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Spotlight on the Human Face of Migration

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Foreword

Globalization of the world has a human face: increasing international migration. It represents a complex phenomenon, which raises diverse questions – inter alia – in the area of politics, demographics, culture, religion, and national safety. Labour law should, of course, appear on the top of this list. Growing economy and decreasing unemployment rates in many European countries increase the interest of many employers in hiring migrants from outside the EU. Such a demand can be easily matched with a supply of economic migrants coming from Eastern Europe or Arabic countries, attracted by local salaries and working conditions, welfare and liberal and democratic environment. Another phenomenon of globalized work is international posting of workers.

The foundations for this book have been established at the Labour Law Research Network conference in Valparaiso, Chile in 2019 where several co-authors met in a panel dedicated to labour law aspects of international migration. In order to offer a balanced analysis of the topic addressing it from many different angles, two other co-authors have been invited to contribute to this book.

At first sight, it may appear that each of the chapters deals with a different topic. The unifying idea of our research is, however, the focus on humanity as a key principle. This is why some of the chapters focus on topics such as precarization of migrant workers and equal treatment, and why we also choose to look at certain marginalized sectors of work like prostitution. As the book will be issued with a Czech publisher, the final chapter provides insights into the regulations of this country.

On behalf of the authors

Jakub Tomšej

1. Precarity of Migrant Workers

Consideration of the precariousness of the employment of economic migrants, often referred to as migrant workers, should begin with a very strong, but not obvious statement: *only exceptionally is employment migration associated with the prospect of worsening living conditions*. The entire substantive structure of the following chapter is built on this initial assumption, which is not supported by my empirical research. However, it stems from the generally accepted assumption that a person is ready to make sacrifices only in extremely exceptional cases. Usually, according to survival instinct, people strive to get what is, in their subjective assessment, better for them. Therefore, there is logical justification to assume, as do the vast majority of researchers of migration phenomena, that migrant workers travel to a foreign country with a great hope of having a better life, better work place, and better salary.[1]

In order to properly discern the topics related to the precarization of migrant workers it will first be necessary to outline the conceptual framework of the precariat, obviously limiting it to the sphere of employment. Such an introduction enables further considerations related to the main topic of this study, namely the precarization of migrant employment. Causes underlying the precariousness of migrants in the labour market and possible remedies to ensure its elimination or at least reduction are discussed as well.

To begin further discussion, it is first necessary to define in detail the circle of entities which, for the purposes of this study, are considered

1 Sharmin Jahan Putul and Md Tuhin Mia, "Exploitation of Migrant Workers in Malaysia and Protection under Domestic Laws," in *Proceedings of the International Law Conference (iN-LAC 2018) – Law, Technology and the Imperative of Change in the 21st Century* (Malaysia, 2018), 125–131, here 125.

as migrant workers. These are people who, by changing their place of residence, permanently or temporarily change their centre of living interest, and this change entails a change in the legal system in which they operate. Fully understanding the complexity of the issue of documented and undocumented labour migration, this chapter shall only concern persons whose legal status is not in doubt from the point of view of the countrys' legalisation. The issue of undocumented migration from the point of view of precariousness of employment constitutes extensive material for a separate scientific study, as the unregulated legal status of migrants affects their overall situation, including their bargaining power and their vulnerability to exploitation.

The concept of precariat. Precarious employment

Although the phenomenon of the precariat is discussed in sociology, there is no clear legal definition. The concept of the precariat has been present in both public and academic debate for over half a century[2] and seems to be understandable. Yet, any attempts to provide a uniform definition create difficulties typical for defining all social phenomena. Social issues are related to important, forthright views of certain significant individuals and groups who believe that their situation is not in line with the desirable standards and is also harmful and threatening from the point of view of the values these individuals and groups hold and the interests they further. From this perspective, it appears unattainable to give one universal definition of precarious work, as global standards of employment are not uniform. They are entangled in the situational context of the perspective from which they are analysed (national, multi--national, etc.).[3]

According to Guy Standing, distinctive relations of production constitute one of the defining characteristics of the precariat. Among distinctive relations of production belong: the so-called flexible labour contracts; temporary jobs; labour as casuals, part-timers, or working intermittently for labour brokers or employment agencies.[4] Within this concept of the precariat, conditions of unstable labour are part of its definition, but they

2 Mentioned as early as 1964 by Paolos Sylos Labini in the article "Precarious Employment in Sicily" published in *International Labour Review*.

3 Izabela Florczak, "Precarisation of employment of third country nationals in Poland in the light of Guy Standings' concept," *Praca i Zabezpieczenie Społeczne* 9 (2019): 9–13, here 10.

4 Guy Standing, "The Precariat," *Contexts* 13, no. 4 (2014): 10–12, here 10.

do not provide the full picture. People who are in the precariat have no secure occupational identity; no occupational narrative they can apply to their lives. These people are exploited in the workplace as well as outside of it, and both within paid hours and outside of them.

Distinctive distribution relations are another characteristic of Standings' theory of the precariat. The precariat has lost such forms of remuneration as pensions, paid holidays, retrenchment benefits and medical coverage, and has no prospect of regaining them.

Another feature of the precariat is a lack of rights-based state benefits, such as unemployment benefits, as well as private benefits gained from investments and contributory insurance plans.

Standing claims that precariat class is divided into:

1. those who have fallen into the precariat from old working-class families or communities;
2. migrants and ethnic minorities who feel they are denied a sense of home, a viable present;
3. the educated young (although some older people also fall into this category), and those in the salariat who worry about their offspring drifting into the precariat.

From the perspective of the subject matter of this chapter, the second group is obviously the most relevant. Standing refers to the members of this group as *nostalgics*. In his opinion, they mostly keep their heads down and put up with insecurity, concentrating on survival.

The precariat is closely related to the work environment, but its scope does not end with employment. The phenomenon of the precariat has to be seen as linked to various social relations, especially by the employment relation. These relations have a number of other implications. Precarious workers are those who, for various reasons, work in worse conditions. Of course, the term *worse conditions* has to be defined first. We can assume that these are the working conditions that do not guarantee stabilization of employment, social security, or protection of interests. Precarious workers are also individuals, who are deprived of the right to a decent wage and work within the scope of short-term contracts or contracts that are easily terminated. They are not protected by the standards concerning working time or health and safety at work, they do not have social security providing support in the event of certain insurance risks (sickness, maternity, old age) and are unable to use collective workers representation.[5]

5 Izabela Florczak, "Precarious Employment V. Atypical Employment in the EU," in *New Forms of*

In line with the above-mentioned statements, the concept of precariousness in employment can be defined as a term which encompasses a full range of attributes associated with employment quality,[6] whatever the employment form may be.[7]

It has already been indicated that precarious employment is not framed by law, although it appears in the European Pillar of Social Rights,[8] as a rule according to which: *Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration*. However, the document does not explain how, for the purposes of its application, the concept of precariousness should be understood. It shows that precariousness of employment can be caused by unequal treatment at work, by the use of different systems of payment of public law liabilities regarding particular groups active on the labour market, by the use of atypical forms of employment or by the use of overtime probation periods.

For the purposes of the analysis in this chapter, I assume that precarious employment occurs when a particular individual or group work/s under conditions that do not provide them with the social protection that is considered average in a given legal system.

Migrant worker – a winner?

Among precarious workers there is one group that is particularly conspicuous, namely economic migrants, whose prime motivation to come to a particular country is to seek employment. It is claimed that economic migrants tend to be favourably self-selected for labour market success.[9] They are described as tending, on average, to be more able, ambitious,

Employment. Current Problems and Future Challenges, ed. Jerzy Wratny and Agata Ludera-Ruszel (Springer, 2020), 203–214, here 205.

6 John Burgess and Iain Campbell, "The Nature and Dimensions of Precarious Employment in Australia," *Labour & Industry* 8, no. 3 (1998): 5–21, here 6.

7 Zeenobiyah Nadiyah Hannif and Felicity Lamm, "When Non-Standard Work Becomes Precarious: Insights from the New Zealand Call Centre Industry," *The International Review of Management Studies* 16 (2005): 324–350, here 330.

8 Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights, Brussels, April 26, 2017, 201 final.

9 See Barry R. Chiswick, "Are Migrants Favourably Self-Selected?," *The American Economic Review* 89 (1999): 181–185.

aggressive, entrepreneurial. It seems, however, that this assumption is not always valid, since migrants are often classified as a special group of precarious workers – as already mentioned – also by Guy Standing. Whether a migrant should be considered a precarious worker depends on many factors – the specific circumstances of their migration, the degree of determination to take up employment, or the labour market situation in the country of arrival. To call a migrants' story truly successful, it has to fulfil several strictly defined conditions. For example, the working conditions in the country of immigration should not only be better than those in his home country but should also be considered relatively favourable in the hosting country. The mere fact that the labour market situation has improved in comparison to that of the migrants' home country is not in itself a reference point for determining the migrants' position. The point of reference is the current social environment at the time of analysis. Therefore, each time a migrants' situation on the labour market is evaluated, his position should not be confronted with the reality of the migrants' home countrys' domestic market, but with the reality of the labour market in which the migrant worker is active as a result of migration.

I do agree with the statement that migrant workers, due to their weak negotiating position and poor knowledge of their rights are a group which is particularly vulnerable to abuse on the labour market.[10] It is even claimed that migrants – like ethnic minority workers – are *the last to be hired and the first to be fired*.[11] Migrants tend to supplement labour shortages in the labour market, which are filled when appropriate demand arises. Whenever demand falls, it is the workers who previously filled the vacancies through the surplus process (mainly migrant workers) that lose employment. What is also worth mentioning is that migrant workers take up employment rejected by national workers. As an example: native women have preferred to employ immigrant domestic workers in the household as they have freed them from caring and cleaning tasks.[12] All in all, migrant workers usually carry out the tasks the national workers

10 Jakub Tomšej, "On the Balance between Flexibility and Precarity. Atypical Forms of Employment under the Laws of the Czech Republic," in *Precarious Work. The Challenge for Labour Law in Europe*, ed. Jeff Kenner, Izabela Florczak, and Marta Otto (Edward Elgar, 2019), 155–174, here 170.

11 Patrick Taran, "Crisis, Migration and Precarious Work: Impacts and Responses. Focus on European Union Member Countries," in *ITC-ACTRAV European Trade Union Conference on Conversion of Precarious Work into Work with Rights* (Budapest, November 22–23, 2011).

12 Anna Triandafyllidou (ed.), *Irregular Migrant Domestic Workers in Europe: Who Cares?* (Burlington, Farnham: Ashgate, 2013).

are reluctant to do: the so-called 3D jobs, those are dirty, dangerous, and difficult.[13]

Studies conducted by Ethan Lewis, who used the United States as a model, have shown that migrant workers not only fill labour shortages, but also contribute to the betterment of native workers:

> In practice, immigration has almost no potential to do harm because U.S. immigration is basically balanced on the most important skill margin. There are also enough differences between the skills of immigrants and natives that most native-born workers' wages end up going up. Almost all American workers are better off with immigration than without.[14]

Therefore, it seems that the real winner in the process of labour migration is the country of immigration. At the same time, one cannot ignore the negative effects of labour migration. Lilibeth Lopez draws attention to these (also with reference to the realities of the United States), noting however in the conclusion of her research the balance of benefits and costs resulting from the employment of migrants, which is extremely important to emphasise:

> Even with the rise of these negative externalities and other non-wage factors, the benefits immigration brings to the U.S. employment and wages far outweigh the costs. There has been a significant amount of studies done on the economic consequences of immigration, and they do not all agree. The research I conducted shows that overall, immigration has a small impact on employment and wages, though there is a significant impact among those with lower levels of education and skills. Economic studies indicate that immigration does affect the wage and employment structure at the bottom of the labor market. From my research I have concluded that immigration has both negative and positive impacts on the U.S. employment and wages. There are winners and losers. Thus, it would be a mistake to say that we are absolutely certain that immigration reduces the labor market opportunities for low- and unskilled natives. Based on my research, most American workers are not significantly affected by immigration competition. Additionally, immigration does make the economy stronger because while immigration takes

13 Yongyuth Chalamwong, Raphaella Prugsamatz, and Khanittha Hongprayoon, "Exploitation and Discrimination Experience of Migrant Workers in Five Provinces," *TDRI Quarterly Review* 25, no. 4 (2010): 3–7, here 3.

14 Ethan Lewis, "How Immigration Affects Workers: Two Wrong Models and a Right One," *Cato Journal* 37 (2017): 461–472, here 471.

jobs, it also creates them. The benefits of immigration outweigh the costs not only in the housing market, but in the overall U.S. economy.[15]

It is worth considering why migrants choose to work under unfavourable conditions assessed as such in relation to the labour market situation in the country of immigration. One of the key aspects that will be discussed in detail below is certainly the lack of information on migrants' rights and the possibility of their effective enforcement. Moreover, migrant workers usually do not have access to social safety nets and often live without established family support. For this reason, they are often forced to take any job offered – even those that are generally paying less and forcing them to work under more abusive conditions than the jobs in their home country.[16]

We should not forget that the purpose of economic migration is work and the most important thing for a migrant is often its purely economic outcome. If the migrant does not believe that he can stay permanently in the country of immigration or if he does not intend for his stay to be permanent, then the migrant worker is willing to accept work under conditions which would not be favourable for native workers. In turn, the higher the probability of permanent settlement of migrant workers, the more they will strive for a high degree of favourable employment conditions. Thus, short-term migrant workers will be more susceptible to exploitation of their situation than migrants manifesting an intention to settle permanently in the country of immigration. Workers' vulnerability and consent play a key role in identifying employment conditions as exploitative.[17] These two aspects occur when migrant workers are consciously determined to make as much profit as possible in as short a time as possible, even if this were to be at the expense of their health and broader social welfare.

15 Lilibeth Lopez, "What Immigration Means for U.S. Employment and Wages," *Showcase of Undergraduate Research and Creative Endeavors (SOURCE)* 217 (2020): 1–15, here 12–13.

16 Taran: "Crisis, Migration and Precarious Work," 4.

17 Conny Rijken, "When Bad Labour Conditions Become Exploitation," in *Towards a Decent Labour Market and Low-Waged Migrant Workers*, ed. Conny Rijken and Tesseltje de Lande (Amsterdam: Amsterdam University Press, 2018), 189–206, here 204.

Migrants' sources of information on legal realities

In the migration process, it is extremely important to have proper information on employment realities – both on legal regulations and the practice of their application. The awareness of the law acquired when still in the country of origin and the knowledge of the mechanisms of the legal system is of paramount importance to any migrant. The knowledge of law and the way it is used with which the migrants leave their country affects their perception of legal realities in the country of immigration. The more different the legal systems of the country of immigration and the country of origin are, the more difficult it is for the migrant to understand the legal mechanisms in the country of immigration. The migrant is soaked in the legal and organizational conditions in which he has been functioning for years. As a result, the clash of two completely different realities creates a cognitive dissonance: on the one hand the migrants know that they are in a different legal reality, on the other hand they perceive it through the prism of known schemes and experiences.

There is no doubt that every time the perception of a given legal system is, firstly, subjective (because it is individualised and conditioned by previous experiences) and, secondly, very problematic due to, as a rule, difficulty in understanding numerous complexities of its functioning. Furthermore, there are additional obstacles and difficulties migrants have to deal with. These are related to the language barrier – there are often very few sources presenting legal content in a language understandable to migrants. This issue is related to another one – the identification of the actors who provide migrant workers with the information intended to familiarize them with the new legal realities. Depending on who is the author of the content, information can be, intentionally or unintentionally, manipulated.

Depending on whether the migrants migrate to a country where their compatriots are already settled, the acquisition of relevant information may be facilitated more easily. Migrants form networks that may constitute the only source of knowledge about the legal and organisational conditions related to employment. Such networks, called social networks, are important for them as a source of information. Their importance to the migrants often increases as the migrants' competences and education decrease.[18] This means that the lower the educational attainment

18 Marta Kindler and Katarzyna Wójcikowska-Baniak, "Sieci społeczne a integracja migrantów Ukraińskich w Polsce. Raport z badań jakościowych [Social Networks and the Integration of

of migrants and the less competences they have for a job on the labour market of the country of arrival, the more information support they need. It is also worth noting that after a certain period of time spent in the immigration country, the migrants change role from being an *information seeker* to an *information provider*.[19]

Information obtained through social networks is characterised by peculiar traits. Firstly, it is usually passed on as second-hand information. From this point of view, it seems to be important where the informant got certain information from and whether, subjectively, it can be considered reliable. Secondly, such information may be very strongly distorted by the informants' personal experience and their initial perception of reality. Thirdly, as a rule, such information is deemed to be provided in good faith. Any possible distortion of the information from the actual state of affairs is not intentional. In these social networks, migrants seek to help each other, so their initial intentions as sources of information are characterised by a desire to support.[20]

At a time when the internet is the main source of information, social media are increasingly more popular as channels of information on which migrants base their decisions on whether to migrate and where to settle.[21] Such information networks are definitely among the main means of information transfer between migrants, becoming a particular type of network classified as social network.

Research conducted more than a decade ago on migrant workers in Thailand proved that most migrant workers gained knowledge via self-study and family/friends respectively, which makes it possible to recognise that migrants seek sources of information in their immediate, familiar and trusted environment.[22]

Other sources of information used by migrant workers are employment agents (agencies) and employers themselves, who recruit workers while they are still in their country of origin. From a purely economic perspective, the employer is interested in convincing the worker to work for him. Therefore, it would seem that he/she would be interested in

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Ukrainian Migrants in Poland. A Report from Qualitative Research]," *CMR Working Papers* no. 107/165 (2018), 1–45, here 21, http://www.migracje.uw.edu.pl.

19 Ibid., 22.

20 Ibid.

21 Rianne Dekker, Godfried Engbersen, Jeanine Klaver, and Hanna Vonk, "Smart Refugees: How Syrian Asylum Migrants Use Social Media Information in Migration Decision-Making," *Social Media + Society* 4, no. 1 (2018).

22 Chalamwong, Prugsamatz, and Hongprayoon, "Exploitation and Discrimination Experience of Migrant Workers in Five Provinces," 5.

presenting the reality of employment in the country of immigration as immensely favourable to the migrant-to-be. Unfortunately, the reality is very different. In 2019/2020, I conducted a research on the situation of Nepalese citizens in the Polish labour market. The empirical interviews conducted with representatives of this group made it reasonable to conclude that they are unaware of their legal situation and status, and that relevant information was not provided to them by employers and agents (agencies) at all, was provided in an incomprehensible way, or was provided incorrectly. This concerned cases such as:

1. information was provided only in Polish, which made it impossible for foreigners to understand it;
2. there was a lack of precision in specifying the amount of remuneration received in Poland by misleading the migrants with regards to the currency in which the remuneration would take place in the employment contract (remuneration specified in contract in PLN was presented at the time of negotiations as remuneration specified in EUR, which is, taking into account the PLN:EUR ratio (> 4.5:1), unfavourable for the employee) or a lack of information/incorrect information about the amount of the national minimum remuneration for work;
3. there was a lack of intention to provide any information related to employment, in particular with respect to employment bases applied in Poland and the legal consequences of their application. This led to situations in which employed persons (migrants) were convinced that they had the status of an employee, while they worked on the basis of contracts that do not guarantee such a status (civil law contracts) and do not entitle them to, inter alia, annual paid leave.[23]

The conducted research cannot, due to its scale, be regarded as reflecting the actual state of affairs regarding how employers and employment agents (agencies) provide information to migrant workers, but it can certainly provide a reference point for analysis. As a rule, the migrant worker comes from a less developed country (also with regard to the rules and realities of the legal system), so it is not difficult for them to believe the employers' or employment agents' (agencies') assertions that the legal system in the country of immigration functions within certain mechanisms whose social protection value the employer or employment agent (agency) deliberately underestimates.

23 Izabela Florczak, "Case study Poland," in *Shifting Labor Frontiers. The Recruitment of South Asian Migrant Workers to the European Union*, ed. Dovelyn Rannveig Mendoza (Amsterdam: Mondiaal FNV, 2020), 81–122, here 101–107, https://www.fnv.nl.

Obtaining information from the employer or employment agent (agency) has another consequence for migrant workers: they become fully dependent on one source of knowledge, without developing the ability to find their way in the new reality independently. Migrant workers, who from the beginning of their migration process handle all matters related to their employment through the employer or employment agent (agency), become organizationally clumsy in any independent activities and become vulnerable and exposed to exploitation of their weak position.

A desirable provider of information for migrant workers seem to be trade unions, whose task it is to look after the interests of all economically active persons. However, it is not obvious that trade unions are interested in looking after the interests of migrant workers. This is due to the narrative that migrants "steal jobs". If such a narrative gains steam, the trade union will act to defend the interests of native workers against migrant workers (or at least it will not act in the migrant workers' favour). As Ethan Lewis and Lilibeth Lopez point out in their research – such claims are not in line with reality, as the presence of migrants in the labour market has a positive impact on its development.

Assuming, therefore, that trade unions are aware that support for migrant workers is not to the detriment of native workers, their activities should be considered highly desirable. The first step in reaching out to migrant workers must be the breaking down of the language barrier. An example of activities aimed at achieving such a goal may be the activities of the FNV (Federatie Nederlandse Vakbeweging – Federation of Dutch Trade Unions), which, being aware of the presence of a significant number of Polish migrants on the domestic labour market, runs a website dedicated to them in Polish (https://www.fnv.nl/polski/home). The DGB (Deutsche Gewerkschaftsbund), the German Confederation of Trade Unions, is even more active, running websites with very important information for migrant workers in Polish,[24] Croatian,[25] Belarusian,[26] Romanian,[27] Hungarian,[28] and Russian.[29]

24 https://www.fair-arbeiten.eu/pl/.
25 https://www.fair-arbeiten.eu/hr/.
26 https://www.fair-arbeiten.eu/bg/.
27 https://www.fair-arbeiten.eu/ro/.
28 https://www.fair-arbeiten.eu/hu/.
29 https://www.fair-arbeiten.eu/ru/.

Trade unions have a lot more to gain from application of migrant-friendly policies than just possible membership gains.[30] The failure to take care of the most vulnerable individuals active on the labour market (which certainly include migrant workers) consequently leads to a lowering of social standards related to employment. The use of mechanisms which are disadvantageous for employees becomes widespread and, as a result, affects the whole society.

In addition to trade union activities, it is extremely important that migrants are able to benefit from the knowledge base guaranteed by NGOs.

The last actor that can, and should, be involved in the process of providing information to migrants are various governmental agencies. It should be kept in mind that their activities have a real impact on the situation of migrants unless migrants hold a social attitude of limited trust towards state authorities. The reason for this attitude may be mainly the experience gained in the country of origin and the generally accepted social attitudes there. If a migrant comes from a country where the level of corruption on the governmental level is high and there is very little trust in the government, they will transfer the model perception of the functioning of the public administration to the mechanisms in the country of immigration. Low trust in the public informant causes not only reluctance to use its assistance, but also a lack of confidence in the veracity of the information provided. However, this does not change the fact that it is up to public authorities, as specialised and professional bodies, to provide information which should be truthful and reliable.

Whichever actor provides information to migrant workers, the process of providing it is linked to two key issues. First of all, for the process of providing information to begin at all, the migrant must obtain primary information about the existence of the informant. With regard to the source of information classified as a social network, it can be assumed that the migrants will find it on their own. An employer or employment agent (agency) as a source of information will usually also be found by the migrant, or it is the employer or employment agent (agency) looking for an employee, who initiates the contact, resulting in the provision of specific information. If the migrant is not aware of the existence of a certain entity, such as a trade union, an NGO, or a central administration unit, the situation is different. Such entities must take care not only to provide the migrant with correct information in the correct way,

30 See more: Marcus Kahmann, *Trade Unions and Migrant Workers: Examples from the United States, South Africa and Spain* (European Trade Union Institute, 2002), https://library.fes.de.

but they must also keep in mind the primary process – the process of informing the migrant about the possibility of obtaining information.

The second key issue in providing information to migrants is the mode of communication, which should be adapted to the recipient. The mode of communication is not only limited to the language used. It is of utmost importance that the form of communication takes into account the migrants' perception capabilities, which depend on the conditions in which their legal and social consciousness was formed. Existing cultural differences may influence the misperception of the information transmitted.

Who cares about migrant workers?

The above-described issues related to the process of informing migrant workers about their rights is closely related to the already outlined topic of determining which institutional actors care about the labour market situation of migrants. In my opinion, one of the most problematic issues related to the protection of the rights of migrant workers is to identify a group of stakeholders who want to improve their situation. The interests of immigrants are of no consequence to the state they leave. Even though they retain their nationality for the most part, which does not relieve the country of origin of its responsibility for the migrants' situation, the country of origin does not usually have real political or legal possibilities of influencing the situation of migrants in the country of immigration, apart from non-binding lobbying measures.

The state of imigration is more interested in the protection of its own citizens, whose short-sighted interests are usually contrary to the interests of those arriving.[31] The policy of short-sightedness is driven by a belief that the more domestic employers manage to exploit the labour force from migrants, the lower the costs of employment will be, which will lead to a more efficient functioning of the economy. In the final phase, this conclusion ends with the statement: "the greater benefits the domestic workers will have". These benefits will manifest in the fact that they will not have to do low-paid jobs and the decrease of labour costs will have a positive effect on the prices of goods and services in general.

31 As the cited studies indicate – in the long run, the beneficial situation of migrants in the labour market has a positive impact on the economy.

Studies show that Europe is split in the opinion on the topic of government action to foster the integration of immigrants. Around a half of Europeans think their government is doing enough (51%) while 39% disagree with this statement.[32] Within the framework of integration, both the information function and looking after the interests of migrant workers in the same way as looking after the rights of native workers are very important factors.

There is no doubt that the best results are achieved when as many actors cooperate as possible. Some authors even claim that facilitating collaboration between EU migrants, refugees, and social movement groups committed to the struggle against poor working conditions should be at the top of the agenda.[33] A majority of Europeans agree that many different actors play vital roles in the integration of immigrants into their host country. Among these actors are the immigrants themselves, educational institutions, governmental, local and regional authorities, employers, citizens, media, civil society actors such as non-governmental organisations, trade unions, and EU institutions.[34]

However, in the absence of real possibilities for such interaction, the most effective tools for advocating for the improvement of migrants' situation in the labour market would seem to be trade unions, NGOs, and migrants associations. There are several reasons for this. These include:

1. a relatively high confidence among migrant communities in their activities;
2. a familiarity with the realities of the areas of migrants' economic activity that require intervention and support;
3. skills in reaching out to migrants;
4. lack of interest in acting against the migrants' interests.

Conclusions

The social integration of migrants, including labour market integration, is quite often perceived as a certain action aimed at facilitating their functioning. However, it seems that any integration-related actions should be considered a form of human rights that should be granted to each

32 European Commission, "Integration of Immigrants in the European Union," *Special Eurobarometer* 469 (2018): 139.

33 Peter Birke and Felix Bluhm, "Migrant Labour and Workers' Struggles: The German Meatpacking Industry as Contested Terrain," *Global Labour Journal* 11, no. 1 (2020): 34–51, here 48.

34 European Commission, "Integration of Immigrants in the European Union," 144.

migrating individual. Measures to support migrants, and thus to avoid the precarization of their work, should be perceived as a legal obligation of the state, but should also be carried out by non-governmental entities.

Equal treatment and a fostering of the fight against precarious employment are both important for the integration of migrants. Unequal treatment of people arriving in a state and those who have lived there since they were born creates barriers. Those barriers hinder the integration of immigrants into the social structures of a given country. The equal treatment obligation should be considered as one of the fundamental measures enabling migrants to integrate. The equal treatment obligation becomes particularly important during periods of recession and increasing unemployment. A higher unemployment rate results in a deterioration of the situation of foreigners.

Various types of discriminatory behaviour do not have to be intentional and come from prejudice. They are often the result of indifference or lack of awareness of the effect of a decision, a certain behaviour, a particular procedure, or a lack of action (abandonment). Ordinary practices or unreflectively duplicated institutional procedures contribute to unequal treatment as much as intentional ones. It is therefore crucial to educate both employers and migrants about the desirable ways of migrants' employment, in accordance with the law of the country of immigration. Establishing an effective integration policy which takes into account the needs of different groups of immigrants helps avoid precarization and enables them to be equal and fully involved in public life.

The research conducted so far on the adverse consequences of economic migration focuses on very blatant phenomena such as human trafficking, exploitation of undocumented status of employed persons or overt exploitation of migrant workers.[35] Too little attention is given to

35 See for instance: Michele Ford, Lenore Lyons, and Willem van Schendel (eds.), *Labour Migration and Human Trafficking in Southeast Asia. Critical Perspectives* (London: Routledge, 2012); Johan Leman and Stef Janssens, *Human Trafficking and Migrant Smuggling in Southeast Europe and Russia. Learning Criminal Entrepreneurship and Traditional Culture* (London: Palgrave Macmillan, 2015); Bryan Fanning, "How Immigrant Workers Are Exploited," *Studies an Irish Quarterly Review* 100, no. 397 (2011), 55–62; Global Migration Group, *Exploitation and Abuse of International Migrants, Particularly Those in an Irregular Situation. A Human Rights Approach* (Geneva: Global Migration Group, 2013); Laurie Berg and Bassina Farbenblum, "Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law," in *Migrant Labour and the Reshaping of Employment Law*, ed. Bernard Ryan (Oxford: Hart Publishing, 2020); Bodean Hedwards, Hannah Andrevski, and Samantha Bricknell, *Labour Exploitation in the Australian Construction Industry: Risks and Protections for Temporary Migrant Workers* (Canberra: Australian Institute of Criminology, 2017).

the not only unrestrained, but through the increasing scale of migration, growing phenomenon of precarious employment of migrants.[36] The phenomenon of socially precarious employment of migrants will be exacerbated unless there is a sufficiently swift and decisive policy to combat it, including both binding and non-binding measures (such as trade union and NGO activity). People with the status of migrant workers should not be deprived of their rights under international and national law solely due to ignorance of the law, vulnerability to exploitation and a different perception of legal and social conditions.

36 With the exception on latest publication by Anastasia Tataryn, *Law, Migration and Precarious Labour: Ecotechnics of the Social* (London: Routledge, 2020).

2. Posted Workers' Status under EU Law: Still Not Identical to Locals?

The paper gives a short overview of how EU law addressed the legal status of posted workers and highlights some of the problems in the regulation as it stands now. The directive on the posting of workers[37] was in force for over 20 years until its first amendment.[38] After a short historical overview, I argue that the lack of a clear delimitation between posted and migrant workers and the definition of core labour standards that apply to posted workers impede the reach of a fair balance between the directive's economic and social aims. The paper analyses the main changes brought by the directive's amendment and builds on the practice of the Court of Justice of the European Union to indicate the contradictory position posted workers hold within the framework of transnational working patterns in the EU.

The battlefield of concurring interests and its legal framework

Even if the EU has adopted around twenty labour law directives – not to mention the detailed rules on occupational health and safety – national laws still play the major role in the regulation of employment relationships. Strategic issues like termination of employment or responsibility

37 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).

38 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 (hereinafter: amending directive).

for damages have not been touched upon, others – especially pay and freedom of association – are expressly excluded from the legislative authority of the EU.[39] The differences between labour law regimes across the Member States become apparent when workers are posted from one state to another within the framework of transnational services. The fundamental principle of freedom to provide services enables employers to export their home labour standards with their posted workers to host countries. As lower labour law protection means lower costs,[40] the posting scenario becomes a real battlefield of the involved players' interests.

For an overview, the complex dynamics apparent in these cases can be summarised as follows. From the home state's (and its companies' and workers') perspective, providing services abroad is enticing because of new market possibilities and higher employment rates, while this could mean unwanted competition on the market of the host state. To settle the home state service providers' advantage of lower employment costs, the host state could also extend the scope of its labour law to posted workers. Though, such protectionist reaction is not the only possibility. Posted workers might be welcome in sectors with a workforce shortage, or in huge investment projects covered by the public purse. A more permissive regulation could also help to throw back undeclared cross-border work or bogus self-employment. Moreover, the advantage of foreign service providers in the host state's market is not limited to cheaper labour: they might also compete with better services, higher productivity, better trained staff, etc., thus their presence can generate positive competition in the local market. All in all, Member States have to take into account several factors to work out their posted workers policy.[41] The situation is similarly complicated from the perspective of the posted worker: the more rights he/she enjoys in the host state, the less chance he/she gets to have a job there.[42]

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39 Treaty on the Functioning of the European Union (hereinafter: TFEU), Article 153(5).

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

41 For a summary of the competing interests in posting cases, see: Paul Davies, "Posted Workers: Single Market or Protection of National Labour Law Systems?" *Common Market Law Review* 34 (1997), 571–602, here 574, 598; Philippa Watson, *EU Social and Employment Law,* 2nd ed. (Oxford: Oxford University Press, 2014), 281, 303–304; Karl Riesenhuber, *European Employment Law. A Systemic Exposition* (Cambridge: Intersentia, 2012), 197.

42 Paul Davies, "Case Note: Case C-346/06, Rüffert v. Land Niedersachsen [2008] IRLR 467 (ECJ)," *Industrial Law Journal* 37 (2008), 294–295.

The term *posting* has two different meanings in EU law. In private international law, the essence of posting is that the worker is temporarily working outside the country where he/she regularly works. For example, an employee attends a two-week training at the premises of a 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.[43] 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 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 to safeguarding the public interests of the host state.[44] There is no common ground in literature regarding which norms could fall within this category.[45] For instance, Riesenhuber suggests that imperative norms are also protected by criminal law sanctions or have a public law character.[46] According to Piir, such provision could, for example, be in the form of a prohibition to dismiss pregnant women or workers' representatives or in the form of certain rules on occupational safety and health.[47]

In a narrower sense, under EU law, posting means that a worker is temporarily working in another Member State to provide services. For the purposes of this type of situation, a separate piece of legislation was adopted in 1996 in the form of the posting directive. The directive applies if the aim of the posting is the provision of a transnational service and it stipulates that although in such cases the worker remains subject to the employment law of the home State, the host State's law concerning

43 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). The Rome Convention (1980) on the law applicable to contractual obligations contained the same principle, see Article 6(2)(a).

44 Rome I Article 9.

45 Davies, "Posted Workers," 596.

46 Riesenhuber, *European Employment Law*, 182–183.

47 Ragne Piir, "Safeguarding the posted worker. A private international law perspective," *European Labour Law Journal* 10, no. 2 (2019): 101–115.

the explicitly listed (the so-called *hard core*)[48] basic working conditions shall apply, if it is more favourable to the worker.[49] The rules listed here will therefore apply to the posted workers as imperative rules.[50] 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.[51] 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 deal with posting in the narrower sense used in the directive.

EU law has addressed the posting phenomenon by a continuously changing legal framework. From the aspect of primary law, posting cases shall be considered on the basis of freedom to provide services.[52] The legal background of employment may vary in each Member State, yet such differences cannot hamper the freedom to provide cross-border services without proper justification,[53] especially when such restrictions are discriminatory or not justified by overriding requirements relating to public interest. However, there were major turns in how EU law addressed posting cases in the last nearly 30 years.

In 1990 the Court found no unjustified restriction in the extension of host state labour standards to workers who were posted to their territory in the framework of cross-border services. Instead, the famous Rush judgement gave the broadest possible authorisation for Member States

48 Posting directive Preamble (14). COM(2003)458, 5. Communication from the Commission on the implementation of Directive 96/71/EC in the Member States.

49 Posting directive Article 3(1) 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.

50 Florian Schierle, "1996/71/EC: Posting of Workers," chap. 2 in *EU Labour Law: A Commentary*, ed. Monika Schlacter (Alphen aan den Rijn: Wolters Kluwer, 2015), 166, 178; Herwig Verschueren, "The European Internal Market and the Competition between Workers," *European Labour Law Journal* 2 (2015): 140. The Rome I Regulation itself refers to the possibility to adopt special conflict-of-law rules relating to contractual obligations (see Article 23). The posting directive could also be understood as a *lex specialis* to the Rome I Regulation, as a *lex generalis*.

51 Posting directive Article 1–2.

52 TFEU Article 56.

53 Frank Hendrickx, "The services directive and social dumping: National labour law under strain?" in *The Services Directive – Consequences for the Welfare State and the European Social Model*, ed. Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry (Copenhagen: Djoef, 2008), here 244.

to extend their labour law legislation to posted workers. According to the extensively quoted paragraph:

> Community law does not preclude Member States from extending their legislation, or collective labour 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 Community law prohibit Member States from enforcing those rules by appropriate means.[54]

After nearly 30 years, it is still enigmatic how the Court reached this conclusion. The ruling itself adds no hints as for the basis of this axiom,[55] yet it served as the foundation of dealing with posting cases until 1999, when the posting directive entered into force.[56]

With the adoption of the posting directive, it became clear the Member States must apply their working standards listed in the hard core to posted workers. The question, however, remained open whether and how the host states can go beyond that list and apply even more labour law provisions to workers posted in their territory.[57] The directive contained two important derogations that made Article 3(1) a non-exhaustive list.[58] According to the first one, Article 3(1–6) shall not prevent the application of terms and conditions of employment which are more favourable to workers.[59] And secondly, Member States could also apply rules concerning other matters than those listed in Article 3(1) (e.g., further elements of pay or rules of termination), with reference to public policy, in compliance with the Treaty.[60] However, from 2007 in its new practice – starting

54 Rush, C-113/89, para. 18.

55 Davies, "Posted Workers," 588–589; Gregor Thüsing, *European Labour Law* (München: C.H.Beck, 2013), 161; Phil Syrpis, *EU Intervention in Domestic Labour Law* (Oxford: Oxford University Press, 2007), 109–110.

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

57 Eeva Kolehmainen, "The Directive Concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems," *Comparative Labor Law & Policy Journal* 71 (1998): 86.

58 Other derogations limit the applicable host state standards, as they enable or oblige Member States not to apply some of their labour 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.

59 Posting directive Article 3(7).

60 Posting directive Article 3(10).

with the famous Laval judgement[61] – the Court of Justice of the European Union (hereinafter "CJEU") closed all the ways leading to a more protectionist reading of the directive. As for the first derogation, the Court – 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 favourable to workers". Thus, it gives no authorisation to host states to require compliance with their rules solely on the ground that those are more favourable to the employee than the home state standards.[62]

Turning to the second option, the Court had 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.[63]

Later the Court 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 threat to a fundamental interest of society"[64]. On these grounds the Court ruled that the list in Article 3(1) is not a minimum, but a maximum: 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"[65]. Any other matters might be covered by the host state's law only by way of the strictly interpreted public policy derogation. Laval demonstrated that even the right to bargain collectively or the right to strike would not suffice for the use of the public policy clause.[66] Laval undoubtedly brought a conceptual change in accepting labour law as a constraint on the freedom to provide

61 Laval C-341/05, Rüffert C-346/06, Commission v. Luxembourg C-319/06.

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

63 Arblade, C-369-376/96, para. 30–31.

64 Commission v. Luxembourg, C-319/06., para. 29–33, 50.

65 C-319/06, para. 26.

66 Catherine Barnard, *EU Employment Law*, 4th ed. (Oxford: Oxford University Press, 2012), 232.

services. Seventeen years after the judgement in Rush, the CJEU could not have gone any further from its previous case law: the first approach – which took it as evident that host states may apply their own labour law to posted workers – was substituted with the idea to give priority to the freedom to provide services.[67]

The legislative steps taken after 2008 made only minor adjustments in the status quo reached after Laval. First, instead of a substantive review, the Commission only developed a proposal to facilitate practical implementation, which led to a directive in 2014.[68] Second, the Commission's 2016 proposal for a comprehensive review of the posting directive promised substantial progress.[69] The proposal introduced two important changes. It limited the duration of postings to 24 months (which was lowered to 18 during negotiations), after which the posted worker becomes fully covered by the labour law of the host state. With regard to pay, it provided, from day one, for full equality between posted workers and those of the host Member State, at least as regards compulsory pay entitlements. After lengthy debates, by the summer of 2018, eighteen and a half years after the original directive had entered into force, the posting directive was finally reformed. However, as I argue below, the fundamental rationale behind posting remains untouched.

Obviously, EU law's stance on the regulation of postings has always been the result of an actual compromise. The question whether the protection of workers shall take precedence over the freedom to provide services or the other way around and what will be the prerequisites is still open. This is well illustrated by the annulment procedures against the amending directive started by the Hungarian and Polish governments, arguing primarily that as the amendment extended the host state's labour standards to posted workers, the directive is no longer compatible with the freedom to provide services.[70] Although both claims were rejected,

67 Thüsing, *European Labour Law*, 158; Kilpatrick, "Internal Market Architecture," 212–213; Riesenhuber, *European Employment Law*, 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* 9 (2018): 50–72, here 59.

68 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.

69 COM(2016)128 final.

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

the following analysis includes some noteworthy legal arguments that were proposed in the annulment claims.

In the following part I highlight the shortcomings of EU law that make the status of posted workers ambiguous. I also analyse the main elements of the amending directive to find out whether the new rules could help to solve the identified problems.

Who is who? Posted and migrant workers, cross border service providers

The success of the compromise on posted workers' legal status is gravely undermined by the fact that the term *posted worker* is not clearly defined in EU law. There is no precise delimitation between posted and migrant workers (making use of the right of free movement), and yet, this categorisation is of utmost importance as it defines the applicable labour standards.

The first definition of posted worker appeared in the above-mentioned Rush decision in 1990. The CJEU attributed the following characteristics to posted workers: (1) they are sent to another Member State temporarily and (2) they "return to their country of origin after the completion of their work (3) without at any time gaining access to the labour market of the host Member State".[71] Similarly, according to the definition in the posting directive (not effected by the amendment), the posted worker works "for a limited period" in the territory of a Member State other than the state in which he normally works.[72] The idea that posted workers are outsiders in the host labour market was used many times to underpin the Court's view[73] that posting may be limited or controlled by administrative obligations on the grounds of general interest (like for the protection of the labour market) only under strict conditions. This is why host states shall not require work permit from posted workers.[74]

71 C-113/89, para. 15.

72 Posting directive Article 2(1).

73 This proposition was continuously repeated in later case law, e.g., Vander Elst, C-43/93, para. 21, Finalarte, 49/98, para. 22, Commission v. Germany, 244/04, para. 59.

74 Around fifteen years later the ECJ had to decide in a series of infringement procedures whether and how host states may limit posting if the worker is a third country national. The ECJ found that the requirement of a work permit is an unjustified restriction on the freedom to provide services, as such workers do not purport to gain access to the labour market and they return to their country of origin or residence after the completion of their work (e.g., Commission

Nonetheless, all of the above-mentioned criteria appear to be rather vague and even the amending directive did not make the definition entirely clear.

The temporary nature of posting and long-term postings

Until the amending directive, EU law had not set a time limit for posting. After the adoption of the original directive, it was still left to national law to define the exact longevity of such temporary period.[75] Even the enforcement directive did not 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 the specificities of the situation.

The Commission was aware of the problem,[76] however the amending directive addresses it half-heartedly. The new rules limit the duration of a posting to 12 months, which Member States can prolong up to 18 months upon a so-called motivated notification of the service provider. After this period expires, the posted worker becomes subject to the host state's labour law.[77] A striking shortcoming is that the directive does not state what should be the grounds on which Member States should accept the request for extension. It is unclear whether the extension is automatic[78] or whether the Member State may consider the service provider's justification. It is against the foregoing interpretation that the text expressly requires a *motivated* notification and does not simply provide for a request for prolongation. The longer the posting lasts, the longer

v. Luxembourg, C-445/03, para. 38; Commission v. Germany, C-244/04, para. 59; Commission v. Austria, C-168/04, para. 55).

75 EU law prescribed 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.

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

77 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)128 final, 2016/0070(COD).

78 Piet Van Nuffel and Sofia Afanasjeva, "The Posting Workers Directive Revised: Enhancing the Protection of Workers in the Cross-Border Provision of Services," *European Papers* 3 (2018), 1401–1427, here 1422.

the service provider can apply the more flexible rules of the home state. Thus, the host and home states' interpretation and practice will most probably diverge greatly on this issue.

While the precise time limit is welcome, it is still unclear exactly what would happen after the 18 months expire. In principle, once the maximum period ends the posted worker will be subject to the labour law of the host country, but surely not in its entirety. Firstly, 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.[79] Secondly, it must be also pointed out that posted workers will remain outside the scope of the host state's non-generally applicable collective agreements.[80] Thus, if the most important pay elements are defined by a local or branch level collective bargaining, EU law will not close the pay gap between posted and local workforce. For example, if a workplace level collective agreement defines the wages in the host Member State, it will not be applicable to the posted worker even if the time limit has expired. Nevertheless, cases involving non-generally applicable collective agreements have been exactly the ones which caused the most tension in the application of the posting directive.

Apparently, the amending directive only sets a time limit for postings but does not bring full equality to long-term posted and migrant workers. Indeed, it seems that after the 12 (18) months have been expired, the host state cannot demand the termination of the posting and the employment protection of the posted worker does not become equal to that of local workers.

In the annulment cases, 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, see below under point 3), this still does not entail the application of all the terms and conditions of employment of the host State.[81] The situation of posted and local workers has not become identical or analogous.[82] The CJEU found that the posted workers' stay in the host state is temporary and that they are not integrated into the labour market of that state. Consequently, the EU legislature could

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

80 Posting directive as amended Article 3(8).

81 C-626/18, para. 148–149.

82 C-626/18, para. 111.

reasonably consider it appropriate that, for that temporary 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.[83] As a result, migrant workers may continue to enjoy full equality with the local workforce right from the first day of their stay in the host state,[84] while posted workers' status remains in an inferior position even in long-term postings.

Not accessing the labour market in the host state?

Turning to the CJEU's second criteria, it seems incidental that the posted worker actually returns to the country of origin after the completion of the work in the host state. Nothing places such obligation on the posted worker. On the contrary, if we analyse the three measures that form posting in the meaning of the directive, it might well be the case that the posted worker chooses to stay in the host state and finds a job there. For example, workers posted within a company group might exploit this experience to advance to direct employment by the mother company, agency workers might use posting as a springboard towards a job in the host state with the user undertaking. Clearly it is not an abuse or circumvention if the worker – even if he is expected to return to the home state[85] – opts for carrier options in the host state, yet these cases would not fit in the CJEU's definition.

As for the third element, the severe debates over the legal status of posted workers and protectionist reactions clearly show that host Member States indeed feel that their labour market is being accessed by posted workers. Obviously, cheap labour from other states concurs with the local workforce, even if their presence is temporary. While – in accordance with Article 3(1) of the posting directive – the core labour standards of the host state apply to them equally, other working conditions could form an important advantage for their employer.[86] Besides,

83 C-626/18, para. 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 C-620/18, para. 181, and C-626/18, para. 137–138.

84 See Article 45 TFEU and Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

85 Enforcement directive Article 4(3)(d).

86 See for example the Lindsey Oil Refinery dispute where an Italian subcontractor who respect-

irrespective of the applicable labour law, posted workers can compete with their better performance, higher efficiency, etc. – which is definitely a positive effect according to the logic of the common market.[87]

The distinction is similarly blurry seen from the other side. If a worker decides to take up work in another Member State, he will be considered a migrant worker and thus fall under the scope of the whole labour law of that state, no matter how short his stay is or whether he arrives with the definite and expressed will to return to his home state right after the completion of the job. Yet, these factors make the difference between a migrant worker – who enjoys full equality in the host state – and posted workers, who are covered only by the core standards listed in Article 3 of the posting directive.[88]

The picture described above is further toned if we add that cross border service could also mean agency work. In the CJEU's view, if an undertaking is engaged in the making available of labour, such a business directly affects the labour market and the lawful interests of the workforce concerned. Such service is "specifically intended to enable workers to gain access to the labour market of the host Member State", thus host states "have unquestionably the right to require possession of a licence" from the agency.[89] Thus, court practice on the possible limitations of cross border services is very relaxed if the posting takes place in the framework of agency work.[90] Interestingly, the CJEU considered

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ed the minimum wage in the local (UK) collective agreement still could undercut the price of local labour by non-complying with other working conditions in the agreement like paid tea breaks. Catherine Barnard, "British Jobs for British Workers: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market," *Industrial Law Journal* 38, no. 3 (2009): 258.

87 Wolfgang Däubler, "Posted Workers and Freedom to Supply Services. Directive 96/71/EC and the German Courts," *Industrial Law Journal* 27, no. 3 (1998): 266.

88 Nicola Countouris and Samuel Engblom, "Protection or protectionism?: A Legal Deconstruction of the Emerging False Dilemma in European Integration," *European Labour Law Journal* 1 (2015): 41–43.

89 Rush, para. 16–17; Webb, 279/80, para. 18–19.

90 The issue of posted agency workers was raised again twenty years later concerning the Eastern enlargement. In Vicoplus (C-307-309/09), Polish agency workers were posted to the Netherlands in 2005–2006 without work permit, for which their employer was fined by the Dutch authorities. The ECJ followed its previous case law that agency workers gain access to the labour market of the host Member State and also underpinned this by the fact that they are typically assigned to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking (C 307-309/09, para. 31–32). Thus it was not contrary to EU law to require work permit from the mentioned Polish workers during the transitional period defined in the Act of Accession. The same question was raised in the Martin Meat case (C-586/13), involving a Hungarian service provider who was fined for not having

agency workers as gaining access to the host labour market, yet it did not apply the whole labour law of the host state to them, like it did with migrant workers.[91]

Cross border working patterns: a comparison

The following example shows that the lack of clear borderlines between the different transnational working patterns in EU law results in very similar cases dealing with very different legal consequences.

Imagine that a group of young workers leave their home state to take up costumer service jobs concerning an international sport event in a host state, for a short period of two weeks. If these youngsters are contracted by their employer in the host state directly, they are considered migrant workers and become subject to the host state labour, social security and tax law regime, under the same terms as the host state's own nationals. If they are employees of a home state employer who sends them to complete their tasks for its partners in the host state, they become posted workers and will only be covered by the protection of the core labour standards of the host state, but otherwise stay under the scope of their home state law. In this case, they are considered as not gaining access to the host labour market, thus, their employment may be constrained only by administrative measures under the strict test of the CJEU. However, if they complete the same work in the host state as agency workers, the host state may apply stricter administrative checks and controls (as they access the local labour market), yet they will still not enjoy the full coverage of the host state's labour law. Finally, it is also possible that the workers physically stay in the home state and provide their service to the host state from there, such as is the case with online call-centres or help-desk operators. Evidentially, it means that their employment remains under the home state law.[92]

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work permit for his posted workers who the Austrian authorities considered to be agency workers. The Court emphasised that national law generally shall not require work permit for workers posted in the framework of transnational services, only in the case of agency work and only during the transitional period.

91 Herwig Verschueren, "The European Internal Market and the Competition between Workers," *European Labour Law Journal* 2 (2015): 128–151, here 146.

92 Davies, "Case Note," 295. The ECJ was also confronted with this possibility of transnational provision of services, which it considered as a non-posting case, see: Bundesdruckerei, C-549/13.

Basically, a worker involved in the provision of cross-border services might fall into four different legal categories:

1. The worker travels to the host state and takes up work there through a local employer (who might be a subsidiary of a home state employer).
2. The worker habitually works in the home state, but is temporarily posted to the host state.
3. The posting takes the form of agency work.[93]
4. The worker carries out his work in the home state, where his employer is seated, and from where the work is then provided to the client in the host state.

It has to be pointed out that many services might be provided by means of all four possibilities. As in the case of the young workers in the sport event: their employer may choose to post them to the host state or to open his own subsidiary there and employ them through it. Costumer service tasks can be equally provided by agency workers too. Lastly, if the tasks need no physical presence (like handling complaints online), the workers do not even need to move. With growing digitalisation of the workplace, this fourth option (disjoining labour from location) could soon become more important.[94]

To sum up, all essential criteria of the notion of posted worker are problematic. The only specific element which could underpin the difference in 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 freedom of movement for workers but to the freedom to provide services.[95] For me, this formal distinction is not convincing. In this way, even in the case of long-term postings, posted workers may lack the legal

93 The ECJ elaborated on the distinction between agency work and direct provision of services in Vicoplus and Martin Meat. Agency work means a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking, but the worker carries out his tasks under the control and direction of the user undertaking. Unlike in direct service contracts, in agency work the movement of the worker to the host Member State constitutes the very purpose of the provision of services (C-307/09, para. 51; Martin Meat C-586/13, para. 33).

94 Raja Siddhartha, Saori Imaizumi, Tim Kelly, Junko Narimatsu, and Cecilia Paradi-Guilford, *Connecting to Work. How Information and Communication Technologies Could Help Expand Employment Opportunities* (Washington, DC: World Bank, 2013). See the possible effects of "virtual immigration" in Christophe Degryse, *Digitalisation of the Economy and Its Impact on Labour Markets* (Brussels: European Trade Union Institute, 2016), 32.

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

protection afforded to the local workers in the host state, while a worker enjoying the right of free movement enjoys the same protection as locals, regardless of the length of the employment. The explanation of the unconvincing demarcation is therefore that posting is not, in principle, a legal institution based on the legal protection of the worker, but on the freedom to provide services. That is to say, the specific legal situation of the posted worker is nothing more than a compromise between the freedom to provide services and the market protection of the host states. The partial applicability of the host state's law can be well explained by the fact that it partially preserves the competitive advantage of service providers from the sender state, but also provides 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 take the view that posting is a legitimate means of discrimination, as it distinguishes between different groups of workers solely for economic reasons.[96]

The amending directive brings only a modest step forward in the problematic distinction between the different types of cross-border working patterns. The remaining differences could be used to explain that the EU measures on posting are not contrary to the freedom to provide services, but are quite controversial from the perspective of the posted worker. Under EU law, posted and migrant workers' 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.[97]

The broadened hard core of labour standards. Contrary to the freedom to provide services?

At the time of its adoption, the posting directive was greeted with more concerns rather than a warm welcome, yet its significance cannot be underestimated. Its importance can be highlighted by an overview of the CJEU's case law concerning the labour law rules as justified restrictions on the freedom to provide services. The least one can say is that all labour rights listed in Article 3(1) shall be applied to posted workers without

96 Erika Kovács, Mario Vinković, and Zoltán Bankó, "Posting of Workers in Croatia and Hungary," in *Law – Regions – Development*, ed. Tímea Drinóczi and Mirela Župan (Pécs-Osijek: University of Pécs and University of Osijek, 2013), 473–496, here 475–476, 495.

97 C-620/18, para. 57 and 155; C-626/18, para. 62 and 110.

further evaluating its possible limiting effect on cross-border services.[98] The CJEU's practice on the application of the host state's minimum wage legislation to posted workers is a good illustration of this.

Before the posting directive's entry into force, the Court in Mazzoleni 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 taking into account also common charges, the French law was more favourable to the workers. The Court 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 the relevant factors shall be evaluated, including the level of social security contributions and the impact of taxation.[99] Similarly, the Court in Portugaia Construcoes 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, which significantly augments their social protection.[100] Thus, before the posting directive's entry into force, the CJEU had set detailed conditions for the application of the host state minimum wage to posted workers. As a comparison, according to the posting directive, minimum rates of pay in the host state apply to posted workers without any further condition.[101] This causes a certain controversy, as the directive's legal basis is supposed to be the promotion of the freedom to provide services. Instead, this piece of legislation directly restricts this freedom, for the sake of enforcing core labour standards.[102]

Following this argument, in their annulment cases, Hungary and Poland claimed that the amending directive's legal basis was not chosen correctly. While the directive was adopted based on the provisions relating to the freedom to provide services,[103] 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.[104] The Court did not share this view. As a starting point of its reasoning,

98 Barnard, *EU Employment Law*, 228; Syrpis, *EU Intervention*, 124.

99 Mazzoleni, C-165/98, para. 36-39.

100 Portugaia Construcoes, C-164/99, para. 26 and 29.

101 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. See Riesenhuber, *European Employment Law*, 205.

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

103 Articles 53(1) and 62 TFEU.

104 Article 153(2)(b) TFEU.

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 to general interest, pursued by the various Member States, as well as overarching objectives of the EU, including the requirements pertaining to promotion of a high level of employment and a guarantee of adequate social protection.[105] Consequently, the EU coordination measures must not only have the objective of facilitating the exercise of the freedom to provide services, but also the objective of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom.[106] 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's view, the EU legislature's aim has been to find a fair balance between these concurring interests.[107] As for the content of the new measure, following the aforementioned aims, it offers greater protection to workers than the original directive.[108]

As the Court pointed out, the amending directive put more emphasis on the protection of workers, especially through two important provisions. First, by substituting the term *minimum rates of pay* with *remuneration*, all elements of pay rendered mandatory by the host state would be applicable to posted workers.[109] This inevitably brings the legal status of posted workers closer to the status of migrants or locals. Nonetheless, as I mentioned earlier, posted workers will remain outside the scope of the host state's non-generally applicable collective agreements. In addition, the difficulties in interpreting the legal terms of each Member State will remain, as they are to be examined on a case-by-case basis that constitutes "constituent elements of remuneration rendered mandatory".[110] Detecting this practical problem, the amending directive prescribes that Member States shall publish accurate and up-to-date information on the constituent elements of remuneration on a single official national

105 Article 9 TFEU.

106 C-620/18, para. 41–48; C-626/18, para. 51–53.

107 C-620/18, para. 50–51; C-626/18, para. 55–56; amending directive, Recital 10.

108 C-620/18, para. 57; C-626/18, para. 62.

109 Posting directive as amended Article 3(1)(c).

110 Raffaello Santagata de Castro, "EU Law on Posting of Workers and the Attempt to Revitalize Equal Treatment," *Italian Labour Law e-Journal* 12, no. 2 (2019): 149–169, here 155–156; Piir, "Safeguarding the posted worker," 110.

website.[111] While the enforcement directive already contained detailed provisions on the Member States' obligation to inform posted workers and their employers on the rules of posting,[112] the amending directive gives more weight to this provision, prescribing that if the host State does not provide adequate information on the working conditions to be complied with, this should be explicitly considered in the proportionality of penalties for non-compliance.[113] The intention of the legislator lies presumably in the idea that the absence of credible guidance should be considered a mitigating factor.

Second, the amending directive – following the *Elektrobudowa* case – eliminates the differences in the treatment of reimbursements for accommodation, meals, and travel. Until the amendment came into force, these were included in the minimum wage level (and thus were applicable to posted workers) only if they were allowances related to the posting, but did not compensate for the costs actually incurred.[114] According to the new rules, the reimbursement of the costs will be included in the hard core, so the posted worker is entitled to equal treatment also as regards these standards.[115]

Putting reimbursements into the hard core and expanding the concept of pay are the most important elements of the amending directive. However, its practical significance depends mainly on what role the law, the generally applicable and other collective agreements have in wage setting in the host state. If the average wage in the host state is much higher than the mandatory remuneration under the new rules, then the amending directive will not make progress towards posted workers' equality.[116]

Although the judgments in the annulment cases confirm that the EU measures adopted to enhance the freedom to provide services must also respect the protection of other fundamental interests affected, such as 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 labour standards applic-

111 Posting directive as amended Article 3(1), para. 4–5.

112 Enforcement directive Article 5.

113 Posting directive as amended Article 3(1), para. 6.

114 Posting directive Article 3(7). Van Nuffel and Afanasjeva, "The Posting Workers Directive Revised," 1418.

115 Posting directive as amended 3(1)(h) and (i).

116 Aukje A. H. van Hoek, "Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law?," *Common Market Law Review* 55, no. 2 (2018): 449–487, here 483.

able to posted workers are exhaustively listed in the (amended) posting directive, but this list cannot be broadened at 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 unlawfully restricting the freedom to provide services.

Conclusions. New landmark cases?

The debates over the legal status of posted worker are not closed. The amendment of the posting directive brings more clarity to the borderlines between posted and migrant workers, yet a definite gap between their rights remains, even in long-term posting cases. Legislation and court practice will continuously adjust the hierarchy of the effected economic and social interests to strike the right balance between them, considering the ever-changing context.

It seems obvious that there are always going to be new Laval cases, where a fundamental labour right – not covered by the posting directive – is confronted with the freedom to provide services. Such next landmark decisions are all the more exciting as the EU Charter of Fundamental Rights – advanced to the rank of primary law in 2009 – might bring a significant change to the CJEU's practice.[117] The basic assumption that in posting cases the labour law provisions are scrutinized by reference to the economic freedoms[118] changes in cases where such labour rights are protected by the Charter. Moreover, the meaning and scope of the rights in the Charter shall be the same as their equivalents laid down by the European Convention of Human Rights.[119] It is yet to be seen how the Court would deal with a case where primary law stands against primary law: a labour right as enshrined in the Charter collides with – say – the freedom to provide services. Even if the Charter's scope is limited and is

117 The Charter has had only marginal impact on posting cases yet (see the interpretation of pay for annual leave as part of the minimum rates of pay in *Elektrobudowa*, C-396/13.), nonetheless some optimistic views take this as a sign of the growing importance of social values in future case law. Pieter Peonovsky, "Evolutions in the Social Case Law of the Court of Justice. The Follow-up Cases of the Laval Quartet: ESA and Regiopost," *European Labour Law Journal* 7, no. 2 (2016): 294–309, here 305.

118 Mark Freedland and Jeremias Prassl (eds.), *Viking, Laval and Beyond. EU Law in the member States* (Oxford: Hart Publishing, 2016), 18.

119 Charter Article 52(3).

addressed to the Member States only when they are implementing EU law,[120] one can easily imagine such scenarios.

As a closing remark in the analysis of the status of posted workers, I outline an example of how the Charter may interact with other laws in posting cases. Article 30 of the Charter guarantees that every worker has the right to protection against unjustified dismissal, in accordance with EU law and national laws and practices. Legal literature has already pointed out that the Charter's limited scope makes Article 30 an empty shell,[121] as EU law does not cover termination of employment.[122] Nonetheless, certain directives partly touch upon termination issues. As an example, the directive on information and consultation requires Member States to ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to properly perform the duties which have been assigned to them.[123] An adequate protection of trade union officials was transposed into Hungarian law by Article 273 of the Labour Code which prescribes that the employer shall not dismiss a trade union official without a prior consent of the union. Now, imagine that an employee is posted to Hungary to carry out a certain service and he also holds an office in the trade union. If he is dismissed during the time he works in Hungary, shall Article 273 of the Labour Code be applicable? Undoubtedly, the issue is not covered by Article 3(1) of the (amended) posting directive. Yet, the unionist employee could argue that the relevant Hungarian rule harmonises EU law, and therefore Article 30 of the Charter prescribing protection against unjustified dismissal applies. If so, it seems reasonable to hold that a labour right that is protected by a primary source of EU law might be applied to a posted worker as a public policy provision.[124]

120 Charter Article 51(1).

121 Jeff Kenner, "Article 30: Protection in the Event of Unjustified Dismissal," in *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014), 4. For a summary of the first cases invoking Article 30 of the Charter before the ECJ see: Erika Kovács, "Individual Dismissal Law and the Financial Crisis: An Evaluation of Recent Developments," *European Labour Law Journal* 7, no. 3 (2016): 368–386, here 384–385.

122 The ECJ also dismissed the case of eight Hungarian civil servants who were fired without valid reason on the grounds it had no competence as no EU law was applicable to the case, nonetheless all cases referred to Article 30 of the Charter (C 332/13, Weigel v. Nemzeti Innovációs Hivatal).

123 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, Article 7.

124 Posting directive Article 3(10).

It would be reasonable to argue that a Charter provision could be held as a proportionate restriction of the freedom to provide services.

It might take only a few years until we see a next landmark case, where a fundamental labour right – reinforced by the EU's primary law – will be measured against the economic freedoms of the Union. Besides the legislative developments, the Charter could bring a shift towards a more socially sensitive case law in the CJEU's jurisprudence concerning posting cases.

3. Equal Treatment and Posting of Workers[125]

The cross-border posting of workers under the EU freedom to provide services is a highly controversial and timely issue. Even though, posted workers constitute a small percentage of labour market participants within the EU single market, their legal status is the subject of numerous disputes and doubts. The dilemmas of European integration concerning labour appear clearly when viewed through a legal lens, in particular in terms of the relationship between the economic freedoms of the internal market and the protection of social rights in the European Union.[126]

The legal status of posted workers is shaped by three pieces of EU legislation: Rome I Regulation,[127] The Brussels I Regulation Recast,[128] and Directive 96/71 (hereinafter referred to as "the PWD").[129] The interplay between Rome I Regulation and Directive 96/71 heavily turns on the construction of overriding rules withing the meaning of Article 9 of Rome I Regulation. Rome I Regulation is based on the foundational concept of the freedom of choice of law which is explicitly stated in Article 3 of Rome I Regulation. Article 8 of Rome I Regulation sets special

125 This article, in the scope of co-authorship of Jakub Grygutis, was written within the framework of the research project called "Diamond Grant," funded from the budget for science in Poland in 2017–2020, project number: 321691.

126 Leszek Mitrus, "Charakter prawny delegowania pracowników w ramach swobody świadczenia usług w Unii Europejskiej [Legal nature of the posting of workers under the freedom to provide services in the European Union]," *Europejski Przegląd Sądowy* 6 (2018): 4–11, here 4–5.

127 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).

128 Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters. This article does not concern jurisdictional issues which are left out of account.

129 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.

rules for individual employment contracts, restricting the effect of any party choice of law to protecting the interests of the employee, and, absent party choice, creating special rules for determining the applicable law that are substantially different from the general rules in Article 4.[130] Article 8(1) makes the provision of freedom of choice of law given to the parties to an individual employment contract subject to one important qualification. Any such choice may not result in worsening the position of the presumably weaker party (that is an employee) that he/she would have occupied if the choice had not been inserted into the employment contract and in turn become binding to the parties.[131] Article 8(1) is an example of protective measures being introduced by the EU legislation that aim at protecting the weaker party to a contract. This highlights that rules in Article 8 are protective of the weaker party to an individual employment contract which neatly aligns with the principle of *favour laboratoris* to protect employees.[132] The PWD does something similar, though, by introducing a suite of protective rules for posted workers.

Article 8(2) of Rome I Regulation provides for objective connecting factors which are typically used in private international law (PIL) because they are drafted with the principle of searching for the most familiar legislation to the parties to an individual employment contract. If parties to an employment contract with a foreign element, which has triggered an application of Rome I Regulation (let it be the place of performance of the obligations contained in the contract), have not taken on the decision to choose the legal system by virtue of Article 8(1) of Rome I Regulation, their employment contract is governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract by reason of Article 8(2). 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. If the *lex loci* of the contract cannot be decided within the width of Article 8(2) Rome I Regulation, then another connecting factor comes into play. In that case, the employment contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. The last factor which may

130 Michael McParland, "14 Individual Employment Contracts," in *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford: Oxford University Press, 2015), 631–689.

131 Peter Mankowski, "Just how free is a free choice of law in contract in the EU," *Journal of Private International Law* 13, no. 2 (2017): 231–258, here 232–238.

132 Case C-29/10 Heiko Koelzsch v. État du Grand Duchy of Luxemburg [2011] ECR I-1595, [2012] QB 210; [46].

be taken into consideration while deciding on the law being applicable to the employment contract is found in Article 8(4) which gives the judge some leeway in the case that all circumstances suggest that the employment contract is closer connected to another country than the country(ies) pointed out by operation of either Article 8(2) or Article 8(3).[133] Article 8(4) may be evoked if there is no satisfactory outcome after having analysed the preceding paragraphs of Article 8.

Drafters of Rome I Regulation were aware of potential conflicts between Rome I Regulation and the PWD as both these instruments of EU law apply to an individual employment contract if that contract is carried out in the framework of the PWD. There was a desire to achieve both definitional coherence between the instruments themselves and, in turn, eliminate any potential interpretative issues as to their concurrent application to cross border labour relations. This is precisely why they have taken on the decision to make one of the recitals to the Rome I Regulation expressly speaking of the mentioned conflict. Recital 34 to the Rome I Regulation provides that:

> The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with 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.

We may interpret the cited Recital 34, in principle, as a claim that a posted worker is subject to the labour legislation of the country where he has been posted, all other things being equal by virtue of the PWD. In turn, Article 3(1) of Directive 96/71 modifies the posted workers' status by imposing terms and conditions of employment which derive from the legislation of the host country, thus changing the rules contained in Rome I Regulation which would have been applicable differently had there not been the PWD. What is essential to understand is the fact that if a contract of employment falls within the scope of the PWD, Rome I Regulation of Article 8 is overridden by the rules contained in the PWD, as rules stated in Recital 34 and Article 23 of Rome I Regulation are regulated. The PWD does the same to The Brussels I Regulation Recast to some extent by establishing a special rule for jurisdiction over an individual employment contract falling within its scope.

133 McParland, "14 Individual Employment Contracts," 632–633.

The PWD provides that workers who are posted by their employers to perform temporary work in other Member States should enjoy the protection of the same floor of employment rights available to other workers employed in the host country.[134] The PWD refers to these as both "a nucleus of mandatory rules for minimum protection to be observed in the host country" and a *hard core* of clearly defined protective rules (paragraphs 13 and 14 of the preamble). This hard core includes such matters as maximum work periods, minimum paid holidays, minimum rates of pay, health and safety and hygiene at work, and protective measures for pregnant women or those who have recently given birth. This means that the legal status of the posted worker is regulated in parallel by two legal orders of labour law, these are to some extent determined by the country of origin, another part of the rights comes from the host country legislation.

This status is different from the status of a worker enjoying freedom of movement (to whom all the legislation of the host state applies), as it is apparently interpreted by virtue of Article 8(1) of Directive 96/71. The legal status of posted workers formulated in this way essentially results in two groups of workers being able to work in the same place: the first group consists of local and migrant workers, the other group of posted workers. These groups are regulated by different employment rules despite the fact that they carry out the same work.

This study aims to present the uniformity of the terms and conditions of employment of posted workers on the basis of Directive 957/2018. This study narrows its investigation to only a few selected issues which have not been extensively and comprehensively discussed in the literature so far. The three changes described below in the article are intended to contribute to uniformity and become a legal basis of EU's approach to workers and businesses within the framework of a single market. The first issue brought into fore by the Directive 2018/957 consists of replacing the concept of *minimum wage rate* with the concept of *salary* from Directive 96/71. The second issue lies in applying any labour law provisions of the host country to the so-called long-term posting. The Directive also includes the possibility to apply universally applicable collective agreements to workers in any sector, and not only to the construction sector as was previously the case.

134 Nicole Busby and Rebecca Zahn, "European Labour Law in Crisis: The Demise of Social Rights," *Contemporary Issues in Law* 12, no. 2 (2013): 173–192.

Legislative history

On 28 June 2018, the directive 2018/957 of the European Parliament and of the Council (EU) was adopted and brought in several amendments to the text of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereinafter referred to as "Directive 2018/957"). According to recital 1 of the Preamble to Directive 2018/957, the implementation and enforcement of principles set out in therein are further developed by the Union and aim to guarantee a level playing field for businesses and respect for the rights of workers.[135] At the axiological basis of the establishment of Directive 957/2018 lies the principle of equality, both among service providers and employees. The directive makes provisions that strengthen the protection of the rights of posted workers, in particular through a wider application of the protective rules in force instead of creating new rules for posting.[136] In this respect, it constitutes a notable development when compared to previous legislation, which was based on the legislation of the country of origin and led to competition between different national legal orders. This was widely deplored as leading to a race to the bottom in terms of the protection of rights and in turn flying in the face of social policy agenda of the EU.

The principle of equal treatment implies the same legal treatment of workers who are in the same factual situation irrespective of the Member State they came from. Any differentiation of such treatment may only be allowed if there is a relevant characteristic that is legally permitted to be used to differentiate among workers that carry out the same work in terms of quality in that Member State. Those characteristics are to be found in the legislation of the host member state on overriding mandatory rules which are applicable to all workers in its territory. This may be seen as just another example of a step further in limiting the width of free choice of law under Rome I Regulation.[137]

The Directive is part of a broader trend to harmonise the rules on atypical forms of employment. Within this trend, there is a considerable

135 Tonia Novitz and Rutvice Andrijasevic, "Reform of the Posting of Workers Regime: An Assessment of the Practical Impact on Unfree Labour Relations," *Journal of Common Market Studies* 58 (2020): 1325–1341, here 1325–1330.

136 Lukas Rass-Masson, "Révision de la directive concernant le détachement de travailleurs : vers un nouvel ordre public social européen fondé sur l'objectif de protection des travailleurs?," *Journal du Droit International "Clunet"* 9, no. 4 (2019): 15–30, here 15–17.

137 Mankowski, "Just how free is a free choice of law in contract in the EU," 234.

amount of pressure to bring the legal situation regarding the employment conditions of workers employed under atypical forms of employment closer to an employment relationship of indefinite duration. This trend can be illustrated on the Directive on part-time work.[138] In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless a different treatment is justified on objective grounds. According to Article 5 of Directive 2008/104/EC, the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to carry out the same work. The described tendency aligns with the rules in Articles 8 and 10 of the Treaty of Functioning of the EU[139] which stresses the importance of the principle of equal treatment. According to the rule in Article 8 of the Treaty of Functioning of the EU, "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women". The rule in Article 10 of the Treaty of Functioning of the EU stresses that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". The prohibition of discrimination and the principle of equality is a general principle of EU law which "has its source in various international instruments and in a common tradition".[140]

The reference to the indicated principle is explicitly included in Recital 6 of the Preamble to Directive 957/2018. The amending provisions of Directive 96/71 through the adoption of Directive 957/2018 constitute a continuation of the indicated tendency. In all three directives, the EU legislator aims to bring about a situation in which all employees performing the same work have the same rights both in terms of wage provisions and other employment conditions (e.g., various allowances as applicable under host country legislation) and any differentiations between them are only allowed in narrowly defined circumstances. Of course, their

138 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

139 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

140 Opinion of Advocate General Pedro Cruz Villalón delivered on 19 May 2011, C-447/09, here 21.

legal status is far from being the same in relation to the form of the employment contract within whose terms and conditions they work, but other things being equal, in terms of wage provisions and employment conditions they are in the same situation.

Purpose of adoption

It appears that two factors contributed to the adoption of Directive 957/2018. On the one hand, it was a belated response to the *Laval Quartet* rulings,[141] which largely demonstrated the weaknesses of the regulation of Directive 96/71.[142] The issuance of the rulings indicated that EU Member States have been adhering to a strict interpretation of Directive 96/71 that could make it largely impossible to apply social legislation to posted workers, especially in those countries where the level of protection is determined by collective agreements as collective agreements were not included in the category of sources of laws relevant to interpret the rights owed to a posted worker within the meaning of Article 3 of the PWD. As A. Davies points out, there is a discernible tendency in EU law to adopt legislative acts that codify the CJEU's case law.[143] On the other hand, in the political and legal discourse there has been a theme of social dumping and unfair competition by entrepreneurs from Central and Eastern European Countries.[144] According to many authors, these entrepreneurs did not respect the labour rights contained in the legislation of the host countries, thus reducing the costs of services and all of it resulted in financial loss to both posted workers and local businesses.[145] It was precisely this phenomenon that the adoption of Directive 2014/67, which defined the permissible measures for the protection of the posted worker and the control measures of the posting employer at the disposal of the host country's authorities, was supposed to counteract. However,

141 C-341/05, another series of cases had some influence over EU, these are: *Viking* C-438/05, *Rüffert* C-346/06 and *Commission of the European Communities v. Grand Duchy of Luxemburg* C-319/06.

142 Jan Cremers, "Economic Freedoms and Labour Standards in the European Union," *European Review of Labour and Research* 22, no. 2 (2016): 149–162.

143 Dorte Sindbjerg Martinsen, "Regulating the Posting of Workers: Rejecting and Modifying Court Influence," in *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*, Oxford Studies in European Law (Oxford: Oxford University Press, 2015), 185–224, here 218–222.

144 Catherine Barnard, "Social Dumping or Dumping Socialism?" *Cambridge Law Journal* 67, no. 2 (2008): 262–264.

145 Busby and Zahn, "European Labour Law in Crisis," 173–192.

before Directive 2014/67 came into force, work on the Revision Directive started.[146]

In June 2015, seven labour ministers (Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Sweden) sent a letter to M. Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour Mobility at the European Commission under J.–C. Juncker.[147] The letter opened the door to another debate leading, this time, to a revision of Directive 96/71. The letter pointed to the need to establish the principle of equal pay as the main demand for the revision. According to this principle, posted workers performing the same work as workers directly being employed by local workers could not earn less than the former. This proposal is related to the need, proclaimed especially in the countries of the so-called Old Union, to ensure fair mobility. The European Commission stood squarely with the mentioned read of the PWD of the governments of Western European countries and proposed an amendment to Directive 96/71. The declared aim of the European Commission was to level the playing field between local and foreign service providers and to make the rules fairer.[148] The two most important proposals were: the introduction of the principle of equal pay for equal work in the same place and the limitation of duration of posting by introducing two kinds of posting based on the actual duration of the posting. According to the European Commission, these changes were supposed to counteract social dumping and promote fair competition amongst businesses irrespective of the Member State chosen as a place of establishment. This promotion was based on the elimination of comparative differences in labour costs which was being argued through the debate as a factor of production which unreasonably distorted fair competition across the EU.[149] Hence, with the amendment of Directive 96/71, posting companies are supposed to compete rather on the quality of their end services because other factors of production of services like costs of labour are considerably limited.

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146 Marcin Kiełbasa, *Social Rights in the European Union and the Limits of the Freedoms of the Internal Market* (Warsaw: C.H. Beck, 2017).

147 Directorate-General for Internal Policies: *Posting of Worker Directive: Current Situation and Challenges* (Brussels: EP, 2016), https://www.europarl.europa.eu, 84–90.

148 European Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Directive 96/71/EC* (Brussels: EP, 2016).

149 Marek Benio, "Nowelizacja zasad delegowania pracowników," *Europejski Przegląd Sądowy* 3 (2013): 1–20, here 10–12.

The issue of remuneration

In the legal doctrine, these provisions are analysed mainly through the prism of replacing the notion of *minimum wage* with the term *remuneration*, which is undoubtedly a breakthrough from the perspective of achieving the objective of ensuring fair competition between service providers operating on the same market.[150] This change is, to its fullest extent, intended as a prevention of social dumping, which is understood as a situation where a foreign service provider takes advantage of lower protection afforded to employees in its country of establishment in order to compete with local businesses.[151] This change leads to twofold practical consequences.

The European Commission has emphasised that the principle of establishing the remuneration payable to posted worker should be the rates provided for the same work as for a worker directly hired in the host country. This statement requires clarification and qualification. The text of Article 3 of the Directive itself clarifies that the concept of remuneration shall be determined in accordance with the national legislation and/or practice of the Member State to whose territory the worker is posted and shall mean all components of remuneration which are compulsory under national laws, regulations or administrative provisions or collective agreements or arbitration awards which have been declared universally applicable in that Member State or which are otherwise appli-

150 Simon Deakin, "Regulatory Competition after Laval," *Cambridge Yearbook of European Legal Studies* 10 (2008): 581–609. Norbert Reich, "Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ," *German Law Journal* 9, no. 2 (2008): 125–161, here 125.

151 This difference, in terms of salary scale, is notorious when we compare the monthly remuneration of a worker, provided for in the Collective Agreement between AECOPS – Association of Construction Companies and Public Works and Services and others and FETESE – Federation of Industrial and Services, published in BTE no. 26 of July 15, 2017, with the changes of BTE no. 28 of July 29, 2018, in the amount of €581.00, with the monthly remuneration of a servant in Belgium, in the amount of €2,239.04, provided for in the Joint Committee for Construction (JC 124). It is though understood that the Commission in the European Commission – Fact Sheet gives, as an example, a worker posted to the construction sector in Belgium that must be granted, in addition to minimum wage according to his/her category that can range from €3.379 to €19.319 per hour, which currently amounts from €13.994 to €20.207 per hour, and is also entitled to other instalments included in the remuneration provided for in the collective agreement of general application to the construction sector, namely allowance for bad weather, mobility allowance, pay supplement for special works, allowance for tools wear, etc., among others. See European Commission. Sónia de Carvalho, "The Revision of the Posting of Workers Directive and the Freedom to Provide Services in the EU: Towards a Dead End?" *Juridical Tribune Journal* 8 (2018): 719–733, here 719–723.

cable pursuant to paragraph 8 of the same. This provision specifies how remuneration is to be determined under national law.[152] At this point, it is worth mentioning that, according to the authors of the draft, the purpose of introducing this amendment was to increase the level of protection for posted workers. In reality, this does not increase the degree of protection to posted workers, but gives a new suite of rights to those workers. The value protected by the provisions in question is the principle of equality. The purpose of the regulation is to eliminate situations in which two employees work in the same job whereby one of them is a local worker and receives a remuneration with work allowances, and the other is a posted worker who receives only the minimum wage. Clearly, they are both doing the same job in the same place and are treated differently from the employment law perspective. The directive is intended to bring about a situation in which, from a legal point of view, their pay is determined entirely on the same legal ground and does not take into account whether one of them is a posted worker, as that is utterly irrelevant.

During the period in which Directive 96/71 was in force, the problem of classifying the various components that an employee received in the course of his work as minimum wage was repeatedly raised by commentators and case law. Despite the fact that the regulation was *prima facia* clear, interpretative doubts arose as to whether the additional component paid under the law of the country of origin could be covered by the concept of minimum wage as defined by the law of the host country.[153] These doubts emerged, among others, in the *Elektrobudowa* case.[154] In the EC's view, replacing the notion of minimum wage with the notion of remuneration also serves to create a more transparent legal regulation. Legal certainty is undoubtedly a value that contributes to the realisation of the freedom to provide services across the EU (Article 56, Treaty on the Functioning of the European Union).

This objective is pursued by defining the concept of remuneration on the basis of Directive 957/2018. In recital 18 of the preamble to the Directive, the European legislator has created an interpretative rule for the concept of remuneration, indicating that the gross amount of

152 Andrzej Marian Świątkowski, "Zmienione warunki zatrudniania i wynagradzania pracowników delegowanych [Modified Terms and Conditions of Employment and Remuneration of Posted Workers]," *Europejski Przegląd Sądowy* 8 (2019): 12–18, here 14–16. Piotr Wąż, "Zmiany w zakresie delegowania pracowników do innego państwa celem świadczenia usług od 30.7.2020 r. [Changes in the Scope of Posting Workers to Another Country in order to Provide Services since 30 July 2020]," *Monitor Prawa Pracy* 10 (2020): 6–12, here 8.

153 Piir, "Safeguarding the posted worker," 108–110.

154 Sähköalojen ammattiliitto ry v. Elektrobudowa SA, C-396/13 (2015).

remuneration should be taken into account when comparing the remuneration paid to the posted worker and the remuneration that would be paid under the national legislation and/or practice of the host Member State as compulsory.[155] It is the total gross amount of the remuneration which should be compared and not the individual components of the remuneration which are compulsory under this Directive.[156] Yet, in order to ensure transparency and facilitate controls by competent authorities and operators, it is necessary that all components of remuneration can be identified in sufficient detail according to national legislation and/or practice of the Member State from which the worker has been posted. Therefore, in practice, posting undertakings should have at their disposal the documentary evidence of the components comprising the remuneration paid to their posted worker or these components should be listed in the payment confirmation. Rules on the confirmation of all components making up the remuneration actually paid to the posted worker are supposed to make the practice more transparent for the purposes of checking the legality of the posting.

The main problem of this regulation concerns the identification of which rate of pay and which supplements are due to a given posted worker, especially when the basis for determining the remuneration is a collective agreement. Service providers are obliged to pay the rate of remuneration together with any allowances resulting from the law of the host state, which the state grants to employees who perform the same work under its legislation and which can be interpreted quite widely (e.g., collective agreement, administrative acts). However, it should be noted that the posting undertaking is not obliged to pay wages that correspond exactly to the market wage paid to local workers from the host country which might well exceed what is required by law in given circumstances.[157] In fact, it is not the market but still the law of that state that determines the level of remuneration of the posted worker, as was the case before, only on a different legal basis. Therefore, this provision applies to situations in which, for workers in a specific industry, there is a legislative act or a collective agreement of a general nature regulating

155 Marta Głowacka, "Posting of Workers Directive Reloaded," *Studies on Labour Law and Social Policy* 26 (2019): 29–45, here 33–34.

156 Catherine Barnard, "Delegowanie pracowników – kwestia płacy [Posting Posted Workers: The Question of Pay]," *Europejski Przegląd Sądowy* 6 (2018): 29–34, here 32.

157 Jean-Philippe Lhernould, "Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. What will change in 2020?", *Europäische Rechtsakademie* 20 (2019): 249–257, here 252.

the right to remuneration, both with regards to the amount and the allowances. These may be determined on the basis of objective factors or relative percentages for determining such allowances for the industry in question (some industries may have their own collective agreements which laid down what comprises a remuneration or a special allowance). Examples of allowances that will be applied when establishing the remuneration of a delegated employee are the allowance for work in special conditions, such as night-time.[158] In such a situation, the provisions of the law or a collective agreement of general application will apply. In the absence of separate regulations applicable to a given group of employees, the employer who is delegating remains obliged to pay the minimum remuneration. Thus, the amendment does not lead to an equal factual situation with regard to the remuneration of posted employees, but it does lead to the establishment of equality regarding the benefits constituting the remuneration, which may be obtained on other grounds than the act or a collective agreement determining the minimum wage. With this understanding of the provision, it is in fact still a wage which is the minimum level of remuneration that the employer would be obliged to pay the worker if the legislation of the host country applied in full.[159] It is entirely possible that a worker employed by a local business may still earn more than a posted worker but it would be only due to economic factors, not the legal ones (a business can afford to pay higher remuneration than its competitors on the local markets).

The second major change is the adoption of the exclusion of posting allowances and expenses which was substituted with reimbursement of posting expenses. According to Article 3(1) of Directive 957/2018 *in fine*, point (i) applies only to the expenses for travel, board and lodging incurred by posted workers if they are required to travel to and from their normal place of work in the Member State in whose territory they are posted, or if they are temporarily sent by their employer from that normal place of work to another place of work. Hence this provision led to an obligation to apply the rules on compensation based on the law of the host state. The indicated change is justified because the indicated costs reduce the actual value of the remuneration and if the employer had not been additionally sent on a business trip, he would never have incurred them. Hence, employees sent on business trips would be in

158 Ibid.

159 Michał Szypniewski, *Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej* [*Protection of the interest of the posted worker in the provision of services in the European Union]* (Warsaw: C.H. Beck, 2019), 115–120.

a worse situation than employees working permanently in one place. This change is justified and responds to the view expressed in the CJEU ruling in the *Elektrobudowa* case regarding the text of Directive 96/71.[160] According to the thesis of rulings:

> Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that: compensation for daily travelling time, which is paid to the workers on the condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify; coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage; an allowance taking the form of meal vouchers provided to the posted workers is not to be regarded as part of the latter's minimum salary.[161]

Long-term posting

Another important issue is the establishment of provisions on long-term posting. Pursuant to Article 3(1a) of Directive 957/2018, a norm has been introduced that allows EU Member States to apply any terms and conditions of employment to a posted worker whose period of posting will exceed either 12 or 18 months, upon notification, except for issues such as supplementary occupational retirement pension schemes and procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses. This provision sheds new light on the legal nature of the provisions contained in Article 3 of Directive 96/71. This simply means that interpreting the provisions of the host state that are applicable to posted workers' employment contracts depends on the duration of the posting. In practice, this will result in a situation whereby one set of rules will apply to a worker during the first 12 or 18 months, and a different set of rules will apply to the same worker beyond that period, or to the worker replacing him. The change of law mentioned in the preceding sentence will be brought about through an operation of law and not through an agreement between the two parties.[162] As a matter of overriding rules of the host state,

160 C-396/13.

161 Ibid., 86.

162 C341/05, para. 80–81, 19.

parties to an employment contract cannot rule out these provisions being applied after 12 or 18 months in their respective employment contract. There should be no doubt that, as a system of norms, the provisions of the host country may be adjusted by the rule of advantage contained in Article 3(8) of Directive 96/71, assuming that those provisions are neutral for the employee, i.e., they concern, for example, the way work is organised or working time. The rules of the host State must be regarded as applying as a whole following a mechanism for changing the scope of the rules which compel their application. On matters where the advantage can be assessed, the rule indicated will apply. *Ratio legis* of this change is explained to mean:

> Posting is of a temporary nature, and the posted worker usually returns to the country of origin at the end of the task for which he/she was posted. However, in view of the long duration of some postings and the recognition of the link between the host country's labour market and the posted workers for such a long period, it is necessary to provide that, in the case of a posting of more than 12 months, host countries should ensure that the companies posting workers to their territory guarantee an additional set of conditions which must apply to workers in the Member State where the work is carried out. This period should be extended on the basis of a reasoned notification by the service provider.[163]

The problem of this provision in the context of the freedom to provide services concerns matters which do not constitute provisions that have an impact on labour costs. These are, after all, the rights of posted workers that are being protected on the one hand and, on the other, there is also the principle of fair competition between entrepreneurs operating on the internal market. Hence, labour regulations do not have a direct impact on business costs and constitute only those provisions that shape the regularity of the labour process. For example, the provisions on order penalties from a pragmatic perspective should come from the law of the country of origin. This is because the rules are known to the employer and the employee and it is therefore easier to organise the work process on the basis of rules with which one is familiar. However, the Directive is about any rules. Therefore, it is possible to accuse the scope of this regulation of covering a wide range of provisions that do not actually

163 European Commission, "Answer from the European Commission," 2018, https://www.europarl.europa.eu/doceo/document/E-8-2018-003809-ASW_PL.pdf.

affect the achievement of the two aforementioned objectives, and may hinder the labour process by imposing on the employer an exercise of managerial powers under the law of the host country, which is foreign to him and hence unfamiliar, even when such outcome neither promotes fair competition nor does, in principle, enhance protection of workers in terms of allowance or remuneration's components. This unfamiliarity may constitute a certain obstacle that will limit the freedom to provide services in practice. This problem will, of course, depend on how these provisions are implemented and enforced by the authorities across the EU, which at this moment because of absence of data remains uncertain.

The amendment in question makes the legal situation of a worker posted within the framework of a long-term posting equal to that of a migrant worker. An exception to this principle, however, are the issues related to the establishment, termination, and change of the employment relationship and the ban on competition between a former employee and his/her former employer. The indicated institutions of labour law will always be regulated by the law of the country of origin. The rationale for such regulation is that these workers will continue to be employees of the country of origin temporarily working in another Member State. Therefore, under private international law, the applicable law is that of the country of origin.[164] Otherwise, the place of termination of the employment relationship would determine the employees' claims, which would be unfair, for example, in the case of redundancies in several positions at the same time, with the employees concerned working in different countries.

The existence of the indicated regulation raises doubts from a systemic perspective. The principle of changing the scope of the terms and conditions of employment for long-term posted workers applies equally to a worker who has been working in the same place for 13 months and to a worker who works one day in place of another worker who has been working there a long time. This means that the amendment, which is intended to make the rights of posted workers equal to those of migrant workers, may in fact differentiate between the rights of posted workers themselves. Hence the danger that workers posted for the same work will be treated differently depending on when they started work and how much time has passed since previous posted workers had stayed and worked in the host country before they started to carry out the work. The

164 Jakub Grygutis, "Zróżnicowanie statusu prawnego pracownika delegowanego ze względu na długość okresu delegowania [Differentiation of the legal status of the posted worker based on the length of the posting]," *Przegląd Zachodni* 2 (2019): 95–108, here 104.

logic behind Article 3(1a) of Directive 957/2018 is to eliminate the notorious abuse of replacing posted workers with newly posted workers to circumvent the above-mentioned limitation on the duration of short-term posting. The EU legislator has identified three situations when there will be no change in the applicable law. This will not be the case when the posted worker continues to work in the event of any circumstances of the following:

1. change of the posting employer;
2. change of the nature of the service (task);
3. change of the place of performance of the work.[165]

These circumstances will always justify the indicated so-called reset, that is counting the period of 12 months anew. The indicated reset conditions are justified by the fact of protecting legal certainty and thus the freedom to provide services. For example, if a new entrepreneur subsequently subcontracts a service that has already been provided to a similar extent by another posting entrepreneur for a year, the new posting entrepreneur, as the new employer, will not be bound by the indicated period of its predecessors.

Equality from the perspective of the legal position of the posting undertaking

The establishment of Directive 957/2018 was primarily intended to also bring about a level playing field between entrepreneurs. The main objection raised in the context of the amendment of the indicated legal regulation is the increase in labour costs through the actual raising of wage costs by foreign entrepreneurs. The aim of Directive 957/2018 was to bring about a situation where entrepreneurs would compete with each other only on the quality of services, not merely on the wage paid to workers as it used to be the case. This allegation is partly correct, as indeed some foreign entrepreneurs will be obliged to pay higher wages because of the implementation of the concept of remuneration. Such costs will also be borne by local entrepreneurs, so in this respect Directive 957/2018 unifies the legal situation of foreign and domestic service providers. Foreign service providers will also continue to be able to compete on labour costs, because based on Article 12 of Regulation 883/2004

165 European Commission, "Answer from the European Commission," 2018, https://www.europarl.europa.eu/doceo/document/E-8-2018-003809-ASW_PL.pdf.

[Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems] the law of the country of origin will be the law applicable to the social security of the employee. This means that labour costs may still be lower, but on the basis of lower social security contributions. In this respect the situation of the indicated entrepreneurs is different. In the scope of the costs of conducting a business activity, foreign entrepreneurs also incur additional costs connected with cross-border services. These are the costs of legal assistance, accounting costs, costs of translations of documents and the like.[166] These costs, in turn, are not borne by domestic service providers. These differences illustrate well that it is not always possible to strive for cost uniformity. Only a relative approximation is possible. By the way, posted workers do not come mostly from Central and Eastern European countries. For example, posting is usually associated with cheap labour from New Member States, but Belgian data shows that 60 percent of the posted workers sent to Belgium were from the EU15 Member States (mainly from the Netherlands, Portugal, Germany, and France). Only about 27 percent of the posted workers came from the EU10 Member States (mainly from Poland) and 9 percent were sent from the EU3 Member States (mainly from Romania).[167] Hence, the impact on the number of postings indicated by the changes may be small.

Efficiency of law application and ensuring the principle of equality

It is also worth noting that the objective of the amendment of Directive 96/71 was to eliminate unfair business practices in the EU internal market. To achieve this objective, the rules for establishing terms and conditions of employment under private international law were amended so as to pronounce the principle of equality. Such a change is therefore incompatible with the objective announced by the European Commission. It is not possible to combat unfair practices by amending substan-

166 Marek Benio, "Koszty pracy w usługach transgranicznych." *Raport z badań*, Uniwersytet Ekonomiczny w Krakowie 2016. This survey was conducted on a relatively small sample of entrepreneurs posting only from Poland, as there were only 16 of them. Hence, the results give only a minimal idea of the actual scale of the costs.

167 Dries Lens, Ninke Mussche, and Ive Marx, "The different faces of international posting: Why do companies use posting of workers?" *European Journal of Industrial Relations* 28 (2022): 27–45.

tive law, especially conflict-of-law rules. In the opinion of the authors, such an objective can only be achieved by improving the enforcement of provisions that already exist. Indeed, the adoption of Directive 2014/68 served this purpose. It is through effective control of posting, liability in the subcontracting chain or a transparent judicial procedure with an involvement of the social partners that unfair market practices can be combated. However, the work on Directive 957/2018 started before the deadlines for the implementation of Directive 2014/68 had expired. Indeed, the implementation of the principle of equality will not mean that businesses that posted workers under the old wording of Directive 96/71 suddenly start complying with legislation that has actually changed to their disadvantage at a time when a system for an effective protection of workers is not in place.

Conclusions

The amendments to Directive 96/71 aimed at ensuring a level playing field for businesses and improving workers' rights irrespective of their country of origin. The changes indicated were based on an approximation of the legal status of a posted worker to the legal status of a migrating or local worker. Hence, the main idea of the amendment is to ensure equal rights for people who are in the same legal situation. This has been achieved through two fundamental changes to Directive 96/71. Firstly, the concept of minimum rates of pay has been replaced by remuneration in the text of Directive 96/71. Secondly, by distinguishing the legal situation of a long-term posted worker from that of other posted workers. In the authors' view, these changes should be seen as a step in the right direction. The aforementioned changes are aimed at eliminating the phenomenon where two workers are employed to carry out the same work while being affected by different terms and conditions of employment. The legal status of posted workers still differs from that of migrant workers and local workers, which is due to the temporary nature of posting. For example, it will always be the law of the country of origin that will apply to the termination of the employment relationship of a posted worker, not the laws of the host country.

From the perspective of a posting entrepreneur, these changes should also not be assessed as an obstacle to the freedom to provide services. Following the introduction of the aforementioned changes, all entrepreneurs will be subject to the same provisions in the area of wage benefits.

This means that both local and foreign entrepreneurs will be obliged to pay the same amount of remuneration. With regard to long-term posting, the situation of foreign entrepreneurs is also aligned with that of local entrepreneurs. However, in case of changing the posting employer, the place where the service is provided or the nature of the service, this provision may be easy to circumvent and so another issue may arise quite soon. In my view, the argument that foreign entrepreneurs will not be able to compete with local employers on lower labour costs is misconceived, as they can still compete on the basis of social security provisions. This clearly appears to contradict the main reason for the reform put forward by the EU.

4. Prostitution as Forced Labour Focusing on Article 4 of the European Convention on Rights in the Context of Migration[168]

International migration has become a major challenge for governments of European countries in recent years. According to Eurostat, a total of 3.9 million people immigrated to EU Member States during 2018 while 2.6 million people left.[169] 21.8 million non-EU citizens were living in the EU as of 1 January 2019, while EU countries granted citizenship to 672 thousand persons in 2018.[170] It must be also noted that the average age of immigrants into the EU is much lower than that of the average age of the population already residing in the destination country. On 1 January 2019, the median age of the total population of the EU countries was 43.7 years, while it was 29.2 years for the immigrants to the EU in 2018.[171]

The ever-increasing number of migrants coming to the EU can be explained by several factors, amongst which are unfavourable conditions in which migrants are living in their home countries,[172] the situation of labour markets in the EU countries that requires more workers than citizens of these countries can provide, or reunification with family members of non-EU citizens who already live in the EU.[173]

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168 The chapter was supported by the Charles University, project GA UK no. 320121, "Illegal and forced labour with a focus on its performance by foreigners from third countries".

169 Eurostat, "Migration and Migrant Population Statistics: Immigrants, 2018," https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows:_Immigration_to_the_EU-27_from_non-member_countries_was_2.4_million_in_2018

170 Ibid.

171 Ibid.

172 For example, high rate of unemployment, climate change, or political repressions.

173 Eurostat, "Migration and Migrant Population Statistics".

Depending on their country of origin, reasons for migration, or legality of immigration itself, migrants are often faced with more or less serious obstacles when trying to settle in the country of destination.[174]

Based on Articles 79 and 80 of the Treaty on the Functioning of the European Union (hereinafter only as the "TFEU"), the EU has the competence to develop a common immigration policy aimed, inter alia, at combating illegal immigration and trafficking in human beings. For such purposes, it can adopt measures regarding conditions of entry and residence, standards of long-term visas and residence permits, etc.[175] Even though the area of entry into the EU is greatly influenced by EU law, the Member States are the ones who exercise the right to allow only a set number of migrants to enter into the country to seek work or do business[176] and in reality control the number of migrants who enter the country based on a long-term visa or residence permit.[177] Even when a third-country national manages to obtain a residence permit that allows him/her to work in one of the EU countries, strict rules usually apply when it comes to the nature of work that can be performed based on such permission.[178]

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174 For example, irregular migrants or asylum seekers.

175 Examples of EU legislation regarding residence of third-country nationals include, amongst others: Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers or Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

176 See article 79(5) of the TFEU.

177 For example, the Czech Republic established a quota-based system for awarding residence permits connected with a right to work and business. See Section 181b of the Law no. 326/1999 Coll., On the Residence of Foreigners in the Czech Republic (hereinafter only as the "Law no. 326/1999"), and Regulation of the Government no. 220/2019 Coll. The number of other types of residence permits applications is restricted by the pre-set capacity of the embassies.

178 In the Czech Republic, a holder of a long-term residence permit based on employment (which is called an *employee card*) can usually work only at a predetermined position with pre-set conditions. Every change in any aspect of the work contract is subject to previous consent from the Ministry of the Interior. See Section 42g(7) of the Law no. 326/1999. Restrictive visa regimes when it comes to changing employment occur in many countries around the world – see the International Labour Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Geneva: ILO, 2017).

The above-mentioned restrictions and strict procedures required to obtain residence permits coupled with often very complicated laws and regulations lead to situations in which migrants become vulnerable to exploitation. Such exploitation can take various forms – forcing migrants to work under different conditions to what was previously agreed on using threats of cancelling their visas, smuggling people to the EU for huge amounts of money or enforcing a provision of services for arranging a relocation to the EU.[179] Provision of services and performance of work that a person would not be willing to undertake under normal circumstances thus occur in such situations.

This paper aims to focus on one form of exploitation – namely forced prostitution[180] – and analyses under which circumstances prostitution can be considered as forced labour.[181] Additionally, if we think about forced prostitution and migrants, we cannot omit the issue of human trafficking. As will be elaborated upon below, the opinions on whether forced prostitution can be considered forced labour as such, or if the human trafficking element must also be present, vary.

The paper emphasizes the approach taken by the European Court of Human Rights (hereinafter only as the "ECtHR"), whose case-law has recently evolved and elaborated on the question of whether prostitution can be considered forced labour under Article 4 of the European Convention of Human Rights (hereinafter only as the "European Convention"). It is therefore necessary to cite Article 4 of the European Convention at the outset:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:

179 E.g., of sexual nature. According to the data from the International Labour Organization, there were 24.9 million people trapped in forced labour in 2016 out of which 4.8 million persons in forced sexual exploitation. Women and girls constitute 99% of the victims in the commercial sex industry. See the International Labour Organization, *Forced Labour, Modern Slavery and Human Trafficking*, https://www.ilo.org.

180 According to the data of the United Nations Office on Drugs and Crime, human trafficking for the purpose of sexual exploitation is the most detected form of trafficking in the region of western and southern Europe (66 % of the total detected victims). See UNODC, *Global Report on Trafficking in Persons 2018* (New York: United Nations, 2018), https://www.unodc.org.

181 According to data from the International Labour Organization victims of forced sexual exploitation appear most likely to have been exploited outside their country of residence (74%). See ILO, "Global Estimates of Modern Slavery," 29.

a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d) any work or service which forms part of normal civic obligations.[182]

To properly grasp and examine the issue of prostitution in the context of forced and compulsory labour, it is necessary to first provide definitions of the most important terms associated with this area. The next part will consist of a description of the legal framework of both international law and EU law. The fourth chapter of this article will then deal with the respective ECtHR jurisprudence. Conclusions are provided in the final part of this paper.

Definitions

Forced and compulsory labour

The definition of forced and compulsory labour can be found in the International Labour Organization's (hereinafter only as the "ILO") Forced Labour Convention (hereinafter only as the "Convention no. 29") of 1930. Article 2(1) of the Convention no. 29 stipulates that

> for the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.[183]

Paragraph 2 of said provision then goes on to provide exemptions from the definition – from work connected to compulsory military service to any work exacted in cases of emergency (be it war or calamity). It stems from the definition that forced labour situations are defined not by the nature of economic activity but by the nature of the relationship

182 Article 4 of the European Convention on Human Rights, https://www.echr.coe.int.
183 ILO, *Co29 – Forced Labour Convention, 1930 (no. 29)*, https://www.ilo.org.

between a person and an employer.[184] Other relevant international treaties, documents, and national laws do not usually define forced labour, when in the vast majority of cases they only prohibit it and/or stipulate what is not considered as forced labour – providing only a negative definition of this term.[185]

Three constituting elements can be derived from the ILO definition: a) the presence of work or service; b) threat of a penalty;[186] c) provision of work or service is not voluntary.[187] These are to be elaborated on in more detail below with respect to prostitution and possible sexual exploitation.

In order to help practitioners decide whether a person has been placed in a situation of forced labour, the ILO has developed eleven indicators of forced labour.[188] These indicators are: 1. abuse of vulnerability; 2. deception; 3. restriction of movement; 4. isolation; 5. physical and sexual violence; 6. intimidation and threats; 7. retention of identity documents; 8. withholding of wages; 9. debt bondage; 10. abusive working and living conditions, and 11. excessive overtime. ILO suggests that sometimes even the presence of a single indicator in a given situation may imply the existence of forced labour, but in other cases only several indicators appearing together indicate a situation of forced labour.[189]

It must be also noted that, as in the case of the European Convention,[190] the understanding of forced labour changes over time as society and its views on acceptable behaviour transform. What was not considered to fall under this category in the past, therefore, might be assessed differently nowadays. We can find a clear example of this in the preamble of the 2014 Protocol to the Convention no. 29 which stipulates that the context and forms of forced or compulsory labour have changed over time and that it may nowadays also involve sexual exploitation.[191]

184 See ILO, "Global Estimates of Modern Slavery," 16.

185 For example, Article 4 of the European Convention and Article 5 of the Charter of Fundamental Rights of the EU.

186 The term *any penalty* signifies that it comprises many possible forms of coercion ranging from physical violence to threats aimed at the dignity of the victim.

187 According to ILO, the term *offered voluntarily* refers to the free and informed consent of a worker to enter into an employment relationship and his or her freedom to leave the employment at any time. See *ILO Standards on Forced Labour. The New Protocol and Recommendation at a Glance* (Geneva: ILO, 2016), 5, https://www.ilo.org.

188 *ILO Indicators of Forced Labour* (Geneva: ILO, 2012), https://www.ilo.org.

189 Ibid.

190 See, inter alia, the judgement of the ECtHR in the case of Tyrer v. the United Kingdom, application no. 5856/72, judgement delivered on 25 April 1978, para. 31.

191 ILO, *Po29 – Protocol of 2014 to the Forced Labour Convention, 1930*, https://www.ilo.org.

Said Protocol then goes on to recognize that certain groups of people, especially migrants, are in a higher risk of becoming victims to forced or compulsory labour and that its prohibition is a part of the body of fundamental rights and notes.

Taking these ever-evolving standards and indicators into account, the next subchapter considers which situations of sexual exploitation of migrants in the form of prostitution could be considered as forced and compulsory labour.

Exploitation and human trafficking

Irrespective of whether prostitution is legally permitted, the exploitation of prostitution is often closely linked with the crime of human trafficking. Because an increasing number of migrants cannot legally obtain a residence permit in their desired state of destination, they often resort to the services of traffickers who can easily take advantage of their vulnerability and dependence. Doors for possible exploitation are thus wide open.

Trafficking in persons is defined under the international law in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter only as the "Palermo Protocol"), which is the first legally binding international document that includes a definition of trafficking in persons. According to its Article 3(a) *Trafficking in persons* means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of a threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs. Article 3(b) then stipulates that if means set forth in (a) are present, it is irrelevant whether the victim of trafficking expressed consent to the intended exploitation.

The Palermo Protocol, therefore, addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons while the terms *exploitation of the prostitution of others* or *other forms of sexual exploitation* are not defined. This

is without prejudice to how states' parties address prostitution in their respective domestic laws.[192]

It stems from the above-mentioned definition that it may be argued that prostitution should not be, in itself, regarded as forced labour unless exploitation of the person is present. Even though exploitation is an essential part of the definition of *trafficking in persons* according to the Palermo Protocol, and it represents the sole purpose of a trafficking act, Jovanovic points out that exploitation has never been defined under international law and refers to Uhl's opinion that the absence of the definition results in a lack of terminological clarity of the Palermo Protocol.[193]

Turning to the European Convention, Jovanovic points out that in the judgement of *Rantsev v. Cyprus and Russia*[194] the ECtHR ruled that human trafficking, as defined in the Palermo Protocol, is prohibited under the European Convention and prohibition of human trafficking falls within the scope of the right to be free from slavery, servitude and forced or compulsory labour because of its very aim of exploitation.[195] One can therefore say that if a situation of forced prostitution also contains a human trafficking element, Article 4 of the European Convention can be applied. The explanation of the meaning of exploitation was not provided by the ECtHR in the *Rantsev* case.

It is worth mentioning that the ECtHR jurisprudence also provides for the conclusion that the trafficking process itself can be considered as a preparatory stage of exploitation.[196] This was pointed out by Jovanovic[197] in connection with the statement that pre-emptive action by a State is necessary to protect an individual against violation of his/her absolute right enshrined in Article 4 of the European Convention.[198]

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192 United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: United Nations, 2006), 347.

193 Marija Jovanovic, "The Essence of Slavery: Exploitation in Human Rights Law," *Human Rights Law Review* 20, no. 4 (2020): 674–703. See also: Bärbel Heide Uhl, "Lost in Implementation? Human Rights Rhetoric and Violations: A Critical Review of Current European Anti-trafficking Policies," *Security and Human Rights* 21, no. 2 (2010).

194 Rantsev v. Cyprus and Russia, application no. 25965/04, judgement delivered on 7 January 2010, para. 282. Elaborated in detail below.

195 Jovanovic, "The Essence of Slavery," page 682. See also: Uhl, "Lost in Implementation?" and "Rantsev v. Cyprus and Russia," para. 281.

196 "J. and Others v. Austria," application no. 58216/12, judgement delivered on 17 January 2017, para. 40 of the Concurring opinion of Judge Pinto de Albuquerque, joined by judge Tsotsoria.

197 Jovanovic, "The Essence of Slavery," page 683. See also: Uhl, "Lost in Implementation?".

198 Ibid.

Jovanovic provides for three constituting elements of exploitation: a) abuse of vulnerability; b) disproportionate gain; c) sustained action. In her view, vulnerability is associated with a set of victims' personal characteristics, amongst which can be, inter alia, immigration status.[199] The same conclusion can be found in the ILO Working paper *Legal Aspects of Trafficking for Forced Labour Purposes in Europe*.[200] Malpani points to the fact that vulnerability can be the result of an innate characteristic of the victim, such as precarious residence status, and that vulnerability can be worsened by actions of a trafficker, for example by withholding their travel documents or identity documents causing fear of deportation.

Abuse of a vulnerability by a third person is therefore a necessary precondition for exploitation. If we take this statement and apply it to a situation of forced prostitution, just the fact that prostitution is forced[201] signifies that the first constituting element of exploitation is met. When it comes to disproportionate gain, it can be concluded that in all the cases of forced prostitution, the exploited person receives significantly less than the perpetrators. As for the last precondition set by Jovanovic – sustained action – it must be noted that exploitation must take place over a period of time, which is also applicable to the definition of labour.[202]

It may therefore be concluded that if a migrant finds herself in a situation where she is being exploited by a trafficker and forced to provide sexual services, the guarantees of Article 4 of the European Convention should be applied.

International and European law

International law

The first mention of the prohibition of forced labour was provided by the Universal Declaration of Human Rights, namely it's Articles 1, 3, 4, and 23 paragraph 1. These provisions do not yet contain an explicit ban of forced labour, but it can be derived from the general ban of slavery

199 Ibid., page 695. Jovanovic expressly mentions that in Dutch jurisprudence a person is in a vulnerable position if there is a combination of illegal residence, poor economic situation, and inability to speak the official language.

200 Rohit Malpani, *Legal Aspects of Trafficking for Forced Labour Purposes in Europe* (Geneva: ILO, 2006), 5.

201 Be it through physical or psychological threats.

202 Jovanovic, "The Essence of Slavery," page 700. See also: Uhl, "Lost in Implementation?".

and servitude, the rights of human beings to freedom and equality in dignity and rights, the right to life, liberty, and security of person, right to free choice of employment and to just and favourable conditions of work. As is widely known, the Universal Declaration of Human Rights lacks binding effect but its influence comes from the power of persuasion as customary law.

When it comes to binding international instruments, Article 8(3)(a) of the International Covenant on Civil and Political Rights contains a general ban on forced labour and stipulates exemptions that cannot be considered as prohibited acts.[203]

As it stems from the part concerning definitions, two international instruments deal with forced or compulsory labour and trafficking in persons for sexual exploitation and prostitution. These are the Convention no. 29 and the Palermo Protocol. We have already elaborated on them in detail above. Amongst other international treaties related to the field of forced labour is the Abolition of Forced Labour Convention (Convention no. 105), which prohibits forced or compulsory labour for specific purposes set out in the convention, and the already mentioned Protocol of 2014 to the Convention no. 29 and the Forced Labour (Supplementary Measures) Recommendation.[204]

In the context of this paper, a question that must be answered is whether sexual exploitation and forced prostitution can amount to forced labour. If we look closely at the relevant international legal documents, it must be noted that most of them list forced labour and sexual exploitation (forced prostitution) as separate violations of rights.

The ever-evolving understanding of this area however provides for different opinions of respective international bodies. It must be therefore noted that the Office of the High Commissioner for Human Rights, the United Nations Refugee Agency, UNICEF, United Nations Office on Drugs and Crime, UN Women, and the ILO have all stipulated

203 Without defining it.

204 There are also other international conventions that have an impact on the field of forced or compulsory labour. Amongst them are the International Covenant on Economic, Social and Cultural Rights (1966), the Slavery Convention (1926), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), the United Nations Convention against Transnational Organized Crime (2000), the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Convention on the Rights of Persons with Disabilities (2006), etc.

that while the Palermo Protocol distinguishes between exploitation for forced labour or services and sexual exploitation, this does not mean that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking.[205] According to their commentary, coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour.[206] This conclusion is further supported by the above-mentioned ILO's Report III (Part 1B) prepared by the Committee of Experts which presents the opinion that coercive sexual exploitation and forced prostitution are within the scope of the definition of forced or compulsory labour enshrined in Article 2(1) of the Convention no. 29 even though there is no duty to criminalize prostitution itself.[207] It must be therefore stated that international law does not preclude the conclusion that sexual exploitation in the form of prostitution can be, in certain situations, considered as forced labour.

Another important topic deals with a possible link between human trafficking (in this instance for the purposes of sexual exploitation and prostitution) and forced or compulsory labour. The Committee of Experts on the Application of Conventions and Recommendations (hereinafter only as the "Committee of Experts")[208] concluded that a crucial element of the definition of trafficking is its purpose (exploitation), which is defined to include forced labour or services [...] and various forms of sexual exploitation.[209] According to the Committee of Experts' view, the notion of exploitation in the definition allows for a link to be established between the Palermo Protocol and Convention no. 29 and it makes it clear that trafficking in persons for the purposes of exploitation is encompassed by the definition of forced or compulsory labour provided in the Convention no. 29.[210] This position was then adopted by the ECtHR in the case of *Chowdury and Others v. Greece* as will be demonstrated below.[211]

205 As was pointed out in the below-analysed judgement of the ECtHR in the case of S. M. v. Croatia, application no. 60561/14, judgement of the GC delivered on 25 June 2020, para. 117.

206 Prevent, Combat, Protect: Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights Based Approach, 104, 2011, https://www.unhcr.org/fr-fr/en/media/prevent-combat-protect-human-trafficking-joint-un-commentary-eu-directive-human-rights-based.

207 Report of the Committee of Experts on the Application of Conventions and Recommendations: Eradication of Forced Labour, para. 78, 42.

208 The Committee of Experts is a body established by the ILO to provide an impartial and technical evaluation of the application of international labour standards in ILO member States.

209 Committee of Experts, "Eradication of Forced Labour," *International Labour Conference, 96th Session, Geneva*, 2007, https://www.ilo.org.

210 Ibid., 41, para. 77.

211 Chowdury and Others v. Greece, application no. 21884/15, judgement delivered on 30 March 2017.

Regional protection of human rights

When it comes to regional protection of human rights, the European Convention and the subsequent case-law of the ECtHR are the most important sources to examine.

It needs to be reiterated that Article 4 of the European Convention provides that:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:
   a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   d) any work or service which forms part of normal civic obligations.[212]

It is apparent from the above-cited text of Article 4 that there is again no positive definition of what should be considered as forced or compulsory labour. It is therefore on the ECtHR to interpret the European Convention and judge cases based on its own assessment, usually referring to widely accepted international standards stemming from international treaties and opinions of the treaty bodies.[213] A detailed examination of the recent ECtHR case law will follow below.

When it comes to other Council of Europe documents, we must take into consideration the Convention on Action against Trafficking in Human Beings from 2005 which, inter alia, defines human trafficking. The explanatory report to this convention stipulates that: "Trafficking in human beings [...] treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry...".[214] It can be derived from the wording that forced labour can be understood as an overarching term containing also forced prostitution.

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212 Article 4 of the European Convention on Human Rights.

213 As will be shown below, the ECtHR draws largely from Convention no. 29 and the Palermo Protocol.

214 Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 3.

The prohibition of forced labour is also included in the Inter-American system of protection of human rights, as Article 6(2) of the American Convention on Human Rights bans forced and compulsory labour.

European Union law

The general rule prohibiting slavery and forced labour can be found in Article 5 of the Charter of Fundamental Rights of the European Union that reads as follows: "(1) No one shall be held in slavery or servitude; (2) No one shall be required to perform forced or compulsory labour; (3) Trafficking in human beings is prohibited."[215]

It was already mentioned that the TFEU provides a basis for European Union's authority to enact legislation in the field of combating illegal migration and human trafficking. Based on this general empowerment, the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (hereinafter only as "Directive"), was enacted.

Article 2 of the Directive, drawing from the wording of the Convention on Action against Trafficking in Human Beings, enumerates types of offenses of human trafficking that must be made punishable by the Member States. Amongst them are recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. It is apparent that three elements must be present: a) wilful action of a perpetrator; b) exercising control over the will of a victim; c) exploitation.

As for the latter, Article 2(3) of the Directive provides that exploitation shall include, as a minimum, the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery, or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs. The Directive thus lists exploitation of prostitution/other forms of sexual exploitation separately from forced labour or slavery and it seems that EU law strictly differentiates between these terms.

215 Article 5 of the Charter of Fundamental Rights of the European Union.

However, in its non-binding resolution of 26 February 2014, the European Parliament stipulated that prostitution and forced prostitution are forms of slavery.[216] It must be therefore concluded that it has not yet been clearly decided amongst Member States of the EU whether forced prostitution and even voluntary prostitution can fall under the category of forced labour or slavery.

Jurisprudence of the ECtHR

It is perhaps surprising that it took the ECtHR nearly 60 years since its establishment[217] to assess a claim dealing with a situation of alleged forced prostitution under obligations of states stemming from Article 4 of the European Convention. The landmark judgement of the Grand Chamber in the case of *S. M. v. Croatia* was delivered on 25 June 2020.[218] Before we elaborate on this case further, it is necessary to briefly examine two previous cases.

Rantsev v. Cyprus and Russia

The ECtHR had a chance to assess a claimed violation of Article 4 of the European Convention when it comes to trafficking in human beings and forced and compulsory labour for the first time in the case of *Rantsev v. Cyprus and Russia*.[219]

In *Rantsev v. Cyprus and Russia,* the applicant was a father whose daughter visited Cyprus on the so-called artist visa but quit her work with a desire to return to Russia. The manager of the cabaret where she was supposed to work then found her and took her to a police station. There he asked the police to detain the applicant's daughter as an illegal immigrant. The police, deciding that there is no reason for detention, came to the conclusion that the manager is responsible for her, and that he has to pick her up and bring her to the immigration office the next day.

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216 European Parliament's Resolution of 26 February 2014 on sexual exploitation and prostitution and its impacts on gender equality [2013/2103(INI)]. The preamble of said resolution is referring to the Convention no. 29's definition of forced labour.

217 The first judgement of the ECtHR in the case of Lawless v. the United Kingdom was delivered on 14 November 1960.

218 *S. M. v. Croatia*.

219 *Rantsev v. Cyprus and Russia*, para. 282.

The manager then collected the applicant's daughter and took her to his apartment. She was later found dead below a balcony of that apartment with signs suggesting that she was trying to escape from the manager. The official conclusion of the investigation was that it was an accident.

Nevertheless, the circumstances of the death of the applicant's daughter and the nature of her work in Cyprus raised concerns as local ombudsperson, the Council of Europe Commissioner for Human Rights, and the United States State Department have all published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and the so-called artist visas in facilitating trafficking in Cyprus.[220]

When it comes to the assessment of the alleged breach of Article 4 of the European Convention, the ECtHR noted that it does not apply provisions of the European Convention in a vacuum and that the European Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties.[221] According to the ECtHR, account must be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and that the European Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.[222] This statement effectively confirmed the inclusion of the general obligations in the field of forced labour stemming from, inter alia, Convention no. 29 and the Palermo Protocol.

Importantly, the ECtHR stated that human trafficking treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry.[223] As was already mentioned above, the ECtHR thus acknowledged a close link between trafficking in persons and forced labour noting that it could be considered a modern form of slavery. No less important, however, is the fact that the ECtHR also confirmed, perhaps inadvertently, for the first time that forced labour can occur in the sex business.[224]

The ECtHR then recalled the judgement in the case of *Siliadin v. France*[225] where it stated that Article 4 entailed a specific positive obli-

220 ECtHR, *Information Note on the Court's case-law*, no. 126, January 2010.

221 *Rantsev v. Cyprus and Russia*, para. 273.

222 Ibid., para. 274.

223 *Rantsev v. Cyprus and Russia,* para. 281.

224 In the end, the ECtHR concluded that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings, falls within the scope of Article 4 of the European Convention.

225 *Siliadin v. France*, application no. 73316/01, judgement delivered on 26 July 2005.

gation on the Member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour.

The Court stressed that there are positive obligations to take measures to prevent trafficking, protect victims and potential victims and to prosecute and punish those responsible for trafficking. In this regard, Cyprus failed to enact an effective legal framework to combat human trafficking and its police failed to take measures to protect the victim. The ECtHR also stated that the whole regime of artist visas did not offer any effective protection against trafficking and exploitation of workers.

As can be seen from the above-mentioned conclusions, the question of whether the victim was in fact involved in forced prostitution or sexual exploitation ring was not examined by the ECtHR. It restricted itself to state that human trafficking is an act in violation of Article 4 of the European Convention and then proceeded to decide that there was a violation of Article 4.

Chowdury and Others v. Greece

In *Chowdury and Others v. Greece*,[226] the applicants were nationals of Bangladesh who lived in Greece without valid work permits and who were recruited to work on a strawberry plantation. The regime under which they worked consisted of 12-hour shifts, being overseen by armed guards. The applicants lived in bad sanitary conditions with no access to toilets and running water.

Because the applicants did not receive wages in time, they, together with other migrant workers, tried to demand the payment from two of their employers. One of the armed guards opened fire and seriously injured many of them. The two employers, together with the guard who had opened fire and an armed overseer, were arrested and tried for attempted murder – subsequently reclassified as grievous bodily harm – and also for trafficking in human beings. By a judgment of 30 July 2014, the assize court acquitted them of the charge of trafficking in human beings.[227]

Recalling the principles set in *Rantsev v. Cyprus and Russia*, the ECtHR stated that human trafficking falls under the scope of Article 4 of the

226 *Chowdury and Others v. Greece*.

227 ECHR, Press Release, *Migrants who were subjected to forced labour and human trafficking did not receive effective protection from the Greek State* (Strasbourg: ECHR Case Law, 2018).

European Convention. It stated that there is a notable distinction between servitude and forced or compulsory labour – victims' feeling that their condition was permanent and unlikely to change being the distinguishing factor – wherein the present case the applicants could not experience such feeling because all of them were seasonal workers. The ECtHR then proceeded to put forward an important opinion that forced labour can be considered one form of human trafficking, blurring the boundaries between these terms.[228]

The ECtHR then held that there had been a violation of Article 4 of the European Convention because Greece failed to fulfil its positive obligations to prevent human trafficking, to protect victims, to conduct an effective investigation into the offences, and to punish those responsible.[229]

We can see from the two above-mentioned cases that the ECtHR seems to, under certain circumstances, conflate human trafficking with both slavery and forced labour, adopting the ILOs' Committee of Experts views on the matter.

S. M. v. Croatia

S. M. v. Croatia is the first case to expressly deal with the question of whether Article 4 of the European Convention also applies to the trafficking and exploitation for the purposes of forced prostitution. As such it is also the most important case for the topic at hand.

The facts of the case were as follows: a Croatian woman alleged that she had been forced physically and psychologically into prostitution by a former police officer (T. M.) who claimed to know her parents. He contacted her through a social network website with a promise that he would help her find a job as a waitress or a shop assistant. Under the disguise of a job meeting, the applicant was taken to a man who revealed to her that he expected sexual services because he saw an advertisement on the internet stating that the victim and T. M. were a couple that provides such services. When the victim refused to do it, T. M. shouted at her and slapped her.

After this incident, the applicant agreed to provide sexual services – later she alleged that this was only because of the fact that she was scared of T. M. and his threats that he would tell her parents about everything.

228 *Chowdury and Others v. Greece*, para. 93.
229 Ibid.

T. M. then proceeded to rent a flat where he lived with the applicant for some time, and where she provided sexual services. T. M. controlled her life, arranged meetings with clients, requested half of the money she received from them and occasionally also punished her psychologically and physically.

One day, the applicant called her friend, who was familiar with the fact that the applicant was providing sexual services, and asked her to help her escape.

T. M. opposed the allegations made by the victim stating that they had been in a relationship, but never lived together in the same flat. He stated that the applicant was free to go and come as she liked and that he never controlled her life. T. M. did not refute that the applicant provided sexual services, but he disagreed that he received money from her forcibly. He admitted that he had slapped the applicant once when they quarrelled about her refusal to work in a bakery. He also said that he had found her a job in a restaurant but that after he had told her about it, she disappeared.[230]

The ECtHR decided by a Chamber judgement on 19 July 2018 that there had been a violation of Article 4 of the European Convention. Importantly, it ruled that Article 4 can be applied in cases of human trafficking and exploitation for the purpose of prostitution even if there is not an international element.[231] The ECtHR stated that there were shortcomings in the investigation and that Croatian authorities did not take account of international laws on human trafficking.

On 19 October 2018, the Croatian government requested a referral of the case to the Grand Chamber of the ECtHR. The request was then granted on 3 December 2018. On 25 June 2020, the Grand Chamber of the ECtHR adopted judgement with argumentation analysed below.

The Grand Chamber, using its previous case-law, stated that Article 4 refers to three concepts: slavery, servitude and forced or compulsory labour. Because of the fact that the European Convention does not define any of them, a reference must be made to international standards.[232] It recalled that the crime of trafficking has three elements: an action (recruitment, transportation, transfer…), the means (threat or use of force, coercion, fraud, deception…), and exploitative purpose.[233] All of these

230 *S. M. v. Croatia*, para. 14.

231 A more in-depth analysis will be provided below.

232 *S. M. v. Croatia*, para. 279.

233 Ibid., para. 114.

must be present to establish a crime of trafficking as regards adults.[234] The ECtHR reiterated that the consent of the victim to such treatment is irrelevant if one of the means listed above is used.[235]

It also pointed to the view of the United Nation bodies and the ILO that coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour.[236] The ECtHR then proceeded to state that the Palermo Protocol does not require states to abolish all possible forms of prostitution, but a complete ban needs to be put on child prostitution and

> all forms of adult prostitution in which people are recruited, transported, harboured, or received by means of threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of one person having control over another, for the purpose of exploiting that person's prostitution.[237]

It stated, referring to Sigma Huda's report,[238] that prostitution as actually practiced in the world usually does satisfy the elements of trafficking.[239] Based on this, the ECtHR, recalling the above-cited Report of the ILO Committee of Experts from 2007, highlighted that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced and compulsory labour.[240] The ECtHR noted that in this regard, the ILO's definition of forced or compulsory labour should be taken as a starting point for the interpretation of Article 4 of the European Convention.[241]

According to the ECtHR, in the light of international standards, the term *labour* mentioned in Article 4 paragraph 2 of the European Convention, should be therefore understood in a broader sense as all

234 Ibid., para. 115.

235 Ibid., see also Article 3(b) of the Palermo Protocol and *Chowdury and Others v. Greece*, para. 96.

236 *S. M. v. Croatia*, para. 117.

237 Ibid., para. 137. See also: Sigma Huda, Integration of the Human Rights of Women and a Gender Perspective: *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children* E/CN.4/2006/62 (UN: Economic and Social Council, 20 February 2006), para. 41.

238 Sigma Huda was the UN special rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children.

239 Ibid.

240 Ibid., para. 145, 292, and 303.

241 Ibid., para. 281.

work or service, the adjective *forced* as a presence of a physical or mental constraint and the adjective *compulsory* refers to a situation where work was exacted under the menace of any penalty and also performed against the will of the person concerned, that is work for which he/she has not offered himself/herself voluntarily.[242]

The notion of immigration was also touched on by the ECtHR in its reference to the case of *C. N. and V. v. France*[243] where the ECtHR had found that a penalty or harm that a victim can suffer can also take subtler forms of a psychological nature such as threats to denounce victims to the police or immigration authorities when their status is illegal.[244] It can be concluded that irregular migrants are thus in an extremely vulnerable position when it comes to forced prostitution because their status can be easily abused by a threat of revealing their presence in the country to the authorities.

The ECtHR then proceeded to, for the first time, find that the protection from forced or compulsory labour enshrined in Article 4 of the European Convention also covers situations of forced prostitution, irrespective of whether, in the particular circumstances of the case, they are related to the specific human trafficking context.[245] It is therefore crucial to state that forced labour in the form of forced prostitution can occur even in situations where there is no trafficking in human beings. Nevertheless, given the proximity of these concepts, the ECtHR considered that relevant principles relating to human trafficking are accordingly applicable to cases of forced prostitution in the context of obligations of state under Article 4 of the European Convention.[246]

Adding to the above-mentioned, the ECtHR stipulated that a situation of forced prostitution may also have elements qualifying it as servitude or slavery under Article 4 or may raise an issue under another provision of the European Convention.[247]

Regarding the decision on the complaint of the applicant, the ECtHR stated that she had made an arguable claim and that there was prima facie evidence that she had been the victim of treatment contrary to

242 Ibid., para. 282.

243 *C. N. and V. v. France*, application no. 67724/09, judgement delivered on 11 October 2012, para. 77.

244 *S. M. v. Croatia,* para. 284.

245 This enlargement of Article 4 was criticized by the judge Koskelo in her dissenting opinion to the Chamber judgement of 19 July 2018.

246 Ibid., para. 307.

247 Ibid., para. 300 and 303.

Article 4 of the European Convention.[248] The ECtHR pointed out that the applicant was in a particularly vulnerable position which T. M. had abused while using means often attributed to traffickers.[249] The ECtHR identified multiple shortcomings in the conduct of the case by the prosecuting authorities that effectively prevented the ability of courts to decide on the question of whether the applicant had been exploited by T. M.[250] There has therefore been a violation of Article 4 of the Convention in its procedural limb.

Conclusions

The above-mentioned findings of the ECtHR demonstrate how easily can one find himself/herself in a situation considered as forced labour. By delivering the judgement the ECtHR clearly expressed that according to its view, Article 4 of the European Convention should be applied in cases of forced prostitution regardless of whether human trafficking is present or not. Recalling its previous case-law, the ECtHR acknowledged that previous consent from the victim is irrelevant. The conclusion that forced prostitution must be regarded as forced labour, which had previously appeared in international documents, has therefore been reflected in the case-law of the ECtHR.

As was pointed out by Stoyanova in her article covering the judgement in *S. M. v. Croatia*[251] – it can be derived from the judgement that only forced prostitution can be considered in breach of Article 4 of the European Convention. This finding is without a doubt confirming a leeway for national laws to deal with prostitution in general. In this regard, Stoyanova draws attention to the fact that the ECtHR did not determine whether S. M. was actually forced into prostitution, it only stipulated that force can take many different forms.[252] This leaves the doors wide open for interpretation and application of the findings in other cases.

248 Ibid., para. 328.

249 Ibid., para. 329.

250 Ibid., para. 345. It must be noted that the complaint was aimed at deficiencies in the application of criminal-law mechanisms in Croatia. Interestingly, the applicant invoked violation of Articles 3 and 8 of the European Convention, not Article 4.

251 Vladislava Stoyanova, "The Grand Chamber Judgement in S. M. v. Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR," *Strasbourg Observers*, 3 July 2020.

252 Ibid.

Because the case of *S. M. v. Croatia* did not involve any trans-national element, it is even more important to stress that migrants are often in a more vulnerable position than nationals of a respective state. This stems, inter alia, from their immigration status, language barrier, lack of knowledge of the legal system and laws in general, and prejudices of society. Many of them are susceptible to be easily deceived – e.g., by a promise that a perpetrator will ensure that the victim will receive a residence permit, get a better job, etc. Another interconnected issue making migrants particularly vulnerable can be that of a complicated access to justice which is hampered by the above-mentioned problems and unfamiliarity of support networks to raise a complaint.

To conclude, the ECtHR has made it clear that forced prostitution should be treated as forced labour and thus fall within the scope of Article 4 of the European Convention, with state parties responsible for fulfilling their obligations under it. The assessment of the presence of force should be carried out on a case-by-case basis based on the actual circumstances. Only time will tell if this judgement will have a breakthrough impact on the practice within states, as it seemed when it was delivered.

5. Migration of Workers in the Czech Republic. Still a Missed Opportunity?

The movement of workers, both in the sense of the movement outside of the Czech Republic, as well as the influx of foreigners into the Czech Republic, represents without a doubt a significant phenomenon in today's globalized society. Nevertheless, we encounter very different views on the issue. On the one hand, we find employers who are starved for employees to a degree that they would welcome any lawful way to hire foreigners without restrictions. On the other hand, we can still hear strong voices claiming that protection of the local labour market should be the main goal of the lawmaker in this area.

Although it is indisputable that (as detailed below) the Czech labour market is in a shape where it can still absorb many foreigners into the workforce, the Czech legislator, perhaps reflecting the current public opinion, approaches foreigners' access to the Czech labour market rather restrictively.

However, why is that the case?

The primary consistently raised argument for the restriction of foreigners (not only) on the Czech labour market is the increase in crime level. However, if we convert such statement into numbers, we will find that the statistical basis does not support such viewpoint.

For example, in 2019, 37,332 people were prosecuted in the Czech Republic, of which 34,493 were citizens of the Czech Republic.[253] In 2020, the number of prosecuted persons sank to 35,090, of which 32,632 were citizens of the Czech Republic.[254] The number of prosecuted foreigners

253 Czech Statistical Office, *Cizinci v ČR v letech 2004–2020 (stav k 31. 12.) [Foreigners in the CR in the years 2004 –2020 (as at 31 December)]*, 2022, https://www.czso.cz/documents/11292/27320905/c01R01_2020.pdf/ff126a2b-2698-4b3c-a180-db977090564d?version=1.0.

254 Ibid.

seems very low and has decreased year-by-year, even though the number of foreigners in the Czech Republic has increased by approximately 40,000 (see below).[255] This argument is therefore rendered unsubstantiated.

Another common argument for restricting the access of foreigners to the labour market of the Czech Republic is that it poses a danger of abuse of social benefits (burdening the social security system). This represents the idea that foreigners come to the Czech Republic in order to abuse the social system and thus burden the state as well as its citizens. However, this argument also turns out to be false, as in 2019, for example, only 1.38% of the people drawing social funds were foreigners from a third country.[256] The number of foreigners who are registered in the Czech Republic is of a completely marginal value, as it is specified below.

The issue of illegal work is also often discussed in connection with the immigration of foreigners. We encounter such issue on several levels. In the case of foreigners, work without a proper permit or without a proper employment contract would be classified as illegal. In a broader sense, some employers deny foreign workers the status of an employee and hire them in a feigned self-employed status, depriving them of the benefits and protection that arise from the Czech labour law, abusing the already very fragile position of foreigners on the Czech labour market. According to the Employment Act, such conduct is also considered illegal work if the activity carried out by an individual falls within the ambit of dependant work. The Labour Inspection Office, which is responsible for controlling and sanctioning of illegal work, fights against both of these problems. In addition, illegal employment of foreigners can also be considered a criminal offence. The Criminal Code reflects this fact in Section 342: anyone who illegally employs or mediates illegal employment of foreigners in a repetitive or systematic way or under particularly exploitative working conditions or to a greater extent, commits a crime of unlawful employment of citizens. The phenomenon of illegal work represents a significant risk both to the impacted employees as well as to the overall situation in the labour market. While this issue is somewhat more relevant than some of the previous arguments, we believe that it cannot be used as a valid argument for restricting the access of foreigners to the local labour market as this could have quite the contrary outcome

255 Ibid.

256 Jana Vavrečková and Petr Pojer, "Monitoring integrace cizinců z třetích zemí v ČR s důrazem na slučování rodin a čerpání sociálních dávek [Monitoring the Integration of Foreigners from Third Countries in the Czech Republic with an Emphasis on Family Reunification and the Use of Social Benefits]," *Fórum sociální politiky* 4 (2014).

– such restrictions can contribute to an increase in illegal work rather than its elimination.

Social dumping is also often mentioned in connection with the access of foreigners to the Czech labour market. It is argued that if there were no measures that would restrict the access of foreigners to the Czech labour market, the market would be overflooded with jobseekers from countries with lower wage levels, whose presence would lead to higher unemployment among domestic workers, or at least to a reduction in their wages.[257]

However, when discussing the issue of foreigners in the labour market of the Czech Republic, there are also voices calling for a reduction in the scope and number of restrictions. As indicated above, the main advocate for lifting some restrictions are the employers, especially in the food industry, agriculture, engineering and many other fields, which have been facing unprecedented labour shortages in recent years. A similar opinion is held, for example, by sports clubs, who are, often in vain, desperate for players with (usually) lower salary demands, especially from third world countries (e.g., African countries).

The lack of employees in the labour market is not the only argument raised in favour of reducing restrictions on foreigners' access to the Czech labour market. It is often argued that foreign workers are often the only available workforce to take up jobs that are impossible to fill with a local workforce as it is either under- or overqualified.

According to another common argument that supports the immigration of foreign workers is, that it increases competition among employees which results in increased performance. In the environment of the current labour market, competitiveness belongs among the most desired traits. Only a competitive market will allow employers to find skilled workers matching their requirements. Only a competitive market allows employees to find a position that corresponds with their expectations and allows them to develop and enjoy satisfying working conditions. From that viewpoint, national labour markets may not provide sufficient opportunities. The movement of workers between countries and the extension of labour markets to a regional or even global level may be the only answer.[258] However, we can look at competitiveness from two points of view. If we focus on effectiveness than it can be considered

257 Jakub Tomšej, "Přístup cizinců na pracovní trh ČR [Access of Foreigners to the Czech Labour Market], in *Pracovní právo* [*Labour Law*], ed. Jan Pichrt (Praha: C. H. Beck, 2021), 697–702.

258 Julia Connell and John Burgess, "Migrant Workers, Migrant Work, Public Policy and Human Resource Management," *International Journal of Manpower* 30, no. 5 (2009): 412–421.

a positive phenomenon. But on the workers' side, competition can also cause a reduction of wage standards, quality of work and, in general, it makes the position of workers in the labour market weaker vis-à-vis their stronger participants – employers. From a macroeconomic point of view, competition is indispensable. However, given the impact of competition on the daily lives of employees, it may not be particularly desirable from their point of view.

Moreover, given the currently significantly globalized society, a lack of foreign workers in the Czech labour market appears to be paralyzing. A clear example of the paralytic effect can be seen in the area of football and footballers (although Czech law does not clearly specify whether they are employees or whether they are self-employed). Because of restrictive policies towards foreign workers, football clubs lose the opportunity to include skilled but financially affordable players. The absence of such players then disadvantages individual clubs, especially in the international context.

With the integration of European countries resulting in the creation of the European Union, the free movement of workers has become one of the EU's cornerstones and an asset from which many employers and employees have benefitted.[259] In this context, we should not forget that the European labour market represents just a small fraction of the global labour market and the competitiveness target may not be fully achieved without granting access to persons coming from non-EU/EEA countries (often referred to as third countries). This can also be demonstrated on the case of the Czech Republic, where – as this paper documents – most foreign workers in the Czech Republic come from outside of the EU.

Another, no less important topic, is the continuously accelerating trend of movement of Czech citizens from the Czech Republic abroad. Such a movement is important for the labour market of the Czech Republic in many respects, including the outflow of skilled workforce from the Czech Republic, as well as the development of competition on a global level.

259 Article 3(2) of the TFEU; Articles 4(2)(a), 20, 26, and 45–48 of the TFEU; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation no. 492/2011 on freedom of movement for workers within the Union.

Czech labour market in numbers

The Czech Republic is a small country in the heart of Europe, with a total workforce of around 5.4 mil. people, which includes self-employed as well as employees.[260] However, the number of employees in the Czech Republic is significantly higher than the number of self-employed. For example, in the third quarter of 2021, the number of employees was slightly below 4.2 million.[261] In the same quarter of 2021, the number of self-employed people (natural persons) was approximately 1.1 million.[262] These numbers do not include for example unemployed pensioners, students, or children. Since the fall of the communist regime in 1989, the general trend in the area of gainful activity lies in a continual increase in the number of self-employed. However, given the impending economic crisis and uncertainty caused by the COVID-19 pandemic, we can assume that the increase in the number of self-employed will slow down. We are likely to see a tendency to change status from self-employed to an employee, as this legal status provides a higher degree of security.

The Czech Republic also has one of the lowest unemployment rates in Europe, with a total of 3.5% as of December 2021,[263] with 343,148[264] vacancies. As of December 2021, the Labour Office has registered 258,173[265] persons as jobseekers (i.e., unemployed persons), despite the nearly two-year coronavirus pandemic and expected economic crisis. In the Czech Republic, therefore, it is still true that while a skilled employee can choose from many offers, employers sometimes need to go to great lengths to fill a position. This is also one of the reasons why foreign workers are indispensable for many Czech employers.

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260 For the purposes of this article, the term workforce shall include all natural persons who are employed, act as individual entrepreneurs or are registered jobseekers at the Czech Labour Offices. The data is taken from the overview of the Czech Statistical Office (https://www.czso.cz/documents/10180/142141245/25013021041.pdf/e2e167bc-1557-44b9-ad59-0010e3e6073d?version=1.3) and reflects the state as of 30 July 2021.

261 Czech Statistical Office, "The Number of Employees – Headcount," https://www.czso.cz/documents/10180/143014381/11002421q3p2a.pdf/061584e5-12f8-4beb-82c0-344da1e15725?version=1.1.

262 Czech Social Security Administration, "Number of Self-Employed Persons in the Czech Republic," https://data.cssz.cz/graf-pocet-osvc-v-cr.

263 Ministry of Labour and Social Affairs, "Applicants and Vacancies," https://data.mpsv.cz/web/data/vizualizace3.

264 Ibid.

265 Ibid.

According to statistics, at the end of 2020, the Czech Republic was home to approximately 750,000[266] foreign workers, of whom 644,164[267] are employees and 97,803[268] are self-employed. Foreigners accounted for 14.2% of total employment in the Czech national economy. The highest representation among these workers in terms of classification by citizenship were citizens of Slovakia (204,294[269]), who can hardly be deemed foreigners in practice, as Czechs and Slovaks used to form one country for most of the 21st century and speak a very similar language. Slovak workers are usually fully integrated into local communities, as they lack the language barrier inherent to other foreign workers. In the EU context, the largest minorities of workers were formed by citizens of Poland (46,567), Romania (45,363), Bulgaria (37,145), and finally Hungary (20,350).[270] Regarding non-EU countries, the Czech labour market is dominated by citizens of Ukraine (159,468), followed by citizens of the Russian Federation (17,236), Vietnam (14,401), Mongolia (6,724), Belarus (5,332), and Moldova (5,029).[271]

The increasing number of foreign workers goes hand in hand with the number of foreign students (i.e., people studying in the Czech Republic without Czech citizenship). These students constitute a significant future potential workforce. In 2021, a total of 52,109 foreign students studied at Czech universities, which is 4,000 more than in 2020.[272] Slovaks once again form the largest minority of foreign students, followed by students from Russia and Ukraine. However, we can also observe this trend in the opposite direction as the number of students with Czech citizenship at foreign schools (especially universities) has also been constantly increasing.

It should be noted that many employers in certain sectors are directly dependent on foreign workers without whom some jobs would remain vacant. These sectors include the food industry, engineering, automotive industry, agriculture, and many others. For example, the Agrarian Chamber of the Czech Republic conducted a survey which focused on the situation in the labour market of primary agricultural production.

266 Czech Statistical Office, "Employment of Foreigners in the Czech Republic," https://www.czso.cz/documents/10180/142303958/2900262103.pdf/0f19a437-9536-46ee-98d8-cc0e81def133?version=1.2.

267 Ibid.

268 Ibid.

269 Ibid.

270 Ibid.

271 Ibid.

272 Ministry of Education, Youth and Sports, "Department of Statistics, Analysis and Development Education. Data about universities," https://dsia.msmt.cz//vystupy/vu_vs_f1.html.

It took place from 26 July to 8 August 2020 with 207 companies participating. The survey found that some employers in this sector lack up to 60% of employees. The research also showed that 57% of the companies employ foreign workers. It can therefore be concluded that foreigners are a necessary element of the labour market of the Czech Republic, especially in certain areas.

Another trend, already foreshadowed in recent years, is the increase in the number of people working abroad. Since the country's accession to the EU, the number of Czech employees working abroad has been growing, in particular since the termination of all temporary restrictions in May 2011.[273] The statistics show that around 110,000 Czech workers currently work in other EU countries.[274] These workers are spread across all European countries, with their strongest presence in the UK and Germany.

Legal regulations of incoming workers

Definition of the term *foreigner*

An essential term that we encounter while discussing the subject of the movement of workers is the term of *foreigner*. Although having such a term is essential for the purposes of legal regulation, the Czech laws are internally contradictory as to its definition. According to the Act on the Residence of Foreigners in the Czech Republic, the term foreigner describes a natural person who is not a citizen of the Czech Republic, including an EU/EEA citizen. On the other hand, the Employment Act does not consider EU/EEA citizens and their family members to be foreigners and grants them the same legal status (for the purposes of legal relations arising from the Employment Act) as the citizens of the Czech Republic.

273 In accordance with the applicable EU laws and the accession treaty, old EU member states could apply a temporary restriction on the free movement of workers for up to 7 years following the accession. Only three EU member states have fully opened their labour market to Czech workers since the accession: UK, Ireland, and Sweden. Some countries have feared that the access of workers from the new EU countries to their markets could lead to an increase in unemployment. Representatives of these new EU countries would argue that no such phenomenon was observed following the termination of the restriction period, and that the application of temporary restrictions only leads to issues with illegal work.

274 http://www.mpsv.cz/zamestnavani-obcanu-cr-v-zahranici. No statistics relating to non-EU countries are available, however, it is anticipated that the share of Czech citizens working outside the EU is relatively low.

When it comes to the legal regulations of the entry of foreign workers to the Czech Republic, it is first necessary to take into consideration this distinction into two groups. The first one is a group of workers from EU/EEA countries. Such workers, as well as their family members, can participate in the labour market of the Czech Republic almost without limitations as one of the main aims of EU/EEA is to ensure the free movement of workers between Member States. The only obligation imposed on the employers of these workers by the Czech laws is to inform the regional branch of the Labour Office about the employment, changes in reported data or termination of employment. In addition, employers are also obliged to keep records of EU citizens whom they employ as well as of their family members.

EU/EEA citizens can also conduct business as self-employed subject to registration with a local Trade Office, which is a relatively easy process (this issue will be discussed below).

A more burdensome regulation has been adopted for non-EU citizens, or as they are also referred to, *third country workers*, whose employment is subject to a permit regime. The permit then takes two forms. First of all, it is a residence permit and a work permit.

The following subchapter describes the individual types of permits.

Employee card

The most frequently sought after permit is called an *employee card*. There are two types of this card that can be issued. The first with a so-called dual character, which, if issued, entitles its holder both to reside as well as to work in the Czech Republic without a need for the card holder to apply for two permits. The second type is an employee card with a non-dual character, which serves foreigners only as a residence permit, while entry into the labour market is ensured by different means.[275] A non-dual employment card is issued only if the foreigner enjoys the right of free entry into the labour market of the Czech Republic, i.e. the foreigner does not need a permit to work in the Czech Republic, but still needs a permit to reside in the Czech Republic. A typical case of this would be a foreigner who studied in the Czech Republic and obtained a Czech

275 Štěpán Pastorek and Jakub Tomšej, "Zaměstnávání cizinců ze třetích zemí ve světle poslední novely [Employment of foreigners from third countries in the light of the latest amendment]," *Právní rozhledy* 6 (2020): 191–196, here 193.

university degree, thus gaining free entry into the Czech labour market. This article, however, focuses mainly on the first alternative.

To summarize the defining aspects of an employee card with a dual character, it is a long-term residence permit that allows the foreigner who acquires it to reside as well as to work in the Czech Republic. What makes the employee card (i.e., employee card with a dual character) specific, is the fact that it is always issued for a certain position for which the employee has already signed an employment contract (or a future employment contract) with a certain employer. Although an employee card is issued for one specific work position with a specific employer, it is not impossible to change both the position and the employer. If a worker who was issued an employee card desires a change, he/she must fulfill a series of obligations, one of which is to notify the Ministry of the Interior at least 30 days before such a change. Another limitation is that the card holder is entitled to change the employer during the first 6 months since the decision to issue an employee card has come into force. However, there are certain exceptions to this rule. For example, in the event of termination of employment (for reasons under Section 52 letters a–e of the Labour Code), or by agreement for the same reasons, immediate termination of employment, or termination of employment in a probationary period. If the foreigner terminates his/her employment within 6 months of the issuance of the employee card in a manner other than one of the prescribed, he/she is not given any other option than to leave the territory of the Czech Republic.

An application for an employee card may be submitted by a foreigner if the purpose of his/her stay in the territory of employment rests in one of the job positions listed in the central register of vacancies available to the holder of the employee card, which is kept by the Labour Office. The fact that the vacancy is listed in the central register of vacancies is than documented by the foreigner together with the relevant contract and the number under which the given vacancy is kept in the central register of vacancies.

In addition, the law also stipulates the conditions of a given employment relationship. The employee's (future) job must be established by an employment contract or another labour-law agreement. Moreover, it must be set for at least 15 hours a week, and the local minimum salary rate (from 1 January 2022 it is set at CZK 16,200 per month – approx. 660 EUR[276]) must be observed. The Act on the Residence of Foreigners

276 Ministry of Labour and Social Affairs, "Minimální mzda se od ledna 2022 zvýší na 16 200 ko-

in the Czech Republic also stipulates other conditions that an applicant for an employment card must meet.

Moreover, an employee card can only be issued in the event the Labour Office does not find a suitable local candidate for the position in question. For this reason, employers have an obligation to notify the Labour Office of all the positions that they are considering filling with an employee card holder. The application for an employee card is submitted to the embassy of the Czech Republic in the employee's country of origin and must be accompanied by several documents, including a valid travel document, a certificate of criminal record, a copy of the employment contract and a signed confirmation of accommodation, as well as documents proving the professional background of the applicant.[277]

The application must be filed at a Czech embassy outside the territory of the Czech Republic unless the applicant already possesses some form of long-term visa pertaining to the Czech Republic. Citizens of certain countries have the right to choose the embassy at which they apply; for other countries' nationals, an obligation to file at the home embassy of the applicant applies. This sometimes leads to complications in practice as the preparation of the application usually requires the presence of the applicant in the Czech Republic (e.g., based on a visa-free stay or based on a short-time tourist visa) in order to attend interviews, find accommodation, etc., but afterward, the applicant is required to leave the country to file the application and wait until it is processed.

The main issue that foreign workers face is the time it takes to receive a decision regarding their permit. Statutory deadlines for local authorities to issue all relevant permits usually range from 3 to 4 months since the local employer's first interaction with the authorities. In some cases, even these deadlines are being missed by the authorities and delays of several months have been reported. As speed is usually of the essence in the hiring process, this barrier may influence the employer's interest in accepting applicants who have not yet started the procedure.

In practice, the database of jobseekers registered with the Labour Office contains more applicants with lower levels of qualification, and the Labour Office is likely to act decisively where an employer's notification

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run [The Minimum Wage Will Increase to 16,200 Crowns from January 2022]," Press Release, November 5, 2021, https://www.mpsv.cz/documents/20142/2061970/TZ_05_11_2021_minim%C3%A1ln%C3%AD+mzda_vl%C3%A1da_16200.pdf/365eced7-165c-9e37-0eba-ef17c59cb4c6.

277 Section 42h of the Act on the Residence of Foreigners in the Czech Republic.

relates to a job that can be easily filled by such jobseekers. For qualified and managerial positions, it is less likely that the Labour Office's search for a local candidate will be successful, and therefore we often do not observe any activity on the part of the Labour Office.

Blue card

Another tool enabling third country nationals to access the Czech labour market is the so-called *blue card*. This card represents a long-term residence and work permit for a foreigner for the purpose of performing a job requiring high qualification. As is always the case with an employee card, the blue card is always issued only for the performance of a specific job with a specific employer.

The blue card entitles its holder to stay and at the same time work in the Czech Republic, i.e., the foreigner does not need a special work permit. In the context of the Act on the Residence of Foreigners in the Czech Republic, a job requiring high qualification means a job requiring a duly completed university degree or a higher professional education if the studies lasted at least 3 years.

The foreigner, as well as the position such foreigner is applying for, must also meet other conditions, for example, concluding an employment contract for at least one year for the statutory weekly working hours (40 hours per week) and an agreed gross monthly or annual wage, the amount of which corresponds to at least 1.5 times the average gross annual wage in the Czech Republic.

The blue card is issued with a validity period of 3 months longer than the period for which the employment contract was concluded, but for a maximum of 2 years.

A change of employer or job classification of the blue card holder is subject to prior consent of the Ministry of the Interior granted during the first two years of the foreigner's stay in the Czech Republic, provided that the blue card holder continues to hold a highly qualified job that may be filled by a foreigner according to the special regulations. After two years, the blue card holder is obliged to notify the Ministry of the Interior of any changes within 3 working days but there is no approval procedure.

As was the case with an employee card, the application for a blue card is preceded by a compulsory notification of the vacancy to the Labour

Office and by a labour market test.[278] A foreigner who desires this permit must submit an application using a prescribed form at the embassy of the Czech Republic of his/her country of residence. It can be filed in the Czech Republic if the applicant already resides here on the basis of a long-term visa or long-term stay, but also if the applicant holds a blue card issued by another EU Member State.[279] The foreigner's application is then directed to the Ministry of the Interior of the Czech Republic.

The blue card remains very underused, as only 838 foreigners were blue card holders in 2020, which is a marginal number compared to the number of employee card holders that reached 71,579 in the same year.[280]

Other ways of participation in the labour market by foreigners from third countries

In addition to the employee card and the blue card, there are other possibilities that enable foreigners from third countries to enter the labour market of the Czech Republic. These instruments include, for example, a visa for a stay of more than 90 days for the purpose of seasonal employment (Section 32 of Act on the Residence of Foreigners in the Czech Republic) or a card of an internally transferred employee (Section 42k of Act on the Residence of Foreigners in the Czech Republic). Another relatively new institute (introduced by an amendment in 2019) is the extraordinary work visa. By its nature, it is a type of long-term work visa[281] issued by the Ministry of the Interior only if a government regulation has been issued in the event of an exceptional shortage of workers on the labour market in a particular sector, concerning particular professions or in the event of an emergency. Such government regulation may then define, for example, the branch or profession for which a foreigner may apply, as well as the nationality of the foreigner who is entitled to apply for this visa or set a limit of the maximum number of applications. An extraordinary work visa is issued with a period of validity and a period of stay in the territory of a maximum of 1 year and its period of validity

278 Jakub Tomšej, *Zaměstnávání cizinců v České republice [Employment of foreigners in the Czech Republic]*, (Praha: Wolters Kluwer, 2018), 64.

279 Ibid.

280 Czech Statistical Office, "The Life of Foreigners in the Czech Republic 2021," https://www.czso.cz/documents/10180/142303958/29002621.pdf/118e8383-5088-4e32-b777-e1706a636225?version=1.3.

281 Section 30 of the Act on the Residence of Foreigners in the Czech Republic.

cannot be extended. The foreigner applies for a visa at the Czech embassy in the foreigner's country of origin or in the country where the foreigner has been granted a permanent or long-term residence permit. Although it is a relatively new institute in the Czech legal system, the government did not hesitate to apply it. Taking effect on 1 December 2019, the government issued a Government Regulation No. 291/2019 Coll., on extraordinary work visas for Ukrainian nationals working in agriculture, food, or forestry, with the validity of the regulation limited to 31 December 2022. The regulation also set the maximum number of applications, limiting their number to 125.[282]

Another interesting institute is a long-term stay for the purposes of looking for a job or starting a business. This permit can be applied for by a graduate of accredited study programs of universities in the Czech Republic, as well as by a researcher whose research in the Czech Republic has ended. Such a residence permit lasts 9 months and cannot be further extended. The application of this permit applies, for example, to cases where a foreigner is a graduate of a Czech university, thus acquiring free access to the labour market in the future, however, such a worker does not automatically acquire the right to reside in the Czech Republic, which is why long-term stay in order to look for a job or start a business was introduced.

As already mentioned in the previous sections of this article, students are a significant, albeit still developing, part of the workforce in the Czech labour market. In order to enable students to remain in the Czech Republic, the institute of a long-term residence permit for the purpose of study was introduced. An application for a long-term residence permit for the purpose of studying in the territory of the Czech Republic may be submitted in cases of study programs, with the exception of education in a primary school, secondary school or conservatory, which are not carried out as part of an exchange program or professional practice.

The same applies to scientific researchers, as they may have an impact on the labour market of the Czech Republic. Therefore, a long-term residence permit for the purpose of scientific research was also introduced. An application for such permit can be submitted if the foreigner has concluded a hosting agreement with a research organization. Research organization means a public research institution, university or other research organization included in the list of research organizations approved for the admission of researchers from third countries.

282 Pastorek and Tomšej, "Zaměstnávání cizinců ze třetích zemí."

Self-employed

Foreigners may participate in the labour market of the Czech Republic in other ways, one of which is self-employment. Citizens of EU/EEA Member States or citizens of the Swiss Confederation can do business in the Czech Republic under the same conditions as Czech citizens. The main condition in these cases would usually be obtaining a trade license.

Foreigners from third countries are once again in a more difficult position, as they have to apply for a special permit – a long-term visa for business purposes. If granted, successful applicants can do business under the same conditions as Czech citizens. In order to receive such a permit, a foreigner from third country has to submit an application and provide the required documents, one of which proves that the foreigner has sufficient means to stay within the territory, another is a confirmation of the purpose of the stay (e.g., an entry in the trade register or in the commercial register). In addition, all registrations and permits to conduct business must be obtained prior to the filing. Moreover, numerical quotas may be set for the number of applications at selected embassies of the Czech Republic, such quotas are set in Government Regulation No. 220/2019 Coll.

While employee cards are usually granted to everyone who submits all required documents and passes the local labour market test conducted by the Labour Office, we have seen cases where a business visa was withheld for various reasons, including minor breaches of obligations that do not lead to severe consequences for local businesspeople.[283]

An appeal against the decision on denying a visa would be decided by the Ministry of the Interior. Unlike most other administrative decisions, a decision denying a visa to a non-EU citizen is exempt from any court review. This approach has been repeatedly challenged by foreigners in the Czech Constitutional Court which has the power to render inapplicable any provisions of the law that would be contrary to the Czech Constitution. The Constitutional Court has, however, always held that as Czech law does not stipulate a legal claim of a foreigner to receive

283 In one of these cases, an extension of a business visa was not granted to a foreigner due to his failure to publish annual balance sheets and other accounting documents of a company run by him in the Czech Companies Register. Czech law requires all companies to publish the documents in the Companies Registers but the vast majority of local companies do not comply with the rule due to the confidential nature of the data. In theory, a fine could be imposed for such a breach. In practice, the Companies Register courts claim that they have no capacity to control this and no fines are usually issued.

a visa or a visa extension, the exemption from the court review does not conflict with constitutional rights.

On the other hand, in 2009 the Constitutional Court[284] rendered inapplicable a provision of the Act on the Residence of Foreigners in the Czech Republic which provided for an exemption from the court review even for repatriation decisions[285] in cases where a foreigner was found to reside illegally within the Czech territory. The Constitutional Court was of the view that the Charter of Fundamental Rights and Freedoms (which forms a part of the Czech constitutional system) grants foreigners certain rights which can be breached upon repatriation, making a reference in particular to repatriation to a country where the foreigner's life or freedom might be at risk. Following this decision, the court review of any repatriation decision is permitted.

Recent developments

The legal regulations of residence and employment of foreigners have undergone fundamental changes in particular as a result of the adoption of Act No. 176/2019 Coll., which amended the Act on the Residence of Foreigners in the Czech Republic, as well as the Employment Act (and many more), in effect since 31 July 2019. These changes include, for example, the aforementioned extraordinary work visa and long-term stay for the purpose of finding a job or starting a business. The amendment also changes the process of issuing an employee card with a dual character as well as the process of a change of an employer for dual employee card holders. At the end of the proceeding, there is no administrative decision, as it used to be before the amendment, but the law has taken over the diction of *notification*: the employee cardholder only notifies the administrative body about a change of employer. However, such a notification is not unilateral, as it might seem at first glance as the Act on the Residence of Foreigners in the Czech Republic in Section 42g paragraph 9 requires the Ministry of the Interior to comment on this notification within a 30-day period regarding whether all conditions required for the change have been met.

The labour market test also underwent changes as a result of the amendment. As already stated in the introductory chapters of this article,

284 Pl. ÚS 26/07 (47/2009 Sb.; N 218/51 SbNU 709).

285 A repatriation decision represents a legal basis for an involuntary termination of the foreigner's stay within the Czech territory.

in order to apply for an employee card, the position you wish to apply for must be in the central vacancy register. The job will be entered into such records only after (or according to the Employment Act) this job has been unsuccessfully offered by the Labour Office for at least 30 days from the notification by the employer. However, as a result of the amendment in question, the time required to publish (i.e., offer) the position can be (in some cases) reduced to 10 days, from the original 30 days. The change can then be considered a step in favour of employing foreigners. This certainly is not a definitive and complete list of changes introduced by the amendment in question, however, it is sufficient to demonstrate that these changes are rather extensive.[286]

It is expected that further changes may be coming. Another novelty may lie in the introduction of an instrument of a *reliable employer* into Czech law. In the future, such a term should be used in immigration programs in order to have a positive effect on the employers of workers from abroad in order to prevent the negative phenomena associated with labour migration – such as illegal work, labour exploitation and social dumping. An employer classified as a reliable employer would then have certain advantages when employing foreigners. According to the Ministry of Labour and Social Affairs, a reliable employer could be an employer who duly fulfils his obligations under labour, financial, or social law. A similar diction has already emerged in European legislation, where, for example, Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employees and repealing Council Directive 2009/50/EC, use the term *recognized employer*. However, the current legislation does not recognize the concept of a reliable employer or recognized employer. On the other hand, Czech law has a similar term, namely the term *unreliable employer.*

The term was introduced through the Act on the Residence of Foreigners in the Czech Republic (Section 178f), as it protects foreign workers from employers who repeatedly fail to fulfil their legal obligations. In addition, it serves as a preventive measure against covert agency employment. As an unreliable employer is then marked a natural person or legal entity which has been fined for allowing illegal work in the period of 4 months prior to the application, as well as persons who have duly and timely failed to register their employee for social security

286 For other changes see for example Pastorek and Tomšej, "Zaměstnávání cizinců ze třetích zemí."

or public health insurance or a person who does not meet the debt-free condition.[287] If the employer is marked by the Ministry as unreliable, it is not possible to issue an employment card to a position offered by this employer or even to such employer for a certain period of time. The classification of a foreigner's employer as unreliable is also a reason for not granting a long-stay visa (with exceptions[288]).

As is evident from the above-mentioned, the Ministry of Labour and Social Affairs, therefore, makes an obvious effort to improve the position of foreign workers in the Czech labour market, especially with regard to fighting the not uncommon abuse of their weaker position.

Discrimination and employment of foreigners

Foreigners in the Czech labour market hold an unequal position, where their participation is often conditioned by permits. The law allows the possibility to reject job seekers and give preference to domestic employees, even if the foreigner is otherwise a more suitable candidate.[289]

Under local antidiscrimination laws, citizens working within the territory of the Czech Republic must not be discriminated against by employers due to their nationality, origin, ethnicity, or religion and have the right to enjoy the same salary and working conditions as local employees. But the enforcement of these rights in practice may be difficult. There have been many cases reported where non-EU citizens were working illegally in the Czech Republic – without a valid employee card or even an employment contract, under poor working conditions and for a very low salary. If discovered by the authorities, the persons must be repatriated due to having been within the Czech territory without a valid permit, and there is little chance of successful redress against their local so-called employer.

Foreigners who are duly employed under an employment agreement are granted full protection under the Czech Labour Code. This includes the right to a minimum wage, protection against dismissal, regulation of working hours, health and safety at work, employer's liability for damage and other important aspects.

Under older Czech case law, providing such employee protection could be avoided if parties to an employment contract with an inter-

287 Section 178f of the Act on the Residence of Foreigners in the Czech Republic.

288 Section 46 Article 6 Letter d) of the Act on the Residence of Foreigners in the Czech Republic.

289 Tomšej, "Přístup cizinců na pracovní trh ČR", 699.

national aspect (for example if the employee was a foreigner) agree on choosing a different governing law. In a well-known case from 2009, the Czech Supreme Court upheld as valid an agreement between a Czech branch office of a US company as the employer and a Croatian citizen as the employee which stipulated that their employment contract was governed by Californian law.[290] The dispute was initiated by the employee after she was dismissed in 2006 without cause and without a notice period (only with certain payment in lieu of notice). Despite the fact that the employee could validly argue that her position was undoubtedly weaker than the position of Czech employees protected by local law (which stipulates that termination of employment is possible only for specific reasons and with a notice period of at least two months), courts have applied the then valid Czech Act on Private International Law, based on which a choice of law in a contract of employment was valid to the extent that it did not conflict with public order. According to the view of the Supreme Court, termination of employment based on an at-will doctrine did not conflict with public order, and thus the termination was deemed valid.

Even though the reasoning of the Supreme Court is in line with the prevailing interpretation of the Czech Act on International Private Law and was in line with most of the Czech legal doctrine,[291] it must be acknowledged that this approach has significantly increased the vulnerability of foreign employees and weakened their position in comparison to Czech employees.

From the current perspective, the conclusions of the Supreme Court seem to be superseded by the Rome I Regulation. According to Article 8(1) of the Regulation, choice of law in an employment contract may not result in depriving the employee of the protection afforded to him or her by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable. This brings a significantly higher level of protection to foreign workers, as all of the protections defined by the Czech Labour Code consist of mandatory provisions that cannot be derogated by an agreement between the employee and the employer. What remains questionable is the extent to which foreign employees are aware of these provisions and the measures that they can take to enforce them.

290 Decision file no. 21 Cdo 4196/2007.

291 E.g., Martin Štefko, "Několik poznámek k doktríně At-Will Employment a její aplikaci v České republice [Few remarks on the at-will doctrine and its application in the Czech Republic]," *Práce a mzda* 11 (2009).

Conclusions

Currently, voices calling for more restrictions and limitations to the access of foreigners to the Czech labour market are much stronger. Even though from a statistical point of view, foreigners are an indispensable part of the Czech economy, as was demonstrated in previous parts of this article.

It can be assumed that more restrictions regarding the access of foreigners to the Czech labour market as well as the general negative attitude towards immigration lead the Czech Republic to exclude itself from competitiveness vis-à-vis other participants in the international market who have more favourable legislation. For example – if a company does not have enough employees, it may prove difficult for such a company to expand its production and it will therefore cease to be competitive with companies in the same sector covered by the legislation that lacks such extensive restrictions and limitations.

However, restrictions aimed at reducing the number of foreigners on the market lead to better protection and an improved position of workers who are citizens of the Czech Republic as such restrictions will usually lead to higher wages, larger choice in employers, job security or less business competition.

The Czech Republic (at least for the time being) prefers stability and protection of the local labour market over competitiveness. This is despite the fact that the Czech Republic is a relatively popular destination for certain groups of foreigners (especially from Eastern Europe), especially due to its low unemployment rate and shortage of employees in the market. Such an approach can be described by many as a missed opportunity.

To the delight of many employers, the Ministry of Labour and Social Affairs in particular is aware of the situation at hand and is taking (or is trying to take) steps to reduce the current restrictive approach. Among these steps are the newly introduced long-term visas for employees and students, the simplification of the process regarding employee cards or the establishment of institutes such as *reliable employer*.

However, the positive development in the access of foreigners to the labour market of the Czech Republic is directed primarily at workers who aim to become employees, not as much at foreigners who come to the Czech Republic for business purposes (to become self-employed). An example of a move towards restriction is the introduction of quotas for certain embassies on long-stay business visas.

In conclusion, the restrictive trend regarding the employment of third-country workers is declining quite significantly, but it can also be assumed that the Czech Republic prefers a protectionist policy with regard to the local labour market over larger-scale competitiveness. However, such a view is purely analytical and seeks to present objective facts from a large-scale perspective. The issue of employing foreigners can undoubtedly be viewed through the prism of people for whom these foreigners would constitute a direct competition. The concerns of this group of people regarding the diminution of wages, job losses, etc. can then be considered more than relevant and justified.

According to the authors of this article, it is necessary to enable the Czech labour market to be competitive, but at the same time, it is appropriate to respect and consider the fates of the individuals who may be the most vulnerable to certain changes.

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