

German minimum wage – all-clear for the foreign transport industry?

Recent judgments shed more light on this controversial discussed issue

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Introduction:

On November 29, 2016 the Austrian Supreme Court ("OGH"; case no. 9 ObA 53/16h) decided that an Austrian driver is not entitled to receive the German minimum wage even though part of his duties are carried out in Germany. This exclusion stands alongside exceptions put in place by the German Government in relation to foreign haulage and forwarding companies and the pending pilot process initiated by the European Commission. The OGH decision is important because it is a first decision by a supreme court on that issue.

What was the case at hand about?

The defendant was an Austrian rental car service with an operational base in Salzburg mainly providing transfers to and from Munich Airport. The claimant, an employee of the firm, stated that he should be paid German minimum wage for the time spent working in that country. However, the court dismissed his claim stating the German "MiLoG" (Law on Minimum Wages) is not applicable due to Rome I Regulation.

Art. 3 (1) and Art. 8 (1) of the Rome I Regulation determine the basic principle of the free choice of law, while Art. 9 forms several exceptions of this principle. Art. 9 (3) enables the national Courts to take special public interests of foreign countries into consideration.

However to respect the basic principle of free choice of law, Art. 9 nevertheless must be interpreted restrictively. So the judges had to determine if the German law was of paramount importance to override Austrian law. Simply speaking, the judges had to balance both the employee's and the employer's particular interests.

The OGH mainly based its decision on European conflict-of-law considerations. Firstly, the OGH held that the employment relationship was governed by Austrian law and referred in this context to Art. 8 (2) of Rome I Regulation. Following that, the German MiLoG could only be given

effect as an overriding mandatory rule according to Art. 9 (3) Rome I Regulation.

Therefore, the judges focused on whether the MiLoG should be given effect based on its essence. The Court examined nature, purpose and possible consequences of giving effect to the German law. The main purpose of the German legislator was, in their view, to create an appropriate wage level improving the employees ability to cope with the German living expenses. This basically concerns employees who live, and work in Germany or mainly work in that country. As a result, there is no need to pay the German minimum wage to employees, who are not affected by German living expenses.

It was also recognised that applying MiLoG would bring with it reporting and documentation obligations for employers under Sec. 16, 17 MiLoG, which would cause additional administrative costs. In any event, the difference between the wage calculated on the basis of MiLoG and the employees' actual salary was only 36 Ct. per working hour.

For these (main) reasons, the OGH decided to not give effect to MiLoG in the light of Art. 9 (3) Rome I Regulation. Thus, the German minimum wage is not applicable to Austrian employees who merely carry out part of their duties in Germany.

Ramifications:

Even though this decision is not binding for other national courts, the findings of the Austrian judges add value to the current debate. While the German Federal Minister of Labour and Social Affairs sought to apply the MiLoG on foreign employees, it will be interesting to monitor the way courts in other EU member states will handle this and whether they follow the Austrian approach. In our view, the basis of the OGH's decision could be just as easily applied to other transit journeys across Europe. They often involve less time in the foreign country than the rental car service in this particular case. For instance,



drivers of rental car services may have to work at counters or wait for the next customer (at German airports) while lorry drivers just cut across the country concerned.

The OGH has clearly paved the way for a serious debate about the extent to which European law limits the national legislation in enforcing minimum wages in certain industries. A recent preliminary decision by the fiscal court of Berlin and Brandenburg has further informed the debate (FG Berlin-Brandenburg, order from February 7, 2018 case no. 1 V 1175/17). A Polish firm filed an injunction against the German Federal Customs (Customs) and claimed unjustified infringement of their rights to conduct business due to an official action taken by Customs. Customs demanded that the Polish firm provide substantial documentation to prove that their lorry drivers were just transiting Germany without any loading or cabotage activity. The court held by contrast that in light of previously mentioned German legal exceptions as well as the unclear legal situation Customs are not authorised to oblige foreign companies to show this documentation without any further indication that their employees carry out work in Germany. For the time being, this decision may deter Customs carrying out their regular checks.

Summary:

To sum up, this interesting decision sheds light on the approach of individual member states to the application of other countries' laws to those of the workers who spend at least part of their time working in that other country.

The Rome I Regulation has been adopted in UK Law and will survive the Brexit process. The UK Courts could therefore potentially find itself faced with a similar scenario to the OGH where it has to consider whether to uphold German minimum wage laws.

It is also still not yet clear how German Courts will cope with this issue, for example if an UK company has been fined in Germany because of violation of MiLoG and tries to challenge this. This remains an important question. Five months on from the German Federal elections in September 2017 the conservative CDU and the Social Democrats are still trying to form a coalition government and consequently there remains uncertainty as to which way politics are heading and policy in relation to MiLoG may well change depending on what the two parties negotiate as their future priorities.

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