The CJEU endorses the revision of the Posting of Workers Directive

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Abstract

This article discusses the judgments handed down by the Court of Justice in reply to Hungary and Poland's request to annul Directive 2018/957 which had introduced a number of amendments to the Posting of Workers Directive 96/71. Through these amendments, the European legislator had extended the scope of the employment protection of posted workers and these two Member States were of the opinion that this measure was in conflict with the Treaty provisions on the free movement of services. First, this article will briefly examine the amendments to the Posting of Workers Directive. Then, it will analyse the Court's responses to Hungary and Poland's arguments. At the end, a brief evaluation follows.

1 Introduction

The posting of workers within the European internal market has been a topic of legal and political debate for decades. One of these debates is the application of the Posting of Workers Directive of 1996.[2] This directive establishes which provisions of the host state's employment law should be applied to the posted workers. The PWD does not impose the application of all the employment law provisions of the host State, but only of those provisions which constitute the core of the mandatory provisions for minimum protection (the so-called 'hard core'), more specifically: maximum work periods and minimum rest periods; minimum number of paid annual holidays; minimum wages; conditions for the posting of employees, in particular by temporary employment agencies; health, safety and hygiene at the workplace; protective measures for special groups of employees (pregnant women, youngsters); and provisions regarding equal treatment and non-discrimination.[3] However, only legal and administrative provisions and/or collective agreements or arbitration awards which have been declared universally applicable apply.[4] The Court of Justice has repeatedly passed judgment on the application of this directive.[5] It is apparent from that case law that the protection offered by the Posting of Workers Directive is the maximum protection to which posted workers are entitled.[6]

The labour cost competition that arose from only partially applying the employment legislation to posted workers, was considered by some as unfair competition or even as "social dumping".[7] Others, mainly in the newer Member States, considered this as a legitimate competitive advantage and the restriction of it as a form of protectionism.[8] As Advocate General Campos Sánchez-Bordona explained, 'the rules governing the posting of workers combine two conflicting perspectives: on the one hand, the perspective of the freedom to provide services in the internal market….; on the other hand, the perspective of the protection of the working and

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[2] 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 [1996] OJ L 18/1 (hereinafter Directive 96/71 or PWD)

[3] Art. 3(1) PWD.

[4] Art. 3(8) PWD.

[5] See for a brief overview of the case law: Opinion of Advocate General Campos Sánchez-Bordona, C-620/18 *Hungary v EP and Council,* EU:C:2020:392, paras 20-44.

[6] *Kilpatrick* [9], pp. 844-965 and *van Hoek* [14], pp. 466-471.

[7] See for instance *Countouris and Engblom* [3], pp. 36-38.

[8] See for instance *Kukovec* [10], pp. 45-46 and *Leczykiewicz* [11], pp. 316-322.

social conditions of workers who are on temporary postings'.[9] The debate was also fuelled by a number of malpractices such as posting via letterbox companies, long-term postings, the repeated replacements of posted workers, non-payment of the minimum wages applicable in a host country, non-reimbursement of the expenses related to posting such as accommodation expenses, docking travel and accommodation expenses of the wage, poor housing of the workers in question, … [10]

Part of these problems were dealt with by the adoption of the Enforcement Directive 2014/67/EU which contains criteria to identify a genuine posting and to prevent abuse and circumvention as well as provisions on access to information, administrative cooperation, the monitoring of compliance and special enforcement measures.[11] However, the Enforcement Directive did not prevent the Posting of Workers Directive from coming under fire. The predominant issues were the fact that this directive only guarantees the minimum wage applicable in the host country and that there is no specific limitation to the period of the posting. On a political level, the idea of a more fair labour mobility rose, i.a. by ensuring equal pay for equal work at the workplace. Within this context, the European Commission submitted a proposal for a revised Posting of Workers Directive in 2016.[12] Mid 2018, after politically challenging negotiations, the European Parliament and the Council reached an agreement on the matter.[13]

2. Most important amendments to the PWD

The principal amendment to the PWD regards the changes to the list of so-called hard core provisions of Article 3 (1), the application of which has to be guaranteed by the host Member State vis-à-vis the posted workers. Essential in this is the replacement of the concept of "minimum wages" with the concept of "remuneration". As a result of this amendment, all wage elements have to be taken into account, including supplements to the wage such as overtime rates, allowances for working at night, allowances for working on Sundays or on public holidays, holiday remunerations, end of the year bonuses and the 13th month bonuses.[14]

Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons were added to the list of hard core employment conditions.[15] It concerns costs that would also be owed to the local workers from the host country. In addition, this list was extended with the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work.[16]

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[9] Opinion of Advocate General Campos Sánchez-Bordona, C-620/18 *Hungary v EP and Council,* EU:C:2020:392, para. 17.
[10] For recent reports on such misuses see, inter alia, *Cremers* [4], and *Houwerzijl,Berntsen* [7], p. 147-166.
[11] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (the IMI Regulation') [2014] OJ L 159/11.
[12] COM(2016) 128. See also the impact assessment report: SWD(2016) 52 final.
[13] Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16 (hereinafter Directive 2018/957). On this negotiation process see: *Bottero* [1], pp. 244-258 and *Van Nuffel, Afanasjeva* [15], pp. 1415-1416. These latter authors notice that eventually, within the Council of Ministers, only Hungary and Poland voted against and that Croatia, Latvia, Lithuania and the United Kingdom had abstained, thus achieving the necessary qualified majority in the Council.
[14] *European Commission* [5], p. 13.
[15] New Art. 3(1)(i).
[16] New Art. 3(1)(h).

Another important amendment to the PWD is the introduction of rules for long-term postings. The directive of 1996 only stipulated that it had to concern a posting *'for a limited period'*, without further indication as to what that entails specifically.[17] In practice, it turned out that workers were often posted for prolonged periods. In order to counter misuse of long-term posting, Art. 3(1a) was added to the Posting of Workers Directive which says that where the effective duration of a posting exceeds 12 months, Member States shall ensure all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable or otherwise, apply in accordance with Art. 3(8).[18] Still, where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months. This rule only applies from the moment that the actual duration exceeds the period of 12 (or 18) months. Only from that moment on shall the posted worker need to be subject to the extensive employment protection. So it relates to the actual duration of the posting and not the period initially provided for.[19] Furthermore, it is determined that when a posted worker is replaced by the undertaking in question with another posted worker who performs the same work at the same place, the total duration of the periods worked by the individual posted workers should be considered as the duration of the posting. So this means that when the initially posted worker is replaced, the period of the posting continues to run as regards the calculation of the 12 (or 18) months. As soon as the total duration exceeds this number of months, the posted workers need to be subject to the extensive employment conditions of the host Member State. The aim is to prevent misuse of subsequent postings.[20]

Additionally, Directive 2018/957 adds Art. 3(1b) to Directive 96/71, on the basis of which the host Member States have to ensure that temporary employment agencies apply the terms and conditions of employment that apply to temporary workers that are posted by temporary employment agencies established in those Member States in accordance with Article 5 Temporary Agency Work Directive 2008/104, to posted workers as well. This is an obligation, whereas in the original PWD it was a mere possibility.[21]

3 Action for annulment by Hungary and Poland

These amendments to the PWD signify a further step towards guaranteeing posted workers the same wage and employment conditions as those applicable to the workers in the Member State where they are posted. It was apparent during the debate on this revision in the Council of Ministers that these measures were a step too far for some Member States and that they were of the opinion that the free movement of services within the European internal market was being overly restricted. For that reason, Hungary and Poland voted against. However, they did not succeed in gathering a blocking minority. Thus, Directive 2018/957 was adopted by qualified majority. Subsequently, these two Member States have, however, used their right to request the annulment of this directive before the Court of Justice.

They submitted comparable and parallel pleas in law, more specifically: the choice of an incorrect legal basis (Art. 53(1) and 62 TFEU) for the adoption of the contested directive; the

[17] Art. 2(2) PWD.

[18] This will not apply to procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and to supplementary occupational retirement pension schemes.

[19] *European Commission* [5], p. 15.

[20] See recital 11 of Directive 2018/957.

[21] For more details on these revisions see: *Bottero* [1]; *Houwerzijl, Verschueren* [8], p. 96-103; *Lhernould* [12]; *Van Nuffel, Afanasjeva* [15].

disregard of Article 153(5) TFEU; the infringement of Article 56 TFEU and the disregard of the 'Rome I' Regulation. In Grand Chamber, the Court of Justice passed judgments in these cases on 8 December 2020. [22] By and large, these judgments follow the opinion of the Advocate General.

We will now examine in more detail these pleas and the findings of the Court.

3.1 The choice of an incorrect legal basis for the adoption of the contested directive

Hungary and Poland's first argument concerned the choice of legal basis. It is the same as the one for the original PWD, i.e. provisions in the TFEU on the freedom to provide services (Art. 53(1) and 62 TFEU). These Member States claimed that the only or principal aim of Directive 2018/957 is the protection of workers by ensuring equal treatment and it is not concerned with removing obstacles to the freedom to provide services. The new Art. 1(1) of the PWD indeed says that it 'shall ensure the protection of posted workers during their posting'. In their view, it even has a protectionist effect. Hungary argues that the appropriate legal basis would be Art. 153(2)(b) TFEU which allows the adoption of directives in the field of working conditions.[23]

The Court rejected these arguments.[24] It first recalls that the choice of legal basis must rest on objective factors that are amenable to judicial review.[25] It also underlines that where a legislative act has already coordinated the legislation of the Member States in a given EU policy area, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge. The Court refers to the legislature's task of safeguarding the general interests recognised by the TFEU, more specifically the overarching objectives of the EU laid down in Article 9 of that Treaty, such as the promotion of a high level of employment and the guarantee of adequate social protection.[26] Hereby, the CJEU recognises the social objectives laid down by the Lisbon Treaty in 2007 as overarching objectives of the EU and as a *'change of circumstances'*. In the view of the Court, the legislature is even bound to ensure respect for the general interest and the objectives as laid down in Art. 9 TFEU.[27]

Another change of circumstances which the CJEU takes into account is the successive enlargements of the EU, the effect of which was to bring into that market the undertakings of Member States where, in general, terms and conditions of employment that diverged greatly from those prevailing in the other Member States were applicable.[28] Therefore, coordination measures adopted on the basis of the internal market legal bases of Art. 53(1) and 62 TFEU must not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom.[29] The Court identifies as the objective of the contested directive the establishment of a balance between two interests, namely, on the one hand, ensuring the supply of services within the internal market by posting workers and, on the other, protecting the rights of posted workers.[30] The Court finds that the main objective of the revision is to ensure the

[22] Case C-620/18 *Hungary v European Parliament and Council*, EU:C:2020:1001 (hereinafter 'judgment Hungary') and Case C-626/18, *Poland v European Parliament and Council,* EU:C:2020:1000 (hereinafter: 'judgment Poland'). In the proceedings the European Parliament and the Council were supported by Germany, France, the Netherlands and the Commission.
[23] See paras 28-36 of judgment Hungary and paras 39-41 of judgment Poland.
[24] Paras 38-64 judgment Hungary and paras 43-71 judgment Poland.
[25] Para. 38 judgment Hungary and para. 43 judgment Poland.
[26] Para. 41 judgment Hungary and para. 46 judgment Poland.
[27] Para. 46 judgment Hungary and para. 51 judgment Poland.
[28] Para. 62 judgment Hungary and para. 66 judgment Poland.
[29] Para. 48 judgment Hungary and para. 53 judgment Poland.
[30] Para. 50 judgment Hungary and para. 55 judgment Poland.

freedom to provide services *on a fair basis*, more specifically to ensure that competition in the internal market should not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member State.[31] It therefore ensures a level playing field for undertakings active in the internal market.[32] For all these reasons, the EU legislature could adjust the balance of the PWD on the internal market legal bases.

3.2 The use of Art. 153(2)(b) and the disregard of Article 153(5) TFEU

The Court also refutes the argument of Hungary that Art. 153(2)(b) TFEU would constitute a more specific legal basis for the revision of the PWD. For the CJEU, this basis only allows for the adoption of harmonisation measures, which the PWD is not, since it does not do more than coordinate the legislation of the Member States.[33] Hungary also submitted that the directive is contrary to Article 153(5) TFEU which, according to Hungary, excludes the regulation of pay from the competence of the EU, while the directive entails direct interference of the EU law in the determination of pay. In its answer, the CJEU confirms that this exception to the competences of the EU only applies to the competences within Art. 153 TFEU and since the directive is not based on these competences this exception does not apply.[34]

3.3 The infringement of Article 56 TFEU

The next plea in law of Hungary and Poland concerned the infringement of Art. 56 TFEU. This plea is based on comparable arguments as in the plea on the use of the wrong legal bases. Their arguments mainly referred to the negative impact on this freedom of the replacement of the concept of 'minimum wage' with 'remuneration', the obligation to reimburse travel, accommodation and subsistence costs and the regulation for long-term postings.[35] They argued that the revision nullifies the lawful competitive advantage of low wages and consider this unfair. They also reasoned that the initial PWD sufficiently guaranteed the protection of posted workers, that the revision goes beyond what is necessary to protect them and that it disproportionately restricts the freedom to provide services since it imposes an additional financial and administrative burden on the service provider employing posted workers. For them, this is even more the case for the provisions on long-term postings. Posted workers fundamentally differ from workers who make use of their freedom of movement under Article 45 TFEU since they are not genuinely integrated in the society or the labour market of the host Member State. These workers are therefore not in a situation that is comparable to that of the workers of that Member State. Consequently, these Member States felt that the revised directive does not create a level playing field. Hungary also disagreed with the applicability of the PWD to the road transport sector.

In its judgment, the CJEU repeats that the internal market provisions of the TFEU not only have the objective of facilitating the exercise of one of the freedoms, but also seek to ensure the protection of other fundamental interests.[36] The Court stresses again that the main objective of the revision is to ensure the freedom to provide services *on a fair basis*, more specifically to ensure that competition in the internal market should not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on whether or not the employer is established in that Member

[31] Para. 51 judgment Hungary and para. 56 judgment Poland.
[32] Paras 49 and 63 judgment Hungary and paras 54 and 68 judgment Poland.
[33] Paras 65 to 69 and para. 79 judgment Hungary.
[34] Paras 78 to 81 judgment Hungary.
[35] Paras 86 to 102 judgment Hungary and paras 72 to 85 judgment Poland.
[36] Para. 105 judgment Hungary and para. 88 judgment Poland.

State.[37] With regard to the role of the judiciary, the CJEU highlights that the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate in relation to the objective which the competent institutions are seeking, even if the EU legislature must base its choice on objective criteria that respect the principles of subsidiarity and proportionality.[38]

The Court is therefore of the opinion that the contested directive creates a new balance between the factors on the basis of which undertakings established in various Member States can compete with one another, without it putting an end to any possible competitive advantages of service providers from certain Member States. Indeed, according to the Court, this directive does not result in the elimination of all competition based on costs. It determines that posted workers have to be able to rely on the application of a series of terms and conditions of employment in the host Member State, among which the components of remuneration that are compulsory in that Member State, which does not affect the other cost components of the undertakings that post these workers, such as the productivity or the efficiency of said workers. The Court hereby refers, i.a., to recital 16 of Directive 2018/957.[39] So for the Court, this directive does not lead to distortion of competition.[40]

Moreover, the Court points out that the posted workers do not enjoy the same employment protection as the workers of the host Member State on all levels and that the regulation for long-term postings does not put an unreasonable burden on the posting undertaking either. Again, the Court refers to the broad discretion awarded to the Union legislator. The Court argues that even in the rules for long-term postings, the posted workers are not put on a par with workers who have made use of the free movement of workers themselves or with the workers of the host Member State. The Union legislator made use of its broad discretion when introducing these rules and has sufficiently demonstrated, according to the Court, that this measure is necessary, appropriate and proportionate. [41]

With regard to the application of the PWD to the road transport sector, the CJEU admits that a service in the field of transport is excluded from the scope of Art. 56 TFEU by its Art. 58 and that it is regulated by Title VI TFEU. However, since the PWD and the revision do not seek to regulate the freedom to provide services in the field of transport, it cannot be contrary to Art. 58 TFEU.[42] This is a confirmation of what the Court decided in its *Van den Bosch* judgment of 1 December 2020.[43]

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[37] Para. 107 judgment Hungary and para. 90 judgment Poland.
[38] Paras 112 and 115 judgment Hungary and paras 5 and 98 judgment Poland.
[39] Recital 16 says: 'In a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof.'
[40] Paras 128, 139 and 140 judgment Hungary and para. 106 judgment Poland.
[41] Paras 147-149 and 154-156 judgment Hungary and paras 112 and 124-129 judgment Poland.
[42] Paras. 158-162 judgment Hungary.
[43] Case C-815/18 *FNV v Van den Bosch,* EU:C:2020:976. See also the recently adopted Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 [2020] OJ L 249/49. This directive specifies under which conditions the PWD is applicable to the workers in the road transport sector. As a consequence of the adoption of this directive, the revisions of Directive 2018/958 shall also apply to these workers (Art. 3(3) Directive 2018/957). See also on posting of workers in the road transport sector: *van Overbeeke* [16].

3.4 The disregard of the 'Rome I' Regulation

Also interesting is the Court of Justice's stance on the relation between the Posting of Workers Directive and the Rome I Regulation.[44] Hungary and Poland had suggested that Directive 2018/957, and in particular the rules on long-term postings, were in conflict with the Rome I Regulation. Art. 8(1) of this regulation establishes a general conflict-of-law rule that is applicable to employment contracts, the designated law being the law chosen by the parties to such a contract, and Art. 8(2) provides that, where such a choice has not been made, the individual employment contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work, that country not being deemed to have changed if the employee is temporarily employed in another country. The Court replies to this plea by referring to Article 23 of the Rome I Regulation that allows other instruments of Union law to deviate from the conflict-of-law rules laid down in this regulation. For the Court, this applies to the conflict-of-law rules in the Posting of Workers Directive and for the new ones that were introduced by Directive 2018/957 and specifically for the rules on long-term postings.[45] The Court hereby takes a position in a matter which is much disputed in legal doctrine. Some feel that the PWD should be considered as a specification of what is qualified in Article 9 of the Rome I Regulation as overriding mandatory provisions. Others, however, are of the opinion that the PWD is a special conflict-of-law rule that deviates from the one in the Rome I Regulation, which is allowed by its Article 23.[46] The Court of Justice's choice for Article 23 does mean that the Union legislator has a broader discretion than it would have had if the Court had taken the position that the PWD is a specification of what is provided for in Article 9 Rome I Regulation. Indeed, when applying the latter provision, it has to concern provisions that can be qualified as overriding mandatory provisions, a concept which should be construed more restrictively.[47]

4 Conclusion

These two judgments have given the Court of Justice the opportunity to emphasize that the Union's social objectives also apply to the regulation of the internal market and the free movement of services. To this end, the Court, i.a., refers to the social mainstream clause in Art. 9 TFEU, which was introduced by the Lisbon Treaty in 2007. The Court considers this as a new element which the Union legislator has to take into account, including for the regulation of the internal market freedoms. In the Court's view, these social objectives have to ensure that the internal market competition happens 'fairly' and the revised PWD contributes towards achieving that goal. The internal market must not only be *free* but also *fair*. This is a considerable respite after previous case law of the Court, in which social measures were all too easily considered as an unjustified restriction on the free movement of services, as was the case in the much discussed *Laval* quartet.[48] It is the first time that Art. 9 TFEU has played such an important and pivotal role in the Court's reasoning.

The Court also confirms that the Union legislator has a broad discretion to translate these objectives into regulation as regards the employment protection of posted workers. The Court has, however, extensively examined whether these objectives were indeed at the basis of the

[44] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6 (hereinafter 'Rome I' Regulation)
[45] Paras 178-180 judgment Hungary and paras 132-134 judgment Poland.
[46] See more on the relation between the PWD and the 'Rome I' Regulation: *Campo Comba* [2], pp. 294-302; *Piir* [13], pp. 110-114 and *van Hoek* [14], pp. 455-460.
[47] Para. 135 judgment Poland and recital 37 of the 'Rome I' Regulation.
[48] Case C-341/05 *Laval*, EU:C:2007:809; Case 438/05 *Viking,* EU:C:2007:772; Case C-346/06 *Rüffert,* EU:C:2008;189 and Case C-319/06 *Commission v Luxembourg,* EU:C:2008:350.

revised directive and whether the means used are not disproportionate in terms of their impact on the free movement of services. It hereby points out that the rights of posted workers continue to differ from the rights of workers who are part of the host country's labour market. One could ask the question, though, whether the differences are still substantial. The primary elements of the host country's employment law become applicable to posted workers, such as remuneration with a broad meaning, maximum work periods and minimum rests periods and minimum paid annual leave. This certainly applies to workers who are posted long-term and who, to a large extent, will be subject to the same employment protection as the workers of the host Member State. This measure too is considered by the Court as necessary, appropriate and proportionate, although the motivation given in the judgments on this point is rather concise, especially when compared to the elaborate motivation of the Court's reply to Hungary and Poland's other arguments. This might betray a debate within the Court as to whether the long-term posting arrangement passes the test of Article 56 TFEU. In the end, the judges of the Court have given the matter their approval, since the annulment of these provisions would have jeopardized the global balance achieved in Directive 2018/957, which would have forced the Court to annul the entire directive. It goes without saying that this would have been a political bomb that would have put the relation between the EU legislature and the EU judiciary on edge. Hence, the Court's explicit reference to the 'broad discretion enjoyed by the EU legislature'.[49] It is within this political context that the Court eventually dismissed the action of Hungary and Poland.

We should in fact be thankful for the appeal lodged by these two Member States because it has given the Court the opportunity, more than ever, to highlight the EU's social objectives, which also have to be observed when regulating of the internal market.

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[49] For a plea for a greater involvement of the EU legislature in balancing 'the Market' and 'the Social' in the EU see: *Garben* [6].

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