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b-solutions

FINAL REPORT BY THE EXPERT

Advice Case: Cross-border work for non-EU citizens

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I. Description of the Obstacle

“In our euroregion Rhine-Maas-North (Germany: left lower Rhine area/Netherlands: Province Limburg) occur an increasing number of cases where non-EU citizens want to work in a cross-border setting, e. g. in logistics. These are individuals who either have lived in Germany for a long time/their whole life and for any number of reasons did not obtain German citizenship or refugees with a work permit, looking to sustain themselves outside of state assistance.”

While EU-citizens living in Germany are by virtue of Art. 45 TFEU allowed to work in a cross-border setting, non-EU citizens need a variety of permits and need to fulfill different criteria to qualify for cross-border work. I. e. a living and work permit in the one country and – in the situation of cross-border work between Germany and the Netherlands – also a work permit of the Netherlands. As long as there is a Schengen permit, the worker “only” needs an ordinary work permit (tewerkstellingsvergunning – TWV) and not a combination of work and living permit (gecombineerde vergunning voor verblijf en arbeid – GVVA). However, since it is the employer who needs to apply for a TWV, most of them shy away from the effort of filing an application. The same is true for the opposite site: Also German employers rather employ workers already in Germany than those from across the border.

Thus, especially in the logistics sector there are many companies on the dutch site looking for on-site workers and non-EU citizens living in our region wanting to work there but are prevented from doing so by the administrative and/or legal obstacles faced for the most part by their prospective employers.

- Assessment

From an independent standpoint, the description is correct and sufficient. The lack of freedom of movement for the group described limits the availability of potential workers in the labour market, making it more difficult to secure growth and thus ensure further and sustainable employment especially in border regions.

II. Indication of the Legal/Administrative Dispositions causing the Obstacle

In the Treaty on the Functioning of the European Union, Articles 21 and 45 already have descriptions of the rights of residence and freedom of movement for workers. At the same time, the treaty is based on so-called Union citizenship. Union citizens are nationals of the member



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states and have extensive rights in all member states. Third-country nationals, however, are not covered. National rules apply to the latter group especially with regard to residence and freedom of movement rights. In the present case, the need for a national work permit is the cause of the problem described. In the Netherlands and Germany, third-country nationals are subjected to a so-called priority test before a work permit is granted. The priority test involves considering whether a citizen of the member state in question or another member state could fill the vacancy just as well as the third-country national making the application. These procedures are protracted, bureaucratic and, in many cases, fail to meet the real needs of employers. Moreover, cases involving self-employed persons, posted workers and refugees have also been reported. Special groups such as Turkish nationals resident in Germany or the Netherlands are also potentially affected.

At the same time, the situation on the employment markets of border regions is dynamic, as are the situations of potential employees such as students from third countries described in the case submitted by the Economic Board Nijmegen.

III. Description of a Possible Solution

The complexity of the problem described and the applicable legal restrictions require a more in-depth consideration of the issues. In general, the applicant's focus is on the mobility of non-EU nationals in the labour market of the German-Dutch border region. Exploiting the attractive employment potential and securing jobs in the respective region through the provision of a suitable labour force are both stated goals of the applicant region. Both the economic and geographical framework and the legal requirements relate to the entire German-Dutch border region, which is why it would benefit all parties if the issues were dealt with jointly. In particular the application submitted by the Economic Board Nijmegen entitled "Dutch-German cross-border employment of students originally from outside the EU" clearly highlights the legal and geographical breadth of the issues. It is apparent both from the said problems and the ones specifically involved in this case that there are considerable differences concerning the knowledge of the rules and administrative practice in the respective countries. The lack of transparency hinders work on these issues. And no adequate independent counselling is currently available.

As the establishment of a uniform EU law must be considered unlikely at the present time, a solution can currently only be achieved under a bilateral agreement between the member states



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Germany and the Netherlands. On the basis of such an agreement, the existence of a work permit from the country of residence for example could form the basis for the work permit in the neighbouring state.

This should be thoroughly prepared and jointly initiated by the interested parties from the various Euregios. Besides the Euregios, the relevant players are the Border Infopoints, the Eures Partnership and the cross-border employment administrations (SGA).

A campaign or project should deal with the following tasks especially with regard to freedom of movement for workers:

- Establishment of acceptance for the objective of improving freedom of movement for non-EU nationals at local, regional and national level – the target groups are political
- Decision-makers and above all employer and employee organisations, economic development institutions and employment authorities.
- Identification of all potential and relevant cases in which the cross-border work mobility of non-EU citizens is completely or partially restricted.
- Detailed examination of the legal and administrative rules and requirements on the respective side to obtain a joint pool of knowledge and working basis. The consideration of all the requirements should be harmonised with the state entities as well as the implementing local administrations.
- Creation of information material and – ideally – the creation of advisory offerings for the target group of employees from non-EU states to improve mobility by means of a bilateral agreement even before free movement of persons is generally facilitated.
- Examination of potentially suitable measures to accelerate procedures and/or circumvent the described restrictions by creating organisational units that can initiate cross-border employment in connection with posting and/or temporary employment.
- Active press and communications work should seek not only to establish contacts and present the issues at the border region conference (Forum of Nordrhein-Westfalen and the Netherlands for the Improvement of Collaboration and Coexistence), but also to pave the way for the described agreement between Germany and the Netherlands.



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IV. Pre-Assessment of whether the Case could be solved with the European Cross-Border Mechanism

Proceeding from the assumption that the Commission's proposal (COM (2018) 373) were transposed into applicable law and the current proposal were in force without any changes, I am of the opinion that this mechanism cannot be expected to resolve the described problem. The cause of the problem, the description of which is absolutely correct from the perspective of the border region, is based on current European law – in this case Directive (EC) 2003/109 – which was transposed into national law in Germany and the Netherlands.

Even if the proposal is intended to resolve the border obstacles on a legal basis and problems that could be resolved in such a way are clearly imaginable, this instrument does not work in the case described. The instrument is a mechanism that would lead to the application of the legal rules of the neighbouring state in a certain member state for a joint cross-border region if the application of its own law were to constitute a legal hindrance to the implementation of a joint project (which could be an infrastructure measure or service of general economic interest).

However, as this case in particular involves the practical consequences of the transposition of European law into national law, which has the same content and meets similar standards, on both sides of the border, this mechanism is unable to provide a solution. It could instead be of assistance in situations in which there are no legal arrangements in one of the states or if conflicting rules apply in both of the states.

V. Other Relevant Aspects in this Case

Even during the preparatory work for the examination, the thematically closely linked questions and the geographical proximity of the applicants became apparent. This was pointed out in the discussions at local level and all consulted parties favoured a joint attempt to find a solution.

The close linkage, in terms of content, with the Economic Board Nijmegen's description of the problem of "Dutch-German cross-border employment of students originally from outside the EU" quite apparently and clearly calls for joint action by the players across the borders of the Euregio.

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VI. References and Appendix/Appendices if any

- Kathleen Neundorf, “Aktuelle Entwicklungen im Beschäftigungserlaubnisrecht für Drittstaatsangehörige”, in Zesar, Zeitschrift für Europäisches Sozial- und Arbeitsrecht
- Task force on cross-border workers, regulatory impact assessment, creation of a mechanism to resolve legal and administrative obstacles in a cross-border context
- Directive (EG) 2003/109/ of 25 November 2003
- Directive (EC) 2004/38 of 29 April 2004
- Regulation (EC) 883/2004 of 29 April 2004
- Directive (EU) 2016/801 of 11 May 2016
- Proposal for a regulation COM (2018) 373
- Treaty on the Functioning of the European Union, Articles 21 and 45
- Employment Regulation / Employment Procedure Regulation
- German Residence Act / German Residence Regulations
- tewerkstellingsvergunning – TWV / gecombineerde vergunning voor verblijf en arbeid – GVVA