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Employment Law

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European Union – Advocate General Opines on Posting of Third-Country Nationals

On 30 November 2023, the Advocate General delivered his opinion in a case concerning posting of third-country nationals from an undertaking in Slovakia to the Netherlands and in the context of the European directive on posting of workers 96/71/EC, amended by Directive 2018/957/EU.[1]

The Advocate General concludes, among other things, that a host member state (in this case, the Netherlands) can require individual applications for residence permits for posted third-country employees when employees stay there more than 90 days in any 180-day period, and that such residence permits may be limited to maximum of two years, irrespective of the duration of the provision of services. The limitation to residence permits to posted third-country employees in the Netherlands is aligned to the European regulation for social security where a posting is limited to two years.[2]

The Court of Justice of European Union (CJEU) can be expected to deliver the ruling in this case in early 2024. It should be noted that the CJEU is not obliged to follow the opinion by Advocate General.

WHY THIS MATTERS

European rules for posting of workers, rules for social security, and rules for work and residence permits to third-country nationals are separate legal instruments with separate objectives.

This case illustrates that when national legislators seemingly attempt to align certain elements of these different sets of rules, it can lead to disproportionate results that do not necessarily take account of the entire cross-border working

situation. This can then result in more administration, fees, and not least, uncertainty about whether a posted third-country employee will be allowed to complete his/her work in the host member state.

Companies that post employees who are third-country nationals within the EU should monitor the final outcome of this case in the CJEU, as it might impact how they best organise for the posting of employees when they provide services in another member state.

About the Case

The case concerns 44 Ukrainian nationals who were posted from a Slovak undertaking to the Netherlands. The Slovak undertaking anticipated that the postings would be shorter than 90 days during a 180-day period,[3] which means that the posted employees would not need residence permits in the Netherlands.

However, eventually it became evident that the postings would exceed the anticipated duration, and the Slovak undertaking applied for residence permits in the Netherlands and paid fees for the applications for each employee.

The Dutch authority granted applications for residence permits, but the duration of the residence permits was restricted to the duration of the Slovak residence permits. This means that the duration of Dutch permits was shorter than the duration of activities for which the employees were posted.

The Dutch residence permit in a case of posting of third-country employees cannot exceed two years, according to Dutch legislation. The Dutch legislature has aligned the two-year limitation for residence permits with the European regulation for social security that stipulates that a posted employees is covered by social security in the home country when a posting does not exceed two years.

The CJEU is now asked to consider if the Dutch requirement for a residence permit, and the limited duration of two years for such permit in this situation constitutes a restriction of the freedom to provide services.

Selected Highlights from the Opinion of the Advocate General

- Requirement for mandatory notification/declaration prior to posting is not contrary to the freedom to provide services.
- Requirement for mandatory notification/declaration prior to posting and the requirement to hold residence permit are two separate procedures, they occur at different stages of a posting and have separate objectives.
- A distinction should be made between the provision of services itself and the persons carrying it out. Where third-country employees are assigned to a provision of services of long duration in a member state or are reassigned to another provision of services in that member state, it must be considered that the movement of those employees is no longer temporary.
- Freedom to provide services does not preclude the period of validity of the residence permit in a member state where services are provided from being calculated based on the length of the residence permit issued by the member state where the service provider is established, and, in any case, to two years.
- Fees for residence permits in cases of posting of third-country nationals may be the same as fees for "regular" residence permits.

The Advocate General concluded with a recommendation to the CJEU to rule that the host member state may require individual applications for residence permits for posted third-country employees when they stay in the host member

state more than 90 days in any 180-day period, and that these residence permits can be limited to the period of validity of the residence and work permits granted by the home member state and, in any event, to two years.

Further, the Advocate General has recommended to the CJEU to rule that fees for applications for residence permits in a case of posting may be equal to those payable for an ordinary permit, provided that the legislation does not impose disproportionate requirements.

MEIJBURG & CO. INSIGHTS

It cannot be predicted if the CJEU will follow the opinion of Advocate General in this case.

It should be noted that while the Advocate General argues that the validity of residence permits issued to posted workers may be limited to two years, the European Commission has argued that the Dutch limitation on residence permits in this situation to two years is disproportionate.

Although the Advocate General emphasises that a distinction must be made between the provision of service itself and persons carrying it out, it is not clear how the duration and frequency of the provision of services should be understood in the context of posted employees.

Generally, if the CJEU follows this opinion, companies that post third-country employees should be prepared for a possible increase in administration and costs for applications for residence permits because they cannot necessarily obtain permits in the host country for the entire duration of their posting in a single application.

FOOTNOTES:

1 Court of Justice of the European Union: *Case C-540/22 SN and Others*, 30 November 2023.

2 Regulation 883/2004/EC for coordination of social security systems, Article 12 (1), 29 April 2004.

3 According to the Schengen Convention, when employees are expected to stay no more than 90 days in any 180-day period, they can move freely. If the duration exceeds 90 days in any 180-day period, there is a requirement to apply for residence permit.

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Contact us

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