

Trade unions in the process of changes in the posting of workers in the European Union

Związki zawodowe w procesie zmian
w zakresie delegowania pracowników w Unii Europejskiej

JAKUB A. KUS

Trade Union 'Budowlani' / Związek Zawodowy „Budowlani”
jkus@zzbudowlani.pl

Summary: The purpose of the article is to present the position of Polish and European trade unions in the area of legislative and organizational changes in the area of posting workers, social security of posted workers, monitoring and control mechanisms related to the implementation of Directives 2018/957 and 2014/67/EU. In the first part of the article, the author presents the status of work on the abovementioned changes and key areas of consultation for their final effect, mainly regarding the implementation of new tools to improve the posting process, but also the limitations of this process. In the second part, the author presents the position of European and Polish trade unions towards key proposals of the European Commission and presents the historical evolution of the position of Polish trade union organizations towards the conditions of posting workers and defending their interests.

Key words: trade unions, posting of workers, social security, European Union, Directive 2018/957, Directive 2014/67/EU

Streszczenie: Celem artykułu jest prezentacja stanowiska polskich i europejskich związków zawodowych w sprawie zmian legislacyjnych i organizacyjnych w obszarze delegowania pracowników, zabezpieczenia społecznego pracowników delegowanych, mechanizmów monitoringu i kontroli związanych z implementacją dyrektyw 2018/957 i 2014/67/UE. W pierwszej części artykułu autor przedstawia stan prac nad ww. zmianami i kluczowe dla ich końcowego efektu obszary konsultacji dotyczące przede wszystkim wdrożenia nowych narzędzi usprawniających proces delegowania, ale także ograniczeń tego procesu. W drugiej części autor przedstawia stanowisko europejskich i polskich związków zawodowych wobec kluczowych propozycji Komisji Europejskiej oraz prezentuje historyczną ewolucję stanowiska polskich organizacji związkowych wobec warunków delegowania pracowników i obrony ich interesów.

Słowa kluczowe: związki zawodowe, delegowanie pracowników, zabezpieczenie społeczne, Unia Europejska, dyrektywa 2018/957, dyrektywa 2014/67/UE

Introduction

The seminars of the MoveS expert network in Poland create a unique opportunity to meet a wide range of stakeholders of the posting workers system and, not so often, give the opportunity to exchange views on planned and desired changes in this system. This year's international conference entitled 'Posting of

workers – Regulation No 883/2004¹, Directive 2018/957² and Directive 2014/67/EU³. The case law of Polish courts regarding the free movement of workers and coordination of social security systems” took place at the Social Dialogue Center in Warsaw on February 27, 2020.

The network of independent experts operating in 32 EU and EEA countries allows us

* The National Board Trade Union "Budowlani", 4/6 Mokotowska Street, 00-641 Warsaw, tel: +48 22 825 60 61, e-mail: sekretariat@zzbudowlani.pl

¹ EUR-lex, accessed 5.05.2020, <https://eur-lex.europa.eu/eli/reg/2004/883/2014-01-01>.

² EUR-lex, accessed 5.05.2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0957>.

³ EUR-lex, accessed 5.05.2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0067>.

to look at problems related to the posting and social security of posted workers from a different perspective than that seen in Brussels or government offices in Warsaw. Several Warsaw seminars, organized for years with the support of the Polish MoveS national expert, prof. Gertruda Uścińska, with a precisely formulated program and, at the same time, a possibility of broad discussion, become a forum for exchange and confrontation of views.

The confrontation of views and approaches is inevitable in the case of a phenomenon that occurs on the border of two EU freedoms – the provision of services and the movement of employees. The person writing these words observes the process of posting and changes in regulations regarding both posting and posted workers social security for many years, since the entry into force of the German-Polish intergovernmental agreement of 31 January 1990 on the posting of workers of Polish enterprises to implement work contracts in Germany⁴. The author had the opportunity to follow the process of changes regarding posting during several years of activity in the EU Advisory Committee on the Free Movement of Workers, before and after Poland's accession to the Community, and then changes in the regulations and practice of posting – to current, adapting Polish law to the Directive of the European Parliament and of the Council (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Official Journal EU L 173 of 09.07.2018, p. 16), whose transposition deadline is July 30, 2020.

These 20 years of Polish experience allow us to state that the differences in views on introduced and postulated changes are significant. What's interesting and probably most important – the lines of division between groups of stakeholders are not obvious and do not always run where we would expect them.

The subject of the debate at the Warsaw seminar on the posting of workers were, inter alia, changes from Regulation No 883/2004 in the context of new directives on posting, including problems related to the credibility of PDA1 documents, the definition of marginal work and marginalization of employment (and self-employment) as well as key cooperation in this respect between institutions of the relevant EU countries. The debate was conducted in a broader context than the above-mentioned issues and concerned significant and seemingly inevitable organizational changes in the very process of posting workers. Today, several months after the Warsaw conference, assessments and positions presented by panelists may be subject to verification. We found ourselves in a different reality, in conditions dictated by the pandemic and a situation that has a significant impact on the posting process.

Areas of consultation and agreement platforms in EU institutions

On December 13, 2016, the European Commission submitted a proposal to amend Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009⁵. The Council adopted its general approach on 21 June 2018⁶ and the European Parliament adopted the negotiating mandate on 11 December 2018⁷. The reconciliation process is taking a long time. On 1 July 2020, Germany will take over the presidency of the European Council and everything seems to indicate that binding arrangements will be made during that presidency.

The European Commission has taken a very active role in reaching a political agreement on the matter and to this end has prepared several possible compromise proposals:

⁴ Sejm RP, accessed 8.05.2020, <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940980474>.

⁵ EUR-lex, accessed 5.05.2020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0987>.

⁶ Council of the European Union, accessed 6.05.2020, <http://data.consilium.europa.eu/doc/document/ST-10295-2018-INIT/EN/pdf>

⁷ EUR-lex, accessed 5.05.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP%3AP8_A%282018%290270.

- 1) To prevent the risk of fraud and abuse in the posting process, the EC proposes to use a single digital gateway⁸. This would pave the way for solutions to reduce any additional administrative burden for citizens and businesses and facilitate online access to information, administrative procedures and support services. However, the problem is the readiness of member states to fully implement this solution. Trade unions are aware of the problems with implementation of the Single Gateway. Therefore, they propose to start pilot implementation as soon as possible and enable the use of this tool in the same period as for existing solutions.
- 2) At present, PDA1 is still a paper-based procedure in most Member States that requires a lengthy administrative procedure. Therefore, the EC proposes a new digital tool that will replace the current (paper) PDA1. The unions support this course of action in the hope that it will also improve the process of posting monitoring.
- 3) The activities which do not involve the provision of services/delivery of goods would be exempted from the notification requirement.
- 4) For activities involving the provision of services/delivery of goods, the company or person of the sending Member State must notify their intention to perform an activity in the receiving Member State. In this case, they could start their activity without having to wait for the PDA1 to be issued, showing evidence of the notification and thus avoiding the imposition of fines applicable under national law in the host Member State. Upon receipt of the notification, the sending Member State will determine the applicable provisions and provide information to the host Member State via EESSI and will inform the employer / self-employed person accordingly (within 5 days). This would eliminate the need for requesting a physical PDA1.
- 5) To determine whether the employer carries out significant activities in the relevant (i.e. sending) Member State, the interim contract contains an indicative list of criteria (including ‘working time in each Member State in which the activity is carried out’). However, so far no agreement has been reached at this stage on whether and how to include “working time” among the criteria on the indicative list. The European Commission proposes 3 possible solutions:
 - a) Option 1 – it can be made clear in a recital that the list of criteria is not exhaustive and that there should not be a requirement to meet every element in each case.
 - b) Option 2 – it can be made clear in the substantive provision itself that the reference to ‘working time’ does not apply at the individual employee level, but rather at the global level at company level.
 - c) Option 3 – further criteria may be added to the indicative list, such as those already included in the Council’s General Approach⁹.

The European Commission is working on the introduction of the European Social Security Number (ESSN). Within the European Parliament and the Council, this proposal remains controversial. It is therefore likely that the EC will propose an ESSN only after reaching a political agreement on the amended regulation.

It is no secret that no compromise arrangements have yet been reached between the Commission, Council and European Parliament. In the European Council, there are primarily debates in three areas of dispute:

- 1) Prior notification and notification obligation.
- 2) Method for determining the core business area of an enterprise in two or more Member States.

⁸ Regulation (EU) 2018/1724.

⁹ The place of residence of the main directors, the place where administrative and accounting documents are kept, the place where financial and particularly banking transactions mainly take place.

3) Provisions regarding unemployment benefits resident in a Member State other than the competent State.

The Croatian Presidency did not reach an agreement in the abovementioned areas. In addition, the task of Germany, which will chair the Council from 1 July 2020, will be to seek agreement on a possible longer period of posting for frontier workers and to find a compromise with the position of the European Parliament. The latter, in turn, requires the EC's position to be made more specific and translated into specific proposals for legislative changes.

Trade unions towards the implementation of directives and changes in regulations

Trade unions, also through their European federations, emphasize the need to implement an integrated, functional system of coordination of social security systems.¹⁰ They pay particular attention to the inclusion of effective and efficient control measures in the new regulation.

Polish trade unions support the opinions of their European organizations that it is necessary to fully implement and optimize the use of electronic exchange of information on social security (EESSI). The unions are in favour of the introduction of the European Social Security Number (ESSN) and the Insurance Status Verifier. The unions are demanding the introduction of a tool for identifying posted workers through prior notification, which will enable unions, national administrations and inspection services to identify posted workers. Trade unions allow for the need for a derogation for short business trips.

Trade union organizations also express doubts as to the legitimacy of using the Single Gateway tool – the “gate” already mentioned. “Gateway” is an internal market tool for reducing administrative burdens, but it is not designed as a tool for checking, enforcing or exchanging information.

According to the unions, PDA1 can ultimately be replaced by digital tools, but only if the digital tools are fully operational and strengthen control and enforcement. So far, the Union has not been able to provide such guarantees. In addition, control options should be available to Member States in the same way as for PDA1 documents. According to the unions, this is one of the conditions for monitoring the credibility of the posting process itself. The digital procedure should include at least all information contained in PDA1 and be complete (including the full identity of the employee, sending and receiving company, nature of the activity, date of commencement of work and duration). It should be emphasized that the unions of the main host countries are still in favour of the possibility for Member States to continue to impose sanctions after the introduction of the digitized form of the document (except in the cases where the application was sent and only a few days passed). The basic postulate of the unions is that the planned changes do not limit the possibility of verifying the correctness of the posting, mainly in the context of the scope of activity of the posting entity in the sending country. For Polish unions, this also becomes important in the context of the growing number of employees posted to Poland.

Trade unions point to the special nature and need for effective identification of the company's seat. This postulate remains unchanged in the context of the functioning of “mailbox” companies.

For a long time, Polish trade unions have emphasized the need for wider, systemic cooperation of competent institutions in the area of posting and inclusion of social partners in this cooperation. For industry trade unions, the right direction is to strengthen sectoral cooperation with industry partners in the field of social security (for example, the agreement between ZUS and SOKA-BAU in the construction sector).

Polish trade unions, like many other stakeholders of the posting system, see the need to

¹⁰ European Federation of Building and Woodworkers, accessed 5.05.2020, <https://www.efbww.eu/publications-and-downloads/reports-and-studies/putting-an-end-to-cross-border-social-security-fraud-and-abuse/228-a>.

clarify the concept of marginal work in the context of posting employees. The concept of marginal work introduced in the Regulation of the European Parliament and of the Council (EC) 987/2009 in art. 15 point 5b. remains without definition. It seems that the interpretation of the European Commission in the “Practical Guidebook Legislation applicable in the European Union” recommending recognizing as work of a marginal nature, which occupies less than 5 percent. regular working hours or less than 5% the employee’s total remuneration should be reflected in the relevant legal act.

Polish trade union movement and the posting of workers

In order to understand the position and actions of Polish trade unions in the sphere of posting workers, one should refer to history, until 1990, and to the German-Polish intergovernmental agreement. For many entrepreneurs and employees, the possibility of providing legal services on a stable German market was a special opportunity to obtain additional income and improve the situation of companies on the then unstable Polish market. For trade unions, posting has become a platform for expanding cooperation with German trade unions, and information on a law regulations in this market has allowed them to formulate their own demands. Emerging in principle from the ground up, the “young” market economy required a special union activity, whose patterns were sought by Western neighbours. It looked a little different later, when Poland took over the *acquis* of the European Union before 2004 and implemented the provisions of Directive 96/71/EC. In both cases, the process of posting workers was primarily an opportunity for the unions to compare working conditions on Polish and other European markets, including social security solutions.

Of course, there are very significant differences between the process of posting workers under an intergovernmental agreement and under the directive. In the first case, the posting entity was initially only enterprises in

individual sectors, in the second, after extending the definition of the sender, an important (and in many cases dominant) role was played by employment agencies. Trade unions present in posting enterprises had much easier access to information on posting than in the case of employment agencies, which is a significant problem of the trade union movement to this day.

The presence of unions in the posted workers group itself is also important. The number of employees who are members of Polish trade unions among posted workers was and remains negligible. This is primarily due to the inability to effectively represent the interests of these employees on foreign labour markets and, quite often, the actions of employers hindering trade union activities by posted workers. Today, Polish posted workers (although not in all sectors) are increasingly becoming members of trade unions in the host countries. This is favoured by an ever-expanding network of bilateral and multilateral agreements of relevant trade unions on mutual representation of interests (e.g. in the construction sector) and the temporary assumption of roles for the representation of posted workers’ interests on favourable terms. However, the unionization of posted workers remains low. For trade unions of host countries the working conditions of posted workers, are a particularly sensitive topic, due to the quite frequent dumping and threats to the stability of sectoral collective agreements and national labour regulations. For Polish trade unions, cooperation with these unions and European sectoral organizations is still a reference point for assessing national regulations in the field of labour law and social security. For the reasons mentioned above, the positions of the trade unions of European host and sending countries are very often consulted and agreed, and actions on the EU forum are coordinated. This does not mean that the handshaking process is easy. Trade unions of sending countries (including Poland) naturally focus on the interests of employees from their countries, unions of the receiving countries on the interests of national employees (although in this case one cannot speak directly

about protectionist tendencies). For many years, the practices of posting have managed to develop cooperation and coordination platforms in the European trade union movement, including jointly actions at the level of the European Union institutions.

Instead of a summary

In recent years, Polish trade unions, in addition to working conditions and benefits related to posting (transport, accommodation, access to company social benefits), have been paying more and more attention to the conditions and comparability of posted workers' social security. This is related to the demand for comparability and transfer of these benefits within the EU, supported by the trade union movement.

Recently, action aimed at protecting the rights of workers migrating to Poland from third countries has become increasingly im-

portant for the Polish trade union movement. And although it is not directly related to posting based on EU directives, the trade union movement undoubtedly benefits from the experience acquired in this area over the last few years.

The COVID-19 pandemic has a huge, though not yet fully recognized, impact on the functioning of the global and European economy. It will undoubtedly also affect the European process of posting. Already today we can talk about the first negative effects of closing economies for various sectors, closing borders and breaking many cooperation chains. Where the current structures are violated, the "grey area" inevitably appears. This is also the case with posting. This, will, perhaps complicate the development of optimal solutions for the implementation of new EU directives, including in the field of posted workers social security, but at the same time may reinforce the need for their urgent implementation.

WEBSITE

Council of the European Union. Accessed 6.05.2020. <http://data.consilium.europa.eu/doc/document/ST-10295-2018-INIT/EN/pdf>.

EUR-lex. Accessed 5.05.2020. <https://eur-lex.europa.eu/eli/reg/2004/883/2014-01-01>.

EUR-lex. Accessed 5.05.2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0957>.

EUR-lex. Accessed 5.05.2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0067>.

EUR-lex. Accessed 5.05.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP%3AP8_A%282018%290270.

EUR-lex. Accessed 5.05.2020. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0987>.

EUR-lex. Accessed 5.05.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP%3AP8_A%282018%290270.

EFBW. Accessed 5.05.2020. <https://www.efbw.eu/publications-and-downloads/reports-and-studies/putting-an-end-to-cross-border-social-security-fraud-and-abuse/228-a>.

Sejm RP. Accessed 8.05.2020. <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940980474>.