Posting of workers – Still Too Many Ambiguities and Contradictions?

Delegowanie pracowników – wciąż zbyt wiele dwuznaczności?

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Summary: *The purpose of this study is to indicate the interdependences between a posting of workers and other types of employee mobility within the meaning of EU law and national legal sources which allow temporary supply of services abroad, especially regarding a 'business trip'. Firstly, the author analyses the legal construction of a posting in the light of social security coordination. Then, he discusses the concept of a posting in the context of employment law and national labour law, which enables crystallizing mutual relations and connections. The author concentrates on the premises of given institutions and attempts to explain the classic conflict between a different type of employee mobility.*
Key words: *posting, business trip, mobility, certificate A1, coordination of social security*

Streszczenie: *Celem opracowania jest wskazanie współzależności między delegowaniem pracowników a innymi rodzajami mobilności pracowników w rozumieniu prawa Unii Europejskiej i krajowych źródeł prawnych, które pozwalają na tymczasowe świadczenie usług za granicą, szczególnie w odniesieniu do „podróży służbowej". W pierwszej kolejności autor analizuje konstrukcję legalną delegowania w świetle koordynacji zabezpieczenia społecznego. Następnie omawia koncepcję delegowania w kontekście prawa pracy i krajowego prawa pracy, co umożliwia krystalizację wzajemnych relacji i powiązań. Autor koncentruje się na przesłankach danych instytucji i próbuje wyjaśnić klasyczny konflikt między różnymi rodzajami mobilności pracowników.*
Słowa kluczowe: *delegowanie, podróż służbowa, mobilność, zaświadczenie A1, koordynacja systemów zabezpieczenia społecznego*

Introductory remarks

Recent ECJ rulings in the cases *Altun*[1], *Alpenrind*[2] or *Walltopia*[3] emphasize a number of doubts related to issuing A1 certificate that have not been resolved yet. *Prima facie*, it should be absorbing that there is so much interest in a certificate that has merely declaratory character. Confirmation of the social security legislation applicable to the person entitled by the A1 certificate allows, however, to pay social security contributions in the so-called the 'sending' country during temporary work abroad. In the absence of harmonisation, it is for each Member State to determine the features of its own social security system, including which benefits are provided, the conditions for eligibility, how these benefits are calculated, the level of contributions to be paid by insured persons and the income to be taken into account when calculating social security contributions[4]. Consequently, given the varying levels of social

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1 CJEU 6 February 2018, C-359/16, Altun, ECLI:EU:2018:63.
2 CJEU 6 September 2018, C-527/16, Alpenrind and Others, EU:C:2018:669.
3 CJEU 25 November 2018 , C-451/17, Walltopia, EU:C:2018:861.
4 H. Verschueren, B. Bednarowicz, "The EU Coordination of the Social Security Systems of the Member States and Its Applicability in Cross-Border Road Transport". In: *Cross-Border Employment and Social Rights in the EU Road Transport Sector*, eds. A. Zwanenburg, B. Bednarowicz (Haag, 2019).

security contributions in Member States[5] workers and undertakings recalling the EU fundamental freedoms tend to take advantage of them by paying low(er) contributions[6].

As a result, the process of ongoing glorification the A1 certificate among entrepreneurs providing cross-border services has became more and more noticeable. Due to limitations, this contribution focuses on the most thorny issues: notion of posting and interdependences between provisions laid down in coordination of social security systems and other types of employee' mobility covered by EU labour law as well as national labour law, encompassing legendary concept of 'business trip'.

Notion of posting of workers – social security law versus employment law

The fundamental principle of coordination of social security systems is being subject to legislation of a single social security system only. Pursuant to art. 11 Regulation 883/2004[7] persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Being subject to legislation in each country would be unfavourable for obvious reasons. Hence the principle of application only one legislation[8]. It is assumed as a general rule that the applicable legislation is legislation the Member State in which the person concerned performs his work as an employed or self-employed person[9], often called as Stated-of-employment principle.

However, the provisions of Regulation No 883/2004 contain a number of exceptions and special rules. One of the most prominent example of such a special case concern the rules applicable to the posting of workers from one Member State to another. In accordance with art. 12 Regulation 883/2004 during 24 months at the most, a posted employee remains subject to the social security legislation of the Member State to which he/she was subject before the posting.

However, the term and notion of 'posting' does not occur exclusively in social security coordination. It plays also important role in the labour law since the employment conditions of posted workers are laid down in Posting Directive 96/71[10]. From the labour law perspective, posting is usually understood as a form of temporary transnational labour migration functioning on the grounds of freedom to provide services, characterised by the fact that posted workers do not gain the access to the labour market, work without needing a work permit, return to home after performance of services and last but not least they are still employed by the sending company[11].

The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old Article 49 EC), on the one hand, with the need to ensure a climate of fair com-

5 L. Bernsten, *Social Dumping at Work: Uses and Abuses of the Posted Work Framework in the EU* (Brussels: ETUIPB, 2015).

6 K. Ślebzak, „Podleganie ubezpieczeniu społecznemu w przypadku jednoczesnego wykonywania pracy i prowadzenia działalności gospodarczej na terytorium przynajmniej dwóch państw członkowskich UE", *Praca i Zabezpieczenie Społeczne* 11(2013).

7 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004, L 200/1 (corrigendum OJ 2004, L 200/1), (hereafter 'Regulation No 883/2004).

8 See also Judgement of Supreme Court 8.06.2017, II UK 324/16, LEX nr 2312026.

9 G. Uścińska, *Zabezpieczenie społeczne osób korzystających z prawa do przemieszczania się w Unii Europejskiej* (Warsaw, 2013); R. Cornelissen, „Conflicting Rules of Conflict: Social Security and Labour Law". In: *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, ed. H. Verschueren (Cambridge––Antwerp, 2016).

10 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, OJ 1997, L 18, 1 (hereafter 'PWD').

11 A. van Hoek, M. Houwerzijl, "Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive", *Cambridge Yearbook of European Legal Studies* 14 (2011–2012); F. Schierle, In: M. Schlachter, ed. *EU Labour Law. A Commentary* (Alphen aan den Rijn, 2015).

petition and respect for the rights of workers[12].

Unfortunately, the legal framework in relation to posting is considered by many as conducive to 'social dumping', illegal work etc. and results in displacement effects[13].

Hypothetically, definitions and mechanisms in social security coordination and labour law could be homogenous, some remarkable differences still occur.

Firstly, contrary to the provisions of PWD, Regulation 883/2004 concerns the entire social security legislation of the Member State in question, and therefore the social security legislation of the host Member State does not apply for this period[14]. Not only the mechanism stipulated in Regulation is more complex in this context but also the prerequisites for posting indicated in Regulation 883/2004 differ significantly from the prerequisites laid down in PWD. The most fundamental difference is in the first one. Insofar as Regulation 883/2004 provides for performance the work on employer's behalf, then PWD requires carrying out work under a contract concluded between the undertaking making the posting and the party for whom the services are intended. In this respect, Regulation 883/2004 seems to be expressly broader than PWD since the Regulation does not refer to freedom to provide services or cross-border provision of services. Further, Regulation 883/2004 sets the maximum period of posting (24 months), while PWD does not point out such a condition.

Finally, in the light of Regulation a posted worker shall not be sent to replace another posted person, with absence of such restrictions in PWD. Unfortunately, using the same term – despite various prerequisites – implies the identification of these institutions and this leads to many misunderstandings.

It is a daunting task to unequivocally assess the differences presented in this way in the field of social security coordination and labour law. Considering so, the special attention should be drawn to the sharp contrasts of aims and achievements of these legal acts. Whereas the prevention from deprivation social security rights of citizens is generally considered as a fundamental aim of social security coordination, PWD is aimed to guarantee freedom to provide cross-border services, fair competition and protection of posted workers.

These various aims of Regulation 883/2004 and PWD influence for further considerations significantly. As long as the condition of performance the work on employer's behalf significantly broadens the material scope of the legal structure of posted workers in the light of coordination of security systems social, posting limited to 24 months and a ban on replacement limits this scope. Nevertheless, these two the last prerequisites are justified by the need for protection against abuse of posting to reduce labour costs or application instrumentally law on posting.

Such a fact can be puzzling in so far as the main achievement of social coordination is to prevent citizens from deprivation social security rights in the case of their movement from one Member State to another. We therefore put at stake on unfair competition on the one hand, and deprivation of social rights on the other. Failure to meet one of the prerequisites (even that aimed to protect against abuse of posting to reduce labour costs, e.g. replacement of another employee) leads to the appli-

[12] M. Houwerzijl, "The Analysis of the Posting of Workers Directive(s) with A Specific Focus on EU Cross-Border Road Transport". In: *Cross-Border Employment and Social Rights in the EU Road Transport Sector*, eds. A. Zwanenburg, B. Bednarowicz (Haag, 2019); M. Szypniewski, *Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej* (Warsaw, 2019).

[13] M. Bernaciak, *Social dumping: political catchphrase or threat to labour standards?* (Brussels: ETUI Working Paper, 2012).

[14] H. Verschueren, B. Bednarowicz, "The EU Coordination of the Social Security Systems of the Member States and Its Applicability in Cross-Border Road Transport". In: *Cross-Border Employment and Social Rights in the EU Road Transport Sector*, eds. A. Zwanenburg, B. Bednarowicz (Haag, 2019).

[15] H.-D. Steinmeyer, "Article 12: special rules". In: *EU Social Security Law. A commentary on EU Regulations 883/2004 and 987/2009*, eds. M. Fuchs, R.C. Cornelissen (C.H. Beck, Hart Publishing and Nomos, 2015).

cation of the host state system, and this could mean the deprivation of social security rights[15]. *De lege lata*, an employee failing to meet merely one of the five prerequisites laid down in art. 12 Regulation 883/2004 is exposed to risk of forfeiture his/her rights while working abroad in the name of fair competition. The result, perversely, is that fulfilling 80% of conditions laid down in art. 12 Regulation 883/2004 ('being a posted worker in 80%') is insufficient to benefit from the protection mechanism. In addition to that, the principle of equal treatment could be evoked in order to support this reasoning. For instance, given that there are two employees sent to work abroad, employed by the same undertaking, a first one goes to replace of another employee, a second one does not, the first one will be subject to social security system of 'receiving' country, while the second one will remain under social security system of 'sending' country.

Naturally, this shall not be considered as a desirable phenomenon, and the activity of the Court of Justice is becoming a certain remedy[16].

The above remarks compels attention to emphasize the broader scope of the legal structure of posting in light of coordination of social security systems. Specified condition in art. 12 Regulation 883/2004 – 'performing work on employer's behalf' means *lege non distinguente* that the application of the rules on the coordination of social security systems might take place in a situation where the work is performed exclusively for the sending undertaking.

This fact, even if justified by different purposes, is at utmost importance. Employer, even if not providing services, applies to the competent institution for an A1 certificate. Issuance such a certificate confirms that the employee is an posted worker within the meaning of the coordination of social security systems. This does not automatically mean, from my perspective, qualification as an posted worker within the meaning of labour law – PWD. It does depend on whether the employee will provide services to the local recipient, based on a contract between undertaking making the posting and the party for whom the services are intended. For instance, supposing that an employee is sent for a weekly congress to other EU country, should such employee be qualified as a posted worker? Yes, in the light of social security coordination and at the same time negative answer in the light of labour law.

Practice shows however, that host state control authorities attach great importance to A1 certificates and equate posting in meaning coordination of social security systems with posting within the meaning of labour law – PWD. As a consequence, workers sent with A1 certificates in their pocket 'became' posted workers regardless of whether they perform the service for a local recipient in other EU country. Presentation of the A1 certificate in the host country often implies a further control in the context of employment conditions since it is more convenient to commence a potential inspection with the form A1.

To put it another way, the fact that employee's mobility is a consequence of art. 12 Regulation 883/2004 does not necessarily have to mean that it is within the freedom to provide the services. Posted worker under art. 12 Regulation 883/2004 does not necessarily have to be identified with posted worker within the meaning of PWD.

Posting of workers and 'business trip' – EU versus national perspective

Considering that posting of workers is a form of temporary transnational labour migration some doubts related to other type of employee' mobility appear at the horizon. One of the most prominent example of such a blurring is dispute whether 'business trip' falls within the ambit of art. 12 Regulation 883/2004. It hardly needs to be stressed that the concept of 'business trip' is neither known in EU law nor in domestic law of some Mem-

[16] See CJEU 25 November 2018 , C-451/17, Walltopia, EU:C:2018:861.

ber States[17]. At the same time, rules pertaining to 'business trip' are not only expressly laid down in national labour law of some Member States but also quiet often applicable due to the lower financial charges associated when compared to the costs of posting of workers abroad (Study on wage-setting systems, 2015).

What seems to be common for the concept of 'business trip' in the most of the countries, it is a legal instrument serving to send an employee abroad and basically allows to send an employee abroad for usually short period of time or specific purpose. Therefore, the crucial question is how the domestic level concept of 'business trip' fits together with EU law regarding social security coordination, including special rules regarding posting.

Hereby, it could be argued that the national labour law institution excludes the application of a directly applicable EU legal act (regulation) on social security. Such a statement seems to be improper not only because of comparing institutions from different branches of law, but also because of the non-exclusive prerequisites set out in the cited provisions and the purposes for which these provisions are to serve. Let us commence with the aims of these legal institutions. As already indicated, the purpose of all security coordination provisions, including art. 12 is to prevent citizens from deprivation of their social security rights in the event of their movement from one Member State to another. The purpose of a business trip is usually to provide the employee with reimbursement of travel expenses. Thus, the objectives of the cited provisions are not mutually exclusive. To the extent not prohibited by law, a sent worker might continue to be subject to 'sending' social security system, whereas the employer should reimburse him/her for the costs of travel.

Referring to the prerequisites, it should be noted that the decisive factor in the posting is the existence of a direct relationship between the posting undertaking and the posted worker as well as the relationship between the undertaking and the Member State in which it is established.

Similarly, 'business trip' implies an order to travel abroad and at the same time relationship between employer and sent worker remains unaltered. Further, art. 12 Regulation 883/2004 provides for the normal conduct of business in the territory of the sending country, while the main activity of the employer that sends an employee on a 'business trip' is usually conducted in the territory of the country from which the employee was sent.

As you can see, none of the prerequisites specified in art. 12 Regulation 883/2004 precludes the use of 'business trip' for the purposes of posting. This, in turn, leads to the conclusion that it becomes permissible to apply for an A1 certificate during 'business trip'.

Furthermore, it seems that application for an A1 certificate during 'business trip' in not only admissible but also compulsory with a view a number of doubts related to legal status of such worker without A1 certificate. Given that an employee during 'business trip' is not covered by the exceptional nature of art. 12 Regulation 883/2004, and the basic rule is the principle of *lex loci laboris*, then should the legislation of the country in which the work takes place be appropriate?

In other words, should the legislation of the state that is the destination of the trip be appropriate for an employee during a 'business trip'? This would be undesirable for obvious reasons. Nevertheless, EU law anticipates merely two solutions in the field of employee mobility: either posting from art. 12, or pursuit of activities in two or more Member States under art. 13. A 'business trip', depending on its length and frequency, might be often found between the conditions specified in art. 12 and 13.

Formally saying, and *de lege lata* exceptions to these strict rules do not occur, each sending an employee abroad should be treated as a posting under art. 12 or pursuit of activities in two or more Member States under art. 13 Regulation 883/2004, if the other conditions set out in these provisions are fulfilled.

[17] Z. Rasnača, M. Bernaciak, eds. *Posting of workers before national court* (Brussels: ETUI, 2020).

This leads to the conclusion that merely two situations are possible:

1) either the employee has an A1 certificate for a 'business trip',
2) or is subject to the social security system of the country of destination. Unfortunately, *de lege lata* there is no intermediate institution.

In my point of view, *de lege ferenda*, a mechanism excluding very short mobility (such as 3–5 days) from the obligation to apply for an A1 certificate while 'remaining' in the sending country's legislation system should be considered.

Conclusion

The above observations lead to the conclusion that using homonyms ('posting') and combining legal (national and EU) laws does not contribute in any way to legal certainty.

It should be emphasised that incidental nature of any employee mobility no longer occurs in XXI century. In order to stimulate and upgrade The Single Market, European undertakings are sending and will surely send employees to other Member States. Consequently, a demarcation line should be drawn between the legal structure of posting and other types of employee mobility. This will allow, primarily, to answer whether a given mobility should be classified as a 'business trip' or as a posting, both from social security coordination and labour law perspective.

The current state creates incentive to the intuitive application of provisions allowing the mobility of employees, and this is hardly desirable.

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