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COMMENTARY
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The new situation of posted workers in the framework of provision of services in the internal market of the European Union. Gloss to the Judgment of the Court of Justice of 8 December 2020 in Case C-626/18 *Republic of Poland v Parliament and the Council of the European Union*

Nowa sytuacja pracowników delegowanych w ramach świadczenia usług na rynku wewnętrznym Unii Europejskiej. Glosa do wyroku TS z dnia 8 grudnia 2020 r. w sprawie C-626/18 *Rzeczpospolita Polska przeciwko Parlamentowi i Radzie Unii Europejskiej*

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Abstract: Although the institution of posting workers to provide services in another Member State does not constitute a significant share in the internal market of the European Union, it has become a thorny issue among its Member States in recent years. For some of them, it meant the possibility of rendering competitive services on the markets of other countries, whereas others perceived it as a threat to gaining access to the labour market. This is especially visible in the recent amendment to the rules on the posting of workers laid out in Directive 2018/957. The split between Member States resulted in action brought to the Court of Justice of the European Union by Poland, representing one of the sides to the abovementioned division. The doubts expressed in the complaint mainly concerned the

application of the concept of full remuneration rather than minimum rate of pay and the introduction of the new category of long-term posting.

Keywords: posted workers, long-term posting, remuneration, minimum rate of pay

Abstrakt: Instytucja delegowania pracowników w celu świadczenia usług w innym państwie członkowskim, choć nie stanowiąca znaczącego udziału w rynku wewnętrznym Unii Europejskiej, w ostatnich latach wzbudziła wiele emocji wśród jej państw członkowskich. Dla jednych oznaczając możliwość konkurencyjnej aktywności na rynkach innych państw, dla innych zagrożenie w dostępie do rynku pracy, dość skutecznie te państwa podzieliła. Jest to zwłaszcza widoczne w świetle ostatniej nowelizacji reguł delegowania pracowników przewidzianej postanowieniami dyrektywy 2018/957. Realnym tego wyrazem są określone wątpliwości przedstawione w skardze do Trybunału Sprawiedliwości Unii Europejskiej przez Polskę, reprezentującą jedną ze stron wspomnianego wyżej podziału. Wątpliwości te dotyczą przede wszystkim stosowania wobec pracowników delegowanych pełnego wynagrodzenia w zamian za minimalne stawki płacy oraz nowej kategorii delegowania długoterminowego.

Słowa kluczowe: pracownicy delegowani, delegowanie długoterminowe, wynagrodzenie, minimalne stawki płacy

1. Introduction

The institution of transnational posting of workers was introduced into the EU legal order under Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, concerning the posting of workers in the framework of the provision of services. On the one hand, it was intended to remove impediments and uncertainties regarding the freedom to provide services, among others by making it easier to identify the terms and conditions of employment applicable to workers temporarily employed in the Member State where they provided services. On the other hand, it aimed at guaranteeing posted workers the same scope of protection that is generally applicable in the State of destination (Evju 2009: 21-22). Therefore, its provisions were intended to ensure a balance between fair competition in the internal market and respect for workers' rights (De Wispelaere and Pacolet 2020: 31-49).

In order to overcome numerous practical problems connected with the insufficient implementation of Directive 96/71/EC, Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC was adopted. Its provisions also pursued a dual purpose, i.e. protecting posted workers while ensuring that all legal measures introduced by this Directive should not create burdens and restrictions on the free provision of services (recitals 4 and 16 of Directive 2014/67/EU and Article 1(1) of Directive 2014/67/EU). However, these changes also turned out to be insufficient, which is why the European Commission announced a review of Directive

96/71/EC, among others in the area of long-term posting and remuneration of posted workers at a level equal to that of local workers (COM(2016) 128 final and Van Nuffel and Afansajeva 2020: 271-302). This idea was generally supported by other EU institutions (Opinion of the Committee of the Regions 2017, Opinion of the Economic and Social Committee 2017, Report of the European Parliament 2016), although it quite clearly divided the Member States. Austria, Belgium, France, Germany, Luxembourg, the Kingdom of the Netherlands and Sweden supported the introduction of this principle, while Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania were against it (Letters to the European Commission 2015; Fruåker and Larsson 2020). This division became somewhat less pronounced during the vote on the new Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, amending Directive 96/71/EC. Only Poland and Hungary voted against its final adoption, while Latvia, Lithuania, Croatia and the United Kingdom abstained from voting.

Therefore, Poland decided to bring action to the Court of Justice of the European Union (CJEU) against the European Parliament and the Council regarding the annulment of selected provisions of Directive 2018/957, which it did on 3 October 2018. A day before, on 2 October, Hungary also lodged a complaint with the CJEU (Judgment of the CJEU in Case C-620/18). Germany, France, the Netherlands, Sweden and the Commission participated in the proceedings as interveners, which in a way reflected the abovementioned division of EU Member States regarding the new understanding of the institution of posted worker in the framework of the provision of services. In its complaint, the Polish Government essentially raised the problem of choosing the legal basis of Directive 2018/957 in the context of striking the right balance between fair competition and the guarantee of respect for workers' rights, replacing the concept of "minimum rate of pay" with the concept of "remuneration" for posted workers, and introducing a special system of posting exceeding 12 months, the so-called long-term posting. These issues will be analysed in the second, third and fourth parts of this study, respectively.

2. Fair competition and the guarantee of respect for employee rights

In its complaint, the Polish Government questioned the application of Article 53(1) and Article 62 of the TFEU as the legal basis of Directive 2018/957, emphasising that the main purpose of the latter is to protect posted workers. Therefore, it should be based on those provisions of the TFEU that pertain to social policy. Since they were not specified, one is tempted to point to the

provisions of Article 153 of the TFEU, which regulate employee rights, among other issues. However, if we were to agree with Advocate General Campos Sánchez-Bordona that Directive 2018/957 merely stipulates which provisions of the host State are applicable to posted workers, thus resembling a conflict rule of a kind, one may doubt whether the legal basis in the form of Article 153 of the TFEU would be appropriate here (Advocate *General's* Opinion in Case C-620/18, paragraph 84). In its judgment, however, the CJEU focused on proving the legitimacy of maintaining the current legal basis of the contested directive rather than on a broader analysis of other potential "candidates".

Drawing on its previous jurisprudence, the CJEU emphasised that an amending act usually has the same legal basis as the earlier legal act (Judgment of the CJEU in Case C-482/17, paragraph 42). Undoubtedly, Directive 2018/957 shows such a relationship with Directive 96/71, whose provisions it amended, in particular by inserting new provisions (Judgment of the CJEU in Case 626/18, paragraph 54). This is confirmed by recitals 1 and 4 in particular, which concern the need to assess whether the basic principles of the functioning of the internal market guarantee a level playing field for businesses and respect for the rights of workers. Therefore, the basic assumption of the Directive is to strike the right balance between the interests of these two parties. According to the CJEU, this is to be expressed primarily by ensuring free competition, based on the application of substantially similar employment terms and conditions in each Member State, regardless of whether the employer is established in that Member State or not. The guarantee of greater protection for posted workers is expressed in the attempt to equalise the terms and conditions of employment of these workers with the terms of employment of workers employed by enterprises established in the host Member State (Judgment of the CJEU in Case 626/18, paragraph 58). A question arises here whether such attempts will ultimately lead to the equalisation of the institutions of posted workers with migrant workers, which are by definition different from each other. This is expressed primarily in their different rooting within the freedoms of the internal market, i.e. the freedom to provide services and the free movement of workers, respectively.

According to the CJEU, taking into account the aim pursued by Directive 96/71, i.e. ensuring the freedom to provide transnational services within the internal market in conditions of fair competition and to guarantee respect for the rights of workers, Directive 2018/957, which amended it, could be adopted on the same legal basis. The Court pointed to a change in the circumstances caused by successive enlargements of the European Union in 2004, 2007 and 2013, which resulted in the entrance in the internal market of undertakings from Member States whose employment conditions were different from those in force in other Member States (Houwerzijl and Berntsen 2020: 147-166; Rocca 2020: 167-184). In the opinion of the CJEU, it was these undertakings

that caused the need to adjust the balance on which Directive 96/71 was based by strengthening the rights of posted workers in such a way that competition between undertakings posting workers to that Member State and undertakings established in that State should develop in conditions of fairer competition (Judgment of the CJEU in Case 626/18, paragraph 69). However, such a connection between strengthening the protection of posted workers and ensuring free competition between undertakings seems to indicate that this protection is of a secondary nature here. The position of C. Barnard, expressed in this regard in relation to Directive 96/71/EC, seems to remain valid (Barnard 2013: 381). This was essentially indicated by the choice of the legal basis of the abovementioned directive, i.e. Article 62 of the TFEU concerning the freedom to provide services. This option was confirmed by the CJEU in case C-341/05 *Laval*, in which it first quoted the need to ensure fair competition between domestic undertakings and undertakings providing transnational services as the aim of Article 3(1) of Directive 96/71/EC, and only after that did it indicate the need to ensure that posted workers will have the rules of the Member States for minimum protection (Judgment of the CJEU in Case C-341/05, paragraphs 74-76).

The position expressed in this matter by the Polish Government was not supported by Advocate General Campos Sánchez-Bordona either, who insisted that the legal basis of Directive 2018/957 should continue to be the provisions of the TFEU on the freedom to provide services. He indicated that the response to the increasingly widespread phenomenon of transnational posting of workers should take the form of increased focus on the protection of posted workers' terms and conditions of employment, which was to be ensured by the changes introduced by the provisions of Directive 2018/957 and which was later confirmed by the CJEU itself (Advocate *General's* Opinion in Case C-626/18, paragraphs 24-25). Without specifying exactly what the new situation was, Advocate General Campos Sánchez-Bordona stressed the need to strike the right balance between the competing interests of posted workers and employers providing transnational services on the basis of their work. He repeated that guaranteeing such a balance was the primary aim of Directive 96/71, although the centre of gravity and the point of balance between the two sides had shifted towards greater protection of the rights of posted workers. However, in the opinion of the Advocate General, this was not sufficient to change the legal basis towards the TFEU provisions concerning social policy, which, as indicated above, was subsequently confirmed in the judgment of the CJEU (Advocate *General's* Opinion in Case C-620/18, paragraphs 60-72). We can thus notice the shift from the right balance between the competing interests of posted workers and employers providing transnational services towards greater protection of the rights of posted workers, but we still do not know where the border is to apply here the TFEU provisions concerning social policy.

3. Remuneration of posted workers

The amended Article 3(1) of Directive 96/71 replaces "minimum rate of pay" with "remuneration" as one of the terms and conditions of employment in the host State that should apply to posted workers. According to the Polish Government, the obligation to equalise the remuneration of posted and local workers restricts the freedom to provide services by companies posting workers for this purpose. Thus, it eliminates the competitive advantage associated with the existence of lower pay rates in the country in which these companies are established. Therefore, the Polish Government considers the obligation of equal treatment in terms of remuneration to be discriminatory, mainly because local companies are in a different situation than those that post their workers.

The understanding of the provisions of Directive 2018/957 presented by Advocate General Campos Sánchez-Bordona is completely different. According to him, the replacement of "minimum rates of pay" with "remuneration" does not mean that posted workers and local workers are treated fully equally because social security contributions and taxes applicable to posted workers are regulated by the rules of the country of origin (Advocate *General's* Opinion in Case C-626/18, paragraph 45; Judgment of the CJEU in Case C626/16, paragraph 112). Neither is it about "the same remuneration" as local workers are entitled to, because the third paragraph of Article 3(1) of Directive 96/71 only mentions its mandatory elements (Commission Staff Working Document SWD(2016) 52 final, p. 27). In practice, however, this may raise problems regarding, for example, whether it will be justified to pay such elements of remuneration that result from the very status of the worker and are not in fact applicable to the posted worker due to the temporary nature of his work (Benio 2018: 12-21). When posting workers to the host State, the service provider will therefore first have to accurately determine, name and calculate all terms and conditions of employment that are considered mandatory in a given profession or industry. This information should be available on a single national website that Member States were required to set up under Directive 2014/67/EU, whose basic assumption was to foster the application, compliance and enforcement of the rules regarding the posting of workers within the framework of the provision of services (Mitrus 2018: 4-11). In practice, finding the necessary information will not pose a problem to the employer, providing that individual Member States duly fulfil their obligations in this regard.

What is noteworthy is that the very interpretation of the concept of "minimum rate of pay" brings many practical difficulties. It is the Member States that have been tasked with defining this concept, with the proviso that they must do so in a sufficiently clear manner (Peijpe ven 2009: 98). The CJEU responded

to these difficulties in its jurisprudence by adopting a broad interpretation. The Court considered that the minimum rate of pay includes benefits such a daily allowance (under the same conditions as the inclusion of this allowance in the minimum rate of pay paid to local workers in the event of their posting within a given Member State), compensation for travelling time (paid to local workers, provided that daily travel to and from their workplace takes more than one hour a day) and a holiday allowance (granted to posted workers for a minimum period of paid annual leave). The minimum rate of pay includes neither accommodation and supplements in the form of meal vouchers, nor payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross wage which should be taken into account (Judgment of the CJEU in Case C-341/02, paragraph 29; Judgment of the CJEU in Case C-396/13, paragraph 38). If the employer requests the employee to perform an additional job or work under special conditions, compensation must be provided to the employee for that additional work, without taking it into account the purpose of calculating the minimum wage (Judgment of the CJEU in Case C-341/02, paragraphs 39-40).

Admittedly, the interpretation adopted by the CJEU significantly influenced the amendment of Directive 91/76 by introducing the concept of "remuneration" into its Article 3(1) and Article 3(7). Recital 18 of Directive 2018/957 states that allowances such as expenditure on travel, board and lodging travel should be considered part of the posted worker's remuneration, unless they are connected with expenditures actually incurred in connection with the posting. One of the reasons for the introduction of the concept of "remuneration" was insufficient transparency and significant heterogeneity of national laws and practices regarding the calculation of the minimum rate of pay. Some undertakings' practice of paying the minimum rate of pay to posted workers, regardless of their functions, professional qualifications or length of service also caused concern because it often led to a pay gap between posted and local workers (Commission working document SWD(2016) 52 final, pp. 10-14). In this case, however, it should be possible to verify whether the situation could not be improved on the basis of the provisions of Directive 2014/67/EU, adopted for this purpose.

By referring to the replacement of the concept of "minimum rate of pay" with the concept of "remuneration," the CJEU directly indicates that Directive 2018/957 extends the scope of employment terms and conditions applicable to posted workers, which, however, does not have the effect of proscribing any competition based on costs (Judgment of the CJEU in Case 626/18, paragraph 121). Thus, the Court confirmed the opinion of Advocate General Campos

Sánchez-Bordona, according to whom such a solution may reduce the competitive advantage of companies from EU Member States with lower labour costs that post workers to other Member States with higher labour costs, but it will not eliminate this advantage (Advocate *General's* Opinion in Case 626/18, paragraph 72). The justification that this is intended to change the balance underlying Directive 96/71 in favour of a greater emphasis on the protection of posted workers without sacrificing the objectives of fair competition does not seem convincing. Although not eliminated, this competition has in many cases been severely reduced

4. Long-term posted workers

Article 3(1)(a) of Directive 2018/957 introduces a new category of long-term posted workers, different from "normal" posted workers. Namely, if the actual posting exceeds 12 months (in exceptional situations – 18 months), a "normal" posting becomes a "long-term" posting. According to the Polish Government, this new status of long-term posted workers causes unjustified and disproportionate restrictions on the freedom to provide services, equalising long-term posted workers with local workers and migrant workers covered by Article 45 of the TFEU (Advocate *General's* Opinion in Case C-626/18, paragraph 74). These arguments, however, were shared neither by Advocate General Sánchez-Bordona nor by the CJEU itself. According to their position, although a Member State is to guarantee the applicability of all terms and conditions of working in the host country to a posted worker in addition to the terms and conditions of employment specified in Article 3(1)(a), this does not equalise posted and local workers. This is because it does not include the procedures, formalities and conditions of the conclusion and termination of employment contracts, including non-competition clauses, as well as supplementary occupational retirement pension schemes (Advocate *General's* Opinion in Case C-626/18, paragraph 79; Judgment of the CJEU in Case C-626/18, paragraph 124).

Advocate General Campos Sánchez-Bordona also raised another argument in favour of introducing the institution of long-term posting. In his opinion, setting a period of twelve (exceptionally eighteen) months when determining the posting eliminates the uncertainty existing in the original version of Directive 96/71 (Advocate *General's* Opinion in Case C-626/18, paragraph 82). According to Article 2(1) of the directive, "posted worker" was defined as a worker who carries out his work in the territory of a Member State other than the State in which he normally works "for a limited period." According to the Advocate General, the status of "long-term posted worker" is reasonable because it reflects the situation of workers staying in the host Member State for a long period, whose share in that country's labour market is therefore greater.

This position was confirmed by the CJEU judgment (Judgment of the CJEU in Case C-626/18, paragraph 125). However, the question arises as to how this "long term" is to be understood, i.e. why this should be a period of twelve (or possibly eighteen) months, and not, for example, twenty-four months, as provided for by the provisions on establishing social security legislation. This would undoubtedly ensure greater coherence of EU law in the field of labour law and coordination of social security systems (Rennuy 2020: 16; Verschueren 2020: 484-502).

The Polish Government's complaint also raised the disproportionate nature of the mechanism for the adding together of periods of postings introduced by Directive 2018/957, arguing that it takes into account the work undertaken and not the situation of the worker. Moreover, no time limits are specified to calculate this period. Advocate General Campos Sánchez-Bordona emphasised that such a solution is aimed at preventing the circumvention and abuse of the status of the long-term posted worker by replacing posted workers with other workers posted to do the same job (Advocate *General's* Opinion in Case C-626/18, paragraph 86). At the same time, he agreed with the Polish Government that this provision failed to actually set a time limit on adding together the periods in which posted workers perform the work undertaken. This situation neither deserves approval nor gives satisfaction. Similar feelings are evoked by the argument used by the CJEU to reject the Polish Government's complaint regarding the fact that it is the work undertaken that is used for calculating the posting period, and not the situation of the posted worker. The legality of this provision cannot therefore be challenged solely on the grounds that "the Republic of Poland has failed, in that regard, to specify which provision of the FEU Treaty or which general principle of EU law has thereby been infringed" (Judgment of the CJEU in Case C-626/18, paragraph 138). Moreover, the CJEU did not refer at all to the Polish Government's argument regarding the existence of a legal measure for the prevention of abuse and circumvention in the form of Article 4 of Directive 2014/67, although this issue was raised by Advocate General Campos Sánchez-Bordona. Apart from the questionable accusation that the Polish side did not show less restrictive possibilities for the prevention of abuse, the Advocate General pointed out that the purpose of the provision of Directive 2014/67 quoted above is to prevent fraud in the case of a single posting, and not in the case of a chain of workers posted to do the same work.

5. Conclusion

Doubtlessly, it is necessary to react to any practices connected with the abuse of workers, unlawful lowering of rates of payment or horrendous working conditions. However, these do not apply to the situation of legally posted

workers, to which currently apply the new rules concerning the payment of all elements of remuneration, the obligation to apply the entire body of host State's labour law in the event of long-term posting, or the cumulative mechanism for calculating the duration of the posting period. Such solutions should apply when it is certain that the enforcement provisions laid out in Directive 2014/67/EU are ineffective. Both the idea of equalising the terms and conditions of employment of posted and local workers, as well as the adding together of the periods of posting, which results in the treatment of subsequent posted workers as migrant workers, may raise doubts. This may ultimately lead to the identification of these two categories of workers, which by definition differ from each other due to being regulated under different freedoms of the internal market. Such fears and doubts were rightly expressed by the Polish side by filing a relevant complaint with the CJEU. Although none of the accusations presented in it was accepted, it highlighted the shortcomings of the new legal solutions, thus confirming the different approach to this problem in the western and eastern parts of the European Union.

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