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THE PROBLEM WITH HIGHLY MOBILE WORKERS IN THE EU: A CRITICAL ANALYSIS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGMENT IN *DOBERSBERGER* REGARDING THE POSTING OF WORKERS

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INTRODUCTION

On December 19th 2019, the Grand Chamber of the European Court of Justice (ECJ) made a remarkable decision in the Case C-16/18¹ on the application of the Posted Workers Directive² (PWD) to highly mobile workers performing on-board services on international trains. While the majority of the judgments regarding posting dealt with the construction industry, this is the very first ruling on posting in the transportation industry. In particular, the workers concerned crossed the borders quite frequently. With an ever-closer integration in the European internal market short-term mobility is of increasing importance. Hence, the posting of workers has become a highly discussed topic in European labor law. Frequently, workers

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1. Case C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* [2019] ECLI:EU:C:2019:1110.

2. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] O.J. L 18/1.

are temporarily sent to a Member State other than the one in which they normally work (hereinafter referred to as receiving state) to provide work services for their employers. Typically, posting is characterized by the remaining connection to the home state and the integration into the labor market of the receiving state to a minor extent only.³ However, only when workers seek access to the employment market, they exercise the freedom of movement for workers guaranteed under Art 45 Treaty on the Functioning of the EU⁴ (TFEU).⁵ Thus, postings do not constitute a case of freedom of movement for workers but rather a case of freedom to provide services guaranteed under Art 56 TFEU, since the workers are only temporarily posted to another Member State and return home after finishing the work there.

In order to realize the single market within the EU, the removal of obstacles within the cross-border employment of workers is essential. At the same time, however, problems of potential distortions of competition to the disadvantage of Member States with a higher level of protection under labor and social security law have become apparent. It is feared that service providers from low-wage countries could undercut local service providers if the freedom to provide services is guaranteed in an unlimited way. For this matter, the provisions of the PWD are crucial as they extend the protection through the mandatory application of core provisions of the receiving state during the posting. However, the application of the PWD to highly mobile workers is questionable as difficulties arise regarding the connection to the receiving state as well as the determination of the receiving state at all.

FACTS AND QUESTIONS FOR A PRELIMINARY RULING

Henry am Zug Kft, a Hungarian company, provided the Austrian Federal Railways via a series of subcontracts with services on certain international trains linking Budapest (Hungary) with Vienna (Austria) and Munich (Germany). The services included the operation of the dining cars and the on-board service. According to the relevant facts, all workers had their domicile, social insurance and centre of interest in Hungary. They began and ended their shifts in Hungary. All services, including loading goods, checking the condition of stock and calculating the turnover, were executed in Hungary, except for on-board services during the journey.

In accordance with the Directive 2014/67/EU,⁶ which entitles Member States to statute administrative provisions regarding the enforcement

3. GEORG THÜSING, EUROPEAN LABOUR LAW 157 (2013).

4. Treaty on the Functioning of the European Union [2012] O.J. C 326/49.

5. Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] O.J. C 118, ¶ 15, ECLI:EU:C:1990:142.

6. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC [2014] O.J. L 159/11.

of the PWD and to combat illegal employment, Austrian law stipulated the obligation to declare the use of workers one week ahead as well as to keep documents relating to the workers' declaration to social security, employment contracts, proof of payment of wages and documents on wage classification available.⁷ On the occasion of a review of the working documents in Vienna, a violation of Austrian provisions was observed, followed by administrative penalties to the managing director Mr Dobersberger. In the course of the revision of the penalties the Austrian Supreme Administrative Court referred the central questions to the ECJ for a preliminary ruling according to Art 267 TFEU. In essence, the Austrian Supreme Administrative Court asked the ECJ whether the PWD is applicable to workers providing catering on international trains, which pass through another Member State.⁸

DECISION AND REASONING OF THE ECJ

In *Dobersberger*, the ECJ denied the application of the PWD to on-board personnel on international trains. Although – when taking into account the amount of working time – the major part of the work took place in a Member State other than the home state, the Court argued that the definition of posting is not met since there was no “*sufficient connection*” between the workers and the receiving state. The following criteria are decisive for the sufficient link: the place where the significant part of the work is done and the place where the workers begin and end their shifts. The Court denied that on-board services were sufficiently linked to the receiving state, because the essential part of the activity, namely all services except on-board service, was provided in the home state and that the shifts started and ended there.⁹ The ECJ justifies this with reference to the scheme of the PWD, in particular with Art 3 (2) PWD, read in the light of Recital 15,¹⁰ which states that the receiving state's rules on minimum pay and minimum paid annual holiday are not applicable in cases of initial assembly.

CONSIDERATIONS ON THE DECISION

Applicable law

The freedom to provide services constitutes the legal basis for the posting of workers under EU primary law. Art 56 TFEU covers the right of

7. § 7b (3) and (5) AVRAG, BGBl 1993/459 idF BGBl I 2012/98 (ceased to be in force on 31 Dec 2014), § 7d (1) AVRAG, BGBl 1993/459 idF BGBl 2011/24 (ceased to be in force on 31 Dec 2014).

8. *Dobersberger*, ECLI:EU:C:2019:1110 ¶ 9-15.

9. *Id.* at ¶ 9-12.

10. *Id.* at ¶ 31-35.

the service provider to post his own workers to the receiving state. Since a posting involves at least two different Member States, the question arises which national legislation applies to the employment relationship of the posted workers. Therefore, it is necessary to examine the conflict of law rules to determine the relevant labor law.¹¹ Regulation 593/2008/EG¹², also known as Rome I, provides for a uniform conflict of law regime throughout the EU in the area of contractual obligations. Under Art 8 (2) Rome I, employment contracts are governed by the law of the state '*in which or, failing that, from which the employee habitually carries out his work*' if the parties of the contract did not make a choice of law. The so-called habitual place of work does not shift with a temporary change to another country.¹³

In the case of posting of workers, however, the domestic labor law provisions are overlaid by certain mandatory labor law provisions.¹⁴ Art 3 PWD obliges the receiving state to apply certain labor law provisions contained in its national law including minimum pay, maximum work periods, minimum paid annual holiday and others. Nevertheless, the core provisions of the PWD and thus the law of the receiving state with respect to these core rules of employment, only apply if they are more favourable than those of the home state.¹⁵ For this reason, the PWD provides additional protection through the application of core labor law provisions to the advantage of workers. Hence, there is inherent tension between the application order in Art 3 PWD and Art 56 TFEU.¹⁶ Yet, this restriction of

11. Robert Rebhahn & Sebastian Krebber, *Art. 56 AEUV*, in KOMMENTAR ZUM EUROPÄISCHEN ARBEITSRECHT ¶ 20-21 (Martin Franzen, Inken Gallner & Hartmut Oetker eds., 3d. ed., 2019); Birgit Schrattbauer, *Unionsrechtlicher Rahmen der Arbeitnehmerentsendung*, in INTERNATIONALE PERSONALENTSENDUNGEN. CHANCEN UND RISIKEN AUS MANAGEMENT- UND RECHTSPERSPEKTIVE 29 (Sabine Urnik & Walter Pfeil eds. 2015).

12. Regulation (EC) N. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L 177/6.

13. Monika Schlachter, *Art 3 – Art 9 Rome I*, in ERFURTER KOMMENTAR ZUM ARBEITSRECHT ¶ 13 (Rudi Müller-Glöge, Ulrich Preis & Ingrid Schmidt eds., 20th ed., 2020) ; Dieter Martiny, *Art. 8 Rome I*, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: BGB GESAMTWERK ¶ 62 (Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg eds., 7th ed. 2018).

14. Sebastian Krebber, *Art. 9 VO 593/2008/EG*, in KOMMENTAR ZUM EUROPÄISCHEN ARBEITSRECHT ¶ 18-19 (Martin Franzen, Inken Gallner & Hartmut Oetker eds., 3rd ed. 2020).

15. Robert Rebhahn & Sebastian Krebber, *Art. 3 Directive 96/71/EG*, in KOMMENTAR ZUM EUROPÄISCHEN ARBEITSRECHT ¶ 41-43 (Martin Franzen, Inken Gallner & Hartmut Oetker eds., 3rd ed. 2020); Case C-49/98 *Finalarte Sociedade de Construção Civil Ld. v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] E.C.R. I-07831, ECLI:EU:C:2001:564 ¶ 57.

16. Rebhahn & Krebber, *supra* note 11, at ¶ 21.

the freedom to provide services is justified by overriding reasons of public interest such as the protection of workers¹⁷ and the prevention of unfair competition through underpayment of workers.¹⁸

The sufficient connection to the receiving state

According to Art 1 (1), the PWD applies only to undertakings established in a Member State posting workers in the context of transnational services. A worker is posted if three conditions are met: lawful employment in the home state, border crossing and temporary work performance in another state.¹⁹ The wording of Art 1 PWD is ambiguous as to whether highly mobile workers, who frequently cross borders and perform work services in one Member State only for a very limited time, fall under its scope.²⁰ As stated in *Dobersberger*, workers cannot be considered to be posted if there is no “sufficient connection” to the receiving state.²¹ By introducing that “sufficient-connection-criterion”, the Court implicitly established a fourth criterion, which is, at least prima facie, not covered by the PWD wording. The Court decided in *Dobersberger* that the place where the essential part of the work is done and where workers begin and end shifts is decisive for defining the sufficient link to the receiving state.²² It remains uncertain, though, how the “significant” part of the work can be determined. In the Court’s opinion, the loading of goods, the control of the stocks and the calculation of the turnover was considered the “significant” part of the work, whereas the actual on-board service, the cleaning and the service for passengers did not constitute an essential part. However, it surprises that the actual on-board service was deemed insignificant. According to some commentators, though, on-board service could still represent an essential

17. Directive 96/71/EG, *supra* note 2, at recital 5; Case C-315/13 *Edgard Jan De Clercq and others* [2014] ECLI:EU:C:2014:2408, ¶ 65; Case C-515/08 *Criminal proceedings against Vítor Manuel dos Santos Palhota and others* [2010] ECLI:EU:C:2010:589, ¶ 47.

18. Case C-60/03 *Wolff & Müller v José Filipe Pereira Félix* [2004] ECLI:EU:C:2004:610, ¶ 35, 36, 41.

19. Robert Rebhahn & Sebastian Krebber, *Art. 2 Directive 96/71/EG*, in *KOMMENTAR ZUM EUROPÄISCHEN ARBEITSRECHT* ¶30 (Martin Franzen, Inken Gallner & Hartmut Oetker eds., 3rd ed. 2020); *Dobersberger*, ECLI:EU:C:2019:1110, at ¶ 30.

20. Martin Frohn, *Keine Entsendung von Arbeitnehmern für das Erbringen von Borddienstleistungen in Internationalen Zügen*, 4 *EuZW* 151, 154 (2020).

21. *Dobersberger*, ECLI:EU:C:2019:1110, at ¶ 31-33.

22. *Id.* at ¶ 33-35.

part.²³ If compared to a catering business, the preparation of the meals and the serving of food and drinks might be regarded as more important than the control of the stock and the calculation of the turnover. In its decision, the ECJ did not justify why these on-board services were insignificant. For this reason, the distinction between the essential and the inessential part of the work in other cases of posting remains unclear. The solution might be found in the European conflict of law rules.

Rome I and the starting and ending point of the work activity

The reasoning of the Court in *Dobersberger* needs further review in light of the European conflict of law rules. As already stated, Art 8 (2) Rome I provides for the application of the domestic law of the country ‘*in which, or failing that, from which the employee habitually carries out his work*’. In *Dobersberger*, the criterion to define the country “*in which*” the work was habitually carried out cannot be sufficiently assessed due to frequent border crossings. Therefore, the criterion “*from which*” has to be examined. Concerning the international rail transport sector, usually there is a place from which the workers begin the journey and to which they return. Consequently, this is the place of work under Art 8 (2) Rome I.²⁴ According to the facts of the case, the workers began and ended their shifts in Hungary. Hence, the country from which the work was carried out was Hungary and Hungarian labor law was applicable. Surprisingly, however, in *Dobersberger*, the ECJ did not use this criterion to determine the place of work and subsequently the applicable national law, but rather to determine the scope of application of the PWD,²⁵ despite the fact that the criterion on the habitual place of work is actually the initial connecting factor for the conflict of law rule in Art 8 (2) Rome I. Therefore, this new judgment blurs the strict separation between Rome I and the scope of the PWD.

The reference to the exemption of initial assembly under Art 3 (2) in conjunction with Recital 15 PWD

In its short reasoning, the ECJ justifies the recourse to the “*sufficient-connection-criterion*” by referring to Art 3 (2) in conjunction with Recital 15 PWD. These provisions derogate the mandatory application of minimum pay

23. Stefan Schuster, *Der Fall “Henry am Zug” Nicht Jede Grenzüberschreitende Arbeitstätigkeit ist eine Entsendung*, 2 ASoK 56, 58 (2020); Erwin Fuchs, *Neues zum Anwendungsbereich der Entsenderichtlinie*, 3 PV-INFO 20, 22-23 (2020).

24. OLAF DEINERT, *INTERNATIONAL LABOUR LAW UNDER THE ROME CONVENTIONS* § 9 ¶152 (2017).

25. Michaela Windisch-Graetz, *Keine Anwendbarkeit der EntsenderL auf Ungarische Arbeitskräfte in Österreichischen Speisewägen*, 5 DRDA 432, 436 (2020).

and minimum paid annual holiday rules of the receiving state for initial assembly and installation of goods if the duration of the posting does not exceed eight days.²⁶ Yet, it remains unclear how a permanent train connection between three big European cities is at all comparable to initial assembly or initial installation of goods. Nevertheless, this exemption reveals a fundamental conflict: Although Art 56 TFEU guarantees the fundamental freedom to provide services, the PWD allows restrictions by linking the cross-border performance of services to certain requirements – in this case the application of certain core labor standards – and thus makes it more difficult to perform services in other Member States. Yet, this restriction can be justified by overriding reasons in the public interest including the protection of workers²⁷ and the prevention of unfair competition.²⁸

Similar to the exemption of initial assembly, also Art 3 (4-5) PWD allows Member States to provide exemptions for postings that do not exceed the length of one month or when only an insignificant amount of work is done in the receiving state.²⁹ Thus, if the required link to the receiving state is not strong enough, a full application of the core labor provisions simply does not seem necessary.

An analogous application of Art 3 (4-5) to on-board personnel would have been less far-fetched than the Court's recourse to Art 3 (2) in conjunction with Recital 15 PWD. However, in *Dobersberger*, the ECJ has clearly decided that the service personnel on international trains is completely precluded from the scope of application. Strikingly, the decision does not contain any further reasoning. Although explicit reference is made to the specific rule of initial assembly under Art 3 (2) PWD, according to which exemptions can be made for the application of minimum pay and minimum paid annual holidays, the Court then decided for a complete exemption of the train personnel from the entire scope of the PWD. This reasoning does not fit into the system of the PWD, since Art 3 (2) only allows a derogation from certain core provisions and definitely not an exemption from the whole scope of application. Nonetheless, the question whether Austria considered on-board services as minor and therefore could have provided for exemptions regarding minimum pay and minimum paid holidays, was not addressed in the proceedings.

CONCLUSION AND PERSPECTIVES

In order to protect workers, the PWD establishes the mandatory application of core labor law provisions of the receiving state during the

26. *Dobersberger*, ECLI:EU:C:2019:1110, ¶ 31.

27. Directive 96/71/EG, *supra* note 2, at recital 5.

28. *Wolff & Müller*, ECLI: EU:C:2004:610.

29. Frohn, *supra* note 20, at 154.

posting. However, in the *Dobersberger*-judgment, the ECJ excluded workers performing on-board services on international trains from the PWD scope of application. This was justified with the insufficient connection to the receiving state as the workers had performed the essential part of the work in the home state. Yet, it remains unclear how to measure the “*significant*” part of the activities. Additionally, the link to the habitual place of work does not fit into the scheme of the PWD, but is a crucial criterion regarding the conflict of law regime under Rome I. Furthermore, the justification with regard to the exemption of initial assembly under Art 3 (2) PWD does not seem consistent as Art 3 only establishes the exemption of the mandatory application from certain labor law provisions but does not state an exemption from the scope of application of the entire PWD.

Taking all that into consideration, in our opinion the ECJ decision in *Dobersberger* lacks substantiated explanations why highly mobile workers should be exempted from the PWD. This could lead to future problems regarding cases where highly mobile workers frequently cross borders, e.g. in the road transportation sector, because they are typically not particularly linked to the receiving state either. Another case regarding the applicability of the PWD to transportation is pending.³⁰ For future cases, though, at least in the road transportation sector, the new Directive (EU) 2020/1057³¹, which came into force on August 1st 2020, hopefully provides better guidance. The Member States have to implement the provisions of the new Directive into national law by February 2nd 2022. Legislative clarification for other highly mobile workers in sectors other than road transport would be welcomed. While awaiting such clarification, it is essential to adopt a—methodologically less questionable—interpretation of the current provisions.

30. Case C-815/18 *Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 21 December 2018 — Federatie Nederlandse Vakbeweging v Van den Bosch Transporten B.V., Van den Bosch Transporte GmbH, Silo-Tank Kft* [2019] O.J. C 122/10.

31. Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 [2020] O.J. L 249/49.