Court of Justice of the European Union
PRESS RELEASE No 63/20
Luxembourg, 28 May 2020

Press and Information

Advocate General's Opinion in Cases C-620/18 and C-626/18
Hungary and Poland v Parliament and Council

Advocate General Sánchez-Bordona proposes that the Court of Justice should dismiss the actions for annulment brought by Hungary and Poland against the Directive strengthening posted workers' rights

The EU legislature, in the light of the development of the EU employment markets following the consecutive enlargements and the 2008 financial crisis, was entitled to carry out a reassessment of the interests of undertakings benefiting from the freedom to provide services and the interests of their posted workers

In 2018, the EU legislature adopted a directive ('the amending directive')[1] by which it amended Directive 96/71 EC concerning the posting of workers ('Directive 96/71')[2] with the aim of ensuring greater protection for those workers as regards, inter alia, their remuneration and social and employment rights. In accordance with the amending directive, those aspects of the working conditions of posted workers must, in principle, comply with the applicable rules of the host Member State, that is, the Member State to which the workers have been posted.

Moreover, where workers are posted for a period of more than 12 months (or, exceptionally, 18 months), the amending directive provides that practically the same terms and conditions of employment must apply to those workers as apply to workers from the host Member State.

Hungary and Poland both brought actions before the Court of Justice seeking the annulment of the amending directive in whole or in part. Germany, France, the Netherlands, Sweden (in Case C-626/18 only) and the Commission intervened in the proceedings in support of the Parliament and the Council.

In todays Opinions, Advocate General Manuel Campos Sánchez-Bordona, first, considers that the **amending directive was adopted using an appropriate legal basis.** In that context, the Advocate General emphasises that, like Directive 96/71, the amending directive pursues the twofold objective of, on the one hand, guaranteeing that undertakings are able to carry out the transnational provision of services by moving workers from their State of establishment and, on the other hand, of protecting the rights of posted workers and preventing unfair competition between undertakings, derived from the different levels of protection in the Member States.

The Advocate General acknowledges that most of the provisions of the amending directive relate in particular to the protection of posted workers, which is due to the fact that **the EU legislature considered that it was essential to amend Directive 96/71 in that sense in the light of the development of the EU employment markets following consecutive enlargements and the 2008 financial crisis.** The Advocate General underlines that, when the EU legislature enacts a harmonising provision, such as Directive 96/71, it cannot be denied the possibility of adapting that act to a subsequent change in circumstances or development of events.

Furthermore, according to the Advocate General, the fact that the amending directive is aimed primarily at protecting posted workers' rights does not mean that it ought to have been adopted on

[1] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16).
[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 (OJ 1997 L 18, p. 1).

the basis of Article 153 TFEU, relating to certain aspects of the EU's social policy. In that regard, he recalls that an act amending another earlier act will normally have the same legal basis as the amended rule. Accordingly, it is possible for Articles 53(1) TFEU and 62 TFEU, whose objective is to ensure freedom of establishment and the freedom to provide services, to be the appropriate legal basis for the amending directive, as they were previously for Directive 96/71.

Secondly, the Advocate General observes that the amending directive simply coordinates the application of the concurrent employment legislation of the host State and State of origin, and does not, under any circumstances, set the level of wages to be paid, which comes within the competence of the Member States. Likewise, posted workers' remuneration will continue to differ in some aspects from local workers' remuneration, with the result that the differences between the actual remuneration received by both types of worker will not be eliminated. For the same reason, the Advocate General considers that the competitive advantages of the undertakings of EU countries with lower labour costs which post workers to Member States with higher labour costs will not be eliminated either.

Thirdly, the Advocate General is of the view that, in adopting the amending directive, **the EU legislature complied with the requirements of the principle of proportionality without manifestly exceeding its broad discretion in the area of regulating the transnational posting of workers.** In particular, he considers that the replacement by the amending directive of the term 'minimum rates of pay' with the term 'remuneration' was justified on the grounds of the practical difficulties resulting from the use of the former term. Indeed, some undertakings, when they post workers, may have been inclined to pay them the minimum salary regardless of their category, their duties, their professional qualifications and their length of service, thereby creating a pay gap with regard to local workers in a like situation.

Similarly, the Advocate General considers that the regulation of long-term posted workers (12 or 18 months) introduced by the amending directive is justified and involves restrictions that are proportionate to the freedom to provide services, inasmuch as it is consistent with the situation of workers whose integration into the labour market of the host State is greater.

Lastly, the Advocate General observes that the amending directive does not contain any substantive rules governing the posting of workers in the transport sector, and that it will apply to that sector only when a legislative act to that end is adopted in the future. In that respect, the Advocate General rejects Hungary's argument, according to which the reference made by the amending directive to that future legislative act constitutes, in itself, an infringement of the provision of the FEU Treaty relating to the application of the principle of the free movement of services in the transport sector. [3]

In the light of all the foregoing, the Advocate General proposes **that the Court should dismiss in their entirety the actions for annulment brought by Hungary and Poland.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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[3] Article 58(1) TFEU.

The full text of the Opinions (C-620/18 and C-626/18) is published on the CURIA website on the day of delivery.

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