Pravna fakulteta
Univerza v Ljubljani

ZBORNIK ZNANSTVENIH RAZPRAV

2020

LETNIK LXXX

Perspectives on the European Pillar of Social Rights

5

UDC: 349.2:347.9:061.1EU
331.556.4

Peter C. Schöffmann[*]

The Case of *Alpenrind* – The Posting of Workers and the Binding Nature of Portable Document A1

1. Introduction

Every time employers assign their employees to provide services cross-border, the applicable legislation has to be determined. In general, this applies to labour law as well as to social security law. Even in the absence of conflict-of-law rules, the scope of application is frequently governed by the principle of territoriality. This principle of public international law limits the public authority to the national territory.[1]

However, the principle of territoriality requires a connecting factor. In employment-related matters, various factors are eligible: the employee's residence or stay, the place of employment or the place of the employer's registered office.[2] Generally, the attachment to the place of employment is considered the most appropriate.[3]

In labour law, the Rome I Regulation[4] provides a set of conflict-of-law rules that is governed by the primacy of freedom-of-choice of law.[5] For the protection of employees,

[*] *Magister iuris, Teaching and Research Associate at the Institute for Austrian and European Labour Law and Social Security Law, Vienna University of Economics and Business; peter.schoeffmann@wu.ac.at.*

[1] Steinmeyer, Die Einstrahlung im internationalen Sozialversicherungsrecht (1981), p. 26.

[2] Ibid.

[3] Steinmeyer, in: Fuchs, Cornellisen, EU Social Security Law (2015), Overview to Articles 11–16, para. 5.

[4] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008.

[5] Deinert, International Labour Law under the Rome Conventions (2017), Chapter 9, para. 1.

it is impermissible to depart from the mandatory provisions of the law objectively applicable to the contract.[6] If the employee is temporarily assigned to another country, the law objectively applicable is not affected. The labour law of the home country will continue to apply as the integration into the employment system of the host country is of a lesser degree.[7] Under the Posting Directive,[8] the posted employees will benefit from a so-called nucleus[9] of rights provided by the host Member State. Eventually, there will be different layers of the applicable legislation governing distinct issues of the same employment relationship.

To the very contrary, EU social security law is governed by the principle of the single applicable legislation.[10] Double insurance, resulting from multiple applicable legislations, would result in double contributions, i.e. an additional burden potentially impeding the freedom of movement of workers and services. Regulation 883/2004 (hereinafter: the Basic Regulation), therefore, provides "a complete and uniform system of conflict rules."[11] It ensures

> "that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation."[12]

The conflict-of-law rules are intended not only to prevent the simultaneous application of several legislations and the complications, which might ensue but also to prevent that the employee will be left with no applicable law at all.

The Basic Regulation assumes that the employees' legal relations are most closely tied to the Member State where they actually perform their work. Therefore, Article 11(3)(a) codifies the principle of the place of employment (*lex loci laboris*) and provides that "a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State." This holds true even if they reside in the territory of another Member State.[13]

---

6 Ibid., Chapter 9, para. 47.

7 Cf. Thüsing, European Labour Law (2013), § 9, para. 1.

8 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 L 18, 21.1.1997.

9 Defossez, in: Ales (et al.), International and European Labour Law (2018), Directive 96/71, para. 31.

10 Recital 18(a) of Regulation (EC) No 883/2004 of the European Parliament and of the European Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004.

11 C-202/97 *Fitzwilliam Technical Services*, para. 20.

12 Ibid.

13 C-276/81 *Kuijpers*, para. 12.

1.1. Exception for the Posting of Employees

However, this does not apply in cases of short-term cross-border assignments, the "posting" of employees. Typically, posted employees will show a stronger relationship to the posting state, as their employment relationship remains to their employer in the posting state; they usually will not leave their permanent residence and—in case of unemployment—they most certainly will be hunting for a job back home.[14] Therefore, they remain subject to the social security system of the posting state, if

- the anticipated duration of that work does not exceed 24 months and
- that they are not sent to replace other employees (so-called "condition of non-replacement");
- the employment relationship between the employees and the posting employer continues to exist;
- the employer ordinarily performs substantial activities in the posting Member State.

Providing "a complete system of conflict" does not prevent national authorities to assess the same legal question differently, especially as there (obviously) are substantial financial motives to conclude that employees shall pay their contributions in a particular Member State. For example, in the *A-Rosaflussschiff* case, the French social security authority issued a recovery notice for 2 million EUR (as they believed that the employees were wrongly registered with the Swiss social security scheme).[15]

To safeguard the freedom to provide services and to overcome the obstacles likely to impede the freedom of movement of employees,[16] it is important not only to determine the applicable legislation but also to implement a mechanism that forces all authorities (concerned) to agree on one result. For this reason, the employer or the employee can obtain a document issued by their local social security authority. The document contains the information that the assignment constitutes a posting within the meaning of the Basic Regulation and that the posting Member State's legislation will continue to apply. This is the so-called Portable Document A1 (PD A1).

Neither social security authorities nor the courts of the host Member State can deviate from the PD A1 as long as it is not withdrawn or declared invalid. So, the host Member State is prohibited to simply decide that the posted employees shall be subject to its social security legislation and—most importantly—pay contributions.[17] However, PD A1 only has a declaratory effect. It does not constitute the applicable legislation.[18]

---

14 Cf. Schöffmann, Europäische Sozialrechtskoordinierung bei Entsendung (2018), pp. 177 and 179.

15 See Opinion of Advocate General Saufmandsgaard Øe in C-620/15 *A-Rosa Flussschiff*, para. 3.

16 C-35/70 *Manpower v. Caisse d'assurance*, para. 10.

17 C-202/97 *FTS*, paras. 52ff.

18 Opinion of Advocate General Ruiz-Jarabo Colomer in C-178/97 *Barry Banks*, para. 93.

Where there is doubt regarding the PD A1's validity or accuracy, the host Member State's competent institution can initiate a dialogue and conciliation procedure, which is basically aimed at asking the posting Member State to withdraw the document. If the authorities cannot agree whether to withdraw or not, they shall refer the case to the Administrative Commission. It will provide an opinion, which is not legally binding. Eventually, the host Member State can bring infringement proceedings before the Court of Justice of the European Union (CJEU), under Article 259 of the Treaty on the Functioning of the European Union (TFEU). However, no infringement proceedings have yet been brought before the CJEU.

Recently, there was a noticeable increase in preliminary rulings regarding cases, which either clearly did not fall within the material scope of the Basic Regulation or where the PD A1 was fraudulently obtained.

2. *Alpenrind*

Austrian legislation provides a strict regime regulating the posting of employees. The Austrian Act on Anti Wage and Social Dumping[19] provides several obligations regarding the notification and keeping certain documents available at the workplace. Austrian legislation foresees that PD A1 has to be held available for all employees posted to Austria, regardless of the posting's duration. The CJEU considered such restrictive provisions incompatible with the fundamental freedoms.[20] There are more cases pending on whether these provisions comply with EU law.[21]

In December 2013, the authorities inspected the facilities of Alpenrind, where they encountered several employees of a Hungarian contractor. Some of the employees could not provide PD A1. The Regional Health Insurance authority decided that the employees shall be subject to the Austrian social security system. However, as those employees went back to Hungary, they obtained PD A1 issued retroactively for the period of their posting to Austria.

The Hungarian contractor, Martin Meat, has been active in Austria since 2007 (so for six years at the time of the posting). Eventually, they set up another subsidiary in Hungary, called Martimpex. They provided identical services to Alpenrind in Austria for 24 months. Subsequently, Martimpex' employees were again replaced by Martin Meat's employees in order not to exceed the threshold period. The Hungarian contractor brought an appeal against the decision taken by the Regional Health Insurance authority. Their appeal was based on the argument that they obtained PD A1 and that the Austrian

[19] *Lohn- und Sozialdumping-Bekämpfungsgesetz* (LSD-BG), Bundesgesetzblatt I (Federal Law Gazette) 2016/44.

[20] See C-33/17 *Čepelnik*.

[21] See C-16/18 *Dobersberger* and C-645/18 *Bezirkshauptmannschaft Hartberg-Fürstenfeld*.

authorities are hence not competent. The case reached the Austrian Administrative Supreme Court, the competent court of cassation. It was confronted with two questions, which were referred to the CJEU:

– Can PD A1 be issued even if the host State already decided that its social security law shall apply?

And secondly:

– Does it matter—for the prohibition of replacement to apply—whether the workers are posted by the same employer or do the provisions apply to all forms of replacement?

The central issues of this case are the retroactive effect of the PD A1 (see section 2.1 below) and the condition of non-replacement (see section 2.2 below).

2.1. Retroactive Effect

> Regulation 987/2009 (hereinafter: the Implementing Regulation) provides that "the competent institution of the Member State whose legislation is applicable […] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions."[22]

It can be assumed that there is no time limit for the issue of such attestation; hence the PD A1 can have retroactive effect.[23] This is supported by the Administrative Commission's decision No. 126, which states that the competent institution shall issue the PD A1, even if the issue of such document is requested after the commencement of the occupation.[24]

This idea was reiterated by the CJEU in the *Banks* case,[25] where it concluded "[t]here is […] nothing to prevent the [PD A1] from producing retroactive effects." The argument surprises, as the CJEU usually does not adopt the *argumentum a contrario* to underline its results.[26] Furthermore, it should be taken into account that the decision in *Banks* was based on the previous regulations: "Basic" Regulation (EC) 1408/71[27] and "Implementing" Regulation (EEC) 574/72.[28]

---

22 See Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 2009.

23 Steinmeyer, in: Fuchs, Cornellisen, EU Social Security Law (2015), Article 12, para. 18.

24 OJ C 141, 1981, 3. At that time, PD A1's predecessor Form E 101 was used.

25 C-178/97 *Barry Banks*, para. 54.

26 Rebhahn, in Fenyves, Kerschner, Vonkilch, ABGB (2014), Nach §§ 6, 7, para. 62.

27 Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 1971, p. 2.

28 Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons

Article 11 of Regulation (EEC) 574/72 provided that

> "[t]he institution designated by the competent authority of the Member State whose legislation remains applicable shall issue (…) a certificate of posting testifying that he [the worker] shall remain subject to that legislation up to a specific date."

However, Article 5 of the Implementing Regulation currently in force foresees that all "Documents […] showing the position of a person […]" shall be deemed legally binding. Höllbacher and Kneihs suggest that the PD A1 consequently lacks an explicit legal basis in the Basic and Implementing Regulation as the notion of a "document" is broader. Due to the lack of an explicit legal basis, the retroactive effect would infringe the principle of the protection of legitimate expectations. Therefore, the argument that "there is nothing that prevents a retroactive effect"[29] is unacceptable under the new provisions.[30]

It could be anticipated that the CJEU would not follow such a narrow interpretation of the provisions' wording.[31] It again held that "there is no provision of EU law which prevents the application of [a retroactive effect] to A1 certificates."[32] Nevertheless, the CJEU points to Article 15(1) of the Implementing Regulation, stipulating that "the [employer] concerned shall inform the competent institution of the Member State whose legislation is applicable thereof, *whenever possible in advance*." The CJEU concludes that the issue of a PD A1 "during or after the end of the period of employment concerned is still possible."[33] While this is certainly true for some cases, it is impermissible to assume that this provision declares all retroactive PD A1 admissible. It is obvious that the provision requires the competent institution to carry out an assessment of whether the employer's attempt to obtain the PD A1 is improperly delayed. Otherwise, the provision would be utterly pointless.

The problem of retroactive PD A1 becomes far more significant if there already is a decision of the competent institution of the Member State in which the activity is carried out. The referring court raised the question of whether acts establishing that the worker is subject to the social security system in question are also "documents" as referred to in Article 5 of the Implementing Regulation.[34] However, the CJEU does not dwell upon an issue like that. It simply held that such an act—especially the decision of the social security authority—cannot constitute a document within the meaning of the

---

and to their families moving within the Community, OJ L 74, 1972, p. 1.

29 See footnote n. 25.

30 Höllbacher, Kneihs, Zu den sozialrechtlichen Verordnungsbestimmungen über die Entsendung von Arbeitnehmern und Selbständigen (Teil II) (2012), pp. 171 and 172.

31 Regarding the interpretation of the wording see: Stotz, Die Rechtsprechung des EuGH (2015), pp. 491 and 495.

32 C-527/16 *Alpenrind*, para. 71.

33 Ibid., para. 72.

34 Cf. Opinion of Advocate Saugmandsgaard Øe in C-527/18 *Alpenrind*, para. 60.

Regulations.[35] Reasoning as to why this interpretation is refuted was not provided. The CJEU concludes that

> "an A1 certificate […] is binding […] with retroactive effect, even though that certificate was issued only after that Member State [in which the activity is carried out] determined that the worker concerned was subject to compulsory insurance under its legislation."[36]

Spiegel argues that decisions by social security authorities should also be recognised as "Documents" to ensure a "level playing field" between the Member States involved.[37] As a result, these decisions would themselves have a binding effect. It would be impermissible for the institution of the other Member State to issue PD A1. However, the idea of a "level playing field" is not convincing, as it is not consistent with the *ratio* of the principle of the single applicable legislation. While it could possibly be fruitful to prevent abuse of the posting rule, it would also lead to a "race against the clock"[38] between the authorities of the Member States involved.

While the CJEU's decision might seem expedient from the perspective of social security coordination, the situation is different, when we look at the procedural level: it has to be borne in mind that by granting the PD A1 retroactive effect (even though a decision is already in place), EU law infers with the national administrative procedure. According to the Austrian Administrative Supreme Court, PD A1 establishes jurisdiction of the issuing Member State.[39] PD A1 effects not only the applicable social security legislation but also determines the competent jurisdiction. According to Austrian administrative procedural rules, the relevant moment to establish whether an Austrian authority has jurisdiction or not is the moment, when the decision in the first instance is taken.[40] However, it is not relevant whether the decision acquires the authority of a final decision. Granting PD A1 an overriding legal effect consequently affects the national administrative procedure. In result, the *Alpenrind* decision would require the Austrian authorities to set aside its decision. However, the Austrian administrative procedure only provides such instruments within a very narrow margin.

The CJEU, however, does not address the permissibility of such an intervention in the internal legal order at all. Generally, it cannot be accepted that the Regulations endow the issuing Member State with the capacity to overturn a decision taken by the other Member State within its scope of competence. The CJEU held that detailed procedural

35 C-527/18 *Alpenrind*, para. 75.

36 Ibid., para. 77.

37 Spiegel, in Spiegel, Zwischenstaatliches Sozialversicherungsrecht, Art. 5 (EU) 987/2009, para. 8.

38 Opinion of Advocate Saugmandsgaard Øe in C-527/18 *Alpenrind*, para. 64.

39 Austrian Administrative Supreme Court (*Verwaltungsgerichtshof*), 2010/08/0321, 16 March 2011.

40 Cf. Austrian Administrative Supreme Court (*Verwaltungsgerichtshof*), 83/01/0399, 15 February 1984.

rules are a matter for the domestic legal order of each Member State, under the *principle of procedural autonomy* of the Member State; provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).[41] As the Regulations do not provide explicit procedural rules, it is for the domestic legal system of each Member State to lay down such provisions.[42]

Consequently, this pervasive retroactive effect would also deprive employees working in Austria of legal protection, i.e. contesting the decision taken by the Austrian administrative authority at an Austrian administrative court. Therefore, the protection of legitimate expectations[43] and the right to a hearing before the legally competent judge or authority should also have been considered.

2.1.1. Potential for Abuse

PD A1's retroactive effect should also be viewed critically for its potential for abuse. The European Commission's *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*[44] (hereinafter: Practical Guide) provides that PD A1

> "should be withdrawn by the issuing institution […] as from the date the competent institution of the posting State was notified and provided with evidence of the situation in the State of employment."[45]

Where PD A1 was issued retroactively after the expiry of the (alleged) posting, the notification by the Member State of employment can inevitably only take place after the issuing. The upshot of this is that the posting is already over and the employee would remain subject to the legislation of the posting Member State, even though it wrongfully assumed its legislation applicable.

In this context, it should be pointed to the ruling *A-Rosa Flussschiff*,[46] where a German employer employed seasonal workers on ships, which "sail[ed] exclusively on French inland waterways".[47] The CJEU held that PD A1 even has a binding effect when there is

41 C-201/02 *Wells*, para. 67.

42 Cf. CC-13/01 *Safalero*, para. 49; Nowak, Rechtschutz im europäischen Verwaltungsrecht (2011), pp. 459 and 514.

43 Höllbacher, Kneihs, Zu den sozialrechtlichen Verordnungsbestimmungen über die Entsendung von Arbeitnehmern und Selbständigen (Teil II) (2012), pp. 171 and 172.

44 The Administrative Commission for the Coordination of Social Security Systems, Practical Guide on The Applicable Legislation in The European Union (EU), the European Economic Area (EEA) and in Switzerland, Social Europe, Brussels 2013.

45 Ibid., p. 14.

46 C-620/15 *A-Rosa Flussschiff*.

47 Ibid., para. 22.

no cross-border activity at all, and employees are simply employed in another Member State. This would allow an employer to obtain PD A1. It could override the decision issued by the other Member State to make those employees subject to their social security system and consequently evade the obligation to pay social security contributions. By confirming the pervasive retroactive effect, the CJEU, in result, delivered a blueprint for social fraud.

2.2. Condition of Non-Replacement

The prohibition of replacement was introduced in the 1960s with an amendment to the very first Regulation on social security coordination (No 3/1958).[48] The Regulation's recital provides that there were previous cases of abuse and fraudulent practices and that the amendment shall put an end to this. In its current version, it stipulates that the postal rule applies, as long as the posted worker "is not sent to replace another posted person."[49]

The CJEU had to address whether the prohibition of replacement only applies to employees posted by the very same employer (or at least different employers with staffing or organisational links) or to all replacements, even to successive postings by different employers.

The Practical Guide argues that the condition of non-replacement is a matter of perspective:

> "The ban on replacing a posted person by another posted person must be considered not only from the perspective of the posting State but also from the perspective of the receiving State. The posted worker cannot be immediately replaced in receiving Member State A by a posted worker from the same undertaking of posting Member State B, nor by a posted worker from a different undertaking based in Member State B or a posted worker from an undertaking based in Member State C."[50]

Advocate General Saugmandsgaard Øe instead argues that the non-replacement condition "must be considered solely from the viewpoint of the employer that posts the worker."[51] This stems from the argument that the posting rule intends to promote the freedom to provide services[52] and that the non-replacement condition aims to prevent employers from taking advantage of a lacuna by replacing employees with their own

---

48 Regulation (EEC) No 24/64 of the Council of 10 March 1964 amending Article 13 of Regulation No 3 and Article 11 of Regulation No 4, OJ 64, pp. 746ff.

49 Article 12 (1), last halfsentence of the Basic Regulation.

50 The Administrative Commission for the Coordination of Social Security Systems, Practical Guide on The Applicable Legislation in The European Union (EU), the European Economic Area (EEA) and in Switzerland, Social Europe, Brussels 2013, p. 13.

51 Opinion of Advocate General *Saugmandsgaard Øe* in C-527/16 *Alpenrind*, para. 95.

52 Ibid., para. 84.

staff.[53] This can constitute an abusive practice. The Advocate General is concerned that in case of a replacement by a different employer, the latter will often not be aware of the posting by the former.[54]

However, the Advocate General's argument is mistaken in its very approach. If the non-replacement condition were only to apply to cases of abuse, the amendment of the provision would not have been necessary. Rather, it is settled case-law that the scope of Union regulations must in no case be extended to cover abuses.[55] In case of abusive practice, it shall be redefined so as to re-establish the situation that would have prevailed in the absence of abuse.[56] In result, the posting-rule could not apply to these employees under the general principle.[57] However, when interpreting a provision, one should assume that the legislature intended not to implement purposeless regulation.

The CJEU consequently rejected the Advocate General's arguments. It held that as a derogation of the general rule, Article 12 of the Basic Regulation must be "strictly interpreted."[58] It applied a textual—and to that effect an extensive—interpretation arguing that a restrictive interpretation does not comply with the wording of the provision.[59] Furthermore, the CJEU argued that a strict interpretation also stemmed from the "view to guaranteeing the equality of treatment."[60]

In result, the CJEU decided that all forms of replacement are covered by the prohibition and not only those where the same employer is responsible for the posting or where at least an organisational or staffing link exists between different employers.

3. Conclusion and Outlook

When it comes to the posting of workers, one can observe a tension between some Member States' need to provide services and other Member States' need for protection against abusive practices. By conferring PD A1 an extensive binding effect, the CJEU expands this gap. Member States, where workers are typically posted to, try to remedy

53 Ibid., para. 89. However, the recital does not actually say that (cf. footnote n. 48).

54 Ibid., para. 94.

55 C-110/99 *Emsland Stärke*, para. 51.

56 C-255/02 *Halifax*, para. 94.

57 Schöffmann, Europäische Sozialrechtskoordinierung bei Entsendung (2018), pp. 177 and 189.

58 C-527/16 *Alpenrind*, para. 95. Interestingly, the (authentic) German version of the judgement reads that the provision must be "narrowly interpreted" ("*eng auszulegen*"), which is fallacious as the CJEU argues for a broader understanding (than the one adopted by Advocate General) of the condition of non-replacement.

59 Ibid., paras. 97 and 99.

60 Ibid., para. 98.

this supposed defect of social security coordination by implementing restrictive legislation on a national level. This leads to a significant higher administrative burden for employers, who intend to pursue business under the freedom to provide services.

Belgium, for example, adopted a regulation that national courts and social security authorities shall disregard PD A1 in cases of abuse. In an infringement proceeding under Article 258 TFEU, the CJEU found that Belgium failed to fulfil its obligations under the social coordination Regulations as it thwarted the principle of sincere cooperation (laid down in Article 4(3) TFEU) by allowing its own institutions to consider unilaterally that they are not bound by the certificate.[61]

Likewise, the CJEU concluded that Austria violated Article 56 TFEU. It implemented a regulation that allowed its authorities to order a commissioning party to suspend payments to its contractor (from another Member State), or even to pay a security to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of Austrian labour law.[62]

Self-evidently, social security coordination is confronted with the challenge to balance the countervailing interests of the Member States. By failing to provide expedient remedies to combat social fraud, the Union is inflicting a loss of confidence towards its own institutions. There already are cases of courts refusing to refer questions to the CJEU for a preliminary ruling. The French *Cour de cassation* found two air transport companies guilty of concealed employment where those companies had submitted E 101 certificates stating that the workers in question were affiliated to the social security schemes of other Member States.[63] Both companies were fined EUR 100,000 each.[64]

The Commission's proposal for an amendment of the social coordination Regulations[65] tries to accomplish this objective. It provides a comprehensive notion of fraud[66] and states that in this case "the issuing institution shall withdraw or rectify the document immediately and with retroactive effect."[67] Still, it is not convincing that the withdrawal shall only be retroactive in cases of fraud as PD A1 is only declaratory.[68]

If an employer supposedly posted workers to another Member State and afterwards it turns out that these employees should actually have been subject of the host State's social

61 C-356/15 *European Commission v. Belgium*.

62 C-33/17 *Čepelnik*.

63 Opinion of Advocate General Saugmandsgaard Øe in C-620/15 *A-Rosa Flussschiff*, para. 34.

64 Cf. Schöffmann, Europäische Sozialrechtskoordinierung bei Entsendung (2018), p. 177. See footnote n. 22.

65 COM(2016) 815 final.

66 "'fraud' means any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State; […]"; ibid., p. 34.

67 Ibid., p. 35.

68 Explicitly stated in the proposal for the amendment; cf. ibid., p. 14.

security system, contributions will have to be paid from the beginning of the posting. According to the CJEU, the precise opposite will be the case, if PD A1 was obtained. It does not seem plausible that one can evade this contribution by obtaining PD A1, which later on will be withdrawn. PD A1 aims at preventing that legal disagreements between Member States become a burden for Union citizens. However, it is not its spirit to open up a safe haven for those who wish to avoid contributions to a social security system.

Leopold shows that one of the Regulations most striking deficits is the lack of a comprehensive procedure to transfer undue benefits from the incompetent authority to the competent authority. For claiming unpaid due contributions and reimbursing paid undue contributions, one instead has to concern oneself with national regulations. In result, it is the employer's and/or worker's risk whether they—once again—have to pay social security contributions and whether they can reclaim already paid contributions.[69] In Austria, social security authorities can claim unpaid contributions for the past three years from the moment they were correctly notified regarding the employment.[70] Reimbursements are possible for five years, starting from the time of payment.[71] Under the assumption that other Member States have similar provisions, it is very likely that employers and/or workers will have to pay contributions, whereas a possible reimbursement is statute-barred.

By not providing rules, how to avert and unwind erroneous social security relationships, the Commission's proposal will inevitably remain imperfect. Tensions will remain not only between the Member States, which pursue different objectives when it comes to the freedom of movement and to provide services, but it also will fail to improve the acceptance of intra-EU labour mobility among citizens.

At first glance, social security coordination and the European Pillar of Social Rights both try to ensure adequate conditions within the internal market but do so independently. Unlike Principles concerning individual and collective labour law, as stipulated in Chapter II on Fair Working Conditions (e.g. Principle 6 on Wages, Principle 8 on Social Dialogue and Involvement of Workers), the issues outlined above relate to the complex relationship between European social security law and national administrative law, without having a direct link to the Principles of the EPSR. However, if employers engage in abusive and fraudulent practices, this is not only to the detriment of the Member States and their respective social security systems, but also affects their employees. Miserable working conditions and social fraud go hand in hand. Providing expedient mechanisms to put a halt to such abuses is an essential feature of ensuring fair working conditions.

---

69 Leopold, Die Vermeidung und Abwicklung fehlerhafter Einbeziehungen in mehr als ein mitgliedstaatliches System sozialer Sicherheit (2014), p. 209, pp. 212ff.

70 Section 68 General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*), in the version Bundesgesetzblatt I (Federal Law Gazette) 2019/23.

71 Ibid., section 69.

References

Ales, Edoardo; Bell, Mark; Deinert, Olaf; Robin-Olivier, Sophie: International and European Labour Law, Nomos Verlagsgesellschaf, C.H. Beck, Hart Publishing, Baden-Baden 2018.

Deinert, Olaf: International Labour Law under the Rome Conventions, Nomos Verlagsgesellschaft, Hart Publishing, Baden-Baden 2017.

The Administrative Commission for the Coordination of Social Security Systems: Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, Social Europe, Brussels 2013.

Fuchs, Maximilian; Cornelissen, Rob: EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009, Nomos Verlagsgesellschaft, Hart Publishing, Baden-Baden 2015.

Fenyves, Attila; Kerschner, Ferdinand; Vonkilch, Andreas: ABGB – §§ 1 bis 43 (3rd edition), Verlag Österreich, Vienna 2014.

Höllbacher, Michael, Kneihs, Benjamin: Zu den sozialrechtlichen Verordnungsbestimmungen über die Entsendung von Arbeitnehmern und Selbständigen (Teil II), in: Das Recht der Arbeit, 171 (2012) 2, pp. 171–181.

Leopold, Anders: Die Vermeidung und Abwicklung fehlerhafter Einbeziehungen in mehr als ein mitgliedstaatliches System sozialer Sicherheit, in: Zeitschrift für europäisches Sozial- und Arbeitsrecht, 13 (2014) 5-6, pp. 209–216.

Nowak, Carsten: Rechtsschutz im europäischen Verwaltungsrecht, in: Verwaltungsrecht der Europäischen Union (Ed. J. P. Terhechte), Nomos, Baden-Baden 2011, pp. 459–518.

Schöffmann, Peter C.: Europäische Sozialrechtskoordinierung bei Entsendung, in: Social Europe? (Ed. C. Lasner), Jan Sramek Verlag, Vienna 2018, pp. 177–198.

Spiegel, Bernhard: Zwischenstaatliches Sozialversicherungsrecht (72.–75. Lfg), Manz, Vienna 2018.

Steinmeyer, Heinz-Dietrich: Die Einstrahlung im internationalen Sozialversicherungsrecht, Duncker & Humblot, Berlin 1981.

Stotz, Rüdiger: Die Rechtsprechung des EuGH (2015), in: Europäische Methodenlehre (3rd edition, Ed. K. Riesenhuber), de Gruyter, Berlin 2015, pp. 491–518.

Newman, Janet; Tonkens, Evelien: Introduction, in: Newman, Janet & Tonkens, Evelien (eds.): Participation, Responsibility and Choice. Summoning the Active Citizen in Western European Welfare States (Ed. J. Newman, E. Tonkens), Amsterdam University Press, Amsterdam 2011.

Thüsing, Gregor: European Labour Law, Verlag C.H. Beck, München 2013.

UDK: 349.2:347.9:061.1EU
331.556.4

Zbornik znanstvenih razprav
Perspektive Evropskega stebra socialnih pravic
LXXX. letnik, 2020, strani 119–131

Peter Schöffmann

Zadeva *Alpenrind* – O zavezujoči naravi prenosnega dokumenta A1 v primeru čezmejne napotitve delavcev

Odločitev v zadevi *Alpenrind* (C-527/16) je razkrila nasprotujoča si stališča držav članic glede svobode opravljanja storitev in vprašanja socialnega dampinga v EU. Trenja, s katerimi se Unija sooča že dalj časa, so se v zadnjih letih le še povečala. Prevladujoče stališče zahodnih držav članic je, da institut napotitve delavcev znižuje raven socialne varnosti ter negativno vpliva na trg dela v državah gostiteljicah. Prepričane so, da pravo EU ne omogoča ustrezne zaščite pred zlorabami instituta, zaradi česar države članice vzpostavljajo dodatne pogoje, vezane na prenosni dokument A1. Pri tem lahko slednji v nasprotju s cilji pravil koordinacije socialne varnosti omejujejo svobodo gibanja delavcev ter svobodo opravljanja storitev. Te izzive dodatno otežuje vpliv nezanemarljivih finančnih interesov: tudi v primeru le kratkega čezmejnega opravljanja storitev lahko prispevki za socialno varnost znašajo več milijonov evrov. Tako ne preseneča, da je v interesu delodajalcev, da so napoteni delavci podvrženi tistemu nacionalnemu sistemu socialne varnosti, v katerem je prispevna obremenitev nizka.

V obravnavani zadevi je podjetje *Martin Meat* z namenom nadomestitve v državo gostiteljico napotenih delavcev vzpostavilo novo podružnico *Martimpex*. Podjetji, ki nista želeli prekoračiti splošne 24-mesečne gornje omejitve trajanja napotitve, sta zatrjevali, da se pogoj prepovedi nadomestitve napotenega delavca z napotenim delavcem v primeru, ko delavci prihajajo iz različnih podjetji, pa čeprav so ta organizacijsko ali kadrovsko povezana. Generalni pravobranilec se je strinjal s tako razlago, Sodišče EU pa je določbo razlagalo širše, in sicer v skladu s prepovedjo nadomestitve neodvisno od delodajalca. Razprava se osredinja na vprašanje veljavnosti prenosnega dokumenta A1, ki ga delavci, napoteni s strani podjetja *Martin Meat*, pristojnim oblastem niso izročili in tako niso izkazali pristojnosti države pošiljateljice na področju socialne varnosti, zaradi česar so avstrijske oblasti odredile plačilo prispevkov. Podjetje *Martin Meat* je prenosne dokumente A1, ki državi gostiteljici odvzemajo pristojnost na področju socialne varnosti, pridobilo retroaktivno. Ključno vprašanje, na katerega je Sodišče EU odgovorilo pritrdilno, je bilo, ali lahko do odvzema pristojnosti pride tudi po tem, ko so oblastni organi zaradi izhodiščne

odsotnosti tako imenovanega obrazca A1 v zadevi že odločili in ugotovili pristojnost. Iz odločbe tako izhaja jasno trenje med omejitvijo presoje držav članic, ki lahko preprečuje zlorabe, ter svobodo opravljanja storitev, ki jo taka presoja lahko omejuje.

Ključne besede: *Alpenrind*, napotitve, koordinacija sistemov socialne varnosti, obrazec A1, svoboda opravljanja storitev, nepoštene prakse, retroaktivni učinek.

UDC: 349.2:347.9:061.1EU
331.556.4

Zbornik znanstvenih razprav
Perspectives on the European Pillar of Social Rights
Volume LXXX, 2020, pp. 119–131

Peter Schöffmann

The Case of *Alpenrind* – The Posting of Workers and the Binding Nature of Portable Document A1

The *Alpenrind* case (C-527/16) revealed opposing positions between the Member States providing services feely across Europe and the Member States fearing for social dumping. A tension the Union is grappling with for a certain time, and that increased in the last years. Many (mostly western) Member States believe that the posting of workers is undermining their social standards and hampering their labour markets. They are not convinced that Union law provides an adequate level to prevent abusive practices. Therefore, these Member States try to take countermeasures by implementing restrictive legislation: imposing obligations on employers to provide documents and comply with notification requirements. This leads to an additional burden potentially impeding the freedom of movement of workers and services; an effect the Social Coordination Regulations actually intend to prevent.

The *Alpenrind* case deals with two questions regarding the postal rule's impact on social security coordination. It addresses the condition of non-replacement as well as the binding effect of Portable Document A1. However, set in a broader context, it reveals the inherent contradiction of social security coordination. The Union finds itself having to strike a balance between the freedom to provide services and the protection against social dumping.

Keywords: *Alpenrind*, posting of workers, social security coordination, portable document A1, freedom to provide services, abusive practices, retroactive effect.