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LIMITE

ASIM 164

N O T E

from: Presidency

to: ~~Migration Working Party (Admission)~~

~~Subject: Discussion paper on the consequences to be drawn from the VANDER ELST judgment~~

Delegations will find annexed hereto the conclusions of the proceedings of the Migration Working Party (Admission).

I. ENTITLED PERSONS

A national of a third country who is lawfully and habitually employed in an undertaking, established in a Member State and providing services in another Member State of the European Union shall be entitled to go to another Member State.

§ 1. Habitually employed worker:

A worker occupying a post for at least a year in a Community undertaking providing services. ⁽¹⁾

§ 2. Lawfully employed worker:

A worker who has fulfilled the obligations deriving from the law on immigration of a Member State of the European Union and who is therefore authorized to stay and work in the territory of the State in which the undertaking has its principal place of business and to return there after the services have been provided.

Residence and labour permits issued in the Member States of the European Union must appear in the Annex.

II. CONDITIONS TO BE FULFILLED BY THE EMPLOYEE(S) TO ENTER THE TERRITORY OF THE STATE WHERE THE SERVICE IS PROVIDED

To enter the Member State where the service is provided, workers must comply with the conditions for entry laid down by that State. If a visa is required, it shall be issued as quickly as possible by the consular authority concerned.

Nationals of third countries who are entitled to move freely pursuant to Article 22 of the Convention applying the Schengen Agreement shall remain subject to the rules laid down by each State party thereto for the implementation of the mandatory declaration.

Nationals of third countries accompanying their employers must produce a long-stay visa if the duration of the service provided so requires.

In the event of the service provided being extended beyond the period authorized by the short-stay visa or the entry permit, employees who are nationals of a third country shall not be obliged to return to the Member State of residence. The appropriate residence and work services must be informed.

⁽¹⁾ Austria – Reservation: the employee must work under an indefinite duration contract and be entitled to free access to the labour market.

The visa is issued for a reasonable sum so that the cost, in the light of the jurisprudence of the Court in this area, is not regarded as an obstacle to freedom to provide services.

III. CONDITIONS TO BE FULFILLED BY THE EMPLOYEE(S) TO STAY IN THE TERRITORY OF THE STATE WHERE THE SERVICE IS PROVIDED

§ 1. STAY

When the service is of short duration, the employee of a provider of services is authorized to stay in another Member State if he possesses a short-stay visa, an entry permit or if he is dispensed from a short-stay visa to which the interested party may be entitled on grounds of his nationality and/or of international agreements.

In the event of the service provided being extended or if the likely duration exceeds that of a short stay, the employee must apply to the appropriate authority of the State where the service is provided for a residence permit or an entry permit which is valid for the whole duration of the service provided and which may not exceed a period of more than one year. ⁽²⁾

If the service provided has not been completed in full at the end of the period of the authorized presence in the host State, the residence permit may be renewed, subject to verification that the service provided must actually continue.

That residence permit must state the following "employee of a Community provider of services [*name and business name*] with [*name or business name of the recipient of the service in the territory of the host State*]"'. ⁽³⁾

Once the service provided has been completed, a check will be made to ensure that the employees have actually left the territory of the host State.

The tax levied on the issue of the residence permit should not exceed that required of nationals for identity documents.

§ 2. WORK

An employee of a Community provider of services who is a national of a third country shall not be subject to possession of a new labour permit in another Member State when he is required to move to that Member State in order to provide a service. ⁽⁴⁾

⁽²⁾ United Kingdom: wanted the duration of the residence permit to be raised to 2 years if the duration of the service so required, before it was renewed.

⁽³⁾ Germany, Austria – Reservation: such a statement to appear on the work permit only (see § 2) and not on the residence permit.

⁽⁴⁾ Austria, Germany: the individual concerned should have a declaratory labour permit.

IV. CONDITIONS TO BE FULFILLED BY THE EMPLOYER ⁽⁵⁾

Any enterprise providing services which posts one or more employees to a Member State shall be required, at the latest before the beginning of the provision of the service, to send the authorities of that State a declaration containing a number of particulars on:

its own situation: business name, legal form, entry on a professional register, (work) contract, appointment of a legal representative in the territory where the service is performed, guarantee to comply with social and fiscal obligations;

the situation of the undertaking or of the person who is the recipient of the service: name and address, etc.

the nature of the activity to be carried out, the location, its likely duration;

the number of employees sent to perform the service; the date of conclusion of their contract of employment or any other document attesting to the employment relationship agreed on between the Community employer and his employee(s); their nationality and the nature of the residence and labour permits issued by the State of customary residence and their duration.

V. CONDITIONS FOR EXERCISE OF THE ACTIVITY

- § 1. **Equal treatment** (for the record: this principle comes under the First Pillar of the TEU) as regards work, employment, working conditions, remuneration etc. with national workers and in accordance with the national law of the Member State where the service is provided.
- § 2. **Remaining in the employment** which has resulted in the worker coming to the host State, for the period required for the provision of services which means that these employees may not obtain other employment after providing the service and may not lawfully stay there beyond the prescribed time.
- § 3. **No access to job placement services** provided for by the national rules of the various Member States. These employees who are linked to a Community undertaking will not be entitled to national employment services in order to receive, for example, unemployment benefit or to enrol on vocational training or reintegration courses which are restricted to national workers and Community citizens present on the labour market.

⁽⁵⁾ Netherlands: pointed out that under Dutch law the recipient of the service was considered the employer and had to obtain a work permit.