

## THE POSTED WORKERS DIRECTIVE AS THE END OF NATIONAL WELFARE POLICY: A CASE STUDY IN CENTRAL EUROPE

### I. INTRODUCTION

As some American scholars point out, employment law in most American states provides considerably less protection for employees in general than is typical under European domestic laws.<sup>2)</sup> Reasons for higher social protection are various: history, tradition and, to a large extent, the desire to prevent cause for another devastating war as WWI or WWII was. It is remarkable (and counterproductive for European integration) that the development of the welfare state means also building a national state, at least since Bismarck's times (the end of the 19<sup>th</sup> Century).<sup>3)</sup> Citizens became loyal to the State who protects them against certain social risks. Even today, social policy remains one of few legal fields that were only to a small degree influenced by the European Union (EU)'s legislature. Every European state has been maintaining its specific social laws, including employment laws, as an important part of national protection system against social risks.<sup>4)</sup>

In fact, higher standards of employees' protection from encroachments on employees' personal lives, from economic disadvantages and from health risks associated with the exercise of a particular job differ throughout the Europe. National laws even differ between the Member States of European Union; the same is true for Contracting States of European Economic Area. This diffusion between employment law standards has become a serious danger for the EU's most important aim – creation of an internal free market. Rich Member States fears that service providers established in other (low-wage) Member States win contracts because of cheaper labour costs. Therefore, they are reluctant to open

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<sup>1)</sup> From 2007 to 2011, the author was examining both the implementation and application of the Posted Workers Directive in Austria, Czech Republic, Germany, Poland and Slovak Republic. Research was financed by the CHARLES UNIVERSITY IN PRAGUE (id. No. 262 405).

<sup>2)</sup> See RASNIC, C.: *Terminating the American Worker: Rights of the Employee and Obligations of the Employer* in Die Kündigung aus wirtschaftlichen Gründen und ihre Beschränkungen im internationalen Vergleich, OGB Verlag 2008, p. 355.

<sup>3)</sup> Cf. EICHENHOFER, E.: *Social Insurance in Germany: The Bismarck Model and Its Challenge in the 21st Century in Reforms and Perspectives on Social Insurance*, Lessons from the East and West, p. 22.

<sup>4)</sup> Unemployment is considered to be both the biggest social risk and the source (as a lack of income) for other social risks.

up the market in services and allow companies settled in another Member State (mainly the southern and eastern Member States) to take their own cheaper workforce with them to the host state. The reason why foreign service providers can afford to win contracts is that the working conditions of relocated workers are usually governed by the employment law rules applicable in the home (low-wage) state.<sup>5)</sup> However, such comparative advantage diminishes social benefits in the host state and may even destruct social cohesion and peace.

Based on the ECJ rulings,<sup>6)</sup> the EU legislature compromised statements given by different Member States enacting 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 (hereinafter „the Posted Workers Directive“). The most important rule is set forth in Article 3 of the Posting of Workers Directive. It requires that employees who are posted by their employers to perform temporary work in other Member States<sup>7)</sup> should enjoy the protection of a "nucleus of mandatory rules for minimum protection" of employees under the law of the host state.<sup>8)</sup> Notwithstanding the Posted Workers Directive's attempt to suppress both host state protective measures and social dumping, there remain fundamental doubts about its compliance with the freedom to provide services.<sup>9)</sup> How can we speak about equality between Member States when the Posted Workers Directive calcifies social differences and leads, in the end, to distortions of the EU's internal competition?

## II. FROM THE ROME CONVENTION TO THE POSTED WORKERS DIRECTIVE

To understand the Posted Workers Directive and connected application issues, it is necessary to know the legal background. Before the Posted Workers Directive was passed, the rights of relocated employees were guaranteed by the

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<sup>5)</sup> The home state is usually a state with lower social standards than the host state.

<sup>6)</sup> See ECJ Case C-244/04 *Commission v. Germany*, para. 61.

<sup>7)</sup> The Posted Workers Directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3 of said Directive, to the territory of a Member State. In particular, Member States are: Austria, Belgium Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, the UK, Spain and Sweden (as so called old Member States); the Czech republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic a Slovenia, Bulgaria and Rumania (the last two states from 1 January 2007). The Posted Workers Directive also applies to Contracting States of European Economic Area (Iceland, Norway and Lichtenstein) and to Switzerland (on the basis of a separate bilateral agreement). For the purpose of this paper, the term „a Member State“ or „Member States“ is used to refer to each of these states.

<sup>8)</sup> See recitals (13) and (14).

<sup>9)</sup> Cf. FETSCH, J.: *Eingriffsnormen und EG-Vertrag*, p. 303 or ŘIHOŠKOVÁ, T.: *Nadnárodní poskytování služeb in Právník 10/2007*, p. 1112.

multilateral Rome Convention of 1980.<sup>10)</sup> <sup>11)</sup> Although Article 3 of said Convention gives an employer and an employee great freedom to choose applicable law, the commitment to freedom of choice was and still is far from absolute. In accordance with Articles 6 and 7 of the Rome Convention (and Articles 8 and 9 of the regulation Rome I.), the choice of law shall not be apply to avoid protection guaranteed to employees by the State with which the employment contract (employment relationship) is most closely connected. Article 6 of the Rome Convention stated: *Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice.* Such a law is determined in Article 6 II of the Rome Convention by either the place of usual performance of work<sup>12)</sup> or by the place of business. If either of these criteria does not determine the most closely connected applicable law, Article 6 foresees an exception. Employment relationships shall be governed by the law of country to which the contract is more closely connected as it appears from the circumstances as a whole.<sup>13)</sup>

For the purpose of this Article, we will confine ourselves to the first criterion. In accordance with this criterion the applicable law is determined by the law of the country<sup>14)</sup> in which the employee habitually carries out his work in performance of the contract, even if he/she is temporarily employed in another country. Article 8 II of the regulation Rome I adds that when it is impossible to determine *the country in which*, then the law of the country from which the employee carries out his/her work shall be applied.<sup>15)</sup> If an employee carries out his work in several Contracting States, the place where he habitually carries out

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<sup>10)</sup> The Rome Convention has been ratified by all Member States. Therefore, the terms contracting states and Member States are synonyms.

<sup>11)</sup> The Rome Convention will be replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) that shall apply from 17 December 2009 (with a small exception that is immaterial for the purpose of this article), hereinafter the regulation Rome I.

<sup>12)</sup> The usual place of work performance is a workplace at which the employee is fully incorporated into the employer's organization of work.

<sup>13)</sup> This is not considered to be a third criterion used for determination of applicable law. It is just an exception ensuring that the applicable law is really the most closely connected law. Therefore, it is necessary to apply both criteria from Article 6 II of the Rome Convention before the exception will be used. Cf. JUNKER, A.: *Internationales Arbeitsrecht in der geplanten Rom I-Verordnung*, p. 405.

<sup>14)</sup> Neither the Rome Convention, nor the Regulation Rome I confines the place where an employee habitually carries out his work to Member States. In accordance with Article 2 I of the Regulation Rome I, any law specified by this regulation shall be applied whether or not it is the law of a Member State.

<sup>15)</sup> Cf. ECJ case C-37/00, Weber.

his work is the place where he/she has established the effective centre of his working activities.<sup>16)</sup> 17)

Hence, the place where an employee habitually carries out his/her work supersedes the place where the employee has been temporarily relocated.<sup>18)</sup> The place of usual performance of work could be considered as a parallel to principles used in freedom of goods where Member States must rely on mutual recognition – that is, an acceptance that standards in other Member States are sufficient.<sup>19)</sup> The same general rules apply here as they do to the treaty articles; companies and individuals are entitled to take advantage of the internal market and the „abuse“ argument will only be accepted in very limited circumstances.

The identification of temporal employment in another country has become an issue. Nevertheless, as far as relocation of employees is concerned, the Commission stated that temporal employment is a case of workers sent abroad for a given duration or for the needs of a specific job or employees who conclude a new employment contract in the host country within a group of companies.<sup>20)</sup>

It is significant, and we will see it in the Posted Workers Directive as well, that the Rome Convention provides employees with a (additional) protection clause envisioned in Article 7 I. This provision states: *When applying the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.* The practical effects of Article 7 I of the Rome Convention are not considered to be positive. In fact, courts were reluctant to look to mandatory rules of other states when their domestic labour market had been endangered;<sup>21)</sup> Germany, Ireland, Luxemburg and Great Britain proclaimed not to be bound by Article 7 I of the Rome Convention during ratification;<sup>22)</sup> and, in addition, there is not a strict line between protection guaranteed

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<sup>16)</sup> When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his activities for his employer and to which he returns after each business trip abroad. See ECJ case C-383/95, *Rutten v Gross Medical*, para 27.

<sup>17)</sup> Cf. ECJ case C-125/92, *Mulox IBC Ltd v. Hendrick Geels*.

<sup>18)</sup> This rule had been derived by the ECJ and the legislature has subsequently adopted it in the Rome Convention. Cf. ECJ case C 133/81, *Ivenel v Schwab* and ECJ case C 266/85, *Schenavai v Kreischenr*.

<sup>19)</sup> See WILMOWSKY, P.: *EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit*, p. 17.

<sup>20)</sup> Cf. Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, Brussels: 2003, pages 35 and 37. Accessible at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002\\_0654en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf) (Cited on 7 November 2009)

<sup>21)</sup> Cf. FETSCH, J. *Eingriffsnormen und EG-Vertrag*, p. 302.

<sup>22)</sup> According to Adelman, these states rejected Article 7 I of the Rome Convention because of its ambiguity. See ADELMANN, N. *Das Haftungsprivileg bei grenzüberschreitenden Arbeitsverhältnissen im Spannungsfeld zwischen Arbeitskollisions- und Arbeitnehmerentsenderrecht*. IPRax 2007, p. 541; and further PLENDER, R. *The Rome Convention – on the Law Applicable to Contractual Obligations*, p. 33.

employees under Article 6 and under Article 7. Because of all these reasons the regulation Rome I did not re-adopt said provision into its language. Notwithstanding the critics towards Article 7 I of the Rome Convention, the protection of host states' interests has been considered as important and that was a basis for a new more detailed legal development – the enactment of the Posted Workers Directive. Not accidentally, the Posted Workers Directive inherited the tension between freedom and protection and is rightly considered as a successor of Article 7 I of the Rome Convention.<sup>23)</sup>

### III. THE POSTED WORKERS DIRECTIVE AND THE MINIMUM PROTECTION GUARANTEED TO POSTED WORKERS IN THE HOST STATE

The level of protection given to relocated employees is one of the most demanding issues connected to the application of Posted Workers Directive. This question is not only about the scope of application but also about the quality of the ensured working conditions. Not surprisingly, answers are not of high importance for all; mainly they are highly important for employers transferring employees into Member States. The reason is apparent: the level of working conditions extended unilaterally by the host state to relocated employees may water down business operated by foreign undertakings in that state.

#### III.1 The Minimum or Maximum Protection?

The Posted Workers Directive does not unify either national employment laws or working conditions guaranteed in Member States. There was not and is still not enough consent between Member States for that. What the Posted Workers Directive does is the unification of choice of law rules for determination of law applicable to employees relocated from one Member State to others in order to provide services in host states. The main rule is contained in Article 3 of the Posted Workers Directive and is composed of two elements. Firstly, Member States must guarantee employees transferred into another Member State of the European Union or European Economic Area working conditions enumerated in Article 3 I; these conditions may be derived from laws and, to a limited extent, from collective agreements valid in a host state. Such working conditions must be upheld during the whole term when employees are working in the host state. Article 3 of the Posted Workers Directive is overriding, or mandatory; so far these working conditions are concerned when the right to choose a different employment law is abandoned.<sup>24)</sup> Secondly, Member States

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<sup>23)</sup> Neither the Rome Convention (see recital 34), nor the regulation Rome I (see article 23) cover the Posted Workers Directive (see recital 11 of said Directive).

<sup>24)</sup> See Bericht der Kommissionsdienststellen über die Umsetzung der Richtlinie 96/71/EG des Europäischen Parlaments und des Rates z 16. Dezember 1996 über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen, January 2003, p. 2.

shall not treat foreign service providers with posted workers less favourably than they treat national service providers.

Apart from Article 3 I of the Posted Workers Directive, host states may extend to relocated employees other regulations in the case of public policy provisions (Article 3 X second point of said Directive), such as provisions guaranteeing the prohibition of forced labour, protection of child work, coalition freedom, protection of an individual's personality (including data protection) or labour inspection.<sup>25)</sup> There are also special rules for activities in the construction industry (enlisted in Appendix of the Posted Workers Directive).<sup>26)</sup> Working conditions of such workers may be stipulated in collective agreements or arbitration awards which have been declared universally applicable.<sup>27), 28)</sup> In addition, Article 3 VII of the Posted Workers Directive<sup>29)</sup> states: Paragraphs 1-6 (of Article 3) shall not prevent application of terms and conditions of employment which are more favourable to workers.

Nevertheless, the Posted Workers Directive's aim is not only to guarantee protection to relocated employees. Surprisingly, it was not issued on the basis of provisions of social policy set forth in the Founding Treaty at all. Although the Posted Workers Directive may be used, in accordance with its Article 3 X, against social dumping, its purpose remains mainly to facilitate freedom of services; it should help to overcome differences in national employment laws. Therefore, the Working Committee (an advisory board) has inferred limitations for Article 3 X, second paragraph, of the Posted Workers Directive. The Working Committee explained that said provision is confined only to working conditions enumerated in Article 3 I of the Posted Workers Directive.<sup>30)</sup> Also ECJ has ruled in several judgments that the Posted Workers Directive cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection, the level

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<sup>25)</sup> Cf. Bericht der Arbeitsgruppe zur Umsetzung der Richtlinie über die Entsendung von Arbeitnehmern, p. 12, 13.

<sup>26)</sup> They are all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work, and improvements.

<sup>27)</sup> This means, in accordance with Article 3 VIII of the Posted Workers Directive, collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

<sup>28)</sup> Member States may also, in compliance with equality of treatment, extend terms and conditions of employment laid down in collective agreements or arbitration awards to other relocated employees than those performing work in the construction industry. See Article 3 X of the Posted Workers Directive.

<sup>29)</sup> See also recital 17 of the Posted Workers Directive.

<sup>30)</sup> Cf. Bericht der Arbeitsgruppe zur Umsetzung der Richtlinie über die Entsendung von Arbeitnehmern, p. 13.

of protection which is set forth in Article 3 I, first subparagraph, (a) to (g) of the Posted Workers Directive.<sup>31)</sup> For example, minimum wage is not exchangeable with the average minimum wage in a certain economic branch<sup>32)</sup>,<sup>33)</sup> and universally applicable collective agreements are not the same as any collective agreements.<sup>34)</sup> In addition, the ECJ expressed that a national court that will decide such cases *should balance the administrative and economic burdens that the rules impose on providers of services against the increased social protection that they confer on workers compared with that guaranteed by the law of the Member State where their employer is established.*<sup>35)</sup>

### III. 2 The Most Favourable Working Conditions

As analysed in the previous section, the borders of minimum protection are confusing; rather wide regulations set forth in the Posted Workers Directive have been confined by the restrictive ECJ case-law. In addition, the application of the Posted Workers Directive is dependent, in principle, on its national implementations. The Posted Workers Directive, like every directive issued by EU legislation, has binding power on the Member States as to the objective that shall be achieved, but it lacks the rigidity of a regulation in that it allows the Member States' authorities to decide how to incorporate the directive's objective into the domestic legal system and a specific period of time in order to do so.<sup>36)</sup><sup>37)</sup> Therefore, Member States have enjoyed a wide discretion to implement the Posted Workers Directive as appropriate to their needs and interests. In the end, every Member State has implemented it uniquely, but only some states have done so properly.<sup>38)</sup>

All elements of minimum protection envisioned by the Posted Workers Di-

<sup>31)</sup> See ECJ case C-341/05, paras 81 and 82. See also ECJ case C 113/89, *Rush Portuguesa*, para 12.

<sup>32)</sup> See DAVIES, A. *One Step Forward, Two Steps Back? The Viking And Laval CASE*. In *The ECJ, Industrial Law Journal*, 2008, No. 37, p. 129.

<sup>33)</sup> See ECJ case C-346/06, *Rüffert* paras 33–34.

<sup>34)</sup> See ECJ case C-346/06, *Ruffert v Land Niedersachsen*, para 33.

<sup>35)</sup> See ECJ cases C-49/98, 50/98, 52-54/98, 68-71/98, *Finalarte*, para 51.

<sup>36)</sup> In practice, Member States adopt legislation to implement a directive into the national law though in some cases a directive may be implemented by other means, and more especially by collective agreement, which is expressly envisaged under Article 137, Paragraph 4 of the EC Treaty.

<sup>37)</sup> However, a directive may acquire the direct effect if a Member State fails to comply with the directive within the period determined for its implementation. Consequently citizens of that Member State are entitled to claim their rights on the basis of an unimplemented directive.

<sup>38)</sup> At the IX. European Congress of the International Organisation for Labour Law and Social Security Law, R. Birk assessed that more than half of all Member States failed to implement the Posted Workers Directive properly. For example, contrary to Article 1 IV of the Posted Workers Directive, there is no particular provision in Czech law which would regulate the same duties for employers from non-member countries as the Labour Code sets forth for employers settled in Member States. These employers are not obligated to compare working conditions.

rective (public policy requirements, universally applicable collective agreements and arbitration awards) are connected to the working conditions enumerated in Article 3 I of the Directive. In accordance with said provision of the Posted Workers Directive, Member States shall guarantee relocated employees the terms and conditions of employment covering the following matters: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates (this point does not apply to supplementary occupational retirement pension schemes); the conditions of hiring of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination. Despite the importance of Article 3 of the Posted Workers Directive, no authority has explained why these and not other working conditions were incorporated in its scope.<sup>39)</sup> For example, Article 3 of Posted Workers Directive protects special measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people. All Member States in Central Europe have developed protective measures for men raising children or disabled persons. Why are the special conditions of these employees not covered?

However, a host shall not only guarantee relocated employees working conditions set forth in its domestic law, but the state shall also allow the application of another Member State's law if *pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.*<sup>40)</sup> This means that the host state's regulations of working conditions, even within the scope of minimum protection in the meaning of Posted Workers Directive, are superseded by more favourable foreign working conditions (the principle of more favourable working conditions). The advantageousness of each right shall be considered separately.

The principle of more favourable working conditions mixed with separated consideration given to each working condition enumerated in Article 3 I of the Posted Workers Directive leads unavoidably to the shared application of a few national law systems; laws valid in the host state, home state or other states shall be applied simultaneously. Hence, employers who wish to relocate his/her employees in accordance with the Posted Workers Directive must get familiar with all laws in question, compare them, and determine the most favourable

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<sup>39)</sup> Cf. GEMMEL, Y. Personaleinsatz über Grenzen hinweg. *Arbeit und Arbeitsrecht*, 2008, No. 5, p. 271 or ADELMANN, N.: *Das Haftungsprivileg bei grenzüberschreitenden Arbeitsverhältnissen im Spannungsfeld zwischen Arbeitskollisions- und Arbeitnehmerentsenderrecht*, IPRax 2007, p. 539.

<sup>40)</sup> ECJ case C-341/05, Laval, para. 81.



regulations. However, there are few free legal materials about respective regulations in other Member States that are published in English, and such informative materials were not published in all official languages of the EU. In response to this situation, EU authorities have launched an information campaign.<sup>41)</sup> It could help. Nevertheless, there are other problems that complicate comparison of various laws in two or more Member States.

### III.3 A Case Study of Maximum Work Periods and Minimum Rest Periods in Central Europe

The author has conducted a detailed comparison of current employment laws in five Member States in Central Europe (Austria, Czech Republic, Germany, Poland and Slovak Republic).<sup>42)</sup> Application problems connected with the Posted workers Directive can be demonstrated, in short, on the basis of working conditions laid down in Article 3 I Lit. a) of said Directive regarding maximum work periods and minimum rest periods. Both terms, working time and rest periods, shall be interpreted in accordance with Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.<sup>43)</sup> This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).<sup>44)</sup> The Directive 2003/88/EC does not cover payments.<sup>45)</sup> Therefore, payments are not a part of comparison for the purpose of maximum and minimum periods.

Working time is defined in Article 2 I of the Directive 2003/88/EC as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.<sup>46)</sup> All free requirements must be fulfilled simultaneously<sup>47)</sup> but the condition „to carry out his activity, in accordance with national laws and/or

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<sup>41)</sup> See Commission Recommendation of 31 March 2008 on enhanced cooperation in the context of the posting of workers in the framework of the provision of services [2008/C 85/01 – Official Journal C 85 of 4. 4. 2008]

<sup>42)</sup> Outputs of the research were published in a Czech book called simply „Relocation of Employees Abroad“ in 2009.

<sup>43)</sup> See Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services from 4 April 2006, p. 15.

<sup>44)</sup> This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

<sup>45)</sup> Cf. ECJ case C-14/04, *Abdelkader Dellas and others v Premier ministre a Ministre des Affaires sociales, du Travail et de la Solidarité*.

<sup>46)</sup> Contrary to some opinions, working time is not each period of time when an employee is present at the workplace. See ECJ case-law: case C-151/02, *Landeshauptstadt Kiel v Jaeger*, para 58 and case C-303/98 *Simap*, para 48.

<sup>47)</sup> See ECJ case C-303/98, *Sinal*, para 48.

practice“ is less important.<sup>48)</sup> Rest period means any period which is not working time (Article 2 II of the Directive 2003/88/EC). Rest period is also time spent without work due to poor weather conditions.<sup>49)</sup> However, it is up to a Member State if it will implement this in its legal system. Maximum weekly working time is set forth in Article 6 of the Directive 2003/88/EC. Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.

Directive 2003/88/EC regulates breaks, daily rest periods, weekly rest periods and annual leave.<sup>50)</sup> Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break.<sup>51)</sup> Every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.<sup>52)</sup> Weekly rest period is 35 hours (24 hours plus the 11 hours' daily rest) per each seven-day period. Article 16 of the Posted Workers Directive sets forth reference periods for weekly rest period (14 days)<sup>53)</sup> and maximum weekly working time (four months). All limits, including reference periods, may be exceeded due to a variety of reasons set forth in Articles 17, 19 and 22 of the Directive 2003/88/EC. The maximum limits for reference periods are six and twelve months.

Although each Member State has to implement the Directive 2008/88/EC, there is no uniform definition either of working time or rest periods. That makes

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<sup>48)</sup> Cf. BARNARD, C. *EC Employment Law*, p. 587.

<sup>49)</sup> Cf. Bericht der Kommissionsdienststellen zur Durchführung der Richtlinie 96/71/EG über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen from 4 April 2006, p. 16.

<sup>50)</sup> Annual leave is compared in compliance with Article 3 I Lit. b) of the Posted Workers Directive separately.

<sup>51)</sup> The details of break, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of the industry or, failing that, by national legislation.

<sup>52)</sup> A predecessor of Directive 2003/88/EC the Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time set forth in Article 5 II prescribe that the minimum rest period referred to in the first subparagraph shall in principle include Sunday. This rule was upheld in *Stoke on Trent* (ECJ C-169/91, *Stoke on Trent v. B. Q.*) but subsequently overruled by the ECJ's decision C-84/94 in *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*. The ECJ explained it with the reasoning that ... *the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week*. Cf. BARNARD, C. *EC Employment Law*, p. 580

<sup>53)</sup> If the minimum weekly rest period of 24 hours required by Article 5 (minimum weekly rest) falls within that reference period, it shall not be included in the calculation of the average.

comparison very difficult because one cannot compare maximum limits when there is no common standard. For example, break is considered to be a rest period in four states but a working period in Poland.<sup>54)</sup> Is it more favourable for an ordinary employee to have a longer unpaid rest period or a shorter paid working time? Let us repeat that the will of contracting parties is not relevant, in accordance with Article 3 I of the Posted Workers Directive. Another issue is public holidays. Do the minimum rest periods include public holidays? Some Member States (for example, the Czech Republic) do explicitly mention public holidays as an important part of rest periods. If the answer were affirmative then more public holidays would mean more favourable (higher) minimum rest periods. However, public holidays are considered to be public law; this topic is tightly linked to State sovereignty.

Actually, the most complicated issue is how we shall determine exact amounts of maximum work periods and minimum rest periods. Each Member States sets forth maximum work periods and minimum rest periods but there are various exceptions from those limits. It is unfortunate that official materials that are uploaded at the EU's website and translated into English do not specify these exceptions.<sup>55)</sup> For example, the German report provides information that the employment law is based fundamentally on an 8-hour working day and a 6-day working week (48 hours per week). Even though this amount is contrary to the Directive 2003/88/ES, the piece of information is factual. However, German law also provides a possibility to increase working times up to 60 hours for a work week under a condition that during a reference period, daily working time will not exceed eight hours on average. Additionally, the exact amount of working time is usually set forth in universally applicable collective agreements that are not translated either into English or in the home language of that foreign employer. Hence, when an employer settled in another Member State wants to obtain comprehensive information, he/she must hire a skilled local counsellor, which definitely means extra costs.

#### IV. CONCLUSION

The Posted Workers Directive represents a compromise on how to negotiate the tension between freedom and protection in an employment relationship with employees temporarily relocated to another Member State. In accordance with the Rome Convention (or the regulation Rome I) respective employment relationships are governed by the home state's laws. However, employers relocating employees to another Member State shall obey minimum protection guaranteed within the ambit of Article 3 I of the Posted Workers Directive by the host state. Such employers shall apply working conditions more favourable to

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<sup>54)</sup> Compare Article 134 of the Polish Labour Code. The same is for German regulation of breaks in the mining industry.

<sup>55)</sup> Cf. national booklets at <http://ec.europa.eu/social/main.jsp?catId=726 langId=en> (Cited 12 November 2009).

relocated employees. This mandatory comparison that applies solely towards foreign employers makes foreign labour more expensive. Relocated employees acquire more rights than domestic employees; duties are not subject to comparison. Such practise is not sustainable in the long-term, even if the information campaign of the Member States improves. Minimum harmonisation thus introduces the possibility of differing approaches to regulation being taken by the various Member States which is a situation opened to abuse. There must therefore be issued either a uniform set of rules governing employment relationships of relocated employees or one law system chosen that will govern respective employment relationships.<sup>56)</sup> However, both solutions are in a short-run without missing common consent unfeasible.

Although the EU is primary an economic union, the Posted Workers Directive is evidence that, in social Europe, it is impossible both to constitute and guarantee freedom to provide services without setting forth rules unifying social protection in all Member States. Not only did social policy on the European Union level not improve and not harmonize in each Member State somehow „automatically“ (which is what the founders expected), but it also has become a serious obstacle for the European Union’s most important aim – creation of an internal free market.

There are serious problems connected to the application of Posted Workers Directive. Regardless of the chosen solution, for Central Europe there is no alternative to the process of the EU’s integration. Either strong national welfare states will surrender or the integration will be diminished.<sup>57)</sup> What the dissolution of the EU would mean for EU citizens is not hard to foreseen.

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<sup>56)</sup> In principle, employment relationships of relocated employees may be governed either by the host state or the home state. The former would keep equality between all employees working in one place at the same time. See Windisch-Graetz, M. Lohn- und Sozialdumping bei grenzüberschreitenden Entsendungen, *Das Recht der Arbeit*, 2008, No. 3, p. 228. This solution was proposed by the Commission in the first proposal of Posted Workers Directive. Employment relationships of relocated employees had to be governed solely by the home state only within a period of the first three months of relocation. The second option is the home state law. This would be in compliance with the Rome Convention (the regulation Rome I) and principles applied in interstate exchange of goods. See WINDISCH-GRAETZ, M. Lohn- und Sozialdumping bei grenzüberschreitenden Entsendungen, *Das Recht der Arbeit*, 2008, No. 3, p. 228.

<sup>57)</sup> Although there is no possible to draw a parallel, it may be worth to know the situation within the communistic block in the previous century. Social rights acquired because of work or other circumstances in other Central or Eastern European communist states were guaranteed by international bilateral agreements. Despite these agreements, these benefits and rights did not survive the subsequent chaos that has occurred in Russia and other post-Soviet states.