HUNGARIAN LABOUR LAW
E - J O U R N A L

A sender state's response to the new posting rules: The amendment of the posting of workers directive and its transposition in Hungary

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The new EU directive concerning posted workers in the framework of the provision of services will be applicable from 30 July 2020. The Hungarian regulations has been amended to transpose the new measure, which raises several problems regarding the legal status of posted workers both on EU and national level. This paper summarizes the new EU rules of posting, their background, the problems they have responded to and the possible progress that can be expected from them. The Hungarian rules affected by the amendment will also be analysed, highlighting the points where compliance with EU law appears to be problematic.

1. Posting: the hot spot in EU labour law

The EU regulation of posting is a real battleground of conflicting interests. An employer can gain a significant competitive advantage making use of the more favourable domestic labour costs by providing service to the market of another Member State, where local rules would only allow the activity with higher expenses.

Under EU law, these cases must be assessed on the basis of the freedom to provide services.[1] If a Member State (host country) applies its labour law provisions (e.g. the minimum wage) also to workers who are temporarily posted to its territory by their employer from another Member State (home country) to provide services, this clearly restricts the freedom to provide transnational services. The working conditions applicable from the host country's law are harmonised by the posting of workers

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1 Treaty on the Functioning of the European Union Article 56.

directive, which has been in force for 20 years.[2] The directive sets out the "hard core" of labour law, which applies to the posted worker from the labour law of the host state if this is more favourable to him/her (e.g. minimum wage, maximum working hours, minimal annual leave).[3]

Despite the long standing legal framework, posting is currently the most controversial area of EU labour law. The current developments are the following:

– After 20 years, the posting directive has been amended, the transposition deadline is the end of July 2020.[4]
– This amendment is the subject of an action for annulment brought by Hungary and Poland.[5]
– Three infringement proceedings are pending before the European Court of Justice concerning the minimum wage rules applicable to transit workers in the international transport sector.[6]
– In the meantime, the European Commission has presented a proposal for a directive on special rules for posted workers in the international transport sector.[7]
– As regards the social security status of posted workers, the coordination of social security systems is also under review.[8]
– The European Labour Authority, which – among others – is responsible for the monitoring of postings, will take up its duties on 1 August 2021.[9]

This overriding interest is particularly contradictory if we add that posted workers make up barely 0.4% of the EU labour market, as the European Commission estimates that around 2 million posted workers work in the Member States each year.[10] The phenomenon is therefore unlikely to have such an impact on the functioning of the EU labour market that would in itself justify the decision-makers' increased attention.

Rather, the explanation is that posting is a conflict area where social disparities within the Union and the different economic interests of individual Member States become very visible. To put it simply, the currently less developed Member States are interested in giving their businesses a competitive

2 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter: posting directive).

3 Catherine Barnard: *EU Employment Law.* Oxford, Oxford University Press, [4]2012. 221.; Paul Davies: Posted Workers: Single Market or Protection of National Labour Law Systems? *Common Market Law Review*, 1997. 593.

4 Directive (EU) 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 (hereinafter: amending directive).

5 Hungary v European Parliament and Council of the European Union, C-620/18.; Republic of Poland v European Parliament and Council of the European Union, C-626/18.

6 European Commission – Press release (IP/16/2101). Transport: Commission takes legal action against the systematic application of the French and German minimum wage legislation to the transport sector. Brussels, 16 June 2016; European Commission – Press release (IP/17/1053). Road transport: Commission requests Austria to ensure its minimum wage legislation does not unduly restrict the internal market. Brussels, 27 April 2017.

7 COM(2017)278 final.

8 COM(2016) 815 final.

9 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

10 Posted workers in the EU. European Commission Factsheet (2015).

advantage in the markets of the richer Member States by making use of their lower employment costs.[11] For the latter Member States, on the other hand, the opposite trend can be observed: host countries seek to limit the advantage of foreign service providers who compete with domestic companies.[12]

The aim of this paper is to show how the above dilemmas appear in the current EU and Hungarian law, based on the domestic transposition of the amending directive. In this context, I summarize the Hungarian transposition measures already adopted and coming into force on 30 July 2020[13], pointing out the problems of legal harmonization and further steps to be considered.[14]

2. The definition of posting

In private international law, the essence of posting is that the worker is temporarily working outside the country where he or she regularly works. For example, the employee attends a two weeks long training at the premises of the foreign parent company, provides services to a foreign client on the other side of the border, or travels to another country for an international meeting. Thus, the concept has two essential elements: first, the place of work differs from where the employee works regularly, and second, working abroad is only temporary. EU law stipulates that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.[15] Temporary employment abroad therefore does not change the applicable law to the employment relationship, but the employment remains under the law of the home State (the law of the place 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.[16] In labour law, such provision could be, for example, the prohibition of forced labour or discrimination.

In a narrower sense, under EU law, posting means that a worker is temporarily working in another Member State to provide services. For this setting, a separate piece of legislation was adopted in 1996 in the form of the posting directive. The essence of the legislation is that if the aim of the posting is the provision of a transnational service, although the worker remains subject to the employment

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11 This correlation was confirmed for each enlargement, see: Emmanuel Comte: Promising more to give less: international disputes between core and periphery around European posted labor, 1955–2018. *Labor History*, 2019/2.

12 For conflicting interest concerning the posting of workers, see: Davies op. cit. 574., 598.; 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., No. 2., 2009. 83–84.; Karl Riesenhuber: *European Employment Law.* Intersentia, 2012. 197.; Philippa Watson: *EU Social and Employment Law*. Oxford, Oxford University Press, ²2014, 281., 303–304.

13 See the new rules in Act 126 of 2019 on the amendment of certain acts concerning the action plan to protect families.

14 The paper does not deal with the new rules on the application of collective agreements, posted agency workers and questions of enforcement, as these issues got little attention during the Hungarian transposition.

15 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Article 8 (2).

16 Rome I Article 9.

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 favourable to the worker. The rules listed here will therefore apply to the posted workers as imperative rules.[17] An additional requirement is that the posting takes place in the framework of the performance of a service contract, intra-corporate posting or temporary agency work.[18] The concept of posting under the directive is therefore narrower than that of private international law, since the purpose and form of posting are irrelevant in the latter.

In this article, I will deal with posting in the narrower sense, used in the directive. The main elements of the definition were not affected by the amendment, but the domestic transposition is not perfect even on the basis of the original text. Therefore, in the following I will examine how the Hungarian legislator transposed the concept of posting within the meaning of the posting directive.

3. The definition and its shortcomings in the Hungarian regulation

The legal definition of posting stipulates that a foreign employer – on the basis of an agreement concluded with a third party – employs the employee in the territory of Hungary in an employment relationship which is otherwise not covered by the Labour Code.[19]

This covers the following conceptual elements of the directive:

- the posting employer is established abroad. Hungarian law does not distinguish between the place of establishment within the EU and in a third country.[20] This solution is not contrary to the directive, as it merely stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State, but equal treatment of the two employer groups is not prohibited.[21]
- the employee does not regularly work in Hungary, therefore his/her stay is only temporary (and that is why he/she does not come under the scope of the LC).[22]
- there is an employment relationship between the posting employer and the posted worker,

17 Peijpe op. cit. 101.; Florian Schierle: 1996/71/EC: Posting of Workers. In: Monika Schlacter (ed.).: *EU Labour Law: A Commentary*. Wolters Kluwer, 2015. 166., 178.; Herwig Verschueren: The European Internal Market and the Competition between Workers. *European Labour Law Journal,* 2015/2. 140.

18 Posting directive Article 1–2.

19 Act I of 2012 on the Labour Code (hereinafter: LC) Article 295 (1).

20 Rózsavölgyi, Bálint: A kiküldetés és a külföldi munkavégzés elhatárolásának egyes kérdései. In: Bankó, Zoltán – Berke, Gyula – Tálné Molnár, Erika (szerk.*): Quid Juris?* Ünnepi *kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20.* évfordulójára. Budapest–Pécs, Kúria – PTE Állam- és Jogtudományi Kar – Munkaügyi Bírák Országos Egyesülete, 2018. 398.

21 Posting directive Article 1 (4).

22 LC Article 3 (2).

– the posting takes place through one of the three forms mentioned in the directive. The wording that the posting is based on the "agreement concluded with a third party" also covers temporary agency work and there is a separate paragraph for posting within a group of companies.[23]

It is a striking shortcoming of the LC that it does not indicate at all that the posted worker works in Hungary within the framework of the provision of services. This, however, is an essential conceptual element of posting under the directive.[24] Thus, the "hard core" rules of Hungarian labour law shall be applied even if the employee is not providing any service in Hungary.[25] The phrase "under an agreement with a third party" may cover a number of other cases. For example, the employees take part in training in Hungary under an agreement between an employer and a Hungarian training company or, as traveling staff, they only travel through the country towards another Member State. In these cases, the LC contradicts the Rome I Regulation, according to which the employment relationship – in spite of a temporary stay in Hungary – shall remain under the scope of the sending State's labour law.[26] Obviously, the LC cannot overwrite the directly applicable Regulation, nonetheless in order to avoid misunderstandings in practice, it would certainly be appropriate to clarify Article 295 of the LC, and make it clear that the "hard core" standards only apply to foreign workers if they are posted to Hungary within the framework of the provision of services.

A further shortcoming is that the LC does not cover the case where an employee of a Hungarian employer is posted to abroad. This is irrelevant if the worker works in another Member State, as the protection under the directive also applies there. In the case of third countries, however, no rule orders that the law of the host state as regards the "hard core" shall be applied if it is more favourable to the employee than Hungarian labour law.[27] For example, a Hungarian worker posted to an Asian country with high wage levels is not eligible for the local minimum wage even if it is more favourable to him/her, unless local law provides otherwise. In this way, companies established in non-member states, as the recipients of Hungarian posted workers, are treated more favourably than their counterparts in the Member States. This is contrary to the directive[28] and, moreover, it does not provide adequate protection for the workers. It would therefore be worthwhile to adopt the solution of the previous regulation, which required the application of the local rules even if the posting took place outside

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23 The labour standards listed in LC Article 295 (1) are also applicable if the employment takes place at the Hungarian site of the foreign employer or of an employer belonging to the same group of companies as the foreign employer [LC Article 295 (2)]. However, there is no any regulation on the content of the agreement between the employers concerned. Ferencz, Jácint – Fodor, T. Gábor – Kun, Attila – Mészáros, Katalin: *A munkaviszony létesítése*. Budapest, Wolters Kluwer, 2016. 20.

24 Posting directive Article 1 (1).

25 A reference to this was contained only in the explanatory memorandum of the act on the entry into force of the LC. According to this, Article 295–297 shall be applied on the basis of an "agreement for the performance of a service in Hungary". Quoted by: Cséffán, József: *A Munka Törvénykönyve* és *magyarázata*. Szeged, Szegedi Rendezvényszervező Kft., 2016. 776.

26 In addition, the rules listed in Article 295 (1) of the LC include many from which derogations are possible, so their application cannot be prescribed as cogent rules [Rome I Article 8 (1)]. Moreover, these are clearly not imperative rules.

27 Fodor, T. Gábor – Magyar, Éva: Milyen jogot alkalmazunk a nemzetközi elemet is tartalmazó munkaviszonyban? *HR&Munkajog,* 2015/10. 12.

28 Posting directive Article 1 (4): undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

the EU, if they were more favourable to the worker than the Hungarian standards.[29] Nonetheless, the current solution clearly favours Hungarian companies, as they can gain a competitive advantage over their local counterparts in third countries which have to comply with higher labour law requirements.

4. The temporariness of postings

The most problematic element of the concept of posting is that the employment in the other Member State is of temporary nature. The application of the law of the home state is appropriate only as long as the employment in the host state is genuinely temporary.[30] The longer the posted worker works in the host state, the less it can be argued that this is not his/her place of regular employment. A key question in the regulation therefore is when the turning point comes from which the law of the host state, as the law of the place of regular employment, shall prevail. Oddly enough, however, this specific time limit was not set out in either the Rome I Regulation or the posting directive, which now was changed by the amending directive.

According to the definition in the posting directive, the posted worker works "for a limited period" in the territory of a Member State other than the State in which he normally works.[31] Not even the enforcement directive[32] shed more light on the time dimension of posting. Article 4 lists seven factors to assess whether a posted worker temporarily carries out the work in the host state, but also adds that the assessment of those elements shall consider all relevant factors and be adapted to each specific case and take account of the specificities of the situation. Legal literature[33] often uses the coordination of social security systems as an analogy to fill in this legislative gap. The relevant regulation prescribes that posted workers remain under the scope of the home state social security system, if the anticipated duration of work in the host state does not exceed twenty-four months.[34] However, the posting directive and the regulation on coordination of social security systems are two independent pieces of union law and nothing in the wording of either of them underpins that this analogy would be mandatory. Thus – up until the amendment in 2018 – it was left to national law to

29 Act 22 of 1992 on the Labour Code Article 106/A (5).

30 Jon Erik Dølvik – Jelle Visser: Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles? *Industrial Relations Journal*, 2009/6. 505.

31 Posting directive Article 2(1).

32 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'), hereinafter: enforcement directive.

33 See e.g. Watson op. cit. 285–286.

34 Regulation 883/2004/EC of the European Parliament and of the Council of of 29 April 2004 on the coordination of social security systems, Article 12.

define the exact longevity of the posting,[35] which is highly problematic from the view of the effectivity of legal harmonisation.[36] It has to be added, that in many cases the duration of the posting cannot be defined at the commencement of the work, not least because it does not necessarily depend on the will of the parties (e.g. the construction is delayed due to lack of materials, agricultural work cannot be carried out on time because of the weather).

Nevertheless, the Commission seems to be aware of the problem,[37] however the amending directive handles it only half-heartedly. The new rules limit the duration of a posting in 12 months, which Member States can prolong up to 18 months upon the "motivated notification" of the service provider. After this expires, the posted worker becomes subject to the host state's labour law.[38] A striking shortcoming is that the directive does not harmonise on what grounds Member States should accept the request for extension. It is unclear whether the extension is automatic or the Member State may consider the service provider's justification.

While the precise time limit is to be welcome, it is yet not clear what would exactly happen after the 18 months expire. In principle, after the maximum period the posted worker will be subject to the labour law of the host country, but surely not in its entirety. First, the amending directive itself states that 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.[39] Second, it must be also pointed out that posted workers will remain outside the scope of the host state's non-generally applicable collective agreements. Thus, if the most important pay elements are defined by local or branch level collective bargaining, union law will not close the pay gap between posted and local workforce.

Finally, the preamble raises the most serious concern. Upon the recommendation of the Council, recital (10) emphasises that any provision applicable to posted workers after the posting exceeded the time limit must be compatible with the freedom to provide services, and "It is settled case law that restrictions to the freedom to provide services are admissible only if justified by overriding reasons in the public interest and if they are proportionate and necessary.". Thus while the standards listed in Article 3(1) of the posting directive may be applied to posted workers without any further inquiry, no green light is automatically awarded to the other labour law provisions after 12 (18) months. However, if the general test applies also after the time limit expires, Member States would have the same limited room to give priority to their own standards over the home state law as they had before to extend the

35 Union law prescribes only that the length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting, taking into account any previous periods for which the post has been filled by a posted worker [Article 3(6)]. Evidently, if it is up to the Member State to define the length of the posting, this calculation rule has little practical significance.

36 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. Bulletin of Comparative Labour Relations*, 2009. 187.

37 See the Impact Assessment for the posting directive's proposed amendment, SWD(2016)52final, 16–17.

38 Posting directive as amended Article 3 (1a). The Commission originally proposed 24 months, which the Council broke down to twelve but with the possibility to extend it with additional six months. COM(2016)128final, 2016/0070(COD).

39 Posting directive as amended Article 3 (1a).

measures covered by Article 3(1).[40] The reference to the case-law of the Court at this point is highly misleading. It gives the impression that the legislator could not decide otherwise but to upkeep the Court's previous practice. Instead, the legislation – and only the legislation – can except certain labour law rules from the test of justified restrictions on the freedom to provide services and automatically declare them applicable from the law of the host state. However, the amending directive seems to anticipate that new rules will apply after the expiry of the time limit, as Member States will have to publish separate information on these.[41]

In conclusion, although the amending directive sets a time limit for postings, it does not in any way ensure equality between long-term posted workers and local (or free movement) workers. Moreover, it seems straightforward that after completing 12 (18) months, the host state cannot demand the termination of the posting, nor does the posted worker's employment protection necessarily become more favourable.

5. The Hungarian transposition: "harmonised" interpretation problems

According to the LC, if the duration of the posting exceeds 12 months, the whole LC becomes applicable to the employment relationship, with the exceptions specified in the directive.[42] However, this period is extended by a further six months in the case of a reasoned notification of the foreign employer which is to be issued to the employment authority.[43] These requirements are in line with the amending directive, but two important remarks need to be made. On the one hand, it is clear that the Hungarian legislature did not address the concerns expressed above concerning the preamble of the amending directive. Thus, as a general rule, it orders the application of the full LC to postings exceeding the time limit, notwithstanding any unjustified restrictions on the freedom to provide services. This is a rather oversimplifying solution. Clearly, it extends the scope of a number of rules which, according to the Court's test, otherwise would constitute an unjustified restriction on the provision of services. For example, one could hardly imagine any overriding public interest behind the application of the rules on working on Sundays or public holidays, on sick leave, or on the notification deadlines for scheduling annual leave.[44] Or, even if these were found to serve the protection of workers, it is similarly dubious whether such limitations on the transnational provision of services are necessary or proportionate.

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40 Paul Davies: Case Note: Case C-346/06, Rüffert v Land Niedersachsen [2008] IRLR 467 (ECJ). *Industrial Law Journal*, 2018/3. 293.; See also the following cases: C-341/05., para 80.; C-346/06., para. 33–34.; C-319/06., para 26.; C-298/09., para. 45.

41 Posting directive as amended Article 3 (1a) see subsection 4.

42 LC Article 295 (7). Amending directive Article 1 (2) point b).

43 LC Article 295 (5)–(8).

44 LC Article 101, 123 and 126.

On the other hand, Hungarian legislation remained similarly uninterested with regard to the requests for the six months extension. The law provides that the 12 months period is extended by a further six months in the event of a reasoned notification by a foreign employer.[45] The text contains no conditions, thus it seems that the labour authority has no choice but to prolong the posting upon the notification, however the employer is required to give reasons. Apparently, the Hungarian rule does not resolve the contradiction in the directive's text, so it is not clear whether the authority can refuse the extension in case of insufficient reasoning.

In my opinion, from a practical point of view, it is rather inconvenient that the Hungarian legislation did not solve the interpretation problems in the directive, but "faithfully harmonized" them.

6. The "hard core" of labour law and the rules on remuneration

The essence of the posting directive is therefore that, while the law of the home State continues to apply to the posted worker, he/she falls within the scope of the law of the host State as regards the "hard core" rules prescribed in the directive, provided that this is more favourable to the worker. Thus a key issue of the regulation is what rules to apply from the law of the host State. The table below shows the "hard core" of working conditions defined by the original text and by the amending directive.

1. Chart: Labour standards applicable from the host state's law (own edition)

The applicable labour standards (the "hard core")	
The original directive	**Amendment (effective from 30 July 2020)**
maximum work periods and minimum rest periods	
minimum paid annual holidays	
the minimum rates of pay	constituent elements of remuneration rendered mandatory
the conditions of hiring-out of workers (in particular temporary agency work)	
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	
	New element: the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work.
	New element: allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

45 LC Article 295 (6).

The amendment introduces a two-pronged change in this system. On the one hand, it replaces the notion of "minimum rates of pay" with "constituent elements of remuneration rendered mandatory", so that all mandatory pay elements in the host state will apply to the posted worker. For example, allowances and supplements which alter the relationship between the service provided by the worker and the consideration which he receives in return (in particular: quality bonuses and bonuses for dirty, heavy or dangerous work) were not considered as elements of the minimum rates of pay.[46] However, if, in a given Member State these benefits are compulsory for all employers (by law or by a generally applicable collective agreement), they shall, indisputably, fall within the scope of mandatory pay elements. On the other hand, remuneration prescribed in collective agreements will apply to a posted worker only if the agreement is "generally applicable".[47]

A further change is that the amending directive practically abolishes the difference between the reimbursement of travel, board and lodging and other pay elements. Before the amendment, these has been included in the minimum wage level – and thus has had to be provided to posted workers in the same way as to the local workforce – only if these has been allowances specific to the posting, but not to reimburse any costs actually incurred on account of the posting.[48] While the concept of mandatory remuneration will similarly not contain benefits with a reimbursement function, such reimbursements have been included in the "hard core" separately (in point h. and i.), so the posted worker is also entitled to equal treatment also in these respects.[49]

Equal treatment is therefore ensured for both pay elements and reimbursements, but the distinction between the two categories remains important. This is explained by the fact that when comparing remuneration under the law of the home and host states, it is not the individual items that need to be compared separately, but the total gross amount due to the worker.[50] For example, if the minimum wage in the host state is € 300 higher, but under the law of the home state the worker is entitled to a wage supplement of € 300 in addition to the local minimum wage, then the total gross pay under the two laws is the same. Apparently, it would be unfair to include in such gross amount the reimbursement of costs due to the employee, as it is not the consideration for the work, but only the reimbursement of work-related costs. Returning to the previous example, we would offset the higher minimum wage in the host state with € 300 given to cover the meal, travel and accommodation costs incurring during the posting. Therefore, the directive treats reimbursements separately, which shall be disregarded in

46 Commission v Germany, C-341/02., para. 38–40.

47 Posting directive as amended Article 3 (1) subsection 3. Raffaello Santagata De Castro: EU Law on Posting of Workers and the Attempt to Revitalize Equal Treatment. *Italian Labour Law e-Journal*, 2019/2. 156–157., 164.; Aukje A. H. Van Hoek: Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law? *Common Market Law Review*, 2018/2. 483.

48 Posting directive Article 3 (7).

49 Posting directive as amended Article 3 (1) points h) and i).

50 Preamble (18).

the above calculation of the total gross pay. In case of doubt, the directive presupposes that the benefit in question does not constitute remuneration but reimbursement of expenditure.[51]

7. From more to less: the applicable rules on remuneration in the LC

The definition of the rules applicable to workers posted to Hungary reproduces Article 3 (1) of the posting of workers directive.[52] At the same time, Hungarian labour law interprets the term "minimum rates of pay" extremely broadly. It orders that all regulations in the LC concerning wages shall apply to posted workers.[53] Thus, in addition to the Hungarian minimum wage, the posted worker is also subject to the calculation of all wage supplements, idle time and absence pay as defined in the LC, provided, of course, that the Hungarian provisions are more favourable than the law otherwise applicable to the employment.[54] This is certainly not in line with the case law of the Court, which does not include in the "minimum rates of pay" any wage elements which alter the balance between the work performed by the worker and the remuneration she/he receives.[55] However, each of the wage supplements prescribed by the LC is of such a nature as to provide a higher consideration for some additional work or work performed under special circumstances.[56] Therefore, the LC goes beyond Article 3 of the directive in this respect.

This broad concept of remuneration is "ratified" by the amendment of the directive. The new concept of "mandatory remuneration" includes for sure all the wage rules prescribed by the LC, as they are compulsory for all employers. According to the wording after the amendment, the posted worker is subject to Hungarian law with regard to the "amount of remuneration generally applicable at the place of work" as defined by Articles 136–153 of the LC. The definition of the rules on remuneration has therefore changed, but the interpretation of the two terms has remained the same.[57]

However, it is problematic that while before the amendment, the Hungarian rule ordered the application of the Hungarian wage rules more widely than what is prescribed in the directive, the definition after the amendment is now narrower than what follows from the amended union law. While, according to the new directive, any statutory remuneration applies to posted workers, the LC only provides for elements of remuneration regulated by itself. That means, if any other law prescribes

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51 Posting directive as amended Article 3 (7). However, Preamble (20) suggests that this presumption can also be rebutted by a simple contractual agreement (such as a clause in an employment contract).

52 LC Article 295 (1).

53 LC Article 136–153. However, the minimum rates of pay does not include the contribution to the voluntary mutual insurance fund and the remuneration provided to the employee which does not form the basis of personal income tax [LC Article 295 (2)].

54 LC Article 295 (5).

55 C-341/02., para. 38–40.

56 Kovács, Szabolcs – Takács, Gábor: *Bérszámfejtés a gyakorlatban*. Budapest, Wolters Kluwer, 2018. 71–76.

57 LC Article 295 (3).

a wage element that is binding on all employers, it is applicable to employees posted to Hungary under EU law, but not according to the LC. Nevertheless, such a wage element is easy to imagine. It is enough to think of the sectors in which posting is possible, but in which the remuneration of the work is not governed by the LC but by another sectoral law (for example, a group of artists performing a guest play in Budapest upon the invitation of a Hungarian theatre would not be subject to the legislation on public employees).

While the LC extends the scope of the rules applicable to posted workers to include benefits and reimbursement of travel, board and logging,[58] the further detailed rules of the amending directive have not been transposed. The rules on the distinction between remuneration and reimbursement (in which cases a reimbursement is considered remuneration, see above) have, surprisingly, only been included in the explanatory memorandum of the Act, just like the presumption that, in case of doubt, the benefit is not remuneration but reimbursement.[59] This is clearly not enough: first, EU law cannot be properly transposed by a non-binding explanatory memorandum, and second, from the point of domestic law, a legal presumption can only be set up by law.

As for the form of the applicable norms, in Hungary, there was little interest in cases related to postings and collective bargaining, and there was no substantive response from the Hungarian trade unions or employers' organisations to the Laval-quartet.[60] This is not surprising as the sectoral (especially extended) collective agreements have relatively little significance in domestic labour law.[61] In any case, the legislator also transposed the directive's provisions on the application of collective agreements. Regarding the form of the applicable rules to a worker posted to Hungary, not only the laws but also the extended collective agreements apply.[62] Therefore Hungary made use of the option provided for in Article 3 (10) of the directive and declared extended collective agreements applicable in all sectors (not only in the construction industry). The amendment changes only the wording but the essence of the rule will remain the same.[63]

Finally, an inaccuracy in defining the rules applicable to long-term postings should be highlighted. A fundamental rule of EU law is that the law of the host state applies to the posted worker only if it is more favourable to the worker than the law of the home state.[64] Naturally, this also applies if the newly introduced time limit (12+6 months) has already been exhausted. In comparison, the Hungarian law does not apply the principle of the more favourable law after the time limit has been exceeded, thus in

58 LC Article 295 (1) points h) and i).

59 Proposal for an Act No. T/8013. Posting directive as amended Article 3 (7).

60 Háns, Ágnes – Neumann, László: *Hungary: Posted workers*. https://www.eurofound.europa.eu/publications/report/2010/hungary-posted-workers (Downloaded: 07. 05. 2019.), point 3.

61 Kiss, György – Kajtár, Edit: Hungary. In: Roger Blanpain (ed.): *The Laval and Viking cases: freedom of services and establishment v. industrial conflict in the European Economic Area and Russia. Bulletin of Comparative Labour Relations*, 69. 2009. 85–86.

62 LC Article 295 (1), see the last sentence.

63 LC Article 295 (4).

64 Posting directive Article 3 (7).

case of long-term assignments Hungarian law shall be applied even if it happens to be unfavourable to the employee.[65] This solution is wrong and explicitly in breach of the directive.[66]

8. Summary

In my view, the transposition of the amending directive is a particularly difficult task, as the EU norm does not provide clear guidance on a number of key issues. In particular, it is difficult to find out from the directive how the maximum period of posting can be extended and exactly what additional labour law rules may be applied by the host state after the time limit has been exceeded. The definition of mandatory pay elements is similarly vague.

For Hungary, the new directive is primarily important from the aspect of a sending state (from where the services are exported). However, the harmonisation of the directive requires the approach of the host state, as the LC applies to workers posted to Hungary. Perhaps this is one of the reasons why the transposing measures appear to be simplifying and do not provide answers to the main questions raised by the directive, especially concerning long-term postings.

As Hungary is primarily involved in the sending role, it will have great importance for the future how the other Member States solve the mentioned harmonisation tasks and what conditions Hungarian workers and their employers will be faced during postings to another Member State after 30 July 2020. Therefore, the other Member States' interpretations and any possible guidance from the Commission should be closely monitored. Based on the lessons learned from all this, the Hungarian rules can be clarified later.

65 LC Article 296 (9): "The provisions of paragraphs 1 to 4 shall not apply if the law otherwise governing the employment relationship is more favourable to the worker as regards the conditions set out in paragraph 1.". However, the rules for postings exceeding 12 (18) months are set out in paragraphs 5 to 8.

66 Posting directive as amended Article 3 (7): "Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers.". This reference also includes paragraph 1a on long-term postings.