



The legal and sociological aspects of posting of workers in the framework of the provision of services in the European Union in the light of current regulations and proposed amendments

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ABSTRACT

This paper concerns the issue of posting of workers in the framework of the provision of services in the European Union. The legal approach to this research area allows to detect considerable legislative activity in this field (including a number of concerns about proposed amendments). Directive 96/71/EC was supplemented by Directive 2014/67/EC and the revision of the former is currently underway. Remuneration paid out according to local host country regulations will prove a favorable solution for workers, but it will bring about various difficulties for employers. The perspective of political sociology, meanwhile, demonstrates that politicians are primarily interested in fighting for power and influencing the future shape of Europe. The proposal of equal work subject to equal pay, which implementation is to combat social dumping, constitutes an important issue in the field of sociology of work

Keywords: posting of workers, labour standards, remuneration, minimum wage, social dumping

1. INTRODUCTION

Posting of workers is a topic that has entered the mainstream of public debate as a result of the political strategy currently pursued in Europe. The idea of posting of workers

dates back to the early 1990s, and even then it was problematic to establish minimum pay rates across Member States. Directive 96/71/EC 42 of 1996 - hereinafter referred to as the Basic Directive¹ - is a legal act which accounts for the case law of the European Court of Justice arising from past disputes related to cross-border employment. The dispute over the posting of workers is one that concerns the shape of European integration and Europe's future, in particular the convergence of working conditions and European economies as a whole. Posting of workers can be a driving force for bringing EU economies closer together. In the meantime, there is another dispute between Western EU countries (calling for raising the standards of the Directive on the Posting of Workers) and the countries of Eastern Europe (preferring to leave the current regulations as they are or even further liberalize specific provisions of the Directive). Tackling this subject from a different standpoint, one can address the conflict between workers who want to earn as much as possible and employers who want to keep costs as low as possible.

This paper is divided so as to correspond to the indicated research assumptions. The study additionally discusses the concept of social dumping, which is the most common argument justifying the amendments currently introduced by the European Commission. The subsequent section analyzes the provisions in force related to the posting of workers. The conclusions were preceded by an indication of the main proposal concerning the revision of the Basic Directive. The theses contained in this paper concern mainly Polish posted workers and their employers. The case law of courts, professional source literature, Polish and EU legal acts, as well as other opinions and articles from the daily press were used in the study. The paper refers to the legislation in force as at 30 October 2017.

2. SOCIOLOGICAL CONCEPT OF WORK AND SOCIAL DUMPING

Sociology of work can be said to have originated in the vastness of human problems arising from economic transformations and industrialization. Source literature correctly points out that the main stimulating factors for sociologists all over the world are the processes of industrialization and democratization, along with the consequences they entail, the problems related to work life (including job satisfaction), or the essence of work in terms of gender. In specialist publications, attention is drawn to the fact that after 1970 there was a decline in interest in work sociology, and the rebirth of this discipline took place after the financial crisis in 2008². The most interesting current research problem, however, is the impact of the decline in employment in the strictly manufacturing industry and the globalization of work in the context of the working-age population. As a brief reference to T. Watson's view, one must note that the sociological concept of work comprises of two facets. The first relates to the execution and commissioning of tasks, whereas the second is the role that work plays in enabling people to make a living. Perceiving work as such requires the cost of effort to be invested in task performance. Equally important is the economic realm

¹ 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, electronic version: <http://eur-lex.europa.eu/eli/dir/1996/71/oj> (online: 30.10.2017).

² G. Meardi, J. Donaghey, D. Dean (2016), The strange of the state: implications for the sociology of work, *Work, Employment and Society*, Vol. 30, Issue 4, pp. 559-572.

related to the shortage of resources³. There is a widespread perception that the labor gap is being bridged by workers posted from low-income countries, who take away jobs from workers of the founding members of the European Union. This process is referred to as social dumping.

Public debate on social dumping is accompanied by various initiatives to liberalize trade and economic integration between the high-income and low-income countries of the EU. Already at the beginning of the 1990s, there was a visible problem of lack of a system that would guarantee minimum incomes for workers in an integrated Europe⁴. Inter-state differences in wage levels and welfare have long been a source of concern among high-income states due to the potentially negative consequences for integration processes⁵. As pointed out by J. Buelens and M. Rigaux, European economic unification has, unfortunately, brought about a number of victims. Establishment of a common European Union market gave rise to fierce competition, where large companies have been undermining local economies as well as small and medium-sized enterprises.

The unification has led to substantial restructuring, which resulted in the loss of jobs or their transfer to other places⁶. Another suggested point of reference is the stance of business representatives and trade union leaders in developed countries, who often accuse governments of less developed and developing countries of social dumping by means of deliberately and strategically slowing down the development in terms of social well-being, which consequently translates into the better competitiveness of their industrial sectors⁷. Posted workers often have lower expectations in terms of wages and working conditions and therefore undertake low-wage and precarious jobs⁸. As rightly pointed out by E. Bengtsson: European labour mobility after the 2004 enlargement of the European Union has often occurred in a context of precariousness, with a preponderance of atypical jobs typified by, for instance, short-term employment, complex subcontracting chains, temporary staffing agencies and bogus self-employment⁹.

3. DIFFERENT DEFINITIONS OF SOCIAL DUMPING

Given the interpretation problems, indicating different definitions of social dumping is undoubtedly justified. The concept of social dumping is as old as the concept of free market - in a world of market competition, capital usually seeks long-term return on investment

³ T. Watson (2003), *Sociology, Work and Industry: Fifth edition*, Published by Routledge, London, p.13.

⁴ P.E. Abrahamson (1991), *Welfare and Poverty in the Europe of the 1990: Social Progress or Social Dumping?*, *International Journal of Health Services*, Vol. 21, Issue 2, pp. 237-264.

⁵ M. Bernaciak (2015), *Expansion and Social Dumping in Europe*, Published by Routledge London, p. 2.

⁶ J. Buelens, M. Rigaux (2016), *From Social Competition to Social Dumping*, *Social Europe Series*, vol. 35, Published by Intersentia, pp. 33-62.

⁷ H. W. Sin (2002), *The New Systems Competition*, A joint Initiative of Ludwig-Maximilians-Universität and Ifo Institute for Economic Research, CESifo Working Paper No. 623, electronic version: http://www.cesifo-group.de/DocDL/cesifo_wp623.pdf (online:30.10.2017).

⁸ C. Devitt (2011), *Varieties of capitalism, variation in labour immigration*, *Journal of Ethnic and Migration Studies*, Vol. 37, Issue 4, pp. 579-596.

⁹ E. Bengtsson (2016), *Social dumping cases in the Swedish Labour Court in the wake of Laval, 2004-2010*, *Economic and Industrial Democracy*, Vol. 37, Issue 1, p. 28.

limited by policy, technology and the existing system of rights and principles¹⁰. Neither the codified law of the European Union nor the case law of the European Court of Justice specifically use the term "social dumping". This absence of clear definition is the reason for the different perceptions of this phenomenon, which in turn poses a fundamental challenge to the proper understanding of its meaning.

As proposed by the European Economic and Social Committee, social dumping is when "cheaper" workers from an outside Member State occupy the workplace of the country's own citizens¹¹. On the other hand, according to the European Commission, social dumping refers to those cases where foreign service providers occupy local market positions¹².

The perception of social dumping in source literature rarely goes beyond the indication it consists in the deliberate misuse of the rights conferred on entrepreneurs by the Treaty freedoms¹³. In contrast, according to J. Alber and G. Standing social dumping refers to situations: in which standards in one country are lowered relative to what they would have been because of external pressure from all or part of the global economic system¹⁴.

It is also pointed out that social dumping is the practice of interested market participants whose objective is to undermine or avoid the obligation of complying with social standards in order to gain a competitive edge¹⁵.

On 14 September 2016, the European Parliament adopted a resolution on social dumping in the European Union, and although it does not explicitly define the phenomenon under consideration, it nonetheless points out it could potentially lead to discrimination and unfair treatment of workers in the EU and to depriving them of the possibility to make effective use of their social and occupational rights, including remuneration and social protection¹⁶.

The wording used to describe what is termed "social dumping" is interpreted in many ways, thereby providing a tool to support different concepts and views. The above findings lead to the conclusion that the essence of social dumping should be perceived as transferring services to countries where they can be performed for less money. These practices are undertaken by individual labor market participants and include the circumvention of regulations in force (balancing between the regulatory systems of individual Member States) with a view to generating a competitive advantage.

¹⁰ D. Goodhart (2005), Social dumping within the EU [w:] D. Hine, H. Kassim (ed.), Beyond the Market. The EU and National Social Policy. The state and the European Union series, Published in the Taylor & Francis e-Library, London and New York, pp. 81-92.

¹¹ The European Economic and Social Committee, Report of the SMO on „The working of the Services Directive in the Construction Sector”, INT/SMO - EESC-2014-02466-00-01-TCD.

¹² <http://ec.europa.eu/social/main.jsp?catId=471&langId=en>, (online: 30.10.2017).

¹³ D. Vaughan-Whitehead (2003), EU Enlargement versus social Europe? The uncertain future of the European Social Model, Edward Elgar, Cheltenham 2003, p. 325.

¹⁴ J. Alber, G. Standing (2000), Social dumping, catch-up, or convergence? Europe in a comparative global context, Journal of European Social Policy, Vol. 10, Issue 2, p. 99.

¹⁵ M. Bernaciak (2014), Social Dumping and the EU integration process, European Trade Union Institute Working Paper 2014.06, Brussels, p. 5.

¹⁶ European Parliament resolution of 14.09.2016 on social dumping in the European Union 2015/2255(INI).

4. POSTING OF WORKERS IN THE LIGHT OF CURRENT REGULATIONS

Normative regulation of the posting of workers is the result of the development of the internal market for services in Europe¹⁷. The essence of posting is that a company operating in the territory of one Member State enters into an agreement with a foreign company established in another Member State.

This company, as a subcontractor, provides a service with the use of its own workers¹⁸. As defined in art. 2, sec. 1 of the Basic Directive, a "posted worker" is a worker who, for a limited period of time, performs his or her work in the territory of a Member State other than the country where he or she normally works. It is important that for the purposes of applying the Directive on the Posting of Workers (also known as Posted Workers Directive), the definition of a worker as it is force in the legislation of the host country is adopted¹⁹.

Furthermore, it should be noted that the terms "posting" and "posted worker" are essential for a proper understanding of the scope of the directive²⁰. The posting of workers involves the transitional nature of the work performed within the meaning of the freedom to provide services, as defined in art. 56 of the Treaty on the Functioning of the European Union²¹. In the case law of the European Court of Justice, the term "transition" can refer to a period as short as 7 days or as long as 3 years, depending on the nature of the service the company provides. If the activity of posted workers is conducted on a permanent basis, and in any case without predictable time limits, it will not be subject to EU regulations on the provision of services²².

In contrast, the term posted worker is associated with the short-term nature of the work. This means that provision of services in another country of EU should be temporary and incidental. According to C. Tacu from "Alexandru Ioan Cuza" University of Iași: „posting of workers in the transnational provision of services, is a special form of European internationalization of business operations²³.

While there is a working relationship between the posting company and the worker during the entire posting period, there is also an actual relationship between the employer and the worker's country of origin. Posting of workers is a paid provision of services in the

¹⁷ S. Lalanne (2011), Posting of workers, EU enlargement and the globalization of trade in services, *International Labor Review*, Vol. 150, Issue 3-4, pp. 211-234.

¹⁸ M.S. Houwerzijl (2005), Posting of Workers: Background, content and implementation of Directive 96/71/EC, *Construction Labour Research News*, No 2, p. 22-46.

¹⁹ S. Majkowska-Szulc (2009), Sytuacja prawna pracownika delegowanego w ramach świadczenia usług [in:] S. Dudzik, S. Biernat (ed.), *Przeptyw osób i świadczenia usług w UE, Nowe zjawiska i tendencje*, Warszawa, pp. 248-259.

²⁰ A. Hoek, M. Houwerzijl (2012), "Posting" and "Posted Workers": The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive, *Cambridge Yearbook of European Legal Studies*, Vol. 14, pp. 437-443.

²¹ Treaty on the Functioning of the European Union, electronic version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> (online: 30.10.2017).

²² Judgment of the European Court of Justice of 7 September 2004 in case C-456/02 Trojani.

²³ C. Tacu (2013), Challenging european human resource management: Posting of workers, from literature review to research ideas, *Managerial Challenges of the Contemporary Society*, Vol. 6, p. 143.

framework of which the posted worker is employed by the service provider without concluding a contract of employment with the company benefiting from those services²⁴.

This is the case when the posting of workers to another Member State is, in itself, a cross-border provision of services²⁵. P. Davies, Professor of Law at University of Oxford, explains that the host State is required to apply to that employment relationship certain basic standards of its own labour law system (and is permitted to apply certain other basic standards), even though these standards have not been agreed between the employee and the (home State) employer²⁶.

Provision of services under cross-border conditions requires compliance with the principles of fair competition and providing measures guaranteeing respect for workers' rights²⁷. Under the Basic Directive, Polish posted workers are in fact subject to Polish labor law. This apparently simple solution involves the need to provide these workers with six legislative elements of the host country, which are: 1. minimum wage, 2. maximum working hours and minimum off-work periods, 3. minimum annual paid leave 4. conditions for the provision of work by temporary workers, 5. occupational health and safety, 6. equal treatment of women and men. The Basic Directive strives to find a balance between two groups of fundamental values guaranteed by the EU, i.e. the freedom to provide services on the one hand, and the provision of decent working and pay conditions, along with proper social protection, on the other hand²⁸.

The Basic Directive should be regarded as a conflict-of-law rule that determines the national jurisdiction to be applied in the case of cross-border services²⁹. Under the Amendment Act of 5 December 2008 concerning the Code of Civil Procedure and certain other act³⁰, the Polish Code of Civil Procedure was expanded to include art. 1103⁴ which fulfills the requirement of implementation contained in art. 6 of the Basic Directive. This provision establishes the scope of national jurisdiction in matters pertaining to labor law. It is worth pointing out that the cases recognized in the process belong to national jurisdiction if the defendant is domiciled, or habitually resident or established, in the Republic of Poland. The worker's actions concerning the provision of employment conditions pursuant to the Polish Act on the Posting of Workers in the framework of the provision of services are also

²⁴ A. Ojeda-Avilés (1997), *European Collective Bargaining and Posted Workers – Comment on Directive 96/71/EC*, *International Journal of Comparative Labour Law and Industrial Relations*, Vol.13, Issue 2, pp.127-130.

²⁵ A. Boguska (2016), *Konstrukcja delegowania pracowników w celu świadczenia usług na poziomie unijnym i w praktyce prawa polskiego*, *Monitor Prawa Pracy*, No. 2, pp. 70-75.

²⁶ P. Davies (1997), *Posted Workers: Single Market Or Protection od National Labour Law Systems?*, *Common Market Law Review*, Vol. 34, Issue 3, p. 571.

²⁷ M. Wołoszyn-Juszczak (2014), *Perspektywy delegowania pracowników Polski do krajów Unii Europejskiej*, *Studia z zakresu prawa pracy i polityki społecznej*, pp. 357-371.

²⁸ COM 304 (2007), *Opinion of the European Economic and Social Committee on the Posting of workers in the framework of the provision of services — Maximising its benefits and potential while guaranteeing the protection of workers* COM(2007) 304 final, point 2.1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008AE0995> (online 30.10.2017).

²⁹ M. Schmidt (2001), *Das Arbeitsrecht in der Europäischen Gemeinschaft*, Baden-Baden, Published by Nomos, p. 254.

³⁰ Act of Polish Sejm of 5 December 2008 amendment of the Act - Code of Civil Procedure and some other acts, *Journal of Laws of the Republic of Poland*, abbreviated Dz. U. nr 234, poz. 1571.

subject to national jurisdiction anytime the worker has been posted to work in the territory of the Republic of Poland by an employer established in a Member State of the EU.

The numerous misconceptions associated with the imprecise term "entrepreneur operating in a Member State" consisted in setting up fictitious establishments in countries with favorable social and taxation rules and then posting workers to work in another Member State. The primary challenge – after the establishment of the Basic Directive – was to develop effective enforcement mechanisms³¹. To prevent such practices, on 15 May 2014, the Enforcement Directive to the Directive on the Posting of Workers in the framework of the provision of services - hereinafter referred to as the Enforcement Directive³² – was adopted, thereby amending Regulation (EU) No. 1024/2012 on Administrative Cooperation through the Internal Market Information System³³. The Basic Directive outlines standards for the protection of posted workers, but the provisions contained therein were unclear and left room for interpretation, with a number of cases having been submitted to the European Court of Justice for consideration.

It was then decided to introduce the Enforcement Directive with a view to providing entrepreneurs with legal clarity and thus facilitate their operation in the EU common market. The Directive defines the way workers are posted, indicates the type of information to be shared between institutions within a country, and strengthens cooperation and exchange of information between Member States. Key provisions for entrepreneurs are contained in art. 4 and art. 9 of the Directive, where the former sets out the elements for confirming the legality of posting, and the latter - administrative requirements and control measures applied by Member States. Adoption of the Enforcement Directive is seen in the political environment as the success of those Member States that seek to restrict posting.

The first Polish act on the posting of workers in the framework of the provision of services of 10 June 2016 officially entered into force on 18 June 2016³⁴. Both the Enforcement Directive and the above act impose on employers posting workers in the EU a number of formalities and mechanisms to control posting. A question arises as to whether such norms – among them the need to report one-day postings - are not excessively rigorous. In the light of the new rules on the supervision of posting, Schiffter calls for the legislation to be clarified as well as for clear guidelines to be defined by the Polish National Labor Inspectorate (Państwowa Inspekcja Pracy) in terms of occupational health and safety requirements³⁵.

³¹ J. Cremers, J. E. Dølvik, G. Bosch (2007), Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU, *Industrial Relations Journal*, Vol. 38, Issue 6, pp. 524-541.

³² 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, electronic version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0067> (online: 30.10.2017).

³³ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation') Text with EEA relevance, electronic version: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2012.316.01.0001.01.ENG (online: 30.10.2017).

³⁴ Act of Polish Sejm of 10 June 2016 posting of workers in the provision of services, *Journal of Laws of the Republic of Poland*, abbreviated *Dz.U. poz.* 868.

³⁵ K. Schiffter (2017), *Praktyczne aspekty stosowania ustawy o delegowaniu pracowników w ramach świadczenia usług*, *Monitor Prawa Pracy*, No. 5, pp. 242-250.

5. CONTROVERSY AROUND THE PROPOSED REVISION OF DIRECTIVE 96/71/EC

5. 1. Origin of the dispute

The dispute, which has been the subject of much discussion regarding the posting of workers, originated on 8 March 2016 when European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, M. Thyssen, put forward a reform of the Basic Directive, and the European Commission issued a legislative proposal to amend the then-current Basic Directive³⁶. Furthermore, the proposal was announced at a time when the previous directive still had not been well implemented, as it was only in 2014 that the legislative act was enacted to help enforce the employer's obligations regarding the posting of workers. The period for the implementation of the provisions relating to the Enforcement Directive had yet to finish and further proposals had not been preceded by any public debate.

5. 2. Superiority of the host country's legal system

A fundamental amendment consists in regulating employment by the legal system of the host country each time an employer posts a worker abroad for a period of 24 months. In other words, posted workers are to fall within the scope of foreign legal systems, and their contracts are to be governed by the law of the country to which they are posted. In fact, the employee is to be deprived of the choice of law. If a Polish worker is posted abroad to work in France on a construction site or in transportation (these are the industries where Poland is a leading country), he or she will be subject to French legislation as far as wages, labor codes, etc. Similarly, it is assumed that the period of work performed by the posted employee will be over two years (according to the original assumptions), which raises a number of doubts due to independent circumstances that may ultimately affect the form of being subject to a specific legislation. When referring to construction workers, it can be said that it is difficult to predict weather conditions in the workplace more than two years in advance. The same goes for those working as caregivers for elderly people. The length of work as a caregiver for a disabled person is determined by the needs of that consumer in the service market. In other words, caregivers of the elderly most often work until the passing of the person they take care of. Needless to say, it is difficult to predict the life expectancy of each and every senior citizen, which leads to the conclusion that the choice of applicable law regarding posted workers may rely on secondary factors, independent of workers themselves and the employers who post them abroad.

5. 3. Uniform regulations for the chain of subcontractors

Due to the complexity of subcontracting chains, trade unions often face a variety of issues relating to the regulation of working conditions and pay of posted workers³⁷. Research has shown that the same problem applies to workers posted by temporary staffing

³⁶ European Commission (2016), Proposal for a Directive of the European Parliament and of the council amending 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, 2016/0070 (COD), Strasbourg, electronic version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A128%3AFIN> (online: 30.10.2017).

³⁷ K. Alsos, L. Eldring (2008), Labour mobility and wage dumping: The case of Norway, *European Journal of Industrial Relations*, Vol. 14, Issue 4, pp. 441–459.

agencies (often Poles), who also experience lower wages and worse employment conditions than are granted to workers with standard employment³⁸.

The proposed assumptions include uniform regulations for the chain of subcontractors. This occurs when a company contracts a specific task to another company (subcontractor), and that company then entrusts that task to yet another entity, thus creating a chain of subcontractors. The proposed change consists in the fact that equal remuneration will be established for workers posted in subcontractor chains and for the main contractor's employees. This is to be achieved by applying the working conditions used by the main contractor, which means that the regulations concerning the posting of workers are to cover the entire chain of subcontractors within the framework of the implementation of the service.

5. 4. „Wage rate” instead of „minimum wage”

Next, a very important amendment proposed by the European Commission is the replacement of the concept of "minimum wage" with the concept of "wage rate" under the heading of the combating social dumping. Currently, the worker's remuneration must be consistent only with the guaranteed minimum wage. The minimum rate corresponds to the regulations of the country a posted worker has left for. In this respect, there is a well-defined case law of both national courts and the European Court of Justice. Just when the things were starting to settle down, the European Commission proposed replacing that wording with a more open, and even more ambiguous, term. As a result, it will not be entirely clear what wage the employer is to provide to the worker when posting him or her to another Member State.

One should probably expect severe sanctions for the failure to meet the wage conditions set out. The key discussion in this regard concerns the scope of the term "remuneration", i.e. what components should fall within its scope. The idea is for a Polish worker to earn as much as a French worker or a German worker (without accounting for the costs paid by the employer who posts workers). According to a research study conducted by the Kraków University of Economics and led by M. Benio, labor costs in the case where the service is performed by workers posted in another Member State add in 32% of total labor costs³⁹. The posting of workers in the light of the new regulations will undoubtedly increase the costs for employers, thereby making these updates seemingly beneficial to posted workers who, if legally employed abroad, will end up earning more money. With that being said, opponents of the proposed changes are arguing that many companies will consequently disappear from the cross-border labor market.

5. 5. Poland's position

Although M. Thyssen points out that the proposed amendment does not contradict the principle of subsidiarity - this issue was reported by Poland so as to maintain the status quo. The Sejm (Lower House of Polish Parliament) of the Republic of Poland stated that the proposal for a directive of the European Parliament and of the Council amending the Basic Directive was not in line with the principle of subsidiarity as set out in art. 5, sec. 3 of the

³⁸ J. Arnholtz, N.W. Hansen (2012), Labour market specific institutions and the working conditions of labour migrants: The case of Polish migrant labour in the Danish labour market, *Economic and Industrial Democracy*, Vol. 18, Issue 1, pp. 21–36.

³⁹ M. Benio (2016), *Koszty pracy pracowników delegowanych*, Published by Kraków University of Economics.

Treaty on European Union⁴⁰. This bill has been said to violate the principle of subsidiarity since the proposed directive fails to achieve the objectives of the intended action at EU level in a way that is improved in comparison with actions taken at national level⁴¹. A special opinion was issued by the Bureau of Research of the Chancellery of the Sejm in this respect⁴².

5. 6. Position of other countries and organizations

The above arguments of the Polish side during the debate over the shape of the new regulations were supported by: the Czech Republic, Hungary, Slovakia, Lithuania, Latvia, Estonia, Croatia, Romania, Denmark, and Bulgaria.

According to the Bulgarian Deputy Prime Minister, the principle of free movement of labor in the EU and the rights of posted workers should remain respected. This position was justified by the inability to neglect issues such as lack of social security or a specified working time. Interestingly, I. Kalfin spoke for the introduction of a personal social card for each EU citizen, which would include information on employment history, with details of wages and social contributions⁴³.

A similar stance was assumed by the American Chamber of Commerce in Romania, challenging the Commission's decision to revise the Basic Directive. According to AmCham, the current directive provides fair solutions and the proposed amendments (replacing the "minimum wage" with "remuneration" and setting out new rules on posting workers for periods longer than 24 months) will significantly limit the freedom to provide services guaranteed under the TFEU and will hamper the growth and creation of jobs in the EU⁴⁴.

Countries in opposition are: Austria, Belgium, Italy, Luxembourg, Norway, Sweden, Germany, and above all France. The current French president is facing a serious problem in his own country where unemployment is at 9% and economic growth falls short of 2%. Both these factors make it harder for him to retain popularity and consequently urge him to seek solutions.

Amending the Posted Workers Directive is one of the main themes of Emmanuel Macron's electoral campaign, hence his haste to give it a new course of action. French President described the current regulations of the Directive as "treachery of the European spirit", recognizing it as a tool for promoting social dumping⁴⁵.

⁴⁰ Consolidated version of the Treaty on European Union, electronic version: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT> (online 20.10.2017).

⁴¹ Sejm of 13 April 2016 on the recognition of a proposal for a directive of the European Parliament and of the Council amending Directive 96/71 / EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the context of the provision of services incompatible with the principle of subsidiarity.

⁴² W. Zgliczyński, B. Pawłowski, Opinion of 29 March 2016 on the amendment of 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, Sejm Analyses Office of the Sejm Chancellery, BAS-WASGiPU-WAPEiM- 657/16.

⁴³ <http://societalsecurity.net/MediaWatch/article/kalfin-expect-long-discussions-over-revision-posted-workers-directive> (online 30.10.2017).

⁴⁴ Position Paper of American Chamber of Commerce in Romania (2017), https://m.amcham.ro/UserFiles/committeePaper/POSITION%20PAPER%20AmCham%20secondment%20FINAL_03241304.pdf (online: 30.10.2017).

⁴⁵ A. Durand, A. Sénecat, Que contient la directive européenne sur les travailleurs détachés? *Le Monde* of 23 August 2017.

Competition from Eastern Europe is therefore a delicate matter from the French perspective⁴⁶. E. Macron's goal is to convince the public their president cares for their interests by protecting French citizens from external forces. The proposed restrictions on the posting of workers on the French side constitute an extension of the infamous legend of Polish plumber (French: plombier polonais).

5. 7. Initial position of the Visegrad Group

On 11 May 2017, Prime Ministers of the Visegrad Group issued a joint statement in which they objected to the proposed amendment. They pointed out that the national parliaments of eleven Member States (representing over 100 million EU citizens) expressed their views using yellow cards, which unfortunately was not taken into account by the European Commission⁴⁷. In the opinion of the Visegrad Group's Prime Ministers, draft regulations on remuneration, subcontracting and posting for periods longer than 24 months will negatively affect price competition and will increase the cost of the provision of services in the EU⁴⁸.

5. 8. Latest findings

Following the vote of the European Parliament's Committee on Employment and Social Affairs on 16 October 2017, a EU Council meeting was held in Luxembourg, with the participation of the Ministers of Member States in charge of employment and labor. The meeting was intended to reach a compromise on the revision of the Directive, but several hours of discussion were not enough to do so. The document was ultimately rejected by Poland, Hungary, Lithuania and Latvia. As can be seen, difference in opinion was present even within the very Visegrad Group, with the Czech Republic and Slovakia having backed the proposals.

United Kingdom, Ireland and Croatia abstained from voting. On the night of 23 October 2017, an agreement was signed to limit the period of posting to 12 months with the possibility of extending it by additional 6 months. What is more, Poland wanted the Directive not to refer directly to transportation, but this topic ended up outside the scope of the Council's proposal. In line with the adopted stance, Member States will have 3 years to implement the new legislation once it has entered into force. In turn, companies will enjoy a transition period of 4 years to adapt to the new regulations. The final form of the revision of the Directive on the Posting of Workers must be further elaborated in the negotiations between the representatives of the European Commission, Members of the European Parliament (MEPs) and Member States themselves.

⁴⁶ A. Meier, Wie Macron die Regeln für ausländische Arbeiter verschärfen will, *Der Tagesspiegel* of 23 June 2017.

⁴⁷ D. Fromage, V. Kreilinger (2017), National Parliaments Thrid Yellow Card and Struggle over the Revision of the Poted Workers Directive, *European Journal of Legal Studies*, Vol. 10, Issue 1, pp. 125-160.

⁴⁸ Joint statement of the Prime Ministers of the Visegrad Group on the amendment of Posting of Workers Directive 11 May 2017, electronic version: https://inicjatywa.eu/wp-content/uploads/2017/05/wspolne_oswiadczenie_premierow_grupy_wszechradzkiej_dot_zmiany_dyrektywy_ws_delegowania_pracownikow.pdf. (online: 30.10.2017)

6. CONCLUSIONS

In light of the above considerations, it should be stated that the assessment of the proposed legislative amendments related to the posting of workers depends on the assumed research perspective. From a worker's standpoint, these changes are a step in the right direction since, according to the idea of equal pay for equal amount of work, the regulations strengthen the position of the Polish employee on the market. The issue of social dumping will not be resolved until there are equal wages for equal work across Europe. This proposal can be considered as a move towards underlying a social foundation of the European Union. In the opinion of the author of this paper, it makes little sense why Polish posted workers are paid at the minimum rate in the host country, while their colleagues in the same country earn wages several times higher working on the same position.

For all it is worth, it appears to be mere discrimination on the grounds of nationality. The European Commission's proposal concerning equal remuneration should be looked upon favorably as making all employees equal will help eliminate discriminatory practices. Employers are now required to pay posted workers the local minimum wage, but as soon as the discussed legal amendments enter into force, they will have to pay them the local remuneration of the host country. The difference in remuneration is due to the various types of allowances and bonuses resulting from party-to-party agreements and local legislation.

One can only partially agree with the opinion of sociologist and expert on international affairs, R. Żółtaniecki. While it can be seconded that negotiations on the revision of the Posted Workers Directive are a struggle for power, and for who decides the today and who will be deciding the tomorrow of Europe, R. Żółtaniecki at the same time deems the Directive as a protectionist act, arguing that no one is going to pay Polish people local rates and so they will eventually return to Poland and potentially increase unemployment there⁴⁹. At present, however, there is no empirical data to support that thesis and in no way does it imply that these workers will be replaced by native employees. General as that statement is, it can be said that Polish people fill the industry gaps on the European labor market. France is in need of roofers and turners, while Germany demonstrates a shortage of elderly care workers and there is no one who could take over that job smoothly.

When evaluating the changes from the perspective of the Polish state, it should be pointed out that the Polish Social Insurance Institution is bound to lose big time on this solution. A separate issue is the application of the provisions of the EU coordination of social security systems, which have raised a number of controversies already prior to the draft amendments⁵⁰. It will certainly prove problematic to resolve those cases where a person remains simultaneously employed by two independent entities and is posted to work in the territory of different Member States at the same time⁵¹.

It is also important to bear in mind what all this means for employers. Under the present legal circumstances, minimum remuneration in the host country may be derived from different sources. There are countries with a universally applicable minimum pay rate, and

⁴⁹ R. Żółtaniecki, O nowelizacji dyrektywy ws. delegowania pracowników: Tu chodzi o władzę w Europie, *Dziennik Gazeta Prawna* of 28 August 2017.

⁵⁰ K. Ślebzak (2013), Proceduralne aspekty ustalania ustawodawstwa właściwego – wybrane zagadnienia, *Ubezpieczenia społeczne. Teoria i praktyka*, No. 11, pp. 28-34.

⁵¹ K. Ślebzak (2016), „Delegowanie równoległe” w świetle przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, *Praca i Zabezpieczenie Społeczne*, No. 8, pp. 9-14.

others with sectoral minimum rates (i.e. set out for a particular industry) whose amount is determined based on negotiations between trade unions and employer organizations). In addition, there are countries that have recently changed their systems, among them the Federal Republic of Germany that until 2015 used to apply sectoral wages only and now has a statutory minimum wage rate stipulating that all workers employed in Germany are to receive a minimum remuneration of €8.5 per hour (until 31 December 2017 transitional provisions remain in force, i.e. instead of minimum wage rules, rules in accordance with the collective agreement for representative parties are in place)⁵². There are also countries, which currently do not have any nationwide regulations governing minimum wages. One example is Denmark. Researchers from the Department of Political Science at Aalborg University report that Danish workers, despite surprisingly strong collective agreements, are interested in minimum wage arrangements. Therefore, we can expect changes in this matter in this country⁵³.

The above observations imply that finding oneself in a world of the host country's legal rules will cause many difficulties. It will become necessary to obtain a better understanding of a couple, or even dozens, of collective agreements and detailed regulations that vary from region to region within a particular Member State. Nobody is capable of learning all the systems and even employers may find it difficult to get accustomed to the labor rules of the host country. Replacing the minimum wage rate with the payment of remuneration means taking into account all aspects of remuneration.

This can be, for instance, a Christmas supplement, a bonus for work performed in particularly difficult conditions (formulations unknown to Polish law), various types of allowances due to high qualifications, a bonus for work performed in unfavorable atmospheric conditions.

The problem is that depending on the country - or sometimes the region, or even the particular collective agreement - these extras are of a different nature, varying in time of their payment and method of their calculation. In the Scandinavian countries for example, the entire culture of job creation relies on collective labor agreements, i.e. there is virtually no labor law imposed directly by the legislature. In Poland, on the other hand, social partners are for the most part insufficiently competent to regulate labor law. The change in question, albeit in favor of posted workers, brings along with it a legislative uncertainty of a kind, making it more difficult for employers to ensure that the worker's remuneration is correctly calculated.

A Polish employer posting workers abroad will nevertheless not be exempted from the obligation to apply Polish labor law, which entails further legal doubts resulting from the superimposition of two legal orders. Which is to say there will be rules in place that are mutually exclusive, such as overtime rules, rules of employment contract termination, or the fate of an employee whose company has been taken over by another company.

It will be a long time before the various labor law systems work out the best solutions between each other. R. Zann from University of Strathclyde holds a corresponding opinion, according to which: „The Commission's most recent proposal is certainly a step in the right

⁵² Gesetz zur Regelung eines allgemeinen Mindestlohns, electronic version: <https://www.gesetze-im-internet.de/millog/> (online: 30.10.2017).

⁵³ H. Laust, J. Henning (2017), Development in the Regulation of Wages and Working Conditions: The Employee Perspective, *Nordic Journal of Working Life Studies*, Vol. 7, Issue 1, pp. 3-17.

direction however it is limited in its potential due to the legal base and the continued way in which it attempts to europeanise the applicability of national labour law systems⁵⁴.

The European Commission's original proposal for the amendment spoke of 24 months and the same approach was adopted by the European Parliament's Committee on Employment and Social Affairs. However, some EU countries want this period to be shorter. France still opts for 12 months. The difference in opinion also concerns whether the provisions of the new directive apply to workers employed in ground transportation as well. It was not possible to reach an agreement in this respect on 23 October 2017, or even as much as clearly exclude truck drivers from the rules of posting in the light of the revision of the Directive – as posited by Poland. Neither was it possible to adopt the provision allowing to discount “short-term postings” from the posting period. With that being said, the case has been in some way deferred until certain specific rules have yet to be enacted. These will be developed by relevant Ministers of Transportation who are to participate in negotiations on what is known as mobility package.

The approval of the concept of equal pay by the author of this paper does not exclude the existence of reasonable grounds for believing that the motives for updating the Directive on the Posting of Workers have been quite different from providing equal pay in the interest of equality of workers in individual Member States. The impression, instead, is that some countries will want to use this reform to get rid of Polish competitors from the cross-border market for services.

Consequently, the final version of the revision of the Basic Directive should be closely followed. One must remember that even these regulations, in their final form, will not combat social dumping completely. This is due to the fact that certain entities (such as self-employed or unregistered workers) will not be subject to the regulations of the Posted Workers Directive, and so they will still be able to compete with lower labor costs on the EU market for services.

At the same time, however, it is worth noting that in the long run the interdisciplinary nature of the issue under consideration favors further research covering the scope of labor law, social security law, European law (on the impact of individual legislations on changes in the revision of the Basic Directive). Another interesting research aspect makes the analysis of employment policy in terms of Britain's exit from the European Union⁵⁵. Quantitative and qualitative research in the field of sociology of work and economics will also prove significant in the context.

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⁵⁵ S. Lavery (2017), ‘Defend and extend’: British business strategy, EU employment policy and the emerging politics of Brexit, *The British Journal of Politics and International Relations*, Vol. 19, Issue 4, pp. 696-714.

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