

Chapter 9

Posting of workers before Polish courts

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Introduction

Poland has the highest number of workers posted to other European Union (EU) Member States. Between 2014 and 2016, Polish companies sent between 260,000 and 310,000 people to EU and European Free Trade Association (EFTA) countries. The largest number of Polish workers, mainly in industry and construction, are posted to Germany (56.9%), then France (11.9%), Belgium (8.8%) and the Netherlands (6.6%). Poland also has the largest negative net balance of posted workers; between 2014 and 2016, it hosted between 13,000 and 18,000 posted workers, mainly from Germany (6,124), France (2,714) and Spain (1,603).¹

Poland's profile as a predominantly sending country, and with one of the lowest labour costs (EUR 9.40 per hour)² goes some way to explain the continuing lack of interest from both the social partners and the academic literature³ in the issue of fair labour mobility in the EU. There is also a rather minimalist regulatory approach to the protection of rights of posted workers in Poland. In fact, it was not until the proposed revisions to the Posted Workers Directive were introduced at the EU level that the relevant actors shifted their focus from the prevailing issue of migrant workers (to and from Poland) to the relevance and consequences for national labour law and functioning of the labour market with respect to posted workers. At the time of writing, a clear split was discernible between the proponents of internal market-oriented rationale (government and employers' organisations) and employee organisations, who favour a broadening of the social dimension of the EU.

This chapter analyses the main aspects of posting of workers' cases brought before the Polish courts, including: the criteria of being subject to the Polish social security

1. See e.g. Voss E, Faioli M, Lhernould J.-P. and Iudicone F. (2016) Posting of Workers Directive - current situation and challenges, Brussels, European Parliament.
2. http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs [accessed 16 June 2019].
3. To date the academic literature has been mainly concerned with the implications of posting of workers to social security systems; See e.g. Ślęzak K. (2017) O wymogu podlegania przed delegowaniem ustawodawstwu państwa członkowskiego, w którym siedzibę ma pracodawca, w rozumieniu przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, *Praca i Zabezpieczenie Społeczne*, 10; Ślęzak K. (2016) Delegowanie równoległe w świetle przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, *Praca i Zabezpieczenie Społeczne*, 8, 9-15, Potocka-Sionek N. (2016) Nielegalne delegowanie pracowników tymczasowych do pracy w Niemczech a moc wiążąca formularza A1, *Praca i Zabezpieczenie Społeczne*, 10, 25-32. For a more comprehensive analysis, see Szywniewski M. (2019) *Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej*, Warsaw, Wolters Kluwer.

system; the differentiation between business trips and the posting of workers for the purpose of calculation of social insurance contributions; and the remuneration of Polish workers posted abroad. Given the quantitative abundance on the one hand, and the *sui generis* homogeneity of the factual matrix and the limited substantive scope of the resulting judgments⁴ on the other, the analysis is based largely on the relevant Supreme Court jurisprudence. This has proved to be an important benchmark, as can be seen by the regularity of reference to its judgments in the lower instances courts. The key factors shaping the relevant jurisprudence, including the legal framework of posting of workers, the key legal debates on posting in Poland, and the current situation of workers posted to and from Poland, are briefly outlined below.

1. Legal framework on posting of workers in Poland

In Poland, the regulation of posting of workers is based solely on legislation, which exemplifies the rather mechanical duplication of standards contained in the relevant EU Directives, and also the relatively minimalist and reactive regulatory approach to the protection of rights of posted workers, which for years were enshrined in a patchwork legal framework.

Legal provisions that transposed the Directive 96/71/EC in 2001 into the Polish legal order were originally included in Chapter IIa of the Labour Code (LC):⁵ Working conditions of employees posted to Poland from an EU Member State, as well as the Act on the National Labour Inspectorate (*Państwowa Inspekcja Pracy*) (PIP)⁶ and the Code of Civil Procedure.⁷ Notably, the relevant minimum standard provisions were at first addressed to employees posted from Poland to other EU Member States. This was because the essence of the obligations of the EU Member States that resulted from the Posted Workers Directive had been misinterpreted. The regulation was amended accordingly, just before the Polish accession to the EU. Yet the legislator clearly reaffirmed that its purpose is to establish the minimum standards of entitlements of employees posted to the territory of Poland.

It was not until 18 June 2016 that new legislation came into force regarding the posting of workers within the framework of the provision of services (*o delegowaniu pracowników w ramach świadczenia usług*) (PWA).⁸ This established a unified and comprehensive framework on key issues related to the posting of workers, and repealed the relevant provisions of the Labour Code. The new statutory rules stem directly from the obligation to transpose EU Directive 2014/67/EU on the enforcement of Directive 96/71/EC into the Polish legal order. Yet, the PWA also incorporates the solutions already implemented on the basis of Directive 96/71/EC.

4. Within the 111 judgments concerning posting of workers in the framework of the provision of services published in Lex Online Legal System (probably the most opinion-forming source of the actual line of jurisprudence in Poland), 67 constituted the judgments of the Supreme Court, 22 the judgments of the district courts, 21 the judgments of the appellate courts, and 1 of the regional court.

5. Journal of Laws of 2014, item 1502, as amended.

6. Journal of Laws of 2015, item 640, as amended.

7. Journal of Laws of 2014, item 101, as amended.

8. Journal of Laws of 2016, item 868.

The material scope of the Act is broad and includes principles concerning posting of workers on the territory of the Republic of Poland in the framework of the provision of cross-border services, and protection of employees posted to and from Poland, or monitoring compliance with relevant provisions. It also elucidates relatively detailed rules concerning the principles of administrative co-operation between competent Polish authorities with other EU Member States, as well as imposition and execution of administrative pecuniary sanctions and fines.

As regards the personal scope, in accordance with the relevant EU law, the new regulations apply mainly to foreign employers posting their workers to Poland, and to some extent also to Polish enterprises that post their workers abroad to EU countries or to countries that have an agreement with the EU to implement Directives 96/71/EC and 2014/67/EU into their national legislation. Importantly, legal uncertainty concerning the terms ‘posting employer’ and ‘posted worker’ (‘from the territory of Poland’) was removed by referring *expressis verbis* in the relevant statutory definitions to the concept of employee within the meaning of the regulations of the Member State to which the employee is posted.⁹ The provisions of the PWA, however, do not generally apply to merchant navy undertakings and international transport, excluding cabotage operations.¹⁰

In essence, the Act aims to guarantee an appropriate level of protection for posted workers to and from the territory of the Republic of Poland. In particular, the PWA explicitly reiterates the previously established Labour Code formula that employers who post workers to Poland must ensure working conditions that are no less favourable than those applicable under the Polish Labour Code and other relevant employment legislation (the favourability principle). The relevant ‘protected terms’ include: working-time standards and hours, as well as uninterrupted rest in 24-hour and weekly periods; the extent of holiday leave; minimum remuneration for work, overtime pay and overtime allowance; occupational safety and health; protection of pregnant employees and protection during their maternity leave; employment or hiring of juveniles; equal treatment in employment without discrimination; and performance of work according to the provisions for the employment of temporary workers.¹¹

In addition, the PWA imposes a number of new obligations on foreign employers who post workers to Poland, stemming from administrative requirements and control measures included in Directive 2014/67/EU, such as the obligation to appoint a person residing in Poland responsible for liaising with the PIP, and for sending and receiving notifications and/or documents; the obligation to submit, by the date of commencement of the provision of services in Poland, a declaration to PIP containing the information necessary to conduct an audit of the state of affairs at the employee’s place of work,¹²

9. PWA Article 3 (5) and (7).

10. PWA Article 2.

11. PWA Article 4.

12. In 2017, 1878 declarations from 748 foreign employers posting employees to Poland (representing 62 countries) were submitted to PIP. Employees most often posted to Poland came from enterprises operating within Germany (1,259 people), Ukraine (1,134 people), Czech Republic (642 people), and Italy (638 people). Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy z 2017 r., <https://www.pip.gov.pl/pl/t/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf>, 123-24 [accessed 16 June 2019].

as well as the requirement to store and share, at PIP's request, during the posting (and within two years after the end of the posting) documents relating to the employment relationship of the posted worker.¹³ Finally, in accordance with Article 12 of the Directive 2014/67/UE, the PWA introduces joint and several liability of a construction work or building structure maintenance (earthwork, renovation, or demolition) contractor and an employer who posts an employee to Poland as its subcontractor for obligations relating to unpaid remuneration (minimum statutory pay) and overtime pay, as well as the institution of due diligence, demonstration of which in principle releases the contractor from the liability.¹⁴

The task of monitoring compliance with the PWA is entrusted to PIP. The Act indicates the latter as the competent authority on the territory of the Republic of Poland and provides for its new powers to control whether the employee has the status of a posted worker and whether the terms and conditions of employment meet the requirements of Polish law.¹⁵ As a general rule, PIP only examines complaints related to employment on the basis of employment contracts. Civil law contracts are controlled only with regard to irregularities in the field of health and safety regulations at work or the conclusion of bogus civil law contracts.

Failure to comply with relevant PWA obligations may trigger a fine of between Polish zloty (PLN) 1,000 (approximately EUR 250) and PLN 30,000 (approximately EUR 7,500). In principle, PIP does not have the authority to impose sanctions on Polish employers posting abroad who violate the law in the receiving country. Foreign institutions, however, can apply sanctions for such violations based on information and evidence provided by PIP. Notably, in accordance with Article 12 PWA, concerning the provision of the necessary information on the posting employees from the territory of Poland and carrying out controls in response to reasonable requests from competent authorities, failure to provide PIP with the information on the conditions of employment of workers posted abroad is also subject to the above-mentioned fine (of between EUR 234 and EUR 7,000).

As a general rule, lodging a complaint to PIP does not exclude claims before the Labour Code.¹⁶ Pursuant to Article 11034 Section 2 Code of Civil Procedure, matters brought by an employee regarding the provision of employment conditions in accordance with PWA belong to national jurisdiction; also when an employee is or has been posted to work on the territory of the Republic of Poland by an employer established in one of the EU Member States.

13. PWA Chapter 5, Article 24-25.

14. PWA Chapter 3, Article 7-8. For a more detailed explanation of the relevant provisions see the PIP website created in accordance with Article 13 PWA: www.biznes.gov.pl/przedsiębiorcy/biznes-w-polsce/prowadze-firme/pracownicy/delegowanie-pracownikow-do-polski [accessed 7 January 2017].

15. PWA Chapter 4, Article 9-23.

16. In Poland, claims arising out of employment relationships are decided by Labour Courts that constitute separate organisational units of regional courts (*sądy rejonowe*), and labour and social insurance courts that constitute separate organisational units of district courts (*sądy okręgowe*). Proceedings before Polish courts take place in two instances and are conducted on the basis of the Code of Civil Procedure. As a general rule, claims arising from an employment relationship shall expire after three years from the date on which the claim became due (Article 281 LC).

Under Polish law, the action in matters of labour law can be brought by an employee, employer, public organisation or labour inspector either before the courts of general jurisdiction of the defendant (owing to the place of residence), the court in whose jurisdiction the work is, has been, or was to be performed, or the court in whose district the undertaking is operating. Pursuant to Article 6 of the PWA, posted workers bringing judicial or administrative proceedings shall be protected against any unfavourable treatment in employment.

2. Public debate on posting of workers: between the wage discrimination of Poles and competitive advantage rhetoric

In Poland, the issue of fair labour mobility in the EU was for years somewhat sidelined in the public and academic debate, which focused on the broadly understood migration problematic. In fact, it was not until the introduction of a new legislative framework both at national and EU level that the relevant actors started shifting their focus onto the relevance and consequences for national labour law and the functioning of the labour market, more often with recourse to posted workers.

In general, the introduction of the comprehensive/EU-compliant framework governing the posting of workers issue was met with a positive reception, as public consultation with the social partners proved.¹⁷ Yet the exclusion of the international transport sector from the scope of application of the PWA was controversial. In the view of the Social Dialogue Council¹⁸ in accordance with Article 1 of Directive 96/71/EC, its provisions shall not apply only to commercial navy companies with respect to ship personnel. Thus, in principle, international transport, including road haulage, should fall within the scope of the PWA.

The Ministry of Foreign Affairs, however, is not willing to share the same interpretation, stating that posting of workers is carried out under EU law provisions regulating the freedom to provide services, namely Articles 56-62 of the Treaty on the Functioning of the European Union (TFEU). Pursuant to Article 58 TFEU, the free movement of services in the field of transport is governed by the Treaty's provisions on transport, and not by Articles 56-62 TFEU. Thus it remains questionable as to whether secondary law, such as Directives 96/71/EC and 2014/67/EU that implement the provisions of the Treaty, may regulate matters not covered by it. Moreover, in the view of the Ministry, international transport does not essentially constitute posting within the meaning of Article 1 Point 3a) Directive 96/71/EC. The application of several national legal regimes to highly mobile transport workers would result in a lack of legal certainty and considerable difficulties for entrepreneurs who provide transport services in the EU context and, as a consequence, could result in violating the principle of proportionality. Accordingly, considering the obvious loophole in EU law and the disputes over the

17. <https://legislacja.rcl.gov.pl/projekt/12279950/katalog/12327608#12327608> [accessed 16 June 2019].

18. A forum for co-operation of employees, employers and government representatives appointed by the President upon the request of authorised entities. See Act of 24 July 2015 on the Social Dialogue Council and other institutions for social dialogue (Journal of Laws of 2015, item 1240).

application of the provisions of Directive 96/71/EC to international transport that have been going on at EU level for many years, unambiguous compliance with EU law, in the view of the Ministry, will only be effective once the scope of Directive 96/71/EC is determined by the Court of Justice of the European Union (CJEU).¹⁹

In recent years, a lot of concern has been raised in Poland over the revision of the Posted Workers Directive. For Polish employers' federations, as well as some EU law experts, the new Directive goes too far in the wrong direction, limiting as it does the key principles of economic freedom. In their view, the envisaged principle of 'equal pay for equal work at the same place' is likely to result in 'unequal treatment of foreign service providers', and as such infringes the Treaty provisions related to the competences of the EU, in particular with regard to the application of the subsidiarity and proportionality principle.²⁰ As they explain, the pay rate differences existing among EU Member States do not constitute unfair competition and therefore should be no obstacle for service providers to profit from the relevant competitive advantage, which in practice derives from the generally weaker condition of the entire economy of new EU Member States. Moreover, since it is precisely the purpose of a rigidly defined minimum wage to ensure that there is no social exclusion of posted workers, it seems neither reasonable nor proportionate to introduce the requirement for equal remuneration in relation to locally employed and posted workers.²¹ Finally, they view the validity of the revision of the Directive 96/71/EC as doubtful in light of the fairly recent deadline for transposition of the enforcement Directive 2014/67/EU, and therefore it is still not clear whether the problems related to the allegedly persistent unfair competition on the internal market could be solved by applying the Enforcement Directive. Thus, in principle, the policy focus should be shifted to fighting undeclared work, bogus self-employment and other illegal practices.²² On 3 October 2018, Poland submitted a complaint to the CJEU regarding the protectionist character of the Posted Workers Directive, which 'impedes the realisation of the freedom of provision of services and the *freedom* of movement of workers.'²³

In contrast, among the country's trade unions (NSZZ Solidarność, FZZ and OPZZ), the idea of 'equal pay for the same work in the same place' was met with a positive reception. In their opinion, every action that contributes to maintaining a wage growth consistent with at least increasing productivity should be supported. This is necessary from the

19. <http://tlp.org.pl/dyskusja-o-zmianach-w-dyrektywie-o-delegowaniu-pracownikow-tym-razem-w-ramach-rady-dialogu-spolecznego/> [accessed 16 June 2019], NSZZ Solidarność does not preclude a complaint against Poland to the European Commission, see http://serwis.gazetaprawna.pl/transport/artykuly/1105537,kierowcy-a-ustawa-o-delegowaniu-pracownikow.html?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3Bls4TfdicTL%2BeIGXfkdMLg%3D%3D [accessed 16 June 2019].
20. See e.g. Kwasiborski P. (2016) Planowana rewizja dyrektywy 96/71/WE w świetle dotychczasowych uwarunkowań prawnych instytucji delegowania pracowników w Unii Europejskiej, Europejski Przegląd Sądowy, 6, 12-21.
21. See e.g. position of the Polish Confederation Lewiatan on the draft Directive amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final), available at www.konfederacjalewiatan.pl/legislacja/opinie/prawo-pracy-i-rynek-pracy/3/_files/2016_03/reGB09_03_16_Stanowisko_konfederacji_Lewiatan_do_projktu_dyrektywy_zmieniaj_cej_dyrektyw_96-71-we_eng.pdf
22. Ibid.
23. <https://praca.gazetaprawna.pl/artykuly/1288073,polska-zlozyla-wlasna-skarge-do-tsue-ws-dyrektywy-o-delegowaniu-pracownikow.html>

point of view of the ability to overcome weak GDP growth in many EU countries. Trade unions are distancing themselves from the view expressed in the resolution of the Polish parliament, pursuant to which the amendments to the Posted Workers Directive violate the principle of subsidiarity. As they explain, ‘the nature of the posting on a cross-border level indicates that action is required for all EU Member States with respect to this institution’.²⁴

3. Posting of workers before the National Labour Inspectorate

In general, the system of collecting data on complaints submitted to the National Labour Inspectorate (PIP) does not allow it to be clearly determined whether the relevant complaint was submitted by the worker posted to Poland within the framework of the provision of services. The available statistical data only makes it possible to distinguish the central aspect of the complaint and whether it was reported by an employee or by an institution, office or co-operating body.

According to the information obtained from the Chief Labour Inspectorate, 28 complaints regarding the issue of posting of workers to Poland were filed with PIP in 2017. More than half of these concerned the failure to provide posted workers with terms of employment no less favorable than those resulting from the provisions of Polish law (in particular, 13 complaints related to daily and weekly rest periods, one regarded the amount of remuneration and allowance for overtime work, and one the principle of equal treatment and the prohibition of employment discrimination).²⁵ In contrast, irregularities revealed in the course of inspections carried out by PIP most often concerned statements on the posting of employees (lack of or late notification of the fact of posting, submitting an incomplete statement or lack of updates) and the failure to appoint a person responsible for liaising with the Labour Inspectorate.

Notably, PIP’s report clearly states that not all solutions provided for in the Act are sufficiently precise and thus fully effective in practice. In this respect, PIP suggests introducing, *inter alia*, explicit regulation of the issue of medical examinations and occupational health and safety (OHS) training for employees posted to Poland to be carried out in accordance with the rules applicable to Polish employees. Currently, these issues cause significant controversy, especially in the case of employers relying on medical examinations or OHS training undertaken in the home country. Unambiguous regulations in this area would bring some clarity.²⁶

24. <http://www.solidarnosc.org.pl/aktualnosci/wiadomosci/kraj/item/13295-strona-zwiazkowa-rds-o-delegowaniu-pracownikow?highlight=YTozOntpOjA7czoxMToiZGVsZWdvd2FuaWEiO2k6MTtzOjEyOiJwcmFjb3duaWVdDs3ciO2k6MjtzOjIoOiJkZWxlZ293YW5pYSBwcmFjb3duaWVdDs3ciO3o>

25. Response of the Chief Labour Inspectorate, Department of Employment Legality, 1 February 2018 r. GNL-434-5105-7-2/18. Notably, most of the complaints were brought either by employees or former employees, and only one by an external institution.

26. PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Państwowa Inspekcja Pracy. <https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf>, 110.

At the same time, as demonstrated in PIP's annual reports, foreign control authorities have been showing increasing interest in Polish employees posted abroad by Polish companies. During the first year the PWA was applied (2016), the number of relevant inquiries addressed to PIP had increased by 40% from 2015. As a result of applications from foreign institutions, in 2017 alone, labour inspectors conducted 177 inspections of Polish companies posting abroad,²⁷ with many of them revealing irregularities concerning minimum employment conditions. According to PIP, some Polish employers still pay posted employees less than the minimum wage in the receiving country. The reports also draw attention to attempts to bypass the provisions on the posting by Polish employers by having recourse to the generally more beneficial regulations on business trips (4.2),²⁸ as well as observing the increasing practice of posting third-country nationals (mainly from Ukraine) employed in Poland under civil law contracts for temporary work abroad.

The latter problem was signalled by the control institutions of the posting countries (including Czech Republic, Lithuania, Estonia and the Netherlands), which had some doubts as to the legitimacy of the relevant employment. Most posted workers were citizens of Ukraine who performed work on the basis of employers' statements about intention to entrust work registered at labour offices in Poland. In many cases they did not hold an A1 certificate (formerly E101); this was usually because they failed to meet the criteria to obtain it. In practice, the relevant posting companies do not usually conduct any business in Poland and are generally registered at the virtual office (the so-called letterbox companies), which *de facto* makes it impossible for public institutions to carry out inspections. As PIP explains, in most cases this type of enterprise only serves the purpose of registering a relevant statement from the employer in the district (*powiat*) labour office, which, as the basis for the legal work performed in Poland by a foreigner, enables him or her to work abroad.²⁹

The practice of posting workers to Germany to provide 24/7 care for elderly or sick people in private flats appears similarly problematic from PIP's perspective. Typically, a civil law contract concluded with a Polish company constitutes the basis for performing such work. The latter is often accompanied by a second/parallel contract with the caregiver to undertake marketing work or promotion in Poland, which in reality is rarely carried out. This practice, however, allows the acquisition of A1 forms issued by the Social Insurance Institution (ZUS), which confirm their being subject to the Polish social security system. In practice, there are a number of barriers to co-operation with German control institutions in this respect, related *inter alia* to the limited possibility of controlling private homes (the latter in principle requires the court's warrant), as well as the fact that German regulations established for the care sector do not apply

27. In total, in 2017, labour inspectors carried out 243 controls regarding the issue of posting of workers from Poland. In total, 229 entities were examined, within which 40% carried out activities in the construction, 18% industrial processing, 18% administration services, 6% transport and storage.

28. PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Państwowa Inspekcja Pracy. <https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf>, 108-109.

29. PIP (2018) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy - 2017, Warszawa, Państwowa Inspekcja Pracy. <https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%202020%20dzialalnosci%20PIP%20w%202017.pdf>, 120

to people who work 24/7. The resulting lack of information on the number of actual working hours prevents German institutions from making an assessment as to whether there has been a breach of the minimum pay provisions in Germany. In this situation, workers whose rights have been violated may bring claims only before the court.³⁰

4. Posting of workers before Polish courts: a solely social security dilemma?

The jurisprudence of the Polish courts with respect to posting of workers within the framework of the provision of services is impressive in terms of its volume, yet considerably limited when it comes to the heterogeneity of the factual matrix³¹ and the substantive scope of the judgments. In general, the available case law seems to reflect the statistical portrait of Poland as a predominantly sending country, and concerns posting out (most often to Germany, France, Belgium, Netherlands and Spain), typically within the broadly understood construction or care sector.³²

By and large, neither identifying the situation as regards posting, nor reference to relevant national as well as EU law, including the CJEU case law, seem to have posed many difficulties for the Polish courts. The main aspects of posting the courts dealt with concerned the criterion of being subject to the Polish social security system, yet considerable interpretative dilemmas also induced the issue of differentiation between business trip and posting of workers for the purpose of calculating social insurance contributions. Finally, the remuneration of Polish workers posted abroad received some attention.

Given the quantitative abundance of the case law on the one hand, and on the other the *sui generis* homogeneity of the factual matrix and the resultant limited substantive scope of the judgments, the following analysis will be largely based on the relevant Supreme Court jurisprudence,³³ which although *de iure* binds other courts only in the case to which it relates, *de facto* constitutes an important benchmark for the lower instances courts, as the regularity of reference to its judgments proves.

30. Ibid.

31. The Supreme Court heard several dozens of cases just between Company P (temporary work agency) and the social security institution (cf Supreme Court judgments: 18 November 2015, II UK 100/14, OSNP 2016/7/88; 12 April 2016, II UK 108/14, unpublished; 6 July 2016, II UK 49/15, unpublished).

32. The claims were brought individually or within the co-participation framework, either by posted worker versus posting company, or posting company versus social security institution with the participation of the interested parties. NB under the Code of Civil Procedure of 1964 the co-participation is not a collective action mechanism but rather a case management mechanism for a number of separate cases. Class actions procedure, in principle applies only to consumer law, product liability and tort liability (except for claims for the protection of personal interests).

33. The relevant analysis is based on 67 individual claims brought before the Supreme Court between 2004 and 2018. In most cases, the Court revoked the appealed judgments and remanded the case to the labour and social security court for reconsideration. NB, the substantive scope of the Supreme Court's judgments presented *infra* (see section 4) is generally representative of the overall dynamics of the judicial review in the lower courts.

4.1. Remuneration

Pursuant to the established line of judicial decisions in Poland, every worker who within a limited period of time performs work in the territory of a Member State other than the country in which he normally works has the status of a posted worker and is also entitled to the minimum remuneration and overtime pay in force in the territory of a Member State to which he or she was posted.³⁴

While it is often still unclear as to which components of the wage should be regarded as constitutive elements of the minimum rates of pay in the host country, the Supreme Court in Poland firmly acknowledged that it is the duty of the Court, not the party, to take all actions, including obtaining access to the text and accepted interpretation of the foreign law, enabling proper orientation in the normative state which forms the basis for adjudication.³⁵ Thus, in principle, the Court *ex officio* determines and applies the applicable foreign law and in this context may ask the Minister of Justice to provide the text of this law and to clarify foreign court practice.

Notably, in the view of the Supreme Court, the provision of a contract of employment, which allows for Polish law to be applied to work performed abroad, is not an obstacle to the abovementioned interpretation. By virtue of Article 2 of private international law, in force at the time the relevant employment contracts were concluded,³⁶ parties can submit the employment relationship to the law of their choice if it remains related to this relationship. According to the Court, however, this provision could not be used in the case examined, as 'Article 3 Paragraph 1 of Directive 96/71/EC is a law enforcing its use, regardless of what law would be appropriate on a different basis'.³⁷

Yet, according to the Supreme Court, it is permissible to stipulate in the company collective agreement in Poland that employees employed abroad are not covered by this agreement with respect to employment-related benefits and allowances (for example, retirement bonuses, holiday allowance, 14th salary or Jubilee Award). Employment abroad may therefore be a relevant criterion that justifies exclusion under Article 239 Section 1 LC.³⁸ As the Court explains, employment abroad is usually combined with the distinct situation of the employee in the factual and legal sphere, which *per se* may justify the non-inclusion in a company collective agreement.

In essence, work abroad is often associated with the change of not only the place of residence but also remuneration conditions. It results from the will of the employee and takes place after the employer assesses his or her fitness to work abroad. These basic conditions distinguish the situation of the employee employed abroad from that of

34. Judgment of the Supreme Court of 9 February 2010, I PK 157/09, OSNP 2011/15-16/200.

35. Judgment of the Supreme Court of 3 March 2011, II PK 208/10, LEX 817518 (Three former employees of G.H. LLC in 'O', brought an action for the payment of compensation for amounts due to the difference between the remuneration paid to them and the remuneration resulting from the minimum wage rate applicable in the Netherlands, an 8% holiday allowance, and also to award remuneration for overtime work).

36. Ustawa z dnia 12 listopada 1965 r. Prawo prywatne międzynarodowe, Dz.U. Nr 46, poz. 289 i 290 (repealed).

37. Judgment of the Supreme Court of 2 February 2012, III PK 49/11, LEX 1212058.

38. Article 239 Section 1, 'An agreement shall be concluded for all employees employed by the employers covered by an agreement, unless the parties thereto decide otherwise'.

workers employed in the country. Typically, conditions for remunerating an employee employed abroad would not have resulted, therefore, from the company's collective agreement. Of course, as the Supreme Court observes, one cannot exclude 'hybrid' solutions, in which, despite a separate agreement to work abroad on other terms of employment than in the country, the employee would not lose additional benefits from the collective agreement in force in a given company.

Still, as a general rule, employment abroad usually constitutes an important criterion which precludes the application of the provisions on unequal treatment in relation to employees employed in the country. Thus, the unequal treatment of the employee employed abroad does not mean that the company collective agreement is invalid on the basis of Article 9 Paragraph 4 LC.³⁹ In principle, the provision of a collective agreement which excludes a worker employed abroad from receiving certain employment-related benefits and allowances does not constitute a breach of the principle of equal treatment if his or her remuneration is higher than that of the person employed in the country.⁴⁰

4.2. Business trip versus posting of workers

The Polish accession to the EU on 1 May 2004 opened up new markets for Polish goods and services in Western Europe. One of the largest beneficiaries of the EU regulations of the internal market were undoubtedly Polish entrepreneurs, who could start operations based on a cross-border model and freely provide services throughout the EU, *inter alia* by sending Polish employees to work in the area of other Member States. The latter, in practice, has usually been carried out within two legal frameworks: business trip and posting of workers abroad. After some time, however, this apparently neutral practice presented Polish courts with a considerable interpretative quandary.

One of the major issues in Poland, which in 2015, *nota bene*, also reached the Constitutional Tribunal,⁴¹ appeared to be the determination of whether the work of the workers posted abroad may qualify as performed as part of a business trip, which is of considerable practical relevance when it comes to the calculation of social security contributions. In principle, the determination of the amount of contributions for social security, in accordance with Article 18 of the Act of the social security system,⁴² is based on the income defined as 'revenues within the meaning of the provisions on personal income tax'. As a general rule, the daily subsistence allowance, as well as other payments

39. 'The provisions of collective labour agreements and other collective agreements, regulations and statutes based on the law and determining the rights and duties of the parties to an employment relationship, are not binding if they violate the principle of equal treatment in employment.'

40. Judgment of the Supreme Court of 11 September 2012, II PK 36/12, OSNP 2013/15-16/179.

41. In the judgment of 28 October 2015 (SK 9/14), the Constitutional Tribunal ruled on the incompatibility of Section 2 Paragraph 1 point 16 of the Regulation of 18 December 1998 on rules determining the basis for calculating contributions to pension insurance, with the Constitution, precisely to the extent to which it provided for a mechanism for increasing contributions due from the remuneration of a Polish employee employed abroad to the level of average wages, even if he earned much less.

42. Journal of Laws of 2007 No 11, item 74.

owing to a business trip, are not subject to income tax⁴³ and are also excluded from the basis for calculating contributions for pension insurance.⁴⁴

The concept of a business trip is regulated in Article 77⁵ LC, pursuant to which ‘an employee who, at the employer’s request, performs an official task outside the area where the employer has its registered office, or outside the regular workplace, is entitled to the reimbursement of any expenses incurred in relation to the business trip’ (for example, daily subsistence allowance or reimbursement of local transport and accommodation costs). Pursuant to the established case law, a business trip takes place only when delegating or sending is imposed on the employee by way of an employer’s command obliging him or her to undertake such a trip. Accordingly, a trip by a worker combined with the performance of specific work on the basis of an agreement concluded with employer in practice leads to a periodic change in the type of work agreed in the contract and place of performance,⁴⁵ and as such does not constitute a business trip within the meaning of Article 77⁵ of the Labour Code.

Notably, as emphasised in the judgment of seven judges⁴⁶ of the Supreme Court of 19 November 2008,⁴⁷ differentiating between posting and a business trip hinges on determining whether the employee has to complete the task, which in the set of his duties is an unusual, occasional phenomenon, or whether he or she works for a short time in a different place (even abroad) from that agreed in the employment contract. In the view of the Court, one should differentiate between the performance of work for remuneration and a business trip, because the daily subsistence allowances and other benefits from this trip are not remuneration for work, but rather constitute other work-related benefits. Thus, in principle, the institution of a business trip should not be so freely applied, let alone instrumentally, for hiding salaries, working time, or to reduce taxes and other contributions.⁴⁸

In the case of posting of workers abroad, pursuant to the established line of judicial decisions,⁴⁹ setting the basis for the calculation of social security contributions requires the exclusion of only the equivalent of daily subsistence allowances (but no longer the lump sum for accommodation). Notably, the relevant regulations allow the worker to deduct costs related to posting abroad only to the level of the aforementioned average remuneration. Thus, if the employee earns less abroad, he or she will pay contributions on the actual wage.⁵⁰

43. Article 21 Paragraph 1 point 16 of the Act of 26 July 1991 on personal income tax, *Journal of Laws* of 2016, item 2032.

44. Section 2 item 1 point 15 of the Regulation of 18 December 1998 on rules determining the basis for calculating contributions to pension insurance, *Journal of Laws* of 1998 No 161, item 1106, as amended.

45. Judgment of the Supreme Court of 8 November 2012, II UK 87/12, LEX 1341675.

46. See also Article 59 of the Act on the Supreme Court, *Journal of Laws* 2002 no 240 item 2052 ‘If the Supreme Court, recognising cassation or other measure of appeal, has serious doubts about the interpretation of the law, he may defer recognition of the case and present the legal issue to the composition of seven judges of this Court’.

47. See e.g. judgments of the Supreme Court of 20 February 2007, II PK 165/06, OSNP 2008/7-8/97; 4 March 2009, II PK 210/08, OSNP 2010/19-20/233; 11 January 2013, II UK 157/12, LEX 1555520.

48. Judgment of the Supreme Court of 17 February 2012, III UK 54/11, LEX 1157573.

49. NB only those whose income is higher than the average remuneration referred to in Article 19 Paragraph 1 of the Act on the social security system (approximately EUR 1,071).

50. *Ibid.* Section 2 Paragraph 1 point 16. See e.g. judgment of the Supreme Court of 8 March 2016, II UK 96/15, LEX 2007794; the resolution of the Supreme Court of 10 December 2015, III UZP 14/15, OSNP 2016/6/74;

Interestingly enough, in several judgments the Supreme Court also presented the position according to which the mere issuance by ZUS of A1 forms excludes the recognition that the person involved was on a business trip in the periods indicated therein. As a consequence, daily subsistence allowances and other payments due to business trips paid in the period certified by ZUS on form A1 will not be excluded from the basis for the calculation of social contributions. In other words, in the opinion of the Supreme Court, the issuance of the A1 form is allowed only in the case of the posting of workers. The Court does not indicate, however, which document confirming the application to a Polish employee of legislation in the field of social security would be appropriate during a business trip abroad.⁵¹

4.3. Temporary work agency and the criteria of being subject to the Polish social security system

The Polish Supreme Court has on numerous occasions pointed out that the primary link indicating the applicable social insurance law constitutes the place of work (*lex loci laboris*).⁵² An exception that allows a Polish citizen to remain subject to Polish social security is short-term posting (less than 24 months) by a Polish employer (having a registered office in Poland or representation) under an existing employment contract, or posting to work on behalf of an entity related to the Polish employer. In the view of the Court, however, such an exception has its rational limits, delineated by the conditions set out in the Regulation No. 883/2004 on social security co-ordination. Determining whether a temporary work agency that delegates employees to work in other EU Member States ‘normally carries out its activities’ in Poland (within the meaning of Article 12 Paragraph 1 of Regulation No 883/2004), until recently, nonetheless, often raised considerable interpretative controversies.

In the judgment of 18 November 2015, *nota bene*, concerning the refusal to issue an A1 certificate to the applicant (employer),⁵³ the Supreme Court in the composition of seven judges, modified the presented hitherto line of judicial decisions. For years the relevant determination had been made dependent on achieving the 25% of the total required turnover in the posting Member State.⁵⁴ In the view of the Court, proper reasoning requires assuming that turnover at the level of 25% can at most create a factual presumption that the temporary work agency ‘normally does business’ on the territory of the sending state within the meaning of Article 12 Paragraph 1 of Regulation 883/2004. Thus, as a general rule, assessing whether the company is operating significant parts of the activity in the EU Member State of establishment requires analysing the case

judgment of the Supreme Court of October 30, 2013, II UK 112/13, LEX No. 1403878; 3 December 2013, I UK 156/13, OSNP 2015/2/25; 23 April 2013, I UK 600/12, OSNP 2014/2/28.

51. See e.g. judgments of the Supreme Court of 13 January 2015, II UK 205/13; 14 November 2013, II UK 204/13.
 52. See e.g. judgments of the Supreme Court of 13 October 2016, II UK 336/15, LEX No. 2169488; 15 June 2016, II UK 232/14, LEX 2071115.
 53. Judgment of 18 November 2015, II UK 100/14, OSNP 2016/7/88.
 54. See e.g. judgments of the Supreme Court of 4 June 2014, II UK 550/13, LEX 1478710; 4 June 2014, II UK 565/13, LEX 1475235; 6 August 2014, II UK 31/14, LEX 1738485; 14 October 2014, II UK 32/14, LEX 1545034; 18 November 2014 r., II UK 46/14, LEX 1621341; 16 December 2014 r., II UK 93/14, LEX 177789.

by both the social security institution and the Court controlling its regularity in civil proceedings, all criteria characteristic to this activity.

As the Court explained, the turnover of a temporary work agency, in the form of global revenue from the sale of goods and services in a specific period, is worked out in both sending and host country. Yet in the country of its establishment, the temporary work agency in general does not achieve profit, mainly because of the free-of-charge character of the services.⁵⁵ In addition, in the country where it employs employees, the company bears significant administrative costs related to the conclusion of employment contracts, keeping records and fulfilling other employer's obligations, and above all, paying remuneration to temporary workers. Thus, in principle, the failure to achieve the relevant turnover requires an analysis of the circumstances of a specific case, taking other criteria into account.⁵⁶

It is interesting that, pursuant to the view presented already in several Supreme Court judgments, the relevant set of applicable criteria should be tailored to the specificity of the given case.⁵⁷ Thus, for instance, it is self-evident that taking into account the relevant 'other criteria' in the case of a company with a structurally and administratively organised recruitment site, whose main activity concerns the recruitment of employees, it must be stated that the temporary work agency 'normally carries out its activity' in the country in which it mostly recruits employees.⁵⁸

Similarly relevant to the valid application of the exception to the *lex loci laboris* rule remains the assessment of whether the posted worker, immediately before the start of his or her employment, was already subject to the legislation of the Member State in which his or her employer is established (within the meaning of Article 14 Paragraph 1 of Regulation No.987/09). In the view of the Supreme Court, the relevant wording implies any entitlement to insurance, including health insurance, even if at the same time a person was not subject to social insurance (for example, in the case of work provided under employment or civil contracts, or non-agricultural economic activity).

As a general rule, being subject to relevant insurance occurs *ipso iure* and is a consequence of the existence of the entitlement to this insurance. Thus, it is legally irrelevant whether

55. E.g. in Poland, pursuant to the Act on the promotion of employment and labour market institutions, it cannot collect amounts other than those related to the actual costs incurred in connection with referral to work abroad (*vide* Article 19d and Article 85 Section 2 point 7).

56. Notably, and not without significance for the view expressed in the relevant judgment of the Supreme Court, was also the fact that 'turnover of around 25% of the total turnover' as an indicator sufficient to establish the existence of a significant part of activities in the posting state, is only mentioned in the Practical Guide issued on the basis of authorisation included in point 7 of Decision No. A2. Given the fact that the latter is essentially a document introducing good administrative practices, the quantitative criterion indicated therein according to the Court is a non-normative criterion that cannot be treated as sufficient and decisive for relevant legislation in the field of social insurance.

57. See e.g. judgments of the Supreme Court of 19 April 2016, II UK 175/14, LEX 2290391; 20 June 2017, II UK 411/16, LEX 2321889; 14 June 2017, II UK 388/16, LEX 2326162; 15 November 2016, II UK 386/15, LEX 2178680; 15 November 2016, II UK 385/15, LEX 2178679; 14 June 2016, II UK 383/16, LEX 2326161, 14 June 2017, II UK 374/16, LEX 2321887; 11 October 2016, II UK 301/15, LEX 2159115.

58. See e.g. judgments of the Supreme Court of 5 April 2016, II UK 179/14, OSNP 2017/11/149; 14 June 2017, II UK 386/16, LEX 2321888; 13 October 2016, II UK 335/15, LEX 2169487; 12 October 2016, II UK 317/15, LEX 2162813; 13 April 2016, II UK 143/14, LEX 2290390.

insurance or payment of premiums for this insurance was applied for.⁵⁹ Likewise, a decision based primarily on the application of an additional criterion of being subject to relevant legislation for at least one month, resulting from the A2 decision,⁶⁰ without considering all others factors presented in the case, is incorrect.⁶¹

In essence, as expressed in several Supreme Court judgments, it should not be the case that the Polish social security authority takes away (without an adequate legal basis and justification) the national insurance entitlement in connection with their short-term work abroad from the Polish employees posted to work in other EU Member States, even if they were not reported and covered by the *lex loci laboris* legislation. The Polish social insurance institution does not have the ‘anti-dumping’ police authority and there is neither legal grounds nor justification for excluding workers posted to work in other EU Member States from the national social security system on the basis of an unverifiable assumption of the application of the social dumping practice. In the view of the Court, the contested practices of the Polish Social Security Institution not only weaken the competitiveness of Polish entrepreneurs, but also burden them with unnecessary and time-consuming applications for determining foreign social insurance entitlements that require extensive knowledge of foreign law.⁶²

Conclusion

As the presented analysis reveals, the jurisprudence of the Polish courts on posting of workers within the framework of provision of services remains rather detached from the current national and European debates on posting. This is mainly down to the *sui generis* homogeneity of the factual matrix and the resultant limited substantive scope of the judgments. To date, the main aspects of posting out the courts dealt with concerned the criteria of being subject to the Polish social security system, yet considerable interpretative dilemmas also instigated the issue of differentiation between business trips and the posting of workers for the purpose of calculation of the social insurance contributions of Polish companies posting abroad. The remuneration of Polish workers posted abroad also received some attention.

The relevant lack of any posting-in case law in Poland may be to some extent attributable to the fact that Poland is a low-wage country, with a statutory minimum wage of PLN 2,250 (approximately EUR 516).⁶³ Thus, the typically most controversial component of minimum working conditions - wages - may not constitute an issue for the group of workers most often posted to Poland, that is, those from Germany or Italy. In practice,

59. See e.g. judgments of the Supreme Court of 6 August 2013, II UK 116/13, OSNP 2014/5/73; 12 October 2016, II UK 326/15, LEX 2165571.

60. Decision No. A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text of relevance to the EEA and to the EC/Switzerland Agreement), OJ C 106, 24.4.2010, p. 5–8.

61. Judgment of the Supreme Court of 3 March 2016, II UK 84/15, LEX 2015134.

62. See e.g. judgments of the Supreme Court of 13 October 2016, II UK 361/15, LEX 2169490; 13 October 2016, 337/15 LEX 2169489; 5 October 2016, 240/15, LEX 2155195 237/14; 13 April 2016, II UK 107/14, LEX 2290387.

63. Journal of Laws of 2018, item 2177, as amended.

however, as demonstrated in the PIP annual reports, some Polish employers still fail to provide posted workers with terms of employment no less favourable than those resulting from the provisions of Polish law, or try to bypass the provisions on the posting out by having recourse to financially more 'beneficial' regulations on business trips.⁶⁴

At present, PIP is lacking real potential to sanction offences committed by posting employers. In this respect, PIP suggests initiation of legislative works aimed at sanctioning infringements of the Act in the course of administrative fines, and not – as is currently the case - in the course of proceedings concerning misdemeanours. In the view of PIP, the introduction to the PWA of a provision obliging employers to include employment conditions of posted workers in the content of employment contracts seems to be of equal importance to enforcement of the new legislative framework. This would allow labour inspectors to enforce obligations resulting not only from foreign legislation but also from a contract of employment. This constitutes an important source of mutual obligation on the parties to the employment relationship.⁶⁵

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