European Court of Justice clarifies the Vander Elst rules covering the posting of non-EU employees to provide services within the EU

In its landmark ruling of Vander Elst 1994, the European Court of Justice found that non-EU employees of EU companies, who are being sent to other EU Member States to provide services, benefited from the free movement rules on service provision. Member States could not require them to obtain work permits as these were seen as an obstacle to these free movement rights.

Despite this, many Member States have continued to apply a restrictive interpretation to the judgment and have maintained requirements which have limited the practical use of the Vander Elst rules. The UK, for example, requires non-EU employees to have been employed for 12 months prior to being posted to provide services.

On 19 January 2006, the European Court of Justice handed down judgment in the case of Commission v Germany (C-244/04) on posted workers. The Court found that Germany is in breach of its obligations under Article 49 by applying a prior control measure to third country national posted workers.

The Court held that "by not confining itself to making the posting of workers who are nationals of non member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking established in another Member State which intends to post such workers, and by requiring that they have been employed for at least a year by that undertaking, the Federal Republic of Germany has failed to fulfill its obligations under Article 49 EC."

Germany put forward three arguments in favour of a prior visa requirement for third country national workers: (a) to prevent abuse; (b) to protect workers and (c) legal certainty. The Court rejected all three arguments.

Importantly, the Court went on to find that the requirement that the worker must have been employed with the business for more than 12 months before the posting is disproportionate to the objective of preventing social dumping (as argued by the German Government). The Court did not suggest what period of employment might be acceptable but it could be argued that ANY period of prior employment would be disproportionate on the reasoning of the Court.

The judgment means that Member States may now not require any minimum prior period of employment before a non-EU national can be sent to provide services within the EU on behalf of their employer. In addition, any prior visa requirements will also not be justifiable, as the court confirmed that a declaration from the employer would be sufficient.