# TO PROTECT OR NOT TO PROTECT? ANALYSIS OF SOME KEY FACTORS OF THE AMENDED RULES OF POSTING AT THE INTERSECTION OF FREE MOVEMENT OF WORKERS AND THE FUNDAMENTAL RIGHTS OF WORKERS*

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**ABSTRACT**:*The free movement of workers as a fundamental freedom – laid down in Article 45 of the Treaty on the Functioning of the European Union – is supported by fundamental right guarantees from more sides. These guarantees primarily focus on the economic side of the labour market and of employment in general. This factor has a huge impact on the workers' social rights and legal interests as well. However – besides the economic circumstances – free movement has a great effect on the workers' social situation as well, which means that the traditional, socially-motivated interests that stem from labour law should also be in the focus of the regulation of free movement, otherwise workers would not be able to exercise this fundamental right properly. Therefore, free movement of workers shows a special duality of interests, which is on the one hand based around the economic necessity and on other hand around a stronger need for protecting the social interests of workers. The latter is reflected in some recent legislations in European Union law and this phenomenon shows the importance of the protection of workers' rights in general. We can see the social and labour market development based and planned on the European Pillar of Social Rights (2017) and specifically the reform of Directive 96/71/EC on the posting of workers (2018) because both new directions clearly show the need for strengthening the social protection of posted workers in the field of equal treatment or the minimum guarantees of employment. This paper analyses these new ways in the regulation of posting of workers.*

**KEYWORDS***: European Pillar of Social Rights; free movement of workers; fundamental social rights; labour law; posting of workers.*
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## 1. INTRODUCTION

In the social policy of the EU, the area of the protection of workers' (social) rights is closely linked to the freedom of movement for workers provided by Article 45 of the

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Treaty on the Functioning of the European Union (hereinafter: TFEU) (Guibboni 2010). Of course, the socially motivated protection of rights is just as important within a country's national borders as in terms of the mobility of workers between Member States (hereinafter: MS). Reich points out the necessary link between the free movement of workers and the protection of social rights, in connection with the fundamental rights and freedoms related to posting (Reich 2008 p. 125-161). It can be established, however, that in the absence of the most fundamental guarantees of labour law, such restrictions can be imposed on this freedom that make it impossible to exercise it, and therefore, Article 45 of the TFEU requires certain support from this side (Giubboni 2015). Consequently, in the social policy of the European Union (hereinafter: EU) – and in its latest area, in the European Pillar of Social Rights (hereinafter: EPSR)[1] – it is indispensable to also address the questions related to the free movement of workers when examining their legal position. Even in case, in the opinion of Neal, the thorough exploration of this topic and the enforcement of the related rights have traditionally caused significant difficulties in the EU law and on the unified internal market (Neal 2013). These questions must be addressed, in particular, with a view to the fact that the free movement of workers between MSs, in the form of posting, is governed by special rules.[2] In other words, the labour law and social aspects of the freedom of movement between MSs can be described mostly through the rules applicable to posting, but the issues of workers' mobility, with aspects related to fundamental rights, also constitutes an organic part of the reform concepts of the EPSR (Hacker 2019).

As a complementary aspect of this freedom, it should be mentioned that workers do not emerge on the labour market only as "social" subjects – i.e. as the necessary beneficiaries of the abovementioned protection of rights – but their economic activities also fall within the scope of the freedom to provide services.[3] However, this makes the examination of rights of social nature even more complex, since it would necessarily result in the undesirable distortion of the labour market (economic) positions if workers as service providers would enjoy an excessively strong protection of their status, as this would be fundamentally contradictory with the operating principles of the market. At the same time, a significant duality characterises the collision of these mechanisms, since workers as economic actors may, in principle, appear on the labour market with equal conditions, meaning that they do not need protection. The idea of the freedom to work, however, may not lead to the abolition of the common, EU-level labour law guarantees (Pennings 2015 p. 138-144), since even though it is irrelevant in which MS, but certainly in one of them, workers must be protected in the course of their economic mobility by social and labour law norms. In this respect, however, working across MSs is particularly risky for the workers.

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[1] European Pillar of Social Rights. https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_hu.pdf (Accessed: 22 November 2019).

[2] On the right of free movement between MSs in general, see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[3] TFEU, Articles 56-57.

In the light of the foregoing, the subject of this paper is a special interface being present in the mentioned duality, since the regulation of posting, namely, the employer's possibility of temporary posting workers to another MS, connects the free movement of work and the freedom of provision of services.[4] However, posting[5] from the point of view of fundamental rights, is mainly based on the freedom of provision of services, but not on the free movement of workers – having regard to the fact that posted workers factually do not enter the labour market of the receiving country[6] –the legal system of posting itself states that free movement in general is of high importance,[7] namely, in the circle of the interests and rights of the workers these subjects are still closely linked. Basically, to manage the workforce this way is not forbidden, but on the actually examined area of social policy important restrictions,[8] norms which definitely protect the economic and social interests of workers, are present, however, in certain cases even fundamental freedoms can be limited, but only to a necessary extent focusing on the criteria of the labour market. It is important to add that mobility of workers in the framework of posting is only one of the basic forms of free movement of workers (Sjödin 2013), even if its regulation is special and the particular different fields assume unified legal norms (labour law, social law) which are different in the circle of free movement. Further forms of work are for example, seasonal work or fixed-term employment, which are also closely linked to the right to work and free movement of workers resulting the specific social and economic fundamental basic rights (van der Mei, Melin, Vankova and Verschueren 2018).

Notwithstanding all these characteristics, posting is an activity of fundamentally economic character, in which it is not the worker's social interests that dominate, despite the fact that the existence of such guarantees is essential, even in the face of all the practical difficulties (Kártyás 2017). Accordingly, the present paper is about the minimum requirements applicable to guarantees that substantially determine the legal status of posted workers, also with a view to the principles and fundamental rights under the EPSR, as well as the relevant provisions of the Charter of Fundamental Rights of the European Union (hereinafter: CFREU). The questions concern the possible efficiency of these new rules, as well as the extent to which they may be considered as "worker-friendly." Of course, the efficiency of these methods, even despite the amended rules, is questionable; the way posting is regulated, in fact, provides a good example to illustrate

[4] Posting covers the labour market situations in which an employer operating in a MS sends its workers temporarily to another MS for the purpose of carrying out work duties within the framework of freedom of provision of services but only. In the receiving MS, the posted workers work under the instructions and supervision of another employer and the applicable laws are defined by the posting directive.

[5] See the relevant laws: 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 and the amending Directive (EU) 2018/957 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.

[6] C-113/89. Rush Portuguesa Ldª v Office national d'immigration and C-307/09. Vicoplus SC PUH (C-307/09), BAM Vermeer Contracting sp. zoo (C-308/09) and Olbek Industrial Services sp. zoo (C-309/09) v Minister van Sociale Zaken en Werkgelegenheid.

[7] Para.1 of the preamble of Directive 96/71/EC and para. 1 of the preamble of Directive (EU9 2018/957.

[8] The basics and original ideas of the amendments of 2018 first appeared in 2014 and there was a previous proposal regarding this concept in 2016. See in details: Hungler 2016. The amending directive was published on 28 June 2018.

that the differences between the MSs in terms of economic development and efficiency cannot be resolved with EU rules, or only with great difficulties (Hungler 2018).

This special area of the free movement of workers is therefore in the focus of the present paper, also addressing the rules that support or perhaps restrict the same, as well as the possibilities of protecting the social rights of EU workers. The basis of the provision of the service is the relationship between the worker and the employer, which cannot be interpreted without real legal guarantees of workers' rights (Kiss 2000 p. 36-37, 53, 59-60) regardless of the place or mode or work. Also with a view to this fact, in the present study – which constitutes an integral part of a research project of larger volume[9] – the new posting directive[10] will be analysed in detail, answering such questions that may be grouped around the issue of higher-level social protection within the frameworks of the EPSR. It is not a purpose of this analysis to discuss all provisions of the directive in detail, as only those rules have been highlighted that are related to the worker's fundamental social rights both conceptionally and substantially, as well as those that are also relevant from the point of view of the free movement of workers.

## 2. THE RELATIONSHIP BETWEEN THE RULES APPLICABLE TO POSTING AND THE FUNDAMENTAL RIGHTS OF WORKERS, WITH SPECIAL ATTENTION TO THE EPSR

Also in awareness of the general points of social policy connection discussed in the introductory thoughts, the question may arise how the rules applicable to the posting of workers between MSs is linked to the protection of workers' rights constituting the subject of the research, while we can fundamentally treat it as an economic activity, a service.[11] It is my position that the essence of the rules consists of the social minimums applicable to workers which are to be guaranteed regardless of the place of work (the MS where the work is performed), since in case workers are no longer subject to the labour laws of their own MS, they become exposed and their legal status is uncertain.[12] All of this, however, also cannot lead to the legislator creating standards of too high level, since the restrictive effect of such standards of competition would constitute a significant risk on the freedom to provide services. In terms of social values, the economic integration – which is "protectionist" from a market perspective and "protective" of rights from the workers' point of view – raises significant dilemmas for the whole of the EU integration (Countouris and Engblom 2015). Causing further difficulties in the rules is that we cannot conclude, beyond all doubt, that the interests of the workers and their employers are shared, since it follows from the very nature of posting that certain frictions – especially in terms of the social circumstances of the posted person – are inevitable, and

[9] The topic of the research is the protection of workers' rights, with special attention to recent changes in those rights in EU laws.

[10] It is necessary to note that Directive (EU) 2018/957, implementing a comprehensive amendment of Directive 96/71/EC, was challenged by Hungary and Poland at the European Court of Justice on 2 and 3 October 2018, respectively. The MSs brought action for the annulment of the directive claiming, among other things, that it was not adopted on the appropriate legal basis and that it infringes Article 56 TFEU. No judgment has been given in the case until the completion of the manuscript of this paper (30 November 2019).

[11] Recital 3 in the preamble to Directive 96/71/EC.

[12] Recital 10 in the preamble to Directive (EU) 2018/957.

therefore, the fundamental norms of the protection of workers' rights strive to address exactly these challenges.

It appears natural that, beyond the special set of rules that regulate posting, the common norms of employment and social laws held by employees in a MS are applicable to all posted workers as well. This is important to mention because the reform of the posting directive – even though it does have a certain special character due to its labour market significance[13] – cannot be examined in isolation, and cannot be detached from the general process and range of ideas characterising today's social policy in the EU. More specifically, primarily those aspects of social policy are relevant that concern workers' rights, since the new posting directive was practically the first new piece of legislation created under the aegis of the EPSR[14]. What the above proves is that we must, indeed, address it as one of the most pressing problems of the EU's labour market. In this context, the link with the protection of workers' rights is easy to demonstrate: whether we examine this area from the point of view of fundamental rights,[15] or even via the EPSR, the rules applicable to posting encompass several key areas (ranging from access to work, equal treatment, working conditions to social security and social protection). Furthermore, since the new norms were conceived – among other things – to address the problems of the original directive arising in practice, we can indeed consider the strengthening of the mechanisms of the new directive designed to protect workers' rights as an important development. All of these points of view must, therefore, be interpreted within the system of workers' rights, and in my opinion, several conclusions can be drawn from the rules applicable to posting: since these rules address a situation carrying economic risks inherent on the employer's side and that has significance across several MSs, the fundamental freedoms mentioned above, as well as the operational mechanisms of the labour market in general, also appear in the new directive.

Even upon accepting the above reasoning, which primarily concentrates on the legal status of workers, however, the efficiency of the legislation can be called into doubt (Dudás and Rátkai 2017), as it is questionable to what extent the economic interests of the MSs (employers) are supported by a strong(er), worker-focused rules, and also to what extent this may facilitate the activity and mobility of workers as economic actors.[16] An important role is given in the rules, therefore, to the protection of workers' interests which is manifested, among other things, in the strengthening of the principle of equal pay for equal work.[17] In addition to the social character of the latter principle, it also has a strong economic aspect, which means that these points of view cannot be treated as fully independent from each other. A consensus can be observed, however, on the side of

[13] Recital (9), (10) and (24) in the preamble to Directive (EU) 2018/957.

[14] Joint statement on the revision of the Posting of Workers Directive. European Commission, Brussels, 2018. https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_1405 (Accessed: 22 November 2019).

[15] See, in particular, Article 21 (Non-discrimination) and Article 31 (Fair and just working conditions) of the CFREU.

[16] Bringing the legal guarantees of posting into the foreground and the protection of workers constitute an integral part of the further reforms facilitating free movement. See: Fair labour mobility: Commission welcomes agreement on the European Labour Authority. European Commission, Brussels, 2019. https://ec.europa.eu/commission/
presscorner/detail/en/STATEMENT_19_844 (Accessed: 2019 November 22.).

[17] Recital 6 in the preamble to Directive (EU) 2018/957.

the decision-makers in that efficient rules that are in fact compatible with the purpose of posting cannot exist without guaranteeing the fundamental interests of workers on an appropriate level, and with a view to this, in terms of the effectiveness of the rules, it is definitely worth taking the EPSR and other elements of the social policy acquis into consideration.

Even though the institution of posting – despite its obvious social relevance – does not appear independently in the EPSR,[18] on the level of the rules it is still necessary to reckon with its facets related to social and employment law, especially in terms of the protection of the rights of workers (Schlachter 2010). On the basis of the above, the link between these rules and several other areas of regulation that are topical in the EU's social policy agenda and strengthen the protection of workers' fundamental rights (e.g. informing workers,[19] setting up the European Labour Authority[20]) is unquestionable, and these social policy aspects in aggregate have a substantial effect on the free movement of workers.

## 3. IN THE PRINCIPLES AND CONTRADICTIONS OF THE AMANDMENT – EFFECTIVE SOCIAL PROTECTION?

A few months after the adoption of the EPSR[21], as a substantial result in one of the major areas of regulation, the comprehensive amendment of the directive on posting between MSs, originally created more than twenty years before, was adopted (Hendrickx 2018). This positive development gives a faithful reflection of those processes in labour law that also gave rise to the EPSR and its reform processes (Hendrickx 2017). In this respect, it can be almost considered as symbolic that the posting directive was among the first actual results.[22] A central element of this reform is the regulation applicable to minimum wage and, in general, to the minimum of remuneration,[23] at the same time, it should be clarified on the level of legislation or legal practice what wage elements belong under the scope of the prescribed minimum remuneration (Voss, Faioli, Lhernould and Iudicone 2016 p. 32). It is worth mentioning that these reforms are fundamentally socially motivated, and they aim to provide a high level of protection for workers' interests despite the fact that such rules of guarantee may also have certain negative impacts from an economic and labour market point of view.[24] The necessity of the reform is also underlined by the scale of millions of workers employed in the

[18] These key areas are the following: equal treatment and equal access to the labour market opportunities, fair working conditions and social security.
[19] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
[20] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.
[21] The EPSR was adopted by the MSs at the Social Summit in Gothenburg, on 27 November 2017.
[22] The commitment of the Commission is also firm in connection with the modernisation of the Working Time Directive or the regulations on social coordination, closely linked to posting.
[23] Among the minimum conditions regulated in the Directive, Dudás and Rátkai consider the issue of remuneration, otherwise leading to numerous problems in practice, as being of key importance. See: Dudás and Rátkai p. 33-35.
[24] These negative impacts are illustrated by the East-West opposition, which is typically cited in connection with posting. In connection with the reform, see: Zahn 2017, qtd. in: van der Vlies 2018.

framework of posting,[25] as well as the intention of the European Commission to support employee mobility in order to strengthen the free movement of workers.[26]

It should be noted that the fundamental aim of the 2016 reform, which can be regarded as the immediate antecedent of the amendments, was the simultaneous improvement of working conditions and fair competition,[27] which means that both of the abovementioned social and economic criteria appeared in the text of the proposed reform, even though in the light of the more recent developments it is difficult to conceive of a real balance between these aspects in the new rules. Consequently, it can be concluded that avoiding the distortion of competition was already a priority of the first comprehensive reform; however, Directive (EU) 2018/957 is striving to emphasise this even more strongly. A more spectacular form of appearance of the above is the strict requirement of pay equality. Overall, the strengthening of the social and the market sides may jointly facilitate the creation and development of a market that is fair and does not distort or restrict competition, since the economic significance of posting is too large for the financial advantages hoped by employers to be pushed into the background. Nevertheless, the alignment between workers' interests of social nature and the economic advantages hoped to be achieved by way of posting is, in fact, difficult to imagine even in case of more clarity concerning the legal norms (in details: Bankó and Zaccaria 2018).

The essence of the basic principles of the new directive can be summarised in terms of the following points: equal pay for equal work also in case of posted workers, long-term posting, and certain questions in combination with temporary agency work.[28] In my opinion, the legislator must approach the topic of the "posting economy" carefully, since in the intersection of the freedom to provide services and freedom to work we can see a necessary choice of value, as the enforcement of social criteria in the form of minimum workers' rights can lead to further contradictions. Despite the above, the already mentioned issue of equal pay is a central element of the reform, which is aimed to

[25] According to data from 2014, this number was approximately 2 million, and the proportion has been continuously and perceivable increasing (between 2010 and 2014, for example, by 45%). See: http://europa.eu/rapid/press-release_IP-16-466_en.htm (Accessed: 30 November 2019). By 2015, the number has certainly exceeded 2 million, and the increase by 2015 was 41.3%, and even though this accounts for less than 1% within the entire body of workers in the EU (0.9%), it can still be regarded as a large number. Another interesting figure is that certainly more these people are posted between neighbouring countries; in certain sectors, this proportion can be as high as 80%. See: http://ec.europa.eu/social/BlobServlet?docId=15181&langId=en (Accessed: 30 November 2019). The rate of increase between 2010 and 2016 was already 69%, and the total number of workers affected was over 2.3 million. See: http://ec.europa.eu/social/BlobServlet?docId=19079&langId=en (Accessed: 30 November 2019), p. 1.

[26] Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market. European Commission, Strasbourg, 2016. http://europa.eu/rapid/press-release_IP-16-466_en.htm (Accessed: 22 November 2019).

[27] Commission Staff Working Document. Executive Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. European Commission, Strasbourg, 8.3.2016 SWD(2016) 53 final. https://www.cep.eu/fileadmin/user_upload/cep.eu/Analysen/COM_2016_128_Entsendung_von_Arbeitnehmern/SWD_2016__53_Entsenderichtlinie.pdf (Accessedon 11 November 2019).

[28] Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market. European Commission, Strasbourg, 2016. http://europa.eu/rapid/press-release_IP-16-466_en.htm (Accessed: 22 November 2019).

prevent the dumping of cheap labour[29], and this once again raises the threat of a conflict between fundamental workers' rights and free market (economic) competition (in details: Giesen 2003). Even though one of the central ideas of the reform is the avoidance of the legal conservation of criteria that allowed in practice an open differentiation between posted and "own" workers, the above may still appear as problematic. While from the workers' side, remuneration is undoubtedly one of the key questions of work in another MS, it may still appear that the proposed reform does not go beyond the apparent, symptomatic treatment of the existing problems and difficulties,[30] as the directive itself also lists a number of other, fundamental guarantees that apply to the conditions of work. It would be worth, therefore, putting the task of thinking, these further on the agenda; however, the problem of posted workers' fundamental right to social security also remains a similarly open problem, with special attention to free movement[31] and the other fundamental rights mentioned in the EPSR.[32]

At the same time, on the employers' side, the apparent differences that have survived to this day between the employment of "western" and "eastern" workers[33] – including, in particular, in terms of remuneration – cast a significant shadow on the expected positive aspects mentioned above, since the costs of employment fundamentally restrict the economic latitude that these employers have. It is a contradictory phenomenon, however, since "eastern" workers can fight to protect their own interests exactly so that the equality of working conditions should not be a strict legal requirement, while the interests of the "other side" include as extensive unification as possible, also including fundamental working conditions and remuneration. The freedom to provide services and the free internal market may produce certain "errors" if the rules of posting are not properly settled, and provides opportunities for abuse and for legal constructions as well that are justified by economic necessities (Bernsten 2015), but are not transparent. If we also add to the above the set if workers' interests, which are obviously at odds with the preferences of employers in the majority of cases, then the optimism mentioned at the beginning of this paper can be even more eloquent, since the harmonisation of these economic and social interests is impossible on the level of the directive. Furthermore, since the posting directive explicitly settles also currently the expectations toward fundamental working conditions, the difference of the MSs' employment requirements creates a peculiar reflection for the rules in the directive also in such fundamental

[29] Par. 63 of the judgment in case C-244/04, Commission of the European Communities v. Federal Republic of Germany, as well as par. 41 of the judgment in case C-369/96, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (case C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96).

[30] What is meant by this is the difference between the creation of a formal equality of rights and an actual equal status.

[31] On the relationships between posting to another MS and the regulations on social coordination see, for example: Judgment in case C-527/16, Salzburger Gebietskrankenkasse és Bundesminister für Arbeit, Soziales und Konsumentenschutz v. Alpenrind GmbH and Others.

[32] Chapter II of the Pillar can be typically mentioned as belonging here, which includes the right to secure and adaptable employment, as well as ensuring the conditions necessary for collective action.

[33] In numbers: According to the 2014 figures, 54% of all employees working in the framework of posting (approximately 2 million people) arrived in another MS from the 15 western MSs, while this proportion after the eastern enlargement of the EU is 86%. See: https://www.cep.eu/fileadmin/user_upload/cep.eu/Analysen/COM_2016_128_Entsendung_von_Arbeitnehmern/cepPolicyBrief_COM_2016__128_Posting_of_Workers.pdf, p. 1. (Accessed: 23 November 2019).

questions as the concept of the worker or the minimum wage,[34] since directive 96/71/EC does not define these concepts.[35] These differences, however, cannot constitute a substantial obstacle to a higher-level, socially motivated protection of rights, especially with a view to the fundamental rights of freedom to work and freedom of movement. In this respect, the EU requirements pertaining to applicable law constitute a fundamental guarantee (Kártyás 2019B).

## 4. THE PRINCIPLE OF EQUAL TREATMENT AS A FUNDAMENTAL GUARANTEE FOR WORKERS' RIHTS

Quoting the theoretical question asked by Countouris and Engblom, it can be raised that in case, in connection with the free movement of workers, the principle of equal treatment between workers arriving from different MS is a fundamental requirement, then why is the same not evident in case of the same services provided (work performed) by workers arriving from different MSs? (Countouris and Engblom 2015). What is meant by the latter, of course, is posting, and it is worth calling attention also to the fact that in the scope of the free movement of workers, it is difficult to enforce the principle of equality due to the different systems of employment and social laws of individual MSs (Verscheuren 2015), and furthermore, in case of posting as an economic activity, in many cases there is not even a clearly formulated need for this. We can point to an important economic relationship in this respect also at the intersection of the challenges and the economic necessity of employers' and workers' "mobility" (Neal 2013 p. 33-71). In any case, even though the principle of equality conceptually protects workers – primarily with a view to the differences between the labour markets and economic circumstances in the MSs, as well as to possible abuses – but predictability and the ability to see the range of economic possibilities is also in the interest of employers. In other words, we are simultaneously faced with the economic and social interests competing with each other in connection with the free movement of workers, as well as with the social and employment laws of different MSs also in competition, but the common point must by all means be the principle of equal treatment from the point of view of workers. As the posting directive of 2018 expressly mentioned, the purpose of the law is to ensure competition for achieving real productivity and equal market opportunities, rather than competing for cheap labour force (at least, this would be ideal situation that the directive wishes to help achieve) (Kártyás 2019A).

A central issue with respect to the rights of posted workers is, therefore, the principle of equal treatment, and specifically, the consistent enforcement of the principle of equal pay for equal work. This is because it is an underlying problem that the wages in the MS to which a worker is posted do not fundamentally affect the remunerations earned by workers otherwise working in the same manner and place but posted from another MS, which may in a given case even lead to collective action by the workers, although only within strict limitations (Nystrom 2010, Hős 2008 and .Kiss L. N. 2015). It can be therefore detrimental to posted workers from an economic, social and legal point of view

[34] For a detailed analysis of the directive, also covering the concepts, see: Prugberger 2007 and Prugberger 2016.
[35] See in details: Bankó and Zaccaria 2018 p. 148.

as well. The intention of the legislators was evidently aimed at eliminating this contradictory situation, although it should be noted that the rules applicable earlier were not necessarily strengthened by the power of novelty.[36] At the same time, the significance of the question is indicated by the fact that in the course of the tripartite negotiations serving as the basis for the amendments, the intention to eliminate any wage discrimination was given a central role. The foundations were given in the course of the negotiations in 2017-2018, since the European Commission communicated as important news already on 8 March 2016 that, in the course of the revision of the directive, an agreement was reached between the negotiating partners, among other things, on this point, also emphasising how important a step this can be in facilitating efficient cooperation between the MSs, and more specifically, in the transparent regulation of working across MSs.[37] In the final analysis, on the basis of the above, the intention of the legislator was clearly to ensure that the principle of equal pay for equal work should be enforced in all circumstances with respect to posted workers.

**4.1. The relationship between the equal treatment of workers and posting**

The principle of equal treatment in terms of remuneration must be used as a central element of posting vis-à-vis the own workers of the receiving state, but the guarantee of this fundamental right must basically extend to all conditions of work (van Hoek and Houwerzijl 2011). From a legislative theoretical perspective, the fundamental element of the principle of equal treatment in this area consists of the legal status of posting inherent with a risk from a social point of view, as well as the ban of discrimination based on nationality.[38] All of this appears in the systems for the protection of social rights that vary across MSs, and in this sense, equal pay is a shared expectation, but its implementation may meet special difficulties, primarily related to the labour markets.

Despite the clear nature of the rules, it is questionable in which of the MSs the principle of equal pay for equal work can be observed,[39] when it is not simple to comply with that principle even within the boundaries of the MSs.[40] It should be noted that it is exactly the sometimes quite significant differences between the labour markets of the MSs that the principle of equal pay for equal work, in its *sui generis* form, is designed to bridge,[41] which is, of course, not necessarily relevant in the relationship of posted vs. "own" workers, but rather on the basis of certain protected characteristics. However, it must also be seen that the status of workers posted to another MS is indeed special to the extent that the protection of their rights deserves special attention, at least with respect to

[36] It is exactly this element of the reform that was left practically unchanged in comparison with the earlier, 2016 draft. See: Agreement on the Posting of Workers Directive. https://www.cep.eu/cep-aktuell-archiv/artikel/agreement-on-the-posting-of-workers-directive.html (Accessed: 22 November 2019).

[37] Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market. European Commission, Strasbourg, 2016. http://europa.eu/rapid/press-release_IP-16-466_en.htm (Accessed: 22 November 2019).

[38] TFEU, Articles 18 and 45 (2).

[39] https://www.cep.eu/cep-aktuell-archiv/artikel/agreement-on-the-posting-of-workers-directive.html (Accessed: 23 November 2019).

[40] This means the approximately 16% wage difference on EU level between women and men, as well as the significant differences (3.5 to 25.6%) within the individual MSs. See: https://ec.europa.eu/info/sites/info/files/factsheet-gender_pay_gap-2019.pdf (01.12.2019). In case of posting, it is primarily the wage differences according to the place of work that could be indicative, the extent of which can be shown by way of comparing the average wage levels in the MSs.

[41] Paras. 51 and 52 of the judgment in case C-50/96, Deutsche Telekom AG v. Lilli Schröder.

the minimum guarantees. I would like to remark here that in connection with the legal institution of temporary agency work, related in many ways, the relevant directive explicitly regulates the principle of equal treatment,[42] which assumes a certain degree of analogy between these legal institutions.

From the employer's perspective, enforcing the principle of equal wages perhaps carries even larger risks, at least on the basis of the current practice (Voss, Faioli, Lhernould and Iudicone 2016 p. 42, 49, 51-52). The posting policy of employers is greatly influenced by what wages they "must" pay to different groups of workers; in other words, the application of the principle of equal pay may be determined in many cases by the wage level in the MS from which the worker is posted. This is not illegal in itself, but is fundamentally problematic in terms of the basic values of competition and cross-border services. At the same time, this paradigm may have adverse consequences for MSs with lower wage levels, although these should be overwritten by interests that can be legally protected, with a view to the principle of equal treatment having the force of a fundamental value.

Further complicating the situation is the reference to the wage levels in case of collective agreements, since on the basis of the legal interpretation of the Court of Justice of the European Union it can be established that posted workers only have the right to exert pressure on employers to a limited extent[43]; however, if posted workers have the subjective right to a wage set in a collective agreement, then the employer would have more difficulty, in a given situation, to refuse such a basis for negotiations. We must take this delicate balance into consideration, however, also from the point of view that the CJEU created by way of the Laval and Viking (Hendrickx 2015) judgment in connection with the collective rights of posted workers (Reich 2008 p. 139-141). At the same time, this balance cannot be detached from the context of EU citizens' often contradictory social and economic rights, since the fundamental market problem of social dumping cannot be examined independently from the social rights (Belavusau 2008) that are enjoyed by posted workers as fundamental rights. Even so, this approach also calls attention to the limitation of the free movement of workers. From the point of view of fundamental rights, this would, at least in an indirect way, increase the value of Article 28 of the CFREU[44], whereby the right of workers to collective action could be essentially strengthened.[45] Considering the connections with fundamental rights, however, it should be noted that the role of the Charter in the protection of rights, as well as its practical significance – with special attention, for example, to Article 30 on protection in the event of unjustified dismissal – is uncertain, especially in terms of the principles appearing in the different regulations in the MSs as well as in European judicial practice (Kártyás 2018).

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[42] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Article 5.

[43] C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, paras. 91 and 108-111.

[44]. At the same time, in the opinion of Kiss, despite the universal nature of collective rights, their conflict with fundamental freedoms of the EU is hard to resolve due to the derivative character of the latter, which makes the unified interpretation of the rights of collectives of workers rather difficult See: Kiss 2010 p. 453.

[45] See in details: Bankó and Zaccaria 2018 p. 151-152.

In connection with the potential distortion of competition, the strict remuneration requirements could also be criticized, as they violate the freedom of the provisions of services,[46] since this way the employer cannot pay wages to posted workers on the basis of free wage agreements. This is because we consider the circumstance axiomatic that it is always the interest of posted workers to perform their work at the highest possible wage level, i.e. typically the one applicable in the receiving state. However, such an agreement may also be in place between the parties based on which this is not necessarily the interest of the workers, or at least they would lose more in the given case together with the economic loss of the employer than they would gain. The example is hypothetical, of course, but especially due to the East-West differences (Voss, Faioli, Lhernould and Iudicone 2016 p. 27), this is the interest of workers in most cases; however, we should not forget that this question is similar to the general problem of minimum wages.[47]

**4.2. Equal work and work of equal value**

Perhaps it is not just a characteristic of phrasing, and therefore I mention it in connection with the significance of the principle of equal pay, that in connection with questions of remuneration, constituting a central element of the reform, the word "same" is consistently used in the documents and in communication, which may be surprising in the light of the fact that the principle of "the same pay for work of same value" has been replaced for decades by the concept of "equal value," due to the too narrow conceptual framework of the former principle (Oelz, Olney and Tomei 2013). Further, in case it is not simply inaccurate phrasing, then it is also worth exploring the question whether this principle can, in fact, only be used in case of jobs that are identical in one hundred percent. For the time being, the answer can only be based on assumptions, but in case of a positive answer, we would have to accept an *expressis verbis* restrictive legal interpretation, which would hardly change anything in comparison with the current situation.[48]

This is because we would have to consider it a *contra legem* interpretation if, exactly under the aegis of the fight against discrimination, such legislation would be adopted that is impossible to apply in practice. We can only talk about work that is one hundred percent identical, especially based on objective, measurable criteria, in very special cases only, but the objective measure of equal value is intended to resolve exactly this contradiction. It is not inconceivable in this case to establish the correspondences between the concrete work-related tasks of the posted worker to the concrete tasks and positions of those working in the receiving state, but full identicalness is still difficult to image in such a case. It is possible, of course, that all of this is only the emphasizing of that certain meaning of the word "same" whereby what happens in most cases is that posted workers perform very similar or even entirely identical work with workers of the receiving state, but for a different wage. In other words, in the present case, "same" may mean only the framework, and the value to be protected that it concentrates on is rather the remuneration itself. This may *a contrario* even lead to an extensive legal

[46] Agreement on the Posting of Workers Directive. https://www.cep.eu/cep-aktuell-archiv/artikel/agreement-on-the-posting-of-workers-directive.html (Accessed: 22 November 2019).
[47] See in details: Bankó and Zaccaria 2018 p.152.
[48] See in details: Bankó and Zaccaria 2018 p. 152-153.

interpretation, but in our opinion, it is exactly such inaccuracies that the reform should clarify.[49] In any case, the excessive wage differences between posted workers – in the given situation, from the perspective of a western MS (Blanpain 2011 p. 192) – somewhat change our perception since, beyond the legal aspects of equal pay, the economic and market-related drawbacks should not be disregarded either, and these latter may even lead to a "social catastrophe" (Blanpain 2011 p. 193-194) due to the large differences.

## 5. CONCLUSION

Overall, it is not a question that the conceptional updating of the rules of posting was necessary with a view to the EU's social policy changes, including in particular the EPSR's higher-level expectations of social nature. The posting of workers between MSs has major economic and labour market significance, and therefore, a review of the EU's rules on posting that takes the rights of workers into consideration primarily from a social aspect is by all means timely. The creation of the frameworks of free movement between MSs, the strengthening of the mobility of workers, parallel with their fundamental right to social security, is one of the basic conditions of the creation of a productive and balanced labour market, and the economy of the EU – also independently from posting – definitely requires development in this direction.

Of course, we should not forget either that the amended directive may be subject to criticism on many points, and in practice the interests of employers might even overwrite the fundamental criteria of protecting workers' rights. However, the effort can be clearly seen that could simultaneously reinforce the legal position of workers while also taking into consideration the freedom to provide services. The social and economic aspects – as is general in connection with the protection of the fundamental rights of workers – are hard to align, but they are necessary concomitants of the operation of the labour market. On this market, settling the legal framework and the guarantees of the free flow of workforce is an essential expectation.

Within the scope of the norms ensuring this framework, the regulation of at least the fundamental elements of minimal employment conditions may be expedient. The different labour law systems of the MSs make it necessary anyway, and therefore, this cornerstone of the free flow of workforce necessarily appears in the rules of posting. From the point of view of the posting of workers, the different national rules create a difficult situation, yet it is apparent that there is a fundamental agreement among the MSs concerning certain fundamental legal (social) guarantees. All of this is firmly reflected in the amended directive, even though with a varying degree of efficiency. The concrete substance of the minimum level of the protection of rights remains a question, however, as is also whether the strict rule of equal pay can be efficiently incorporated into this system of rules and the practice.

The enforcement of the principle of equal remuneration, which is of decisive importance from the perspective of the protection of rights, nevertheless raises concerns, as it may even have a counterproductive effect, even though the directive responds to actual labour market problems with it. However, posting employers have the option to

[49] See in details: Bankó and– Zaccaria 2018 p. 153.

shape their wage policy in such a way that the labour market differences should not have excessively harmful effects on their posted workers. At the same time, it does not appear to be realistic for employers in economically less developed MSs, having lower-than-average wage levels, to pay such wages that would prevent them from falling victim to protectionist regulation. With a view to the above, the economic and legal responsibility of posting employers is increasing, since the strict rule of equal remuneration may, in a given situation; result in graver legal consequences, under national laws, in case of failure to comply with the requirements of the directive. In any case, the real purpose of the protectionist rules mentioned several times above is the creation of real equality between the employers, which is actually independent from the place of origin and of the performance of work, indeed enabling the free flow of the workforce also from a social point of view. However, on the economic side, the formula is more complicated, since it is all in vain to start out from remuneration rules that are indeed uniform and apply to everyone in the same way, if we must still calculate with the division between eastern (sending) and western (receiving) MSs, even if this approach is someone schematic. At the same time, the increased social standards serve exactly the purpose of eliminating the east versus west opposition, which means that the intention of the legislators – and perhaps also of the MSs – is clear. The enforceability of the amended rules and calling employers into account, however, remains a key question, but in my opinion, there are some rightful expectations in this respect concerning the future activities of the already mentioned European Labour Authority. The intention, in any case, is clear: to facilitate worker's mobility (real free movement), not by way of sacrificing social interests, but rather by way of the effective monitoring of the enforcement of those interests, and by linking and coordinating the activities of national labour authorities.

Despite all of these positive developments, the rules and practice placing both the protection of workers' rights and the freedom to provide services in the focus are expected to cause significant problems also in the future, since the creation and maintenance of a balance between these market interests, mostly in competition with each other, will remain an important aspect and a main challenge also. Can we, then, in this rather complex situation, really appreciate the amended rules of the directive as the next step of reinforcing the protection of workers' rights? Perhaps it is still difficult to give a clear answer to this question; however, the EPSR and the current changes in social policy allow us to conclude that the answer would be rather positive.

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