All the workers were based in Hungary, had their social insurance and centre of interests there, and began and ended their shifts in Hungary. They loaded goods in Budapest, where they also had to check the stock and calculate turnover. In fact, everything except the work carried out in the trains took place in Hungary.
After an inspection in Vienna (Austria), Mr Dobersberger, managing director of H. Kft., was found guilty of breaching various administrative requirements of the Austrian implementation legislation of Directive 96/71.
After various proceedings, the referring *Verwaltungsgerichtshof* (Supreme Administrative Court) put preliminary questions to the ECJ.

Questions

Must Article 1(3)(a) of Directive 96/71 be interpreted as meaning that it covers the provision, under a contract concluded between an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there?

Consideration

Free movement of services in the transport sector is governed by Articles 58(1) and 90–100 TFEU rather than Article 56 TFEU. Transport services comprise not only any physical act of moving persons or goods from one place to another by a means of transport, but also any service – even if it is merely incidental – which is inherently linked to that act (*Grupo Itevelesa and Others*, C-168/14, paras. 46–47; Opinion 2/15 {*Free Trade Agreement with Singapore*}, para. 61). However, while services such as on-board services are incidental to the service of rail passenger transport, they are not inherently linked to that service, they may be performed independently. Consequently, they fall within the scope of Articles 56–62 TFEU and may, as such, be covered by Directive 96/71, which was adopted based on Article 57(2) and Article 66 EC, relating to services.
According to Article 1(3)(a) of Directive 96/71, the Directive applies, *inter alia*, to a situation in which an undertaking established in a Member State posts, within the framework of the transnational provision of services, workers on its account and under its direction to the territory of another Member State, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the latter Member State, provided that an employment relationship exists between that undertaking and the employee during the period of the posting (*Rüffert*, C-346/07, para. 19). Article 2(1) stipulates that a 'posted worker' means a worker who, for a limited period, carries out his [or her] work in the territory of a Member State other than the State in which he [or she] normally works.
In that regard, a worker cannot be posted to a Member State if the performance of his or her work does not have a sufficient connection with that territory. That interpretation is based on the scheme of Directive 96/71 and, in particular, Article 3(2) thereof, read in the light of recital 15, which, in the case of the very limited provision of services in the territory to which the workers concerned are sent, states that the provisions of that Directive on minimum rates of pay and minimum paid annual holidays are not applicable. Moreover, the same logic underpins the optional exemptions referred to in Article 3(3) and (4) of Directive 96/71.
However, workers who carry out a significant part of their work in the Member State of establishment of the undertaking, i.e. all activities except the on-board service during the train's journey, and who begin or end their shifts in that Member State, are not sufficiently connected to territories of other Member States crossed to be regarded as 'posted' within the meaning of Directive 96/71.
In this context, it is immaterial that the provision of the services falls under a contract concluded with an undertaking in the same Member State as the railway undertaking, even if the services provider hires workers from another undertaking in its Member State.

Ruling

Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there.

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