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INTERNAL MIGRATION OF WORKERS IN THE EUROPEAN UNION: LEGAL ASPECTS OF LITHUANIA'S EXPERIENCE IN TRANSPOSING THE POSTING OF WORKERS DIRECTIVE

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ABSTRACT

Freedom to provide services and free movement of workers are linked to the processes of permanent intra-EU migration, which are regulated, *inter alia*, by the national legislation implementing PWD. Consequently, the posting of workers within EU is not only part of the work organization process, but also part of a wider phenomenon of internal migration of workers. Accordingly, posted workers are to be considered as internal labour migrants. The

regulation of the posting of workers must consider the legitimate interest of Member States in protecting their markets from social dumping as well as ensure minimum guarantees for posted workers. These circumstances presuppose changes in the regulation of the posting of workers. This article identifies four stages in the transposition of PWD into Lithuanian national law that are causally related to changes in European legislation and Lithuanian labour law reform as of 2017. It presents the legal assessment of national legal regulation and case law, identifying the related legal problems. The article pays special attention to the legal regulation of the remuneration of a posted worker, established by PWD (*Directive 96/71/EC of the European Parliament and of the Council on 16 December 1996 concerning the posting of workers in the framework of the provision of services* (Official Journal (EU), 2004, no. L 18) [Directive 96/71/EC], with the amendments introduced by *Directive 2014/67/EU of the European Parliament and of the Council from 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 Revision 4 of the EU Posting of Workers Directive Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')* (Official Journal (EU), 2014, no. L 159) [Directive 2014/67/EU] and *Directive 2018/957/EU of the European Parliament and of the Council on June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services* (Official Journal (EU), 2018, no. L 173) [Directive 2018/957/EU]). It also explains the impact on the regulation of employment relations for posted workers in Lithuania stemming from Directive 2019/1152 on transparent and predictable working conditions in the EU.

KEYWORDS

Internal migration of workers, internal labour migrants, the posting of workers, allowances specific to posting, daily allowances, application of PWD and Directive 2019/1152

INTRODUCTION

Millions of citizens of the European Union (EU), while enjoying their freedoms guaranteed by primary EU law,¹ are at the same time participating in the ongoing process of internal migration of workers. Therefore, this phenomenon has already become part of a wider phenomenon – the internal migration of workers. There were 2.8 million posted workers in the EU in 2017, a number which increased by 83% between 2010 and 2017.² According to 2018 data³, there were about 3 million EU citizens who could have been internal labour migrants⁴. The choice of workers from Member State to work within the EU is determined, *inter alia*, by the nature of the work they perform, the differences in the level of economic development of Member State, the labour demand, unemployment rate, differences in wages, social security systems, etc. In 2018 internal labour migrants accounted for only 0.8 percent of all workers of the EU. This is a relatively small proportion of the total workforce in the EU. Anyway, the internal migration of 3 million workers is a significant social phenomenon in the EU, which tends to grow⁵.

Internal migration of workers within the EU inevitably involves both competition between Member States and the rights of such internal labour migrants. To regulate it and to remove obstacles to the free movement of persons and services between Member States *inter alia* the Posting of Workers Directive (PWD) was passed. The protection of the rights of internal labour migrants directly depends on the transposition and application of PWD in the individual Member State. The implementation of PWD involves the coordination of the interests of individual Member State as well as the additional rights and obligations of the workers and employers involved in the specific process of posting. Therefore, Member States have different experiences related to the process. It can be assumed that the experience with the application of PWD in each Member State depends on, *inter alia*, the number of posted workers and the economic sectors to which they are posted.

The number of posted workers in Lithuania in 2010–2018 was not high (1,850 posted workers worked in Lithuania in 2010, in 2011 – 2,248, in 2012 – 3,497, in 2013 – 2,274, in 2014 – 1,930, in 2015 – 2,404, in 2016 – 2,018, in 2017 – 2,261,

¹ *The consolidated version of the Treaty on the Functioning of the European Union*, Official Journal (EU) (2012, no. C 326).

² Regina Konle-Seidl, "Fact Sheets on the European Union – 2021. Posting of Workers" // www.europarl.europa.eu/factsheets/en.

³ Frederic De Wispelaere, Lynn De Smedt, and Jozef Pacolet, *Posting of workers – Report on A1 portable documents issued in 2018* (Leuven: HIVA-KU, 2018; Luxembourg: Publications Office of the European Union, 2020), 8, 10.

⁴ For the purposes of this Article, 'internal labour migrants' shall mean persons to whom PD A1 certificates, which prove that such person is subject to a social security system 'Portable Document A1 (PD A1)', have been issued by the Member States.

⁵ According to 2017 data, there were about 2.8 million EU citizens who could have been internal labour migrants (Frederic De Wispelaere and Jozef Pacolet, *Posting of workers – Report on A1 portable documents issued in 2017* (Leuven: HIVA-KU, 2018), 9, 15, 45.).

in 2018 – 3,035⁶). Such a low rate of internal labour migration related to Lithuania means that there are not (and cannot be) many legal disputes involving the need to apply statutes governing the employment relationship of posted workers. On the other hand, as can be seen from the above data, the number of workers posted to Lithuania is growing.

The European Parliament and the Council on 20 June 2019 adopted Directive (EU) 2019/1152 on transparent and predictable working conditions in the EU⁷ (Directive 2019/1152), the provisions of which Lithuania must transpose into national law by 1 August 2022 at the latest. Given the overlap between some of the regulatory objectives of Directive 2019/1152 and PWD, and the legal framework contained therein, the question arises as to whether the transposition of Directive 2019/1152 will necessitate adjustments to the current national legislation on posted workers.

The aim of this article is to acquaint the process of transposing PWD into Lithuanian national law, the challenges that have arisen in this process, and to reveal the peculiarities of its application in the case law of Lithuania.

1. PWD AS A LEGAL INSTRUMENT TO UNIFY THE PROCESSES RELATING TO BOTH THE FREEDOM TO PROVIDE SERVICES AND THE FREE MOVEMENT OF WORKERS

When transposing a specific directive into national law, each Member State must ensure that its national legislation achieves the specific objectives set out in the directive. In this sense, there are three restrictions on the discretion of the State. First, the relevant internal measures must correctly reflect the content of the directive. Secondly, the national authorities must comply with the time-limit for implementation laid down in the directive. Third, it must choose the most appropriate forms and methods of incorporation. All this means is that the discretion of the national authorities depends on the accuracy of the directive in question.⁸

The Court of Justice of the European Union (CJEU) held that PWD pursues a dual objective. First, it seeks to ensure a climate of fair competition between national

⁶ Much more workers are posted from Lithuania to other EU countries – 30,801 workers were posted from Lithuania in 2018. 49.4 % of the posted workers, which were posted to Lithuania in 2017, worked in industry (of which – 39.8% in construction), 50.6% – in the service sector (Frederic De Wispelaere, Lynn De Smedt, and Jozef Pacolet, *supra* note 3, 28, 29, 30). From Lithuania in 2018 mainly to Germany, Norway, Sweden, and the Netherlands 30,629 workers were posted (*Explanatory note of the drafts of Law on Amendments to Articles 108 and 109 and the Annex of the Labour Code of the Republic of Lithuania, of Law on amending Article 6 of Law of the Approval, Entry into Force, and Implementation of the Labour Code of the Republic of Lithuania No. XII-2603 // <https://e-seimas.lrs.lt/rs/legalact/TAK/4378278015a011eaad00dac7ebcb2435/>*).

⁷ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 concerning the transparent and predictable working conditions in the European Union, Official Journal (EU) (2019, no. L 186).

⁸ Walter Cairns, *Europos Sąjungos teisės įvadas (Introduction to European Union Law)* (Vilnius: Eugrimas, 1999), 105.

undertakings and undertakings which provide services transnationally, inasmuch as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State. Secondly, it aims to ensure that posted workers will have the rules of the host Member State for minimum protection with regards to the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State (*Laval*⁹; *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*¹⁰).

With respect to the objectives of PWD, the Supreme Court of Lithuania (SCL)¹¹, stressed that the freedom to provide services, as established in Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU), ensures the right of an employer operating under the jurisdiction of one Member State to conclude contracts with a customer operating in another Member State for providing services or performing work, as well as the right of the said employer, in order to fulfil these contractual obligations, to post its workers to this Member State to perform temporary work. The status of posted worker who is sent to provide services in another Member State determines the need of ensuring certain fundamental rights and guarantees at EU level, since competition between service providers from different Member States may not result in the competition of the minimum or imperative labour standards, which can violate the interests of the weaker party – the worker. The aim of ensuring fair competition around posting workers for the provision of services led to the adoption of PWD, regulating the status of and the guarantees applied to posted worker.

While agreeing that EU rules on the free movement of persons go beyond their original context¹², it should be stressed, that the posting of workers goes beyond the narrow scope of the freedom to provide services (Articles 54 and 56 to 62 TFEU) and must be governed by *inter alia* provisions of TFEU Articles 45-48 governing the free movement of workers. The later provisions not only enshrine the principle of freedom of movement, but also lay down various rights relating to that principle – equal treatment in employment, equal rights to move and remain in any part of the community – subject to the possibility of a public policy exception. Thus, the PWD in some extent must also be regarded as one of the legal instruments which seeks to

⁹ *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, CJEU Case C-341/05 (2007), ECLI:EU:C:2007:809, para. 74, 76.

¹⁰ *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, CJEU Case C-396/13, (2015) ECLI:EU:C:2015:86, para. 30.

¹¹ *The order of 2 March 2018 in civil case No 3K-3-68-248/2018*, the Division of Civil Cases of SCL, para. 34–36.

¹² Walter Cairns, *supra* note 8, 209-210.

unify not only the processes relating to the freedom to provide services but also those relating to the free movement of workers.

Posting is often linked to broader issues, such as unfair competition based on labour costs and 'social dumping'¹³. The doctrine of Lithuanian labour law¹⁴ also highlights the issue of social dumping. According to it, the transposition of PWD is aimed at protecting national employers (and workers) against social dumping, which could occur due to the workers of foreign employers arriving to Lithuania to perform temporary work, since they, under the norms of lower-level social protection applicable to them, can gain a competitive advantage over national employers operating in Lithuania.

In Lithuania social dumping is identified as the phenomenon when workers arriving from states with lower labour costs (lower wage states or states in which employers are not bound by strict norms of labour law) to states with higher labour costs compete with the workers of local employers for local contracts, reduce jobs for local workers, and bring down the cost of workforce.¹⁵ However, such a definition of social dumping is not precise in the context of the interpretation and application of the Directive. In this respect, it should be agreed with Magdalena Bernaciak¹⁶, who concluded, that social dumping should not be regarded as the exclusive domain of low-wage countries. Mentioned conclusions are based on the Bohle's (2008) study of V4's rivalry over automotive FDI¹⁷, and Hancké's (2000)¹⁸ account of the concession spiral involving West European automotive plants. These researchers deny popular discourse's usual portrayal of actors from poorer countries 'dumping' on their richer counterparts. In any case, the problem of social dumping in the implementation of PWD is important for both Member States with lower and higher wages, as it has a direct impact on their social and economic interests.

On 2018, the revision of PWD was adopted by the European Council and approved by the European Parliament (Directive 2018/957). As it announced in the proposal from the European Commission¹⁹, this revision of PWD is addressed to prevent unfair practices and to promote the principle that the same work at the same

¹³ Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould, and Feliciano Iudicone, *Posting of Workers Directive: Current Situation and Challenges* (European Union, 2016), 32.

¹⁴ Tomas Davulis, *The Commentary to the Labour Code of the Republic of Lithuania* (Vilnius: Centre of Registers, 2018), 337.

¹⁵ *Ibid.*

¹⁶ Magdalena Bernaciak, "Social dumping: Political catchphrase or threat to labour standards?" *ETUI Working Paper* 2012.06: 33 // https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208393.

¹⁷ Dorothee Bohle, "Race to the Bottom? Comparative Institutional Advantages? Competition of Capitalisms in the Enlarged EU," Paper presented at the Political Economy Research Group seminar, Central European University, Budapest, 26/3/2008.

¹⁸ Bob Hancké, "European Works Councils and Industrial Restructuring in the European Motor Industry," *European Journal of Industrial Relations* 6(1) (2000).

¹⁹ *Proposal for a Directive of the European Parliament and of the Council amending 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*, COM/2016/0128 final - 2016/070 (COD) // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A128%3AFIN>.

place should be remunerated in the same manner. When the European Commission in March 2016 proposed a revision of the PWD, questions related to social dumping came into focus and a stated ambition in the proposal was that posted workers should be subject to the same rules as local workers.²⁰

2. STAGES OF TRANSPOSITION OF PWD INTO LITHUANIAN LAW

Lithuania acceded to the EU on 1 May 2004²¹. Thus, it was not among the Member States that could objectively be bound by the obligation, established in Article 7 of PWD, to adopt the laws and other legal acts necessary to comply with this directive by 16 December 1999. In terms of the scope of the consolidation of the provisions of PWD in Lithuanian national law from 1 July 2004, four stages can be identified: (1) initial transposition of Directive 96/71/EC (1 July 2004 – 28 June 2016); (2) transposition of Directive 2014/67/EU (28 June 2016 – 1 July 2017); (3) legal regulation of posting related to 2017 labour law reform (1 July 2017 – 30 July 2020); (4) transposition of the provisions of Directive 2018/957/EU (since 30 July 2020).

2.1. INITIAL TRANSPOSITION OF DIRECTIVE 96/71/EC

According to the regulation of Labour Code of the Republic of Lithuania (hereinafter – the Labour Code of 2003²²), which was valid until 1 July 2004, employment relations between foreign employers and workers – non-permanent residents of the Republic of Lithuania – when they worked on behalf of the foreign employer in the territory of the Republic of Lithuania, were not regulated via Lithuanian labour laws. To ensure the implementation of PWD, this conceptual provision was repealed. Also, preconditions to expand the scope of application of Lithuanian national labour law provisions, *inter alia* for those workers temporarily posted to the territory of the Republic of Lithuania by foreign employers, were

²⁰ Bengt Furåker and Bengt Larsson, "Revision of the EU Posting of Workers Directive, Social Dumping and Trade Unions' Position"; in: *Trade Union Cooperation in Europe* (Cham: Palgrave Pivot, 2020) // <https://doi.org/10.1007/978-3-030-38770-9>.

²¹ *The Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union*, Official Journal (EU) (2003, no. L 236).

²² *Labour Code of the Republic of Lithuania*, Official Journal (2002, no. 64-2569).

created. It has been established, that a special act will be adopted to implement PWD.

A special act – the Republic of Lithuania’s Law on Guarantees for Posted Workers²³ – was adopted more than a year after Lithuania's accession to the EU²⁴.

This act introduced broader definition of ‘posted worker’. Under PWD ‘posted worker’ means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works (Article 2 (1)). Nevertheless, Law on Guarantees for Posted Workers laid down the definition of ‘posted worker’, as a worker who is habitually employed in the territory of the Republic of Lithuania but has been posted by the employer to temporarily perform work in another Member State, as well as a worker who is habitually employed in another state but has been posted to temporarily perform work in the territory of the Republic of Lithuania. This law applied where ‘posted worker’ was posted under a contract for the provision of services or the performance of work, as concluded by the employer with a customer operating in that Member State, or in a branch or representative office of the undertaking of the employer or an undertaking of the group, or as a worker of a temporary employment undertaking.

Law on Guarantees for Posted Workers introduced a legal framework to implement the PWD's requirement to ensure a minimum level of protection for posted workers. The law in that regard laid down such areas of employment relationship in which the provisions of the State to whose territory the worker is posted are to apply to the posted worker, irrespective of the law applicable, as: (1) maximum work periods and minimum rest periods; (2) minimum paid annual holidays; (3) the minimum rates of pay, including overtime rates; (4) the conditions of employment of workers of temporary employment undertakings; (5) health, safety and hygiene at work; (6) protective measures with regard to the terms and conditions of the employment of young people, pregnant women and women who have recently given birth and are breast feeding; (7) prohibition of discrimination at work. This law consolidated the *in favorem* principle, i.e., it was prescribed that, where the legal provisions of a state whose law was applicable to an employment contract or employment relationship granted workers more favourable conditions than the provisions of this law, the legal provisions of the State whose law was applicable to the employment contract or employment relationship applied. At the same time, there were established exceptions to the application of the minimum wage, overtime pay and minimum annual leave guarantees, according to which: (1) the said guarantees shall not apply where the initial assembly and/or first installation of goods

²³ Law on Guarantees for Posted Workers of the Republic of Lithuania, Official Journal (2005, no. 67-2406), Register of Legal Acts (2016, no. 2016-17710).

²⁴ Lithuania joined EU 1 May 2004.

was an integral part of a contract for the supply of goods and was necessary for taking the goods supplied into use and was carried out by the skilled and/or specialist workers of the supplying undertaking, if the period of posting did not exceed eight days; (2) the guarantees related to the minimum rates of pay, including overtime rates, did not apply where the period of posting did not exceed 30 days in one calendar year.

To ensure the implementation of the minimum protection for posted workers, Law on Guarantees for Posted Workers established related obligations for employers and the State Labour Inspectorate (SLI). It was prescribed that an employer posting a worker to perform temporary work in the territory of the Republic of Lithuania for a period exceeding 30 days or to carry out building work provided for in the Law on Construction²⁵ was under the obligation to inform in advance the territorial division of SLI. Employers, both of the Republic of Lithuania and other State, were required to keep the documents relating to a posted worker and were obliged to immediately submit these documents to competent bodies at their request. The law prescribed that SLI must: provide, free of charge, information or otherwise co-operate with the competent bodies of other Member State concerning the application of the conditions to posted workers, as well as concerning violations of the guarantees provided for with respect to a posted worker; ensure that information about the provisions of Lithuanian normative legal acts, including extended sectoral or territorial collective agreements, was available to the employers of other Member States; at its own initiative and or at the request of the competent bodies or posted workers of other Member States, carry out verifications to ascertain whether the guarantees established for posted workers have been violated.

In order to ensure the implementation of guarantees for posted workers, since 19 November 2005 Lithuanian national legislation²⁶ provides administrative liability for employers or other responsible persons for breach of statutory guarantees for posted workers. Currently, the maximum possible sanction for such violations is an administrative fine of up to five hundred and sixty euros.

During the period under discussion, SCL dealt with several disputes whose consideration led to the need to decide on issues falling within the scope of the interpretation and application of PWD.

²⁵ *Law on Construction of the Republic of Lithuania*, Official Journal (1996, no. 32-788), Register of Legal Acts (2001, no. 101-3597), Register of Legal Acts (2016, no. 2016-20300).

²⁶ *Law on Supplementing the Code of Administrative Violations of the Republic of Lithuania with Articles 41-8, 41-9 and Amending Articles 85, 88, 187, 233, 259-1, 262, 320 of the Code*, Official Journal (2005, no. 137-4911); *Law of the Republic of Lithuania Amending the Code of Administrative Violations*, Register of Legal Acts (2014, no. 2014-15013); *Code of Administrative Offenses of the Republic of Lithuania*, Register of Legal Acts (2015, no. 2015-11216); *Law Amending Articles 100, 101, 106 and 133 of the Code of Administrative Offenses of the Republic of Lithuania*, Register of Legal Acts (2017, no. 2017-11235).

In the case where the order of SCL of 22 October 2009²⁷ was adopted, dispute was initiated by a worker, working for a Lithuanian employer, who was sent on a business trip to France (12 days) and a few months later to Germany (23 days) to recover unpaid daily allowances of this period. SCL noted that work performed in a place other than the worker is established or permanently operates, cannot be qualified as a business trip, if the employment contract stipulates that the nature of the work is mobile. SCL emphasized that where a linguistic interpretation of an employment contract does not establish the existence of such an agreement, the court must consider the specificity of the subjects of the employment relationship, the nature of the work functions, and other circumstances. SCL stated that Law on Guarantees for Posted Workers stipulates that guarantees for a worker posted to a Member State related to the minimum wage are applicable only in cases where the duration of the posting exceeds 30 days. Since, in the present case, the duration of each of the worker's missions did not exceed that time-limit, the guarantees of PWD do not apply to him. SCL held that the protection of the applicant's rights as a posted worker was governed only by the general rules of national employment law, which provided guarantees such as the preservation of employment and pay, the guarantee of working time, reimbursement of daily allowances and mission expenses, etc. SCL stated that posting to foreign countries can be of a different nature: ordinary and under a service contract. When a worker is posted to Member State to provide services, the worker is subject to the mandatory minimum standard of protection for posted workers set out in PWD. It was emphasized that the court hearing individual cases on posting abroad, must examine *ex officio* whether the provisions of EU legislation and special national legislation implementing it are applicable to the protection of a posted worker.

In the case where the order of 28 February 2012²⁸ was adopted, SCL resolved a dispute initiated by a worker injured in an accident during a business trip in Denmark concerning the award of pecuniary and non-pecuniary damages from the employer. SCL ruled, *inter alia*, on the scope of the Law on Guarantees for Posted Workers regarding maximum working hours and minimum rest periods. It was pointed out that the provisions on maximum working hours and minimum rest periods do not mean that the posted worker's entire stay may be considered as working time, as the law also distinguishes between daily uninterrupted rest periods which is not included in working hours. SCL, emphasizing this, ruled that the occurrence of the damage cannot be considered as related to the work activity. SCL *inter alia* found that the worker posted to Denmark was injured when falling through the second floor

²⁷ The order of 22 October 2009 in civil case No 3K-3-449/2009, the Division of Civil Cases of SCL.

²⁸ The order of 28 February 2012 in civil case No 3K-3-36/2012, the Division of Civil Cases of SCL.

of the living quarters during the posting while on a business trip, at the place of residence during their daily uninterrupted rest between the working day (shift), when the employer has no control over the worker, including them being intoxicated.

By its order of 9 December 2016,²⁹ SCL considered the dispute initiated by a worker who had been posted to Norway. The dispute concerned the recovery of unpaid remuneration and posting allowances from the former employer. In this case, during the period of posting to Norway, the claimant performed work – was building cottages from prefabricated elements for over one year and four months, i.e., was posted to work in another state based on a service contract concluded by the employer. It was noted that in a situation where goods are supplied from one Member State to another and, in accordance with the procedure laid down in the contract for the supply of goods, workers posted to carry out the assembly or installation of these goods are considered to fall within the scope of PWD. It was held that, in the case at issue, the work performed in Norway by the worker posted by a Lithuanian undertaking, i.e., carrying out “the assembly of a house package”, constituted building work, which is not subject to the exception established under Article 3(2) of PWD (paragraphs 44–46). The defendant relied on Article 6 of PWD and believed that a decision on the minimum rates of pay established in Norway, which had not been paid to the claimant, fell within the jurisdiction of Norwegian courts rather than Lithuanian courts. Having rejected the argument put forward by the defendant concerning the lack of the jurisdiction of Lithuanian courts, the panel of judges held the following: (1) on the one hand, Article 6 of PWD consolidates the provision concerning jurisdiction and provides for the right of the courts of the Member State in whose territory the worker is or was posted to adjudicate in legal proceedings related to the requirements stemming from Article 3 of PWD; on the other hand, Article 6 lays down the legal norm giving priority to other legal acts with respect to the above-mentioned rule consolidated in this directive; (2) the construction of this legal norm and its purpose, i.e., to protect the rights of a worker, does not lead to the conclusion that it consolidates the rule of exceptional jurisdiction. On the contrary, the linguistic construction of the norm itself shows that it provides for a purely subsidiary jurisdictional rule, enabling litigation (“judicial proceedings may be instituted”) in a court of the respective state; (3) the wording “judicial proceedings may be instituted”, used in Article 6 of PWD, includes claims brought by either a worker or an employer against the other party to the employment contract, while the above-mentioned legal norm giving priority to other documents determines that the subsidiary jurisdictional rule, as consolidated in Article 6 of PWD, does not prejudice the jurisdictional rules established in existing international conventions (paragraphs

²⁹ *The order of 9 December 2016 in civil case No 3K-3-501-701/2016*, the Division of Civil Cases of SCL.

32–36). SCL held, that Lithuanian courts of lower instance reasonably relied on data from the Norwegian Labour Inspectorate on the Norwegian minimum wage rate, in resolving a dispute between the parties. According to SCL, Lithuanian courts of lower instance rightly held that the daily subsistence allowance paid to the applicant, who had been posted abroad, should have been included in the remuneration payable. SCL concluded that, because the applicant had worked for the defendant for more than one year and four months, time-limit did not justify a finding of short duration of the employment relationship and a corresponding reduction in the default pay.

In summing this period up, the cases before the court of cassation in which the provisions of the Directive were applied and interpreted involved disputes concerned exclusively with the violation of the rights of workers posted by Lithuanian employers to foreign states; in all these cases, it was recognised that the provisions of the Directive applied to this category of posted workers. However, this fact did not cause real practical problems either in protecting workers' rights, or in achieving the specific objectives set out in PWD. Thus, the mentioned national regulation was not contradictory in fact.

2.2. TRANSPOSITION OF DIRECTIVE 2014/67/EU

The national legal regulation related to the transposition of the PWD into Lithuanian national law conceptually changed from 28 June 2016 while amending the Law on Guarantees for Posted Workers (Law on Guarantees for Posted Workers of 2016)³⁰. These amendments concern the transposition of the provisions of Directive 2014/67/EU into national law. Compared with the preceding legal regulation of the period discussed above, the national legal regulation in force from 28 June 2016 to 1 July 2017, besides linguistic corrigenda, contained several conceptual differences.

First, Article 2(6) of Law on Guarantees for Posted Workers of 2016 this law introduced amendments to the previously established concept of a posted worker, by consolidating that a posted worker is a worker who is habitually employed in another state, but has been posted temporarily to perform work in the territory of the Republic of Lithuania. Thus, this national legal regulation implementing the provisions of PWD applied exclusively to a worker posted to perform temporary work in the territory of the Republic of Lithuania by an employer operating under the jurisdiction of a foreign state. Such a legal regulation complied with the scope of the regulation of PWD, as defined in its Article 1.

³⁰ *Law Amending the Republic of Lithuania's Law (No X-199) on Guarantees for Posted Workers*, Register of Legal Acts (2016, no 2016-17710).

Secondly, the Law on Guarantees for Posted Workers of 2016 expanded the national legal regulation related to the guarantee of the minimum rates of pay, provided for under Article 3(1)(c) of PWD, to the extent that this guarantee was extended to cover 'night work and work on days off and holidays' carried out by a posted worker. On the other hand, this guarantee was narrowed by establishing that not only daily allowances, but 'daily allowances and other payments', were part of the minimum rates of pay. In addition, this law consolidated the legal regulation related to the duty of a foreign employer posting workers to Lithuania, as a subcontractor, to inform a contractor, as well as established the rules governing the responsibility of such an employer (subcontractor) and a contractor towards a posted worker.

2.3. LEGAL REGULATION OF POSTING RELATED TO LABOUR LAW REFORM OF 2017

The Law on Guarantees for Posted Workers lost its validity as of 1 July 2017, upon the entry into force of the Labour Code of 2017³¹. Thus, since 1 July 2017, different from the periods discussed above, the national legal regulation implementing the provisions of PWD has been codified. The law applicable to labour relations with posted workers is regulated in article 9 of the Labour Code of 2017; this code also contains a separate section (Articles 107–109) designated for governing the particularities of employment relationships specific to posted workers, among others, for implementing the provisions of PWD.

There are two main rules concerning the law applicable to labour relations with posted workers in the Labour Code of 2017:

(1) Rule of law applicable to the employment of posted workers in the territory of a foreign state. According to this rule, the labour law provisions of the Republic of Lithuania shall apply to employment relations with worker assigned to temporarily work abroad by an employer who is under the jurisdiction of the Republic of Lithuania insofar as they are not regulated by the 'mandatory provisions' of the foreign country to which worker is posted. According to the Labour Code of 2017, 'mandatory provisions' shall be provisions of laws and other legal acts, and/or collective agreements or arbitration decisions which have been declared as universally applicable and which, in accordance with the legislation of the country of the applicable law, may not be deviated from by agreement of the parties.

(2) Rule of law applicable to the work of posted workers in the territory of Lithuania. According to this rule, the law applicable to the employment contract of a

³¹ *Labour Code of the Republic of Lithuania*, Register of Legal Acts (2016, no. 23709).

worker temporarily assigned to work in the territory of the Republic of Lithuania by an employer who is under the jurisdiction of a foreign country shall be applicable to the worker to the extent that his or her work is not regulated by 'mandatory labour law provisions of the Republic of Lithuania'. So far, there is no case law explaining the concept of 'mandatory labour law provisions of the Republic of Lithuania', but considering the peculiarity of Lithuanian labour laws, according to which most legal norms are imperative, it can be concluded that such norms cover most provisions of labour law (*inter alia*, regulating working and rest time, health and safety at work, termination of employment, etc.)

Summarizing the rules mentioned above, in both the first and second cases the subsidiary law of the posted workers is limited by the imperative provisions of law of the State, where the posted workers perform their duties. However, considering the mentioned differences between the terms 'mandatory provisions' and 'mandatory labour law provisions of the Republic of Lithuania', the scope of such imperative provisions clearly differs. These differences show the aim of the Lithuanian legislator to ensure the maximum application of the provisions of Lithuanian labour law to posted workers working both in a foreign state and in the territory of Lithuania.

The Labour Code of 2017 regulates posting of workers employed by a Lithuanian employer either to the territory of Lithuania or foreign states. According to this regulation, posting is a period during which a worker employed by a Lithuanian employer performs job duties in a place other than the regular place of work. It consolidates the guarantees related to the remuneration paid to a posted worker and establishes the following: during the period of posting, a posted worker retains his or her remuneration; if a posted worker incurs extra costs (transport, travel, accommodation and other expenses) during the period of posting, the employer must reimburse them; and if the period of posting lasts for more than one working day (shift) or if a worker is posted abroad, the worker must be paid daily allowances. In regulating the guarantees related to the working and rest time of a posted worker working for a Lithuanian employer, the Labour Code of 2017 states, that: the period of posting for such a worker includes travel time by the worker to and from the work place specified by the employer; if the travel takes place after working hours or on a day off or a holiday, the worker is entitled to the rest period of the same duration on the first working day after the travel or this rest period is added to the period of annual leave, leaving the remuneration of the worker for this rest period. A worker employed by a Lithuanian employer is posted to another state for a period of more than 30 days, he or she must, before leaving, be additionally informed in writing about the following: (1) the duration of posting; (2) the currency in which remuneration will be paid during the period of posting; (3) payments in cash and in

kind for work performed in another state, where applicable; and (4) the conditions of returning to the State of the regular place of work, where applicable.

The Labour Code of 2017 regulates the posting of a worker of a foreign employer to the territory of the Republic of Lithuania for the provision of services, and is designated to ensure the conditions of their work. In its content, this legal regulation principally remained analogous to the legal regulation laid down in the Law on Guarantees for Posted Workers.

2.4. TRANSPOSITION OF THE PROVISIONS OF DIRECTIVE 2018/957/EU

The last stage of the transposition of the PWD into Lithuanian law is related to the provision of Directive 2018/957, according to which Member States apply those measures from 30 July 2020. These amendments to the PWD concern: (1) striking a balance between the two needs – to promote the freedom of services and to protect the rights of posted workers; 2) creating conditions for collecting and monitoring statistical data in the field of posted workers; 3) the implementation of the principle of equal treatment and the prohibition of any discrimination in the posting of workers within the EU; 4) recognition of the peculiarities of the international road transport sector and establishment of the relevant legal regulation.

Lithuania has implemented the above-mentioned obligation by amending the Labour Code of 2017³². Among other changes, it is established that a posted worker, regardless of the applicable law, is subject to the Lithuanian norms of labour laws and collective agreements, with the effect of *erga omnes*, establishing: wages (previously only the minimum wage was discussed); accommodation conditions for workers; reimbursement of additional costs (transport, travel and other expenses) incurred by workers traveling to and from the main place of work in the territory of the Republic of Lithuania, as well as additional costs of business trips in the territory of the Republic of Lithuania and abroad (transport, travel, accommodation and other expenses) compensation. National law also regulates in detail, the application of the principles of equal treatment and non-discrimination, providing exceptions to the legal status of posted workers – drivers of road vehicles transporting goods and or passengers on international road routes. The current Labour Code of 2017 stipulates, that in case the effective duration of a posting exceeds 12 months, the posted worker, irrespective of which law applies to the employment relationship, is subject to all norms of normative legal acts of the Republic of Lithuania and collective agreements,

³² Law Amending Articles 108, 109 and annex of the Labour Code of the Republic of Lithuania, Register of Legal Acts (2020, no. 2020-10789).

with the effect of *erga omnes*, except norms regarding the conditions for concluding and terminating an employment contract and the condition of non-compete agreements. There are also rules governing the calculation of the effective duration of posting.

The regulation from 30 July 2020 of the Labour Code of 2017 stipulates that daily subsistence allowances and other allowances specific to the posting (except allowances to cover actual travel, accommodation and subsistence expenses specific to the posting) shall be considered a part of remuneration, provided that, in accordance with the employment law of the State whose law is applicable, daily subsistence allowances and other allowances specific to the posting are separated from actual travel, accommodation, and subsistence expenses. If the daily subsistence allowances and other allowances specific to the posting are not separated from the actual travel, accommodation and subsistence expenses, it is considered that they have been paid to cover the actual travel, accommodation and subsistence expenses of the mission. Thus, regulation from 30 July 2020 of the Labour Code of 2017, as amended, lays down the general rule that the daily subsistence allowances and other allowances specific to the posting paid to a posted worker are to be regarded as part of remuneration within the meaning of the PWD. However, a necessary condition for the application of this rule is that, according to the labour law of the State whose law is applicable (not necessarily Lithuanian), these benefits must be explicitly distinguished from actual travel, accommodation, and subsistence expenses. In the absence of such clear distinction, the said benefits shall be deemed to cover actual travel expenses. Accordingly, they cannot be included in determining the remuneration which, under the PWD, must be paid to the posted worker.

It should be noted that the legal regulation from 30 July 2020 of the Labour Code of 2017 accurately transposes the currently relevant provisions of Article 3 (7) of the PWD. It is fully in line with the aim stated in Recital 19 of Directive 2018/957, that it is for Member States, in accordance with their national law and/or practice, to set rules with regard to the reimbursement of allowances specific to the posting as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging. It is clear that the mentioned provisions of Directive 2018/957 justify the compromise³³ reached and are unquestionable. On the other hand, a reasonable question can be raised as to the compatibility of such legislation with one of the main objectives of the PWD – to ensure equal treatment and protect the rights of posted workers (see Recital 5 of Directive 96/71 and Recital 4 of Directive 2018/957). In this respect, it is important

³³ For more on the political debate, representing the interests of individual Member States and the social partners, see Bengt Furåker and Bengt Larsson, *supra* note 20.

to stress that the inclusion of daily subsistence allowances and other allowances specific to the posting in the posted worker's remuneration is in the direct interest of the sending employer to another Member State, and in the posted worker's own interest in not doing so. Therefore, in our view, in order to protect the rights of the posted worker, the PWD should provide that, in cases where the legislation of the State to which the worker is posted, daily subsistence allowances and other allowances specific to the posting are not recognized as part of remuneration, and are intended to reimburse the actual costs of the posting, it is these provisions that should apply to them, irrespective of the provisions of the employment law of the State whose law is applicable.

In any case, some legal issues regarding the application of the provisions set out in Article 3(7) of the PWD may arise, if in the employment contract of the worker posted to Lithuania it is agreed to apply Lithuanian law. In this context, it should be emphasized that in Lithuania, daily subsistence allowances and other allowances specific to the posting are not part of the salary. This follows from the totality of the legal regulation of labour relations. These benefits are not included in the exhaustive list of wage components in Article 139(2) of the Labour Code of 2017. Article 107(2) of the Labour Code of 2017 *du travail* makes a clear distinction between remuneration and other allowances paid to worker during the secondment, it provides that worker is left with their salary during the posting, and if worker incurs additional expenses (transport, travel, accommodation, and other expenses) during the posting, the employer must reimburse them. Article 107(3) of the Labour Code of 2017 stipulates that if worker's business trip lasts longer than a working day (shift) or worker is posted abroad, the worker must be paid a daily subsistence allowance, the maximum amounts and procedure of which shall be established by the Government of the Republic of Lithuania or an institution authorized by it. As it is mentioned above, daily subsistence allowances are *expressis verbis*, identified as posting expenditure under the Rules on the Reimbursement of Posting Expenditure in Budgetary Establishments. It has also been mentioned that the reimbursable nature of daily subsistence allowances was also highlighted in the case law of Lithuania. In light of the foregoing, it must be concluded that, if the law applicable to a worker posted to Lithuania is Lithuanian labour law, the daily subsistence allowances, and other allowances specific to the posting, should not be considered as part of remuneration which, under the PWD, must be paid to the posted worker.

3. REGARDING THE CONCEPT OF "MINIMUM WAGE" ENSHRINED IN LITHUANIAN NATIONAL LAW (1 JULY 2004 – 30 JULY 2020)

In the PWD it is legally unclear as to which components of the wage paid should be regarded as constituent elements of the minimum rate of pay in the host country. In this context, ambiguities of the regulation of posting by the Directive are particularly relevant and have resulted in uncertainties at the national level.³⁴

In Lithuania, the concept of including daily subsistence allowance in the minimum wage within the meaning of Article 3 (1) (c) of the PWD has been followed in the period from 1 July 2004 to 30 July 2020. In the doctrine of Labour Law³⁵ it is emphasised in the following statement, that "daily subsistence allowances paid to a worker are considered to be part of the minimum wage" based on *Commission v Germany*³⁶ in relation to interpreting and applying the provisions of Article 3(1) and (7) of PWD. Such an approach is to be criticized. Doubts can be raised as to whether the legal regulation laid down in Article 4(2) of the Law on Guarantees for Posted Workers (in its initial wording and wording of 16 June 2016), as well as the legal regulation laid down in Article 108(3) of the Labour Code of 2017, is compatible with the necessity, clearly recognised in Recital 5 of PWD, to create 'a climate of fair competition' and apply 'measures guaranteeing respect for the rights of workers', which are required for the promotion of any transnational provision of services. Such doubts arise due to several reasons.

First, the national legal regulation under which daily subsistence allowances are part of the remuneration payable to a posted worker cannot be based on Article 3(7) of PWD, where it is stated that "Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging." Neither the quoted provision, nor any other regulation explicitly entrenched in the text of this directive, provides any grounds for maintaining that the concept of 'allowances specific to the posting', as mentioned in Article 3(7) of PWD, in itself covers 'daily subsistence allowances' paid to a posted worker. Moreover, considering that 'daily subsistence allowances' are neither defined nor mentioned at all in the text of PWD, they constitute a national legal category. Consequently, in terms of the transposition of the provisions of the directive at issue into the national law, 'daily subsistence allowances' are significant to the extent of

³⁴ Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould, and Feliciano Iudicone, *supra* note 13, 32.

³⁵ Daiva Petrylaitė, Tomas Davulis, and Vida Petrylaitė, *Europos Sąjungos teisės aktų įgyvendinimas Lietuvos darbo teisėje (The Implementation of European Union Legislation in Lithuanian Labour Law)* (Vilnius: Centre of Registers, 2008), 228–229.

³⁶ *Commission of the European Communities v Federal Republic of Germany*, CJEU Case C-341/02 (2005), ECLI:EU:C:2005:220.

whether they can or cannot be regarded as 'allowances specific to the posting', which, under Article 3(7) of PWD, are considered to be part of the minimum wage, i.e. allowances paid to a posted worker during the period of posting insofar as they are not related to reimbursement for expenditure actually incurred on account of the posting. It should be recalled in that regard, that, according to the CJEU's settled case-law³⁷, allowances and supplements which are not defined as being constituent elements of the minimum wage by the law or practice of the Member State to whose territory the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return for that service, on the other, cannot, under the provisions of PWD, be considered to be elements of that kind.

Second, endorsing the conclusion that rulings of the CJEU has not provided a common notion of minimum wages³⁸, it has to be stressed, that the above-mentioned statement that "daily subsistence allowances paid to a worker are considered to be part of the minimum wage" cannot be unequivocally substantiated on the basis of the case law formulated in *Commission v Germany*. In this case the CJEU did not deal with the question of whether 'daily subsistence allowances' are part of 'the minimum rates of pay' referred to Article 3(1)(c) of PWD. Court did not comment on this issue either explicitly or implicitly. In the judgment concerned, the CJEU held that, based on PWD, allowances and supplements cannot be considered to be constituent elements of the minimum wage if they fall within the following criteria: (1) they are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to whose territory the worker is posted; and (2) they alter the relationship between the service provided by the worker, on the one hand, and the consideration that he or she receives in return, on the other (see *Commission v Germany*, paragraph 39). The CJEU found that Germany failed to fulfil its obligations under Article 3 of PWD, since it failed to recognise, as constituent elements of the minimum wage, allowances and supplements that do not alter the relationship between the service provided by a worker and the consideration received by the worker in return and that are paid by employers established in other Member States to their workers in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry (see *Commission v Germany*, paragraph 43). This makes it clear that, according to the CJEU, within the meaning of PWD, allowances, and supplements "which do not alter the relationship between the service provided by a worker and the consideration

³⁷ *Ibid.*, para. 39; *Tevfik Isbir v DB Services GmbH*, CJEU Case C-522/12 (2013), ECLI:EU:C:2013:711, para. 36; *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, *supra* note 10, para. 30.

³⁸ Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould, and Feliciano Iudicone, *supra* note 13, 33.

which that worker receives in return” can be not considered as constituent elements of the minimum wage paid to workers in the construction industry.

Third, in light of the above-mentioned case law of the CJEU, in order to assess whether, having, by the norms of positive law, consolidated the concept of daily subsistence allowances that are considered to be part of the minimum rates of pay within the meaning of Article 3(1)(c) of PWD, Lithuania has properly transposed this directive into the national law and has achieved the objective declared in Recital 5 to the Directive – to create “a climate of fair competition” and apply “measures guaranteeing respect for the rights of workers” in order to promote the transnational provision of services, it is necessary to determine “the purpose of daily subsistence allowances” consolidated in Lithuanian positive law. In this respect, it should be mentioned that Paragraph 1 of Article 220 “Guarantees and Compensations in Cases of Employment-Related Posting” of the Labour Code of 2003 prescribed that workers posted to perform work were guaranteed that during the period of posting they would retain their workplace (position) and remuneration; in addition, they were paid daily subsistence allowances and reimbursed expenditure related to the posting (Article 220(1)). Thus, under the legal regulation in force prior to 1 July 2017, the purpose of daily subsistence allowances was to reimburse additional expenditure incurred by a person during the posting. Respectively, the provisions of the Labour Code of 2003 make it clear that ‘the minimum wage’ was, first, a wage (Article 187(1)); and a wage meant remuneration for work (Article 186(1)). Thus, according to the said legal regulation, the minimum wage was to be paid to remunerate for work performed. In principle, remuneration for work is analogously defined in Paragraph 1 of Article 139 of the Labour Code of 2017, and Paragraph 2 of Article 141 provides that the minimum wage is ‘the lowest permissible amount’ paid to a worker for unqualified work respectively for one hour or for all working time of a calendar month.

The reimbursable nature of daily subsistence allowances was also highlighted by SCL in its order of 2 March 2018³⁹. This court dealt with the question concerning the entitlement of a worker to daily allowances during an employment-related posting, as well as the right of an employer to reduce the rates of payable daily subsistence allowances. SCL, interpreting the meaning and purpose of daily subsistence allowances, *inter alia* noted that the purpose of daily subsistence allowances paid to a worker is to reimburse increased expenditure incurred by the worker as a consequence of the posting in cases where, on assignment by the employer, such a worker is sent for a certain period from the regular place of work to perform the task specified by the employer. In its order of 22 October 2009,⁴⁰ SCL

³⁹ The order of 2 March 2018 in civil case No 3K-3-68-248/2018, *supra* note 11.

⁴⁰ The order of 22 October 2009 in civil case No 3K-3-449/2009, *supra* note 27, 32.

held that “daily subsistence allowances are increased personal expenditure incurred by a posted worker”. The reimbursable nature of daily subsistence allowances was also highlighted in SCL’s order of 16 October 2019⁴¹.

The fact that daily subsistence allowances are allocated to expenditure incurred on the account of the posting to a foreign state and cannot (should not) be considered the amounts payable to a posted worker, “which alter the relationship between the service provided by a worker and the consideration which that worker receives in return”, is also evident from the legal regulation laid down in a sub statutory legal act – the Rules on the Reimbursement of Posting Expenditure in Budgetary Establishments,⁴² as approved by the respective resolution of the Government of the Republic of Lithuania; under these rules, daily subsistence allowances are *expressis verbis* identified as posting expenditure (see Items 7, 7.1–7.11 of these rules).

The indicated positive legal regulation and the practice in relation to its application confirm that daily subsistence allowances in Lithuania are regarded as allowances of an exclusively reimbursable nature, while their payment is not linked to the work performed (amount and quality of work), i.e., daily subsistence allowances (their payment) principally do not alter the relationship between the service provided by a worker and the consideration received by that worker in return. Consequently, according to Lithuanian national law, daily subsistence allowances should not be regarded as allowances “which alter the relationship between the service provided by a worker and the consideration which that worker receives in return”; therefore, based on the interpretation set out in the judgment of 14 April 2005 of the CJEU, they are not required to be part of ‘the minimum rates of pay’ referred to in Article 3(1)(c) of PWD.

Fourth, in its order of 22 October 2009,⁴³ SCL held that PWD is aimed at laying down a nucleus of mandatory rules for the minimum protection of workers to be observed by employers who post workers to another Member State to provide services in that State. When the provisions of Article 3(1)(c) of PWD, obliging a Member State to ensure the payment of ‘the minimum rates of pay’ to posted workers, are transposed into national law, *inter alia*, the universal requirements set

⁴¹ *The order of 16 October 2019 in civil case No 3K-3-299-313/2019*, the Division of Civil Cases of SCL, 30. In this case court dealt with the question concerning the interpretation and application of legal norms regulating the recovery of maintenance awarded to minor children from the debtor's other income (daily allowance). It was noted that, where the parties to the contract of employment agree on the nature of the mobile work, there is no basis for the employee to be classified as a posting in a place other than the permanent place of employment. Therefore, to assess the possibility of recovery from the daily subsistence allowances accrued to the employee (debtor in the enforcement proceedings), it is necessary to address, *inter alia*, whether the amounts accrued to the daily subsistence allowances corresponded to the reimbursable nature of daily subsistence allowances.

⁴² *Resolution (No. 526) of the Government of the Republic of Lithuania of 29 April 2004 on the reimbursement of daily allowances and other posting expenditure*, Official Journal (2004, no. 74-2555), Register of Legal Acts (2014, no. 2014-20067).

⁴³ *The order of 22 October 2009 in civil case No 3K-3-449/2009*, *supra* note 27, 32.

out in the case law of the CJEU in relation to the fundamental freedoms guaranteed under the TFEU (the freedom to provide services in the context at issue) must be complied with.

In this respect, it should be mentioned that, even prior to the adoption of PWD, the case law of the CJEU had been consistently formulated in line with the position that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective that they pursue; and they must not go beyond what is necessary in order to attain it (see *Dieter Kraus v Land Baden-Württemberg*⁴⁴; *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*⁴⁵).

The fact that, throughout the period from 1 July 2004 to 30 July 2020, daily subsistence allowances for workers working in Lithuania, differently from posted workers, were not included for the purposes of calculating the minimum monthly remuneration provides the grounds for doubting that such an unequal legal regulation was non-discriminatory with respect to posted workers. Respectively, the question should be raised as to whether such a legal regulation was in conformity with the objective consolidated in Recital 5 to the Directive – to create 'a climate of fair competition' and apply 'measures guaranteeing respect for the rights of workers' in order to promote the transnational provision of services. In view of this, in the context of the protection of the right of posted workers to receive the minimum rates of pay within the meaning of Article 3(1)(c) of PWD, criticism can be raised both over the positive legal regulation, which was established respectively in Paragraph 2 of Article 4 of the Law on Guarantees for Posted Workers and in Paragraph 3 of Article 108 of the Labour Code of 2017, and over the case law based on this legal regulation.

SCL in the order of 9 December 2016⁴⁶ dismissed the arguments of a worker posted to Norway by a Lithuanian undertaking insofar as they were related to the claim that the daily subsistence allowances should not have been included in the payable remuneration (see paragraph 60, 61, 63). This case shows that the court differently assessed the inclusion of 'daily subsistence allowances' for the purposes of calculating the minimum rates of pay, depending on to whom such minimum guarantees apply, i.e., whether to a worker posted to Norway by a Lithuanian undertaking or to a national worker. It happened because of the legal regulation in force. It sufficiently eloquently illustrates the faultiness of the transposition of the

⁴⁴ *Dieter Kraus v Land Baden-Württemberg*, CJEU Case C-19/92 (1993), ECLI:EU:C:1993:125, para. 32.

⁴⁵ *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, CJEU Case C-55/94 (1995), ECLI:EU:C:1995:411, para. 37.

⁴⁶ *The order of 9 December 2016 in civil case No 3K-3-501-701/2016*, *supra* note 29.

provisions of PWD into the national law with respect to ensuring the objective consolidated in Recital 5 to this directive in the period from 1 July 2004 to 30 July 2020.

4. INFLUENCE OF DIRECTIVE 2019/1152 ON THE REGULATION OF EMPLOYMENT RELATIONS OF POSTED WORKERS IN LITHUANIA

Not later than 1 August, 2022 Member States must apply Directive 2019/1152, which provides that it lays down the minimum rights applicable to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements, or practice in force in each Member State with consideration to the case-law of the Court of Justice (Article 1(2)). Thus, its provisions also cover 'posted workers' as defined in Article 2 of PWD. The purpose of Directive 2019/1152 is to improve working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability (Article 1(1)). Its scope is sufficiently broad – the establishment of minimum rights for Union workers (Article 1 (2)). For its part, PWD is clearly narrower in its main purpose and scope, regulating the system of cross-border provision of services in the EU as far as the rights and obligations of posted workers are concerned. In light of the foregoing, it must be concluded that PWD is *lex specialis* in relation to Directive 2019/1152 in so far as it concerns the rights of posted workers. In cases where general and special rules compete in the field of legal regulation, the principle of *lex specialis derogat generali* (special law replaces the general one) applies. The essence of this principle formulated in legal doctrine is that in case of competition of general and special norms, a special norm is applied. This rule also must be applied to the transposition of competing rules of directives into national law.

On the other hand, to rule on the need for regulatory adjustment to the rules already laid down for posted workers in transposing Directive 2019/1152, it is necessary to assess their relevance to the regulation of Union workers' rights in general.

In that regard, it must be borne in mind that, according to PWD (see Recital 13 and 14) to ensure the protection of the rights of posted workers under it, it must be ensured that employers, providing services in another Member State and posting workers for the temporary jobs, comply with the basic minimum protection rules of that state. Consequently, the rules governing the regulation of employment relations of posted workers are subsidiary to the provisions of Directive 2019/1152.

The provisions of Directive 2019/1152 are also special rules (*lex specialis*) in relation to the legal rules, regulating the provision of information on working

conditions to posted workers, laid down in PWD. Directive 2019/1152 enacts *inter alia* that (1) workers sent abroad should receive additional information specific to their situation, (2) for successive work assignments in several Member States or third countries, it should be possible for the information for several assignments to be collated before the first departure and subsequently modified in the case of any changes, (3) workers who qualify as posted workers under PWD should also be notified of the single official national website developed by the host Member State where they are able to find the relevant information on the working conditions applying to their situation, (4) unless Member States provide otherwise, those obligations apply if the duration of the work period abroad is longer than four consecutive weeks. It is therefore clear that the national legal framework for posted workers will also need to be adjusted in this respect.

In conclusion, the transposition of the provisions of Directive 2019/1152 does not require a substantial review of national legislation in so far as it relates to the implementation of PWD. However, since the rules governing the employment of posted workers are subsidiary to the provisions of Directive 2019/1152, those provisions will undoubtedly also affect posted workers.

CONCLUSIONS

PWD is one of the legal instruments which seeks to unify not only the processes relating to the freedom to provide services, but also those relating to the free movement of workers. A retrospective assessment of the process of transposition of PWD into Lithuanian national law shows, that the related national legal regulation has been changing both in response to the amendments to the PWD and due to the Lithuania labour law reform of 2017. Thus, from 1 May 2004, Lithuania makes consistent efforts to ensure a minimum level of protection of the rights of posted workers (internal labour migrants) under national law and contribute to a smoother legal framework for the free movement of workers within the EU. The provisions of PWD have been transposed into Lithuanian national law with sufficient precision. Nevertheless, the analysis of the current national legal framework and the scarce case law revealed some controversial moments.

The national legal regulation that was in force from 1 July 2004 to 28 June 2016, as well as the practice of its interpretation and application in terms of *ratione personae*, prompts criticism insofar as, in Lithuania, a worker who is habitually employed in the territory of the Republic of Lithuania, but has been posted by the employer to temporarily perform work in another Member State was also considered to be a posted worker, to whom the national legal norms implementing PWD applied.

Such position by Lithuania was incompatible with the provisions of PWD, according to which, the transferring Member State should treat as a 'posted worker' only a worker posted from another Member State within the meaning of PWD. However, this inaccurate transposition of the concept of "posted worker" into national law did not cause practical problems in achieving the specific objectives set out in PWD.

In the period from 1 July 2004 to 30 July 2020, differently from posted workers within the meaning of PWD, daily subsistence allowances were not included for the purposes of calculating the minimum monthly remuneration for workers working in Lithuania. Such an unequal legal regulation should be assessed as possibly discriminatory with respect to posted workers. In our point of view such national legal regulation does not contribute towards achieving the objective consolidated in Recital 5 to PWD – to create 'a climate of fair competition' and apply 'measures guaranteeing respect for the rights of workers' to promote the transnational provision of services.

Transposition of Directive 2019/1152 on transparent and predictable working conditions in the EU, to be completed by 1 August 2022, does not require a fundamental review of national legislation in so far as it relates to the implementation of PWD. Nevertheless, the provisions of Directive 2019/1152 will undoubtedly have an impact on the regulation of the employment relationship of posted workers in Lithuania.

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