

# GMS Flash Alert

2020-292 | June 23, 2020



## European Union - European Court Assessing Directive for Posted Workers

On 28 May, 2020, the Advocate General (AG) of the European Court of Justice delivered an opinion in cases raised by the Polish and Hungarian governments about dismissing the revised European Union (EU) Posted Worker Directive 2018/957/EU in whole or in part.<sup>1</sup> The AG finds that the amendments in the EU directive uphold the fundamental principles in the EU legislation and that the directive is adopted on a valid legal basis. Therefore, the AG proposes to the European Court of Justice (ECJ) to dismiss the actions for annulment brought by Poland and Hungary.

### WHY THIS MATTERS

Most companies whose employees provide temporary cross-border services in the EU find it challenging to understand and implement the requirements presented in the revised EU directive for posting of workers. For example, it is a complex task to determine what level of remuneration a posted worker must be guaranteed in the host country and it is as complex to understand how to calculate the posting's 12-month time limit under the amended directive.

Companies should not rely on a possibility that the amended directive will not come into effect on 30 July 2020. Several countries have already adopted the directive in their national legislation, illustrating the high level of sensitivity of this topic in the EU. It is therefore very important for companies to comply with the new rules and the administrative requirements for posted workers.

### Revised EU Directive for Posting of Workers

The directive amends rules for terms and conditions for employment for workers posted temporarily to an EU country to deliver services.<sup>2</sup> The EU countries must transpose the EU directive on posting of workers into their national legislation by 30 July 2020.<sup>3</sup>

1. One of the most significant changes to the terms and conditions for employment of posted workers in the

directive concerns a concept of remuneration. A posted worker must be remunerated according to the rules in the host country. This means that wages and all other elements (remuneration) that are guaranteed to local workers in the same position must be made available to a posted worker. The condition of remuneration must be met regardless of the duration of a posting.

Before the directive, posted workers had to be paid at minimum rates of pay (minimum wage) in the host country.

2. Another significant change concerns duration of a posting. The directive outlines that a posting or the cumulative duration of the posting periods which take place for the performance of the same task is limited to 12 months with a possibility of extension for an additional 6 months. Postings that last longer than 12 (18) months will be governed by the employment law in the host country.

Before this directive, a posting had no explicit time limit.

The overriding objective of the directive is to protect posted workers and promote fair competition in the EU market.

## **Poland v EU Parliament and EU Council, Case no. C- 626/18**

In its action seeking to annul the amending directive, the Republic of Poland argues that the directive, in particular the provisions concerning remuneration and duration of posting, restricts the freedom to provide services by increasing the burden on service providers, thus eliminating their competitive advantage from lower pay rates applicable in their country of establishment.<sup>4</sup> This then leads to discrimination against cross-border service providers, according to Poland.

### **Highlights of AG's Reasoning**

- The amendments in the directive do not lead to identical treatment of employers in home and host countries. The introduction of remuneration means that a posted worker is protected by being guaranteed the same mandatory parts of the remuneration as local workers, for example. As posted workers are normally covered by social security in their home country, that alone will create differences in wages between posted and local workers.
- The concept of remuneration in the directive is linked to the mandatory parts of remuneration in the host country only. This means that there is no obligation to pay any other non-mandatory part of remuneration in the host country. Therefore, in its condition for equal pay, the directive does not require identical remuneration between posted and local workers.
- The EU Commission's impact analysis showed a gap between wages to posted workers and local workers when minimum rates of pay are applied. It was shown that in several instances posted workers are paid minimum wage in the host country irrespective of their qualifications, experiences, functions, etc. Here, it was concluded that a change of minimum rates of pay is necessary to achieve better protection of posted workers and to create fairer competition between posting employers.
- The introduction of 12 (18) months limit to a posting clarifies what long-term posting is. It is reasonable that a worker whose posting exceeds 12 (18) months is covered by local labour law in the host country to a considerably larger extent than a worker who is posted on short term.

## **Hungary v EU Parliament and EU Council no. C- 620/185**

In its action, the Hungarian government similarly claims that the amended directive for posting of workers must be annulled as it creates barriers for freedom to provide services in the EU.<sup>5</sup> The AG's opinion makes the same conclusions about remuneration and long-term v. short-term posting as in Poland's case. However, the AG's analysis of the directive is more extensive in the Hungarian case, as the AG outlines in meticulous detail the legal basis for the amended

directive and its validity. The AG makes some general observations that can be summed up in the below-noted highlights.

- Even though it is a tough balancing act, the amended directive on posting of workers upholds the principle of freedom to provide services and the aim to protect the rights of posted workers.
- The directive does not determine what a remuneration consists of – or should consist of – as this is in the scope of the national legislation for each EU member state.
- The EU case law shows that the authorities in member states have to observe the principle of proportionality also when they enforce<sup>6</sup> the directive for posting of workers:
  - An authority in an EU member state cannot require a company in that member state to withhold from its payment for services provided by a company in another EU member state, an amount for a fine on this service provider for potential noncompliance with the rules for posted workers<sup>7</sup>;
  - An authority must sanction non-compliance with the rules on posting of workers reasonably and proportionally to the objective of protecting the posted workers.<sup>8</sup> Obviously excessive financial fines and imprisonment for administrative non-compliance are not appropriate sanctions in this context.

---

## KPMG NOTE

As the AG's opinion has considerable legal weight, it is expected that the ECJ will follow the AG's proposal to dismiss the Polish and Hungarian governments' requests for annulment of the directive. Furthermore, the AG's analysis of the revised directive will likely be considered by national authorities when they interpret and enforce the directive.

Currently, the dates for rulings are not published, but the rulings are expected within a couple of months.

---

## FOOTNOTES:

1 European Court of Justice 28 May [press release](#) on the AG's opinion. 2018 [EU Directive 2018/957/EU](#) on posting of workers.

2 Hear more about the revised directive on a 10 June [KPMG Future of Tax podcast](#).

3 See "[KPMG Guide to Posting of Workers 2020](#)," a publication of the KPMG International member firm in Romania. For related coverage see "European Union – EU Council Proposes Changes to Posting of Workers Directive," in GMS [Flash Alert 2017-160](#) (6 November 2017). Also see "Romania – Revised Legislation to Reinforce Rights of Posted Workers," in GMS [Flash Alert 2018-111](#) (24 August 2018).

4 AG opinion in the case [C-626/18 Poland v the EU Parliament and EU Council](#).

5 AG opinion in the case [C-620/18 Hungary v EU Parliament and EU Council](#).

6 The enforcement of the directive on posting of workers including the mandatory registration of posted workers in the host country is outlined in the [EU Directive 2014/67/EU](#).

7 [Judgment of the Grand Chamber, Cepelnik C-33/17 \(13 November 2018\)](#).

8 Judgment of the Sixth Chamber, [Maksimovic and Others C- 64/18 \(12 September 2019\)](#).

## Contact us

For additional information or assistance, please contact your local GMS or People Services professional or the following professional with the KPMG International member firm in the Netherlands:



**Daida Hadzic**  
**EMA Head of Quality**  
Tel. +31 6 532 54 599 (m)  
[Hadzic.daida@kpmg.com](mailto:Hadzic.daida@kpmg.com)

**The information contained in this newsletter was submitted by the KPMG International member firm in the Netherlands.**

© 2020 Meijburg & Co., Tax Lawyers, is an association of limited liability companies under Dutch law, registered under Chamber of Commerce registration number 53753348 and is a member of KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

[www.kpmg.com](http://www.kpmg.com)

[kpmg.com/socialmedia](http://kpmg.com/socialmedia)



© 2020 KPMG LLP, a Delaware limited liability partnership and the U.S. member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved. Printed in the U.S.A. NDPPS 530159

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

The KPMG logo and name are trademarks of KPMG International. KPMG International is a Swiss cooperative that serves as a coordinating entity for a network of independent member firms. KPMG International provides no audit or other client services. Such services are provided solely by member firms in their respective geographic areas. KPMG International and its member firms are legally distinct and separate entities. They are not and nothing contained herein shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners, or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to obligate or bind KPMG International or any member firm in any manner whatsoever. The information contained in herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

*Flash Alert* is a GMS publication of KPMG LLP's Washington National Tax practice. To view this publication or recent prior issues online, please click [here](#). To learn more about our GMS practice, please visit us on the Internet: click [here](#) or go to <http://www.kpmg.com>.