Whose Interests to Protect?

Judgments in the Annulment Cases Concerning the Amendment of the Posting Directive

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Abstract

The directive 96/71/EC on the posting of workers had been in force for over 20 years when its first amendment (Directive 2018/957) came into force on 30 July 2020. The Hungarian and Polish Governments initiated annulment proceedings against the new measure, primarily arguing that as the amendment extended the host state's labor standards ó to posted workers, the directive is no longer compatible with the freedom to provide services (Cases C-620/18 and C-626/18). Although both claims were rejected, the actions contain a number of noteworthy legal arguments (from the perspective of home States), which highlight some of the long-known contradictions of EU legislation on postings. The article summarizes the CJEU's key observations made in the judgments, which are important propositions for further discussion.

Keywords: posting of workers, freedom to provide services, posting directive, remuneration of posted workers, private international law.

1. Introduction

The directive on posting of workers (posting directive)[1] had been in force for over 20 years when its first amendment[2] came into force on 30 July 2020 (amending directive).

Under EU law, *posting* means that a worker who habitually works in one Member State (the home State) temporarily works in another Member State (the host State) to provide services. For example, when a Polish undertaking offering cleaning services has clients in Germany and orders its employees to temporarily perform such services also on the other side of the border. The essence of the posting directive is that although the worker remains subject to the employment law of the home state, the host state's law concerning working conditions

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1 Directive 96/71/EC of the European Parliament and of the Council (posting directive).

2 Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (amending directive).

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explicitly listed in the directive (that is, the 'hard core'[3] of labor standards) shall apply, if it is more favorable to the worker.[4] An additional requirement is that the posting take place in the framework of the performance of a service contract, intra-corporate posting or temporary agency work.[5] While posted workers make up barely 0.4% of the EU labor market (around 2 million posted workers work in the Member States each year[6]) and therefore have a rather limited impact on the functioning of the EU labor market, this phenomenon attracts significant attention. Since employers may gain a considerable competitive advantage making use of the more favorable domestic labor costs by providing services to the market of another Member State, where local rules would render the service more costly, posting reveals the differences in the level of social protection applicable in the various Member States. Consequently, EU legislation on postings pursues complex aims and ensures not only the freedom to provide cross-border services, but also fair competition among service providers.

The amending directive aims to put more emphasis on the *protection of posted workers*. The new measure introduced the following important changes. It limits the duration of postings to 12 months (which may be extended to 18 months upon the request of the service provider), after which the posted worker will be almost fully covered by the labor law of the host state.[7] The amending directive complements the list of the host State's applicable labor standards with two new elements. *(i)* First, with regard to remuneration, it provides from day one for full equality between posted and local workers in the host Member State as regards all mandatory pay entitlements in the host state's law, while the original directive prescribed only the application of minimum rates of pay. *(ii)* Second, posted workers are now also covered by the host state's standards on allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.[8]

However, the debate over the legal status of posted workers did not end with the adoption of the amending directive. The Hungarian and Polish Governments have initiated annulment proceedings against the new measure, primarily arguing that as *the amendment extended the host state's labor standards to posted workers,*

3 Posting directive, Recital (14); COM(2003) 248, p. 5.

4 Before the amendment, the directive covered the following standards: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality of treatment between men and women and other provisions on non-discrimination. *See* posting directive, Article 3(1).

5 Posting directive, Articles 1-2.

6 *Posted workers in the EU*, European Commission Factsheet, 2015.

7 Procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and supplementary occupational retirement pension schemes shall not apply to posted workers, not even after the time limit expires. *See* posting directive as amended Article 3(1a).

8 Posting directive as amended Article 3(1)(c) and (i); Article 3(1a).

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the directive is no longer compatible with the freedom to provide services.[9] Although both claims were rejected, the actions contain a number of noteworthy legal arguments (from the perspective of home States), which highlight some of the long-known contradictions of EU legislation on postings. The article summarizes the CJEU's key observations made in the judgments, which may be important propositions for further discussion.

2. The Incorrect Choice of Legal Basis: Social Policy or Free Movement of Services?

Hungary and Poland claim that the new directive's legal basis was not correctly chosen. While the directive was adopted based on the provisions relating to the freedom to provide services,[10] considering its purpose and substance, the directive's aim is in fact the protection of workers and should thus have been subject to the chapter on social policy.[11] According to the applications, the fundamental objective of the posting directive is to ensure that workers are afforded equal treatment, in particular as regards remuneration, while the Council has failed to specify which provisions are essential to ensure the genuine development of the freedom to provide services by means of the protection of workers and the prevention of unfair competition.[12]

The CJEU emphasized that the *choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review;* these include the aim and the content of the measure and the legal framework within which the new rules are situated, considering also the existing legislation that the new law amends. Should the assessment reveal that the measure pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.[13]

Following these principles, the CJEU had to examine in detail the objectives and content of the amending (and also the original) directive to decide whether its legal basis was chosen correctly. Such an assessment is all the more important as the possible inconsistency of the posting directive's content and its legal basis

9 Judgment of 8 December 2020, *Case C-620/18, Hungary v European Parliament and Council*, ECLI:EU:C:2020:1001; Judgment of 8 December 2020, *Case C-626/18, Poland v European Parliament and Council*, ECLI:EU:C:2020:1000.

10 Articles 53(1) and 62 TFEU.

11 Article 153(2)(b) TFEU.

12 *Case C-620/18, Hungary*, paras. 28-36; *Case C-626/18, Poland*, paras. 39-40.

13 *Case C-620/18, Hungary*, paras. 38-40; *Case C-626/18, Poland*, paras. 43-44.

has been widely debated since its adoption.[14] The development of postings in EU legislation can be described as an ever-changing relationship between the principles of freedom to provide services and of the protection of workers. Therefore, before we turn to the CJEU's assessment of the choice of legal basis, it is worth revisiting how the relationship between these aims evolved and changed over time in the context of the posting of workers.

2.1. 30 Years of Posting in EU Law

As a starting point, posting is indeed closely linked to the freedom to provide cross-border services.[15] This basic economic freedom enables employers to export their home labor standards with their posted workers to host countries. Since lower labor law standards mean lower costs,[16] the posting scenario is a real battlefield of interests of the players' involved.

While the legal background of employment may vary in each Member State, such differences cannot hamper the freedom to provide cross-border services without proper justification, in particular, when such restrictions are discriminatory or not justified by overriding requirements relating to the public interest.[17] However, there were major turns in how EU law addressed posting cases over the last nearly 30 years.

In 1990 the ECJ found no unjustified restriction in the extension of host state labor standards to workers who were posted to their territory in the framework of cross-border service provision. Instead, the famous *Rush Portuguesa* judgment gave the broadest possible authorization for Member States to extend their labor law legislation to posted workers. According to the frequently quoted paragraph of the judgment,

> "Community law does not preclude Member States from extending their legislation, or collective labor agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does

14 *See e.g.* Marco Biagi, 'The 'Posted Workers' EU Directive: From Social Dumping to Social Protectionism', *in* Roger Blanpain (ed.), *Labour Law and Industrial Relations in the European Union*, Kluwer Law International, Hague, 1998, pp. 174-175; Paul Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?', *Common Market Law Review*, Vol. 34, Issue 3, 1997, p. 572; Zoltán Bankó, 'Az atipikus foglalkoztatási formákra vonatkozó rendelkezések', *in* György Kiss (ed.), *Az Európai Unió munkajoga*, Osiris, Budapest, 2001, p. 452; Mijke Houwerzijl, 'Towards a More Effective Posting Directive', *in* Roger Blanpain (ed.), *Freedom of Services in the European Union. Labour and Social Security Law*: *The Bolkestein Initiative*, Kluwer Law International, 2006, pp. 185 and 195; Karl Riesenhuber, *European Employment Law*, Intersentia, Cambridge, 2012, p. 198.

15 Article 56 TFEU.

16 As an illustration, *see e.g.* Eurofound's report on minimum wages in the Member States, ranging from €312/month (Bulgaria) to €2,142/month (Luxemburg). Eurofound, *Minimum Wages in 2020: Annual Review*, *Minimum Wages in the EU Series*, Publications Office of the European Union, Luxembourg, 2020.

17 Frank Hendrickx, 'The Services Directive and Social Dumping: National Labour Law Under Strain?', *in* Ulla Neergaard *et al.* (eds.), *The Services Directive – Consequences for the Welfare State and the European Social Model*, Djoef Publishing, Copenhagen, 2008, p. 244.

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> Community law prohibit Member States from enforcing those rules by appropriate means."[18]

30 years on, *it is still a mystery how the CJEU reached this conclusion*. The ruling itself includes no hints as to the basis of this axiom,[19] yet it served as the basis for dealing with posting cases until 1999, the year of the entry into force of the posting directive. Nonetheless, *Rush Portuguesa* could not erase the principles enshrined in primary law (in particular, the prohibition of discrimination and unjustified restrictions), hence, the extension of host state's labor regulation to posted workers was far from unlimited. Moreover, after *Rush Portuguesa* the CJEU seemed to take a step back from its overly 'protective' approach and elaborated a detailed test on the basis of the laconic rules in primary law. The CJEU ruled that even if the application of a given labor law rule to posted workers was not discriminatory and served overriding requirements relating to the public interest (*e.g.* the protection of workers), the measure (*e.g.* the application of host state minimum wage laws) could nevertheless be held an unjustified restriction if it was not objectively necessary or in case it exceeded what was necessary to attain its objectives.[20]

Self-evidently, *Rush Portuguesa divided the Member States*: while some host states adopted their own national legislation defining the rules applicable to posted workers,[21] others (in particular, home States) wanted to revisit the issue and called for the adoption of a new directive.[22] The posting directive was finally enacted after five years of negotiations in 1996. The final text clearly attests that its adoption could not have been possible without a compromise. While Article 3(1) lists all the labor standards that host states shall apply to posted

18 Judgment of 27 March 1990, *Case C-113/89, Rush Portuguesa*, ECLI:EU:C:1990:142, para. 18.

19 Davies 1997, pp. 588-589; Gregor Thüsing, *European Labour Law*, Beck, 2013, p. 161. Sypris found two possible explanations for the Rush Portuguesa axiom: the CJEU considered labor law rules as justified constraints on the freedom to provide services, or it found that such rules are not constraints at all, *e.g.* collective bargaining agreements are exempted from the scope of competition law. Phil Syrpis, *EU Intervention in Domestic Labour Law*, Oxford University Press, Oxford, 2007, pp. 109-110.

20 Paul Davies, 'The Posted Workers Directive and the EC Treaty', *Industrial Law Journal*, Vol. 31. Issue 3, 2002. *See* especially the following cases: Judgment of 25 October 2001, *Case C-49/98, Finalarte*, ECLI:EU:C:2001:564; Judgment of 15 March 2001, *Case C-165/98, Mazzoleni and ISA*, ECLI:EU:C:2001:162; Judgment of 23 November 1999, *Case C-369/96, Arblade*, ECLI:EU:C:1999:575; Judgment of 21 October 2004, *Case C-445/03, Commission v Luxembourg*, ECLI:EU:C:2004:655; Judgment of 19 January 2006, *Case C-244/04, Commission v Germany*, ECLI:EU:C:2006:49.

21 Austria, France and Germany, *see* COM(2003) 458, 7.

22 *See* the Commission's proposal [COM(1991) 230] and its amended version [COM(93) 225]. *See also* Emmanuel Comte, 'Promising More to Give Less: International Disputes Between Core and Periphery around European Posted Labor, 1955-2018', *Labor History*, 2019/2, p. 6.

workers, owing to two important derogations it is not an exhaustive list.[23] *(i)* According to the first, Article 3(1-6) shall not prevent the application of terms and conditions of employment which are more favorable to workers.[24] *(ii)* Secondly, Member States may also apply rules concerning other matters than those listed in Article 3(1) (*e.g.* further elements of pay), with reference to public policy, in compliance with the Treaty.[25] As a result, the main question in harmonizing the directive was not which labor standards Member States are obliged to apply to posted workers, but which they are permitted to apply.[26]

However, from 2007 on the Member States' seemingly broad discretion to extend the scope of their applicable labor standards was restricted by the CJEU. In its new line of cases, starting with the famous *Laval* judgment,[27] the CJEU closed all the avenues leading to a more protectionist reading of the directive. As for the first derogation, the CJEU, on the basis of the directive's aim, made it clear that Article 3(7) refers to the home state's law when it permits the application of terms and conditions that are "more favorable to workers". Hence, there is no automatic obligation to apply host state standards solely on the ground that those are more favorable to the employee than the home state standards.[28]

Turning to the second option, the CJEU already ruled before the directive's entry into force that the term public order legislation must be understood as

> "so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State."[29]

Later the CJEU added that the *public policy exception is a derogation* from the fundamental principle of freedom to provide services which must be interpreted strictly, and it "may be relied on only if there is a genuine and sufficiently serious

23 Other derogations limit the applicable host state standards, as they enable or oblige Member States to refrain from applying some of their labor standards (minimum paid annual holidays and/or the minimum rates of pay) in certain cases [posting directive, Article 3(2-5)]. Obviously, these rules are less important to Member States, than those which extend the list of applicable rules.

24 Posting directive, Article 3(7).

25 Posting directive, Article 3(10).

26 Eeva Kolehmainen, 'The Directive Concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems', *Comparative Labor Law & Policy Journal*, Vol. 20, Issue 1, 1998, p. 86.

27 Judgment of 18 December 2007, *Case C-341/05, Laval un Partneri*, ECLI:EU:C:2007:809; Judgment of 3 April 2008, *Case C-346/06, Rüffert*, ECLI:EU:C:2008:189; Judgment of 19 June 2008, *Case C-319/06, Commission v Luxembourg*, ECLI:EU:C:2008:350.

28 *Case C-341/05, Laval*, paras. 80-81. Note that the text itself could have been easily interpreted also the other way round. Nonetheless, employers may voluntarily commit themselves to observe those stricter rules in the host state. *See* Claire Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?', *in* Phil Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge University Press, Cambridge, 2012, p. 233.

29 *Case C-369/96, Arblade*, paras. 30–31.

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threat to a fundamental interest of society."[30] On these grounds the CJEU ruled that the list in Article 3(1) is not a minimum, but a maximum list: it sets out "an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State".[31] Any other matter may be covered by the host state's law only in case it falls under the strictly interpreted public policy derogation. *Laval* demonstrated that not even the right to bargain collectively or the right to strike would suffice for the use of the public policy clause.[32] *Laval* undoubtedly *reflected a conceptual change* in accepting labor law as a constraint on the freedom to provide services. Seventeen years after *Rush Portuguesa*, the CJEU could not have moved any further from its earlier case-law: the first approach, which took it as evident that host states may apply their own labor law to posted workers, was substituted with the idea of giving priority to the freedom to provide services.[33]

The legislative steps taken after 2008 made only minor adjustments to the *status quo* reached after *Laval*. *(i)* First, instead of effecting a substantive review, the Commission only developed a proposal to facilitate practical implementation, leading to the adoption of the enforcement directive in 2014.[34] However, with these rather detailed rules, neither the Commission nor the Member States took on too much risk, as the enforcement directive does not go beyond codifying the case-law of the CJEU or explaining the obligations already contained in the posting directive. Given the many problems left open beyond these practical issues, it seems that the Member States and EU institutions had wanted to send a political message through the adoption of the enforcement directive (demonstrating that 'something is happening'), rather than focus on its normative content.[35] *(ii)* Second, the Commission's 2016 proposal for a comprehensive review of the posting directive promised substantial progress.[36] Following lengthy debates, by the summer of 2018, 18 and half years after the entry into force of the original directive, the posting directive had finally been recast. However, as appears from the judgments in the annulment cases, the

30 *Case C-319/06, Commission vs. Luxembourg*, paras. 29-33 and 50.

31 Id. para. 26.

32 Catherine Barnard, *EU Employment Law, Fourth Edition*, Oxford University Press, Oxford, 2012, p. 232.

33 Thüsing 2013, p. 158; Kilpatrick 2012, pp. 212-213; Riesenhuber 2012, p. 206; Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash Between the European Business Freedoms and the National Level of Workers' Protection', *European Labour Law Journal*, 2018/1, p. 59.

34 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (the IMI Regulation).

35 At the same time, the enforcement directive, by summarizing the case-law, makes it explicitly mandatory in some places to apply certain measures, which were left to the discretion of the Member States before (*e.g.* liability in subcontracting, Article 12). To that extent, therefore, restrictions on posting companies have been tightened.

36 COM(2016) 128 final.

fundamental rationale behind posting remains unchanged and some major problems in the law remain unsolved.

Following three major changes in the legal framework relating to posted workers (that is *Rush Portuguesa*, the adoption of the original directive and *Laval*), the relationship (or rather, hierarchy) of the freedom to prove services and the application of host state labor standards is still debated.[37] It seems to be an ever-topical question: which shall take precedent over the other and under what conditions. Naturally, the approach EU law to this issue has always been the result of an actual compromise. The new milestones in this debate are the adoption of the amending directive (which enforces the protection of workers) and the CJEU's decisions in the annulment proceedings confirming that such legislative intervention is not contrary to the freedom to provide services.

2.2. A Free Movement Directive to Protect Workers?

As a starting point of its reasoning, the CJEU emphasized that the EU legislature, when adopting measures to coordinate national rules (which, by reason of their heterogeneity, impede the freedom to provide services between Member States), is also bound to ensure respect for the general interest, pursued by the various Member States, as well as the overarching objectives of the EU, including the requirements pertaining to the promotion of a high level of employment and the guarantee of adequate social protection.[38] Consequently, EU coordination measures must not only have the objective of facilitating the exercise of the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom.[39] In the case of posting, the directive's aim is not only to guarantee the right to all undertakings to supply transnational services within the internal market by posting workers, but also to protect the rights of those workers. In the CJEU' view, the EU legislature's aim has been to find a fair balance between these concurring interests.[40] As for the content of the new measure, following the aforementioned aims, it offers greater protection for workers than those provided for by the original directive.[41] Namely, the directive aims to ensure that fair competition should not be based on the application, in one and the same Member State, of different terms and conditions of employment, depending on whether or not the employer is established in that Member State.[42]

Undoubtedly, the history of posting in EU law, as detailed above, shows a continuously shifting balance between the economic and social interests involved.

37 *See also* the abandoned Monti II proposal, which would have declared that the exercise of the freedom of establishment and the freedom to provide services on the one hand, and the fundamental right to take collective action, including the right or freedom to strike, on the other, shall mutually respect each other. COM(2012) 130 final, Article 2.

38 Article 9 TFEU.

39 *Case C-620/18, Hungary*, paras. 41-48; *Case C-626/18, Poland*, paras. 51-53.

40 *Case C-620/18, Hungary*, paras. 50-51; *Case C-626/18, Poland*, paras. 55-56; amending directive, Recital 10.

41 *Case C-620/18, Hungary*, para. 57; *Case C-626/18, Poland*, para. 62.

42 *Case C-620/18, Hungary*, para. 60; *Case C-626/18, Poland*, para. 65.

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Following the protective approach introduced by the CJEU in *Rush Portuguesa*, legislative intervention pushed for a more liberal regime, where not all labor law provisions could be applied to posted workers. Later, the CJEU's practice changed significantly in favor of the freedom to provide services as opposed to the social aims of the directive (*Laval*). With the amending directive, the legislator stepped in yet again but this time to put more emphasis on the protection of posted workers.[43] Now the CJEU confirmed that while the posting directive and its amendment *mainly target the freedom to provide services*, the legislator could put more emphasis on the social aspect of the posting phenomenon without changing the measure's original legal basis.

However, while the CJEU concluded from the 'context and the aim' of the directive that the legislator was striving for the right balance between the freedom to provide services and the protection of workers, it seems more logical that the real clash of interests lies between the economic interests of home and host states. The EU measures' main aim is rather to reconcile home state undertakings' freedom to provide cross-border services with their counterparts' right in the host states for a fair competition. Taking the perspective of the host states, it is not convincing that their main concern in posting would be to protect the rights of posted workers. As Davies pointed out, the protection of posted workers lies much more in the interest of the home state.[44] Apparently, the CJEU's 'posting practice' spanning thirty years suggests that the legal debates surrounding posting are much more about the Member States' economic interests. It is quite revealing that there is only one case in which a posted worker or his trade union instituted proceedings to protect his rights, demanding that his employer provide him working condition on par with the more favorable law of the host state.[45] Instead, the general starting point of the cases is either a dispute between the posting employer and the recipient of the service, or an action by the authorities of the host state against the posting employer for non-compliance with the host state's administrative provisions or labor standards.

The Advocate General's opinion clearly indicates that the dilemma behind the posting rules is rather a trilemma. Advocate General Campos Sánchez-Bordona argued that the proper balance between the interests of undertakings providing services and the social protection of posted workers must also ensure fair competition between undertakings which had posted the workers, and those established in the Member State of destination.[46] The opinions consistently refer also to this third aim (fair competition between foreign and local competitors) besides the promotion of cross-border provision of services and the protection of

43 Piet Van Nuffel & Sofia Afanasjeva, 'The Posting Workers Directive Revised: Enhancing the Protection of Workers in the Cross-Border Provision of Services', *European Papers*, 2018/3, p. 1405.

44 Davies 2002, p. 302.

45 Judgment of 12 February 2015, *Case C-396/13, Sähköalojen ammattiliitto*, ECLI:EU:C:2015:86.

46 Opinion of Advocate General Campos Sánchez-Bordona delivered on 28 May 2020, *Case C-620/18, Hungary*, paras. 62-63.

posted workers.[47] Instead, the CJEU built its reasoning on the dual aim of the directive and on Recital 10 of the amending directive, stating that "ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long-term, services on a fair basis".[48] Fair competition appears to be not the consequence but the main idea in the reconciliation of the directive's economic and social aim. Rather, the protection of workers is a side effect of harmonizing the home and host states' economic interests.

Although the judgments confirm that the EU measures adopted to enhance the freedom to provide services must also respect the protection of other affected fundamental interests, such as the protection of workers, it should be pointed out that the new judgments did not change the CJEU's earlier case-law on that matter. The substance of *Laval* remained untouched: the host state's labor standards applicable to posted workers are exhaustively listed in the (amended) posting directive, but this list cannot be broadened in the discretion of the Member States. Instead, it is solely the EU legislator who can offer additional protection to posted workers by adding new elements to this list without restricting unlawfully the freedom to provide services (see also the next Section).[49]

While the above considerations form the backbone of the CJEU's reasoning, it is further enhanced by two additional elements. *(i)* First, *the internal market has significantly changed since the entry into force of the posting directive*, not least due to the successive enlargements of the EU. The CJEU therefore concluded that the EU legislature could take the view that it was necessary to adjust the balance at the heart of the posting directive by strengthening the rights of posted workers in the host state in order to develop a more level playing field for posting undertakings and their counterparts in the host state.[50] *(ii)* Second, the CJEU pointed out that *Article 153 TFEU could not have been the correct legal basis for the directive, for formal reasons*. This Article contains two legal bases for the adoption of measures designed to encourage cooperation between the Member States in social matters and for the adoption of harmonization measures in certain fields falling within the scope of Union social policy Yet neither of these corresponds with the objective to establish the freedom to provide services on a fair basis, and

47 Id. paras. 69 and 108; Opinion of Advocate General Campos Sánchez-Bordona delivered on 28 May 2020, *Case C-626/18, Poland*, para. 72.

48 *Case C-620/18, Hungary*, paras. 51, 107, 122, and 126; *Case C-626/18, Poland*, paras. 56, 90, 104, and 122.

49 The Hungarian action superficially mentioned the problem of posting and fundamental collective labor rights. According to the claim, the directive "excludes the exercise of the freedom to provide services" in connection with the right to strike and the right to bargain collectively. Given that the amending directive does not add any new element to the relationship between economic and collective labor rights, this claim seems to be a misinterpretation of the measure. Not to mention that since *Laval*, economic freedoms have clearly taken precedence over collective labor rights. Therefore, the CJEU briefly confirmed that the exercise of collective labor rights is subject to EU law and the freedom to provide services and rejected this claim. *See Case C-620/18, Hungary*, para. 168.

50 Id. paras. 62 and 64; *Case C-626/18, Poland*, paras. 67 and 69.

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clearly, the posting directive does not harmonize working conditions.[51] Based on all these considerations, *the CJEU rejected the claim on the incorrect choice of the legal basis*.[52]

Nonetheless, the judgments remain silent on the practical rationale behind the choice of legal basis in 1996. Accordingly, the Council could adopt the directive in co-decision with the Parliament by qualified majority, whereas had it been adopted on the basis of the social chapter, it would have had to act unanimously. It would have been even less feasible to base it on the Social Policy Agreement annexed to TEU, since the acts adopted based on that document did not bind the UK.[53] One may wonder how different the history of posting in EU law would have been if primary law had set the necessary voting rules for adopting measures in these two different fields exactly the other way round.[54]

3. Unlawful Restrictions on the Freedom to Provide Services?

Hungary and Poland argue that the amending directive amounts to an unlawful restriction of the freedom to provide services. More specifically, three provisions stand in the center of the debate. *(i)* First, the amending directive substitutes the term "minimum rates of pay" by "remuneration" and consequently renders all mandatory pay elements in the host state applicable to posted workers. *(ii)* Second, the host state's standards on allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons shall also apply to posted workers. *(iii)* Third, where postings exceeds 12 months, the posted worker becomes subject to all of the host state's working standards, with some exceptions mentioned in the directive.[55] The claims allege that these new rules are contrary to the freedom to provide services as prescribed by Article 56 TFEU, since they are discriminatory, cannot be justified by overriding reasons in the general interest and constitute an unnecessary and disproportionate restriction.[56] The applicants' reasoning is

51 *Case C-620/18, Hungary*, paras. 66-69.

52 Consequently, the claim that the EU legislature misused its powers by choosing an inappropriate legal basis, was also rejected. Id. para. 84.

53 Davies 1997, p. 572.

54 There is one more dispute around the legal basis of the amending directive. Both actions challenged that the scope of the amending directive extend to the road transport sector once the specific sectoral rules are adopted [amending directive, Article 3(3)]. The claim is based on the fact that the legal basis for the adoption of the amending directive is the free movement of services, while services in the field of transport are covered by a separate legal basis [Articles 58(1) and 91 TFEU]. Previously, in *Dobersberger*, the CJEU did not dispute this argument, but pointed out that services, which are not inherently linked to transport (such as rail catering) can be regulated under the articles on services. *See* Judgment of 19 December 2019, *Case C-16/18, Dobersberger*, ECLI:EU:C:2019:1110, paras. 24-27. Nonetheless, the CJEU could easily overcome the problem by holding that the contested article does not seek to regulate the freedom to provide services in the field of transport, since it is confined to providing a date of application to the sector. *See Case C-620/18, Hungary*, paras. 161-162; *Case C-626/18, Poland*, paras. 146-147.

55 Posting directive as amended Article 3(1)(c) and (i); Article 3(1a).

56 *Case C-620/18, Hungary*, paras. 66-102; *Case C-626/18, Poland*, paras. 72-85.

based on the consideration that the protection of posted workers' rights is sufficiently guaranteed by the legislation of the home state, considering that such workers only stay temporarily in the host state. Besides, the amending directive eliminates the lawful competitive advantage of those states in which the level of pay is lower, thus, the new measure distorts competition.

Even if the CJEU stated that the amending (and the original) directive (with the main aim of promoting the freedom to provide services) shall respect fundamental interests such as the protection of workers, it is still questionable how far the directive can go in pursuing such a secondary aim, while still respecting the freedom to provide services. This issue is well known in literature,[57] since the posting directive directly restricts this freedom for the sake of enforcing core labor standards. As a labor law measure, its importance can be highlighted through an overview of the CJEU's case-law concerning the labor law rules as justified restrictions on the freedom to provide services. The least one can say is that all labor rights listed in Article 3(1) shall be applied to posted workers without further evaluating its possible restrictive effect on cross-border services.[58] The CJEU's practice on the application of host minimum wage legislation to posted workers clearly illustrates how the posting directive restricts the freedom to provide services.

Before the posting directive entered into force, in *Mazzoleni*, the CJEU had to decide upon the applicability of the Belgian minimum wage to French posted workers. The Belgian minimum wage was higher than the French, but taken into account also common charges, the French law was more favorable for workers. The CJEU ruled that for the purpose of determining whether the application of the minimum wage rules of the host state is a necessary and proportionate restriction, all relevant factors shall be evaluated, including the level of social security contributions and the impact of taxation.[59] Similarly, in *Portugaia Construções*, the CJEU held that host states may impose their minimum wage legislation to posted workers only if such rules confer a genuine benefit on the workers concerned, significantly increasing their social protection.[60] As such, before the posting directive's entry into force, the CJEU set detailed conditions for the application of host state minimum wage to posted workers. By comparison, according to the original posting directive, minimum rates of pay in the host state applied to posted workers without further conditions.[61] Seen from this perspective, it indeed seems controversial that the directive's legal basis is

57 *See e.g.* the sources referred concerning the debate on the legal base.

58 Barnard 2012, p. 228; Syrpis 2007, p. 124.

59 *Case C-165/98, Mazzoleni*, paras. 36-39.

60 Judgment of 24 January 2002, *Case C-164/99, Portugaia Construções*, ECLI:EU:C:2002:40, paras. 26 and 29.

61 One might agree with Riesenhuber who argues that the most important rule of the directive is the one which makes host state minimum wage applicable to posted workers. Riesenhuber 2012, p. 205.

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the promotion of the freedom to provide services.[62] As seen above, the CJEU solved this contradiction by stating that while the posting directive provides guarantees for an overarching objective such as the protection of workers, it shall nevertheless be considered a measure to enhance the provision of cross-border services. The annulment cases also revealed that the measures introduced by the amending directive lawfully restrict this basic economic freedom, for the following reasons.

As a starting point, as the Advocate General reminded in his opinion, the case-law of the CJEU on national measures restricting the free provision of transnational services cannot readily be applied to EU measures which are aimed at harmonizing the same. Instead, according to relevant court practice, the EU legislature enjoys a broad discretion in complex areas such as the regulation of the transnational posting of workers. What must be established for annulment is that the legislature made use of that discretion in a way that was manifestly inappropriate when it adjusted the balance of interests struck in the posting directive.[63]

Taking the EU legislature's broad discretion as a starting point, the CJEU built its reasoning around the fact that the amending directive does not eliminate all competition based on costs (not even in the case of long-term postings) therefore, there is still room for competition between undertakings seated in the different Member States.

As the CJEU pointed out, the directive provides that posted workers are entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration rendered mandatory in that Member State. Thus, the directive has no effect on other cost components of the undertakings posting the workers, such as the productivity or efficiency of those workers, which are expressly mentioned in Recital 16.[64] The only cost differences that are eliminated by the directive are those listed among the 'hard core' standards in Article 3(1).[65]

The CJEU also emphasized that while the amending directive broadened the list of applicable working conditions of the host State's law (as regards all mandatory pay elements and reimbursement of costs), this still does not entail the application of all the terms and conditions of employment of the host State.[66] *The situation of posted and local workers has not become identical or analogous*.[67] The CJEU found that the posted workers' stay in the host state is temporary and that they are not integrated into the labor market of that state. Consequently, the EU legislature could reasonably consider it appropriate that, for that temporary

62 Jonas Malmberg, 'Posting Post Laval. Nordic Responses', *in* Marie-Ange Moreau (ed.), *Before and After the Economic Crisis. What Implications for the 'European Social Model?*, Edward Elgar Publishing, Cheltenham, 2011, p. 36; Kilpatrick 2012, p. 232.

63 AG Opinion, *Case C-620/18, Hungary*, paras. 107-110. *See also* in *Case C-620/18, Hungary*, para. 112; *Case C-626/18, Poland*, para. 95.

64 *Case C-620/18, Hungary*, para. 128; *Case C-626/18, Poland*, para. 106.

65 *Case C-620/18, Hungary*, para. 141.

66 Id. paras. 148-149.

67 *Case C-626/18, Poland*, para. 111.

period, the remuneration to be received by those workers should be the remuneration determined by the mandatory legal provisions of the host Member State, to enable them to meet the cost of living in that Member State.[68] The directive does not proscribe any competition based on costs nor does it declare that competition based on cost differences is unfair.[69]

The CJEU also rejected the claim that the amending directive's provision applying the host State's law almost in its entirety in case of long-term postings is neither necessary nor proportionate. The CJEU referred back to the broad discretion enjoyed by the EU legislature and concluded that no manifest error was committed in taking the view that the consequence of such a long-term posting should be that the personal situation of posted workers should, to an appreciable degree, more closely resemble that of workers employed by undertakings established in the host state. Nonetheless, such rules still distinguish the situation of posted workers from that of workers who have exercised their right to freedom of movement or, more generally, that of workers who reside in that Member State and are employed by undertakings established there.[70]

Undoubtedly, the above reasoning duly reflects the fair compromise struck in the (amended) posting directive, seen from the perspective of the undertakings in the host and the home states. Indeed, the possible advantage of foreign service providers in the host state's market is not limited to cheaper labor: they may also compete with higher productivity or with better trained and more experienced staff. Besides, as pointed out by the Advocate General, the differences in matters of *e.g.* social security and taxation remain in place and, as a general rule, are governed by the laws of the home state.[71] Moreover, an important difference still remains between the legal status of posted and local workers which is (interestingly) not mentioned in the judgments: posted workers do not fall under the scope of the host state's selectively applicable collective agreements, not even in the case of long-term postings.[72] Thus, if the most important pay elements are defined by local or branch level collective agreements, EU law does not close the pay gap between the posted and local workforce. Meanwhile, it was cases involving selectively applicable collective agreements that have been the ones which caused the most tension in the application of the posting directive.[73]

From a labor law point of view, probably the most interesting element in the above reasoning is that the CJEU and also the Advocate General argued that the amending directive constitutes a proportionate restriction on the freedom to

68 Id. paras. 117-118. Poland and Hungary also challenged the new rules on the adding together of different workers' posting periods as regards the calculation of the 12-month time frame. The CJEU however confirmed that this rule is a clear and precise measure to prevent circumventions. *See Case C-620/18, Hungary*, para. 181; and *Case C-626/18, Poland*, paras. 137-138.

69 *Case C-626/18, Poland*, paras. 120-121.

70 *Case C-620/18, Hungary*, paras. 155-156; *Case C-626/18, Poland*, para. 125. As the Advocate General put it, "That provision brings the rules applicable to workers on long-term postings closer to those applicable to local workers, but it does not place those workers on an equal footing because their situations are different." AG Opinion, *Case C-620/18, Hungary*, para. 140.

71 Id. para. 165; AG Opinion, *Case C-626/18, Poland*, paras. 45, 68, 70, and 79.

72 Posting directive as amended Article 3(8).

73 *Case C-341/05, Laval; Case C-346/06, Rüffert*.

provide services because the legal status of posted workers remains different from that of the workers employed directly by undertakings in the host state. Nonetheless, one might wonder what rationale lies behind this distinction. The only specific element which could underpin the difference between the legal status of a worker enjoying the right of free movement and a posted worker is that the latter is not subject to the principle of free movement of workers but to the freedom to provide services.[74] Consequently, even in the case of long-term postings, posted workers may lack the legal protection afforded to local workers in the host state, while a worker making use of the right of free movement enjoys the same protection as locals, regardless of the length of the employment.[75] Equal treatment is the fundament of free movement of workers, without this overriding principle this basic freedom would be inoperable in practice.[76] Meanwhile, it is entirely possible that the manner in which a posted worker performs is the same as that of a worker relying on the right of free movement (*e.g.* both of them spend only two months in the host state for a seasonal job). Therefore, the distinction between these groups seems rather formal.

The explanation for such an unconvincing demarcation is that posting is not, in principle, a legal institution based on the legal protection of the worker, but on the freedom to provide services. Apparently, the specific legal situation of the posted worker is nothing more than a compromise between the principle of freedom to provide services and the protectionist ambitions of the host states. The limited applicability of host state law can be well explained by the fact that it partially preserves the competitive advantage of service providers from the home state, while at the same time, providing adequate protection for the market of the host state. The fact that this logic is contradictory from the viewpoint of the worker's legal status seems to be a secondary issue. It is therefore not an exaggeration to say that posting is a legitimate means of discrimination, as it distinguishes between different groups of workers solely for economic reasons.[77]

This is clear, when posting is analyzed not in the light of EU law based on fundamental economic freedoms, but from the aspect of a human rights convention, namely the European Social Charter (ESC). Article 19 ESC provides, *inter alia*, that migrant workers lawfully residing within the Contracting Parties' territories, shall enjoy treatment not less favorable than that of the own nationals of the Contracting Parties in respect of remuneration and other employment and working conditions, membership of trade unions and enjoyment of the benefits of collective bargaining and accommodation. In the Swedish *lex-Laval* case, the

74 *Case C-49/98, Finalarte*, paras. 19-23. This idea was also referred by Advocate General Campos Sánchez-Bordona, *see* the Opinions in *Case C-620/18, Hungary*, para. 164. and *Case C-626/18, Poland*, para. 78

75 Regulation 492/2011/EU of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

76 Nicola Countouris & Samiel Engblom, 'Protection or Protectionism? A Legal Deconstruction of the Emerging False Dilemma in European Integration', *European Labour Law Journal*, 2015/1, pp. 21-23.

77 Erika Kovács *et al*., 'Posting of Workers in Croatia and Hungary', *in* Tímea Drinóczi & Mirela Župan (eds.), *Law – Regions – Development*, Pécs-Osijek, 2013, pp. 475-476, and 495.

European Committee of Social Rights (ECSR) pointed out that the right to equal treatment of migrant workers shall also apply to posted workers. Although the ECSR acknowledged that there are differences between posted workers and other categories of migrant workers (in terms of length and stability of presence in the territory of the host state, as well as of their relationship with that state), posted workers are workers coming from another state, residing lawfully within the territory of the host state. In this sense, they fall within the scope of application of Article 19 ESC and they have the right, for the period of their stay and work in the host state to receive treatment not less favorable than that of the national workers of the host state in respect of labor standards mentioned in the ESC.[78] From a fundamental rights point of view, therefore, the distinction between a posted worker and a worker making use of the right of free movement has proved to be unfounded.

The amending directive is an important step forward in resolving the problematic distinction between the different types of cross-border working patterns by narrowing the gap between the status of posted (especially long-term posted) and local workers. The remaining differences could well explain that EU measures on posting are not contrary to the freedom to provide services, yet are quite controversial from the perspective of the posted worker. Although the ESC calls for full equality between posted and local workers, under EU law their terms and conditions of employment are only "as close as possible", and the personal situation of posted workers should only to "an appreciable degree more closely resemble" that of local or migrant workers.[79]

4. Other Important Lessons Learnt and Questions Left Open

While it is the amending directive's legal basis and its relationship to the principle of freedom to provide transnational services that lie at the heart of the annulment cases, the applicants also raised some other interesting questions. The CJEU could easily reject these claims, nonetheless they address important issues, which are therefore worth a brief analysis.

4.1. Posting and Private International Law

According to both actions, the amending directive is contrary to the Rome I Regulation,[80] as in case of long-term postings the application of obligations imposed by the legislation of the host Member State is mandatory, irrespective of which law applies to the employment relationship. This claim seems unfounded, as the Rome I Regulation explicitly allows for special rules.[81] Nonetheless, the

78 *No. 85/2012. Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, para. 134.

79 *Case C-620/18, Hungary*, paras. 57 and 155; *Case C-626/18, Poland*, paras. 62 and 110.

80 Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

81 Rome I Regulation, Articles 23 and 9; *Case C-620/18, Hungary*, para. 179; *Case C-626/18, Poland*, paras. 133 and 135.

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posting directive (and its amendment) does not entirely coherently fit in the private international law system of the EU and such inconsistencies seem to prevail even after the judgments rendered in the annulment cases.

Under private international law, *the essence of posting is that the worker is temporarily working outside the state where they regularly work*. Thus, the concept has two essential elements: *(i)* first, the place of work differs from where the employee works regularly; and *(ii)* second, working abroad is only temporary. Unlike under the scope of the posting directive, it is not necessary that the posting take place within the framework of transnational services. For example, when the employee attends a two-week long training at the premises of the foreign parent company, travels to another Member State for an international meeting or provides services which by their nature must be performed abroad (*e.g.* tour guide). EU law stipulates that the state where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily working in another state.[82] Temporary work abroad therefore does not change the applicable law to the employment relationship, and the employment remains under the law of the home state (the law of the state where the regular employment takes place). At the same time, the posted worker may also be subject to the so-called imperative rules, which, because of their importance, are crucial for safeguarding the public interests in the host state.[83]

The posting directive prescribes that if the aim of the posting is the provision of a transnational service, although the worker remains subject to the employment law of the home state, the host state's law concerning the working conditions explicitly listed in the directive shall apply, if it is more favorable to the worker. The rules listed here will therefore apply to the posted workers as imperative rules. The posting directive could also be understood as a *lex specialis* to the Rome I Regulation, the latter being the *lex generalis*.[84]

However, it is not clear whether all elements of the directive's 'hard core' list shall qualify as imperative rules. Such overriding mandatory provisions shall be applied irrespective of the law otherwise applicable to the employment relationship. Nevertheless, there is no common ground in labor law literature regarding which norms would fall within this category.[85] For instance Riesenhuber suggests that imperative norms are the ones which are also protected by criminal law sanctions or have a public law character.[86] Daubler (before *Laval*) identified collective autonomy and the protection of labor relations

82 Rome I Regulation, Article 8(2). The Rome Convention (1980) on the law applicable to contractual obligations contained the same principle, *see* Article 6(2)(a).

83 Rome I Regulation, Article 9.

84 COM(2002) 654 final; Florian Schierle, '1996/71/EC: Posting of Workers', *in* Monika Schlacter (ed.), *EU Labour Law: A Commentary*, Wolters Kluwer, 2015, pp. 166 and 178; Herwig Verschueren, 'The European Internal Market and the Competition between Workers', *European Labour Law Journal*, 2015/2, p. 140; Taco van Peijpe, 'Collective Labour Law after Viking, Laval, Rüffert, and Commission v. Luxembourg', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 25, Issue 2, 2009, p. 101.

85 Davies 1997, p. 596.

86 Riesenhuber 2012, pp. 182-183.

as imperative norms.[87] Piir mentioned only possible examples, such as the prohibition to dismiss pregnant women or workers' representatives or certain rules on occupational safety and health. Piir also argued that the labor standards listed in the directive do not necessarily qualify as imperative rules.[88] For example, one may wonder why all the rules on occupational safety and health, paid annual leave or technical rules on secondment of labor should have crucial importance for safeguarding public interests in the host state. As for a further contradiction, while an imperative rule must be applied even where the law otherwise applicable is more favorable to the employee, according to the posting directive, the host state's standards do not apply if the home state's law is more favorable.[89]

While the annulment judgments found the relationship between the Rome I Regulation and the posting directive unproblematic, the CJEU gave no real guidance on how to overcome the mentioned discrepancies. The CJEU only confirmed that Article 9 of the Regulation must be interpreted strictly and concluded laconically that "There is nothing in the documents submitted to the Court to indicate that Article 3(1a) of the amended Directive 96/71 is contrary to such overriding mandatory provisions of law".[90] The question, rather, in case of long-term postings is why nearly all labor law provisions qualify as imperative rules.

4.2. The Nature of the Posting Directive

Some of the claims point to the basic features of the posting directive. The Republic of Poland claims that the substitution of the concept of 'remuneration' with that of 'minimum rates of pay' constitutes a discriminatory restriction on freedom to provide services. This is because the latter provision imposes on service providers an additional financial and administrative burden, the effect of which is to remove the competitive advantage of service providers established in Member States with a lower level of remuneration. In addition, Hungary contests the inaccuracy of the concept of remuneration claiming a violation of legal certainty.

These observations touch upon the legislative technique used in the posting directive, usually referred to as *'partial harmonization'*[91] *or 'coordination'*,[92] meaning that it defines only the legal form and subject of the applicable 'core labor standards' but not their exact content. The directive does not harmonize

87 Wolfgang Däubler, 'Posted Workers and Freedom to Supply Services. Directive 96/71/EC and the German Courts', *Industrial Law Journal*, 1998/3, p. 267.

88 Ragne Piir, 'Safeguarding the Posted Worker. A Private International Law Perspective', *European Labour Law Journal*, 2019/2, pp. 111-113.

89 Posting directive, Article 3(7).

90 *Case C-626/18, Poland*, para. 135.

91 Davies 1997, p. 593.

92 Barnard 2012, p. 221.

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the core rules,[93] thus, the regulatory competence of the Member States remains untouched.[94] However, this also leads to unending debates over how the labor standards listed shall be interpreted in the various Member States. Having the posting directive in force for over twenty years, only a handful of cases reached the CJEU concerning the interpretation of the elements listed in Article 3(1). To be more precise, solely the meaning of the constituent elements of minimum rates of pay was referred to the CJEU.[95]

In the annulment cases, the CJEU pointed out that if service providers are liable to bear an additional financial and administrative burden, that burden is the consequence of the very nature and objectives of the posting directive, since it is an instrument for the coordination of the laws of the Member States governing the terms and conditions of employment. Moreover, even before the amendment, service providers posting workers were subject concurrently to the rules of their home state and of the host state.[96] The term remuneration can only be determined on the basis of the legal system of the host state, but in itself this does not constitute grounds to claim legal uncertainty.[97] This is a direct consequence of the 'partial harmonization' followed by the posting directive, which in turn does not lead to legal uncertainty if Member States duly comply with their obligations to publish adequate information on their applicable labor standards, which obligation is explicitly required by the posting directive.[98]

Nonetheless, employers can hardly comply with the host state's labor standards if there is no easily accessible information provided by that state. For instance, the term 'minimum paid annual holidays' is not a single number, *e.g.* 24 days annually. The measure of paid annual leave in a Member State may be calculated on the basis of complicated rules concerning the employee's personal status (health, childcare, age, profession, *etc.*), the longevity of the employment relationship, the proportion of the time spent in actual employment over the year, each with different rounding rules. Cross border service providers need to be aware of complex regulations to answer such a simple question as to whether the host or the home state's labor law guarantees more paid leave, and which one shall therefore apply to the posted worker.

Hungary also argued that the directive contains a 'rule on remuneration in substance' by requiring workers to be paid in accordance with the measures in force in the host state, while pay is excluded from the legislative competence of

93 Ruth Nielsen, *EU Labour Law, Second Edition*, Djoef Publishing, Copenhagen, 2013, p. 371. *See also* how such consideration appears also in the CJEU's practice: *Case C-396/13, Sähköalojen ammattiliitto*, paras. 31-32.

94 Which was necessary for the adoption of the directive, after long years of debate. Kolehmainen 1998, p. 73.

95 *Case C-396/13, Sähköalojen ammattiliitto*; Judgment of 7 November 2013, *Case C-522/12, Isbir*, ECLI:EU:C:2013:711.

96 *Case C-626/18, Poland*, paras. 101-103, and 126-127.

97 *Case C-620/18, Hungary*, para. 186.

98 Article 3(1) and (4)-(5). The CJEU expressly referred to this obligation when it rejected Poland's claim that the directive's text gives rise to ambiguity on what standards are applicable in case of long-term postings. The CJEU found the prescription to be clear as all labor standards apply which are not expressly excluded by the directive. *Case C-626/18, Poland*, paras. 128-129.

the EU.[99] This plea appears to be unfounded in the light of *Alonso* and the aforementioned 'coordination nature' of the posting directive. The CJEU stated in *Alonso*, that the rationale for the exclusion of pay is that the determination of pay levels at national level falls within the discretion of the social partners and within the competence of the Member States. However, the 'pay' exception cannot be extended to all questions involving any sort of link with pay; otherwise some of the areas falling within the scope of legal harmonization would be deprived of much of their substance.[100] Since the amending directive affects only the scope of mandatory remuneration rules in force in the host state, but does not in any way affect their content or the way in which they are defined, the amending directive cannot, in my view, be annulled by reference to exclusive Member State competences. Nonetheless, the CJEU dismissed this claim on other grounds:[101] since the amending directive was not (and could not have been) adopted on the legal basis of Article 153 TFEU, the exceptions in that Article cannot affect the validity of the directive.[102]

5. Conclusion

The EU is fundamentally a form of economic integration, which has also social objectives.[103] The rules governing posting pose a challenge because it reveals a conflict between Member States' economic and social values and their conflicting interests as to which area should be given priority over the other. Therefore, what eventually becomes EU law on the status of posted workers is the result of a complex political compromise, rather than a dogmatically sound legislation that fits coherently into the system of cross-border employment patterns. Many contradictions and shortcomings may be discovered in the directives which are basically the product of this compromise. The mere concept of the posted worker is a good example, as it cannot be precisely distinguished from other cross-border workers, especially from those making use of their free movement rights. It is reasonable to expect that legislation and CJEU practice continuously adjust the hierarchy of effected interests to strike the right balance between them, considering the changing economic and social context. The basic expectation towards the evolution of EU law is to find an increasingly fair balance between the conflicting interests. One cannot question the CJEU's conclusion in the annulment cases that the main aim of the posting directive is to regulate the freedom to provide services. Nonetheless, in the author's view, the conflicting interests are purely economic in nature (enabling undertakings in the home state to exploit their competitive advantage of lower costs, while ensuring fair

99 Article 153(5) TFEU.

100 Judgment of 13 September 2007, *Case C-307/05, Del Cerro Alonso*, ECLI:EU:C:2007:509, paras. 40-42 and 48.

101 Unlike the Advocate General, who builds on *Alonso* in his opinion. *See Case C-620/18, Hungary*, para. 93.

102 Id. para. 80.

103 Articles 8-10 TFEU.

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competition with the host state's undertakings), where the protection of the workers is a rather ancillary issue.