



**Ad-Hoc Query on interpretation of a judgment of the European Court
in the case C-43/93**

Requested by EE EMN NCP on 2nd November 2010

Compilation produced on 22nd December 2010

Responses from Austria, Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Slovak Republic, Spain, Sweden, United Kingdom (16 in Total)

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

1. Background Information

EE EMN NCP received a query from the Estonian Police and Border Guard Board (PBB) regarding the interpretation of a judgment of the European Court of 9 August 1994 in the case [C-43/93](#) (*Vander Elst v Office des Migrations Internationales*). From the judgement the PBB concludes that if a company established in one Member State (MS) temporarily wishes to provide services in another MS (e.g. Estonia) and for that purpose bring along employees (third country nationals) who hold a residence and work permit in the first MS, then Estonia should not require a legal basis for employment from the employees (e.g. registration of short-term employment in Estonia). The PBB wishes to know how other MS interpret the above named case and how this issue is regulated in their national law.

We would very much appreciate it if you could provide your responses **by 29th November 2010**.

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2. Responses

		Wider Dissemination?¹	1) How does your Member State interpret the case described above and how is this issue regulated in your national law?
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Cyprus	Yes	All third country employees regardless of their employment status are required to be in possession of residence and work permit, combined within a single authorization document.
	Czech Republic	Yes	Third country national who is granted residence and work permit in the Member State where his/her employer resides and is sent out by the employer to provide services in the Czech Republic must apply for short-term or long-term visa and prove the reason for residence (i.e. providing services). Work permit is not required.
	Estonia	Yes	Estonia doesn't have any special regulation for the above mentioned case. According to the Aliens Act all third country nationals (regardless of owning or not owning a residence/work permit in another EU MS) have to apply for a residence permit for employment or the employer has to register aliens' short-term employment in Estonia.
	Finland	Yes	Case ECJ C-43/9 resulted as an amendment to national Aliens Act; new subsection 5 was added to section 81 §, para 1: "Section 81 (549/2010) Employment without residence permits Aliens have the right to gainful employment without a residence permit if they: 5) arrive in the country as permanent employees of a company operating in another Member State of the European Union or the European Economic Area to perform temporary contracting or subcontracting under the freedom to provide services, if they hold permits entitling them to reside and work in that other State, and if the permits remain in force once they have completed the work in Finland; or..." Practise has shown that this new subsection enables illegal employment especially in construction business since it is open for different interpretations of "temporary contracting or subcontracting".
	Germany	Yes	Third-country nationals requiring a visa to enter and stay and who are providing services for an enterprise holding its head offices in another EU Member State, require a visa for Germany. Within the framework of the process for the issuance of visa, the existence of a „Vander Elst“- constellation is verified, that is the provision of services in Germany, the employment according to regulations and the non-permanent posting of the third-country national. The general conditions for the issuance of visa with regard to a lawful residence status must be fulfilled, here the guarantee for the means of subsistence will be safeguarded as a rule due to the employment with the service provider, and security and safety aspects can lead to a visa being refused only when specific criteria prevail for an actually existing, present and considerable threat to public safety, security or health. In accordance with the implementation as required by the Law

¹ A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

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			of the European Court of Justice for the case law C43-/93, Paragraph 15 of the Employment Regulations defines that a visa does not require the approval of the German Federal Employment Agency and therefore may not be dependent on the examination of the employment market to ascertain if all regulations as dictated by employment law have been fulfilled. The competent domestic authorities examine the compliance with employment conditions in accordance with the governing employment regulations. During the procedure for obtaining the visa, any possible facilitation shall be given to the third-country national. The remark „Vander Elst“ shall be placed on the visa to be issued.
	Hungary	Yes	<p>In Hungary foreigners shall only be engaged in employment – except for a few cases – in possession of a valid work permit and residence visa or residence permit for employment purpose. Hungarian employer of the foreigner shall obtain the work permit. Residence visa or residence permit for employment purpose shall be obtained even then, when the foreigner wishes to be engaged in employment for which no work permit is required.</p> <p>If a foreigner established a company in Hungary and applies for the issuance of a residence visa for employment purpose as a high-level official, or as a member of the supervisory board, foreigner shall also certify that activity is economically advantageous for the Republic of Hungary, or represents scientific or cultural values.</p> <p>According to Government’s Directive 355/2009 Section 2. on rules of remunerative activity of third-country nationals without authorization, a third-country national does not need a work permit to engage in remunerative activity in the following cases:</p> <ol style="list-style-type: none"> 1. to engage in remunerative activity as manager of a company registered in a foreign country which has representation in Hungary 2. to engage in remunerative activity not exceeding 15 days within 30 days to install, repair or to guarantee a product according to a contract under civil law for a company registered in a third-country 3. to engage in remunerative activity for a company registered in an EEA-country to proceed boarder exceeding services at the territory of the Republic of Hungary 4. to engage in remunerative activity at the territory of the Republic of Hungary for a human resource hire company registered in an EEA-country 5. to engage in remunerative activity for a company which has foreign portion of property as higher officer or member of the supervisory board of the company.
	Ireland	Yes	Ireland grants Van der Elst visas for persons who are visa-required nationals and who are posted to the State by their employer based in another EU Member State. For non-visa required nationals they can seek entry permission on arrival at the border as a Van der Elst worker. In both situations the person must provide documentary evidence that he/she (i) has lawful employment in the company in the other Member State (ii) is coming to Ireland for a limited period to provide services on the company's behalf and (iii) will be returning to work there on completion of the project and that the person has the right to so re-enter and work in the other Member State. The Van der Elst worker may work in Ireland without the need to obtain an employment permit. The person is subject to the normal rules about registering with the Garda (police) National Immigration Bureau.
	Italy	Yes	The Consolidation Act on Immigration establishes that when an employer - who may be either a natural person or body corporate, residing

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			or based in an EU Member State – needs to temporarily second to Italy his own non-EU citizen employees whom he regularly remunerates, the buyer of contract in Italy (based on which services are provided) has to forward a simple notification to the single desk for immigration of the intended province. A declaration of the employer, containing the names of the employees to be seconded and attesting the regularity of their situation with reference to their residence and work conditions in the Member State of origin, is attached to the notification. Such notification is sufficient for the release of a residence permit.
	Latvia	Yes	Latvia does not require a work permit in these cases. Article 9 of Immigration Law stipulates that “a work permit shall not be necessary if a foreigner is legally employed in another European Union Member State, Member State of the European Economic Area or in the Swiss Confederation and the employer appoints him or her for provision of services in Latvia.” This means that for a period up to 90 days within six months a third-country national is allowed to work on the ground of a residence permit, issued by other MS, but after this period s/he has to obtain a residence permit in Latvia.
	Lithuania	Yes	According to the Order of the Minister of Social Security and Labour of the Republic of Lithuania "On approval of description of conditions for issue work permit to aliens", aliens do not require a work permit if they “are citizens of a non-European Union Member State, legally and permanently employed in the European Union at the undertaking of a Member State, being posted by this undertaking for temporary work in Lithuania and holding a Form E-101 certificate "On applicable legislation" issued by the competent body of the European Union and the Member State (except Denmark), Form E-102 certificate "Authorisation to prolong posted work", or a certificate issued by a competent body of the Kingdom of Denmark or the European Free Trade Association, stating that the alien is covered by social insurance”. According to the mentioned above, such third country nationals do not require a work permit. They will need to acquire a residence permit if they are planning to stay in Lithuania longer than three months in a six months period.
	Netherlands	Yes	The Netherlands have called the group in this case: cross-border service provision workers. He police for this group is that they don't need a working permit but the surely need a residence permit. Instead of the working permit they should get a notification. The procedure to get a notification is described in the following paragraph: In section 1e of the Decree implementing the Aliens Employment Act, it is established that in respect of foreign nationals working temporarily in the Netherlands in the context of cross-border service provision, employed by an employer established outside of the Netherlands in another European Union member country, another state that is party to the Agreement concerning the EEA1 [European Economic Area] or Switzerland, under certain conditions no work permit is required. Under this regulation, an employer who employs a foreign national in the Netherlands should provide notification prior to the commencement of the employment. This obligation to provide notification may be fulfilled in two ways: - The employer may submit an E-101 document on behalf of the foreign national - The employer may use the attached notification form The employer may also make use of both forms. In the event that no notification is provided, or that notification is not provided within the required time, the employer will be in transgression of the Aliens Employment Act.
	Slovak Republic	Yes	When a company established in one EU MS wishes temporarily to provide services in another MS this can be done based on the agreement (commercial treaty or contract for work on provision of services and seconding the employees for the purpose of services

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	<p>Spain</p>	<p align="center">Yes</p>	<p>The issue in question is related with the provisions set forth in Directive 1996/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers within the framework of the provision of services, transposed to Spanish legislation through Law 45/1999 of 29 November regulating the posting of workers within a framework of transnational provision of services in the European Union and the European Economic Area.</p> <p>Later, Instruction DGI/SGRJ/08/2008 was decided, applicable to salaried employees belonging to the human resources of a company established in another Member State of the EU or the EEA which are posted by the company in Spain during a limited time within the framework of transnational provision of services.</p> <p>For these purposes, a salaried employee is defined as the worker of a company (as per the aforementioned definitions) who is a legal resident and authorized to work in the Member State in which that company is established, as well as to return to that Member State upon the termination of the provision of services.</p> <p>According to this Instruction, these workers are not required to hold a work permit for Spain, as long as the services provided comply with the standard conditions for workers posted to a position as per the definition of aforementioned Law 45/199 of 29 November. They must be authorized to work in the Member State of the company's establishment, where the main business activity takes place, within the labour market to which they belong, and to which they return upon finalizing the rendering of services in the destination Member State.</p> <p>Concerning documentary accreditation of their stay in Spain, this will be certified by the valid travel document for entry into Spain</p>

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	Sweden	Yes	<p>The situation is regulated in Chapter 5, section 2, paragraph 4 of the Swedish Aliens Ordinance (2006:97). According to that regulation the employee is exempted from the requirement to have a work permit for the period the services are provided. After three months however, a residence permit is required.</p>
	United Kingdom	Yes	<p>The UK's interpretation is as follows:</p> <p>The Vander Elst concession derives from a 1994 European Court of Justice ruling relating to the right of an EU Company to provide services across the EU without the need to obtain additional work permits. The Vander Elst ruling provides for any non-EU employees who have been working in the EU for a service provider to be admitted as Vander Elst cases. The purpose is for contract work with the employer only and leave to enter is currently granted for a period of 6 months or the length of the contract (as a concession outside our domestic immigration rules). The majority of these cases involve visa nationals, but the Entry Clearance requirement is currently imposed on all beneficiaries, including non-visa nationals. The current requirements for Vander Elst cases are as follows:</p> <ul style="list-style-type: none"> • is lawfully resident in the EU Member State in which the employer is established • is lawfully and habitually employed by an employer who is temporarily providing a service in the UK • does not intend to take any other employment • intends to leave the UK at the end of the period during which his employer is providing the service <p>Further information about posted workers can be found at the Department for Business, Enterprise and Regulatory Reform (BERR) via the link below. http://www.businesslink.gov.uk/bdotg/action/detail?r.lc=en&type=RESOURCES&itemId=1073791870&r.s=s1</p>
