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ATTEMPTS FOR COMMON UNDERSTANDING OF THE CONCEPT OF WORKER AS A CONSEQUENCE OF GLOBALISATION?*

Abstract. Globalisation may concern many different issues, among others, the increase in migration that creates opportunities for all. There should be no doubt that globalisation can bring both positive and negative effects to workers. It can be seen as new opportunities for people, because they can travel, work, learn and live in different countries. Simultaneously however it can be perceived as synonymous to job losses, social injustice, or low environmental, health, and privacy standards. As a result of globalisation, the world is becoming more and more complex and the economic importance of state borders is reduced. It should therefore not raise doubts, that global problems require the capacity to agree on coordinated global responses and mechanisms on the basis of international cooperation. Among the basic international organisations which provide solutions for workers who have decided to look for a job in another country, one can generally mention the International Labour Organisation (ILO), the Council of Europe, and the European Union (EU). There is quite a large number of legal acts created in the framework of those organisations, and so we should ask a question if in such a situation we should also try to understand some legal concepts; in our case concepts connected with taking up employment, in a similar way. Even if the answer is positive, another question comes to mind – is it possible to have such definitions in a global world? It is thus not enough to provide legal regulations concerning worker's rights and obligations if we do not know who exactly should be treated like a worker. The following article will try to answer those questions and simultaneously try to show that globalisation may affect the way certain terms should be understood.

Keywords: free movement of workers, migrant worker, posted worker, globalisation, worker's rights and obligations.

Introduction

Globalisation can be defined as a process of falling barriers to, and an increase in, trade, migration, and investment across borders, or the increased global sourcing of goods, services, labour and capital flows, strengthened by

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the information revolution (Jayassuriya, 2008: 1–3; European Parliament Report, 2006: A). As to the issue of the following article the main attention will be devoted to this dimension of globalization which deals with international migration between different countries, very often between developing and developed ones, which changes the economic relations and structures among and within those countries. People nowadays have many more new opportunities, because they can travel, work, learn, and live in different countries. This is the reason why we need to take forward efforts to improve social and labour standards and practices, in close cooperation with international organisations which aim, with more or less intensity, to protect human rights, especially those of a social character, like the ILO, the Council of Europe, or the EU.

It is worth mentioning that, in order to achieve fair globalization especially in the area of equal opportunities for all, decent work should become a global goal to be pursued by every country and the international community (International Labour Conference, 92nd Session, 2004. A fair globalization. The role of the ILO, Geneva 2004: 3). It should not raise doubts that global problems require the capacity to agree on coordinated global responses and mechanisms to produce integrated decision-making. As a response to call for a socio-economic floor of the global economy social protection and active labour market policies also play an important role (International Labour Conference, 92nd Session, 2004. A fair globalization. The role of the ILO, Geneva 2004: 5, 6). This is the reason why we have a quite large number of legal instruments, both of an international and a European nature, that provides solutions for workers who have decided to look for a job in another country.

We can ask the question if in such a situation we should also try to understand some legal concepts; in our case, concepts connected with taking up employment, in a similar way, and if the answer is affirmative, is it possible in a global world? Sometimes it is not enough to provide legal regulations concerning worker's rights and obligations if we do not know who exactly should be treated like a worker. If, for example, a trainee is also to be treated in this way, he or she should be protected in the same way and have the same obligations. So it definitely would be helpful if we could have a uniform definition of a worker. It is however rather questionable if this is possible taking into account a global world. This is the reason why we should focus our efforts on some groups of states, which means those that are cooperating within different international organisations aiming to protect worker's rights. At the universal level we should take into account the above mentioned ILO and at the regional one the Council of Europe

and the EU. The first two are based on international law, and the third on supranational law. All of those organisations entail a different number of member states, respectively 181, 47, 28. We can ask another question, if the attempt for common understanding of the concept of worker is connected with the number of member states of such organisations or rather with the type and intensity of cooperation in achieving common goals.

The following article will try to answer the above mentioned questions and show that in certain cases and under certain circumstances a common understanding of the concept of a worker is useful and may present specific legal and practical significance. To attain this aim general characteristics of globalisation and its influence on the changes in legal systems will be presented. It will help to show that globalisation may affect the way certain terms, like "worker" should be understood. Also the question of the protection of workers' rights in international law with special attention devoted to the ILO and the Council of Europe regulations will be analyzed. Separate analysis will be devoted to the understanding of this concept within the EU legal order together with its interpretation by the Court of Justice of the European Union (CJEU). This issue is particularly interesting, taking into account its interactions with other international supervisory bodies, like for example the European Committee of Social Rights (ECSR).

Influence of globalisation on the changes in legal systems

As mentioned above, there should be no doubt that globalisation can bring both positive and negative effects to workers. On the one hand it may increase foreign investment in ways that would increase labor demand, on the other it may lead to loss of protection and attempt to reduce costs by worsening working conditions (Jayassuriya, 2008: 1–3; Jackoby, Meunier, 2010: 299). Because of this negative side and the fact that many Europeans see globalisation as synonymous to job losses and social injustice, considering it to be a factor in the erosion of traditions and identities, some legal steps have been taken on the EU level (European Commission Reflection paper on harnessing globalization, COM(2017) 240 final, 3). On the basis of Regulation 1309/2013 the European Globalisation Adjustment Fund has been founded, which provides support to people losing their jobs as a result of major structural changes in world trade patterns due to globalisation. It has a maximum annual budget of EUR 150 million for the period 2014–2020 and can fund up to 60% of the cost of projects de-

signed to help workers made redundant find another job or set up their own business (Regulation (EU) No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014–2020) and repealing Regulation (EC) No 1927/2006, OJ L 347, 20.12.2013, p. 855–864). Since its establishment in 2007, the Commission has received 148 applications from 21 Member States, totaling almost €600 million of EGF co-funding in support of 138,888 redundant workers and 2,944 persons not in employment, education, or training (NEETs) (http://europa.eu/rapid/press-release_IP-17-443_en.htm, 30.09.17). We can thus observe a tangible demonstration of EU solidarity when addressing employment and the social consequences of globalisation. It may, therefore, be the incentive for changes in the legal systems of individual states or international organizations that associate them, which are aimed at minimizing the negative effects of this phenomena.

Globalisation has indeed been initiated by economic processes, which still largely shape its course, but it is definitely not its only characteristic. It can be characterized by some specific features, like for example accelerating the development of the modern world or the violent rise of interdependence not only among all participants in international relations but also among all economic, political, social, cultural, etc. phenomena taking place within countries, regions, or globally. Another fundamental feature of globalization is the enormous intensification of phenomena which have transcended national boundaries and led to a kind of 'shrinking' of the world in time and space. This is generally clearly visible with regard to the current possibilities of traveling, transferring goods, and communicating in very short time for long distances. An additional element of globalization is the emergence of enormous facilitation in spreading different sorts of norms and patterns. In other words, as a result of globalisation, the world is becoming more and more complex with a dense network of comprehensive connections, resulting in its homogeneity and reduction of the economic importance of state borders (Mielczarek, 2004: 15). In this meaning globalisation is generally connected with cross-border flow and often seen as some kind of liberalization; that is, the removal of state regulations in specific areas. This can be very well seen in the EU, especially according to its internal market freedoms, among others the free movement of workers.

The influence of globalisation on changes in the legal systems of separate states cannot thus be avoided when they decide to become a member of a different international trade organisation or one which aims to achieve free flow of other factors, including workers. (Seran, 2015: 125). They vol-

untarily assume the obligation to comply with all duties arising from that membership, which generally requires implementation of these duties into national law. As a result internal legal order expands towards global legal order, covering three dimensions; that is, the one of national law, international law, and the dimension of global polices (Ciongaru 2014: 26). From the other side, globalization should not thus be equated with internalization, because it seems to have a narrower scope that the former one. There are for example some serious problems or challenges like the 'greenhouse effect' that affect humankind everywhere and have no boundaries. It is to serve the common goals of humankind, e.g., the provision of social welfare. Globalisation should therefore be understood as a process of denationalization of markets, laws, and politics for the sake of the common good. Internationalization, on the other hand, aims to attain narrower goals; that is, those of national interest in areas where states are incapable of doing so on their own (Delbrück, 1993: 10).

If we however accept that globalization is connected with the international obligations of states, its impact on changes in legal systems will differ in the case of typical international organisations, like MOP or the Council of Europe and a supranational organisation; that is, the EU. In the former case, member states of those organisations act in accordance with the principle of *pacta sunt servandta* and take decisions unanimously. They are obliged to attain aims protected by those organisations, such as human rights or more specific social workers' rights, but they keep some margin of discretion in doing this. Just as an example, they have to protect workers' rights but can apply its national understanding of a 'worker', which will be pointed out in the next section of this article. When we however talk about the EU, the effect of globalising lawmaking is an immediate one with a supremacy principle that applies and no room for discretion on the part of domestic lawmakers (Delbrück, 1993: 34). Member states of the EU have to cooperate so closely, especially when it comes to smooth functioning of the internal market, that they have to understand some concepts in common. This is the reason why particular attempts for common understanding of the concept of worker have been taken by the CJEU, which will be presented in the following part of this article.

It should not therefore raise doubts that globalization has exerted a huge impact on different legal systems. Just as an example we can mention the European Globalisation Adjustment Fund constituting a response to negative effects of this phenomena. From the other side, appriopriate legal steps are being taken to make (in our case) free movement of workers possible, steps connected with liberalization of this flow without any unjustified na-

tional restrictions. This is especially seen in the case of the EU. It is worth mentioning that the process of globalisation has not only taken the form of legislative activity in making appriopriate changes in law, but also domestic judges' activity in citation of judgments and legal doctrines from international and foreign courts. We have to however remember that from the other side, law in a globalized world derives principles, terminologies, and ideas from other normative systems, especially sovereign state law. One can therefore affirm that national legal systems also influence the evolution of global legal norms (Eric, 2010: 638, 644, 652). It is countries that are the most active actors in the international arena, and through membership in different international organisations they are trying together to answer the most important global problems of the modern world. This is the reason why in the next sections the analysis will be focused on workers' rights protected in the framework of the ILO, the Council of Europe, and the EU, with particular attention on its attempts for a common understanding of a 'worker'.

Workers' rights in international law – the case of ILO and the Council of Europe

Due to changes that have occurred as a result of globalization processes in the framework of work, the ILO has faced the need to redefine its roles. It was recognized that it is necessary to create a core catalogue of workers' rights recognized by the international community. Such a catalogue has been provided by Declaration on Fundamental Principles and Rights at Work from 1998 (http://www.ilo.org/declaration/lang--en/index.htm, 26.9.17). Those rights can generally be divided into four groups: freedom of association and the right to collective bargaining, prohibition of all forms of forced and compulsory labor, effective abolition of child labor, and elimination of discrimination in the field of employment and occupation, which are implemented by core ILO conventions. These conventions include the following: Convention No. 87 on freedom of association and protection of trade union rights of 1948; Convention No. 98 on the application of the principle of the right to organize and collective bargaining of 1949; Convention No. 29 on forced or compulsory labor of 1930; Convention No. 105 on the abolition of forced labor from 1957; Convention No. 138 on the Minimum Age for Admission to Employment 1973; Convention No. 182 on Prohibition and Immediate Action for the Elimination of Child Labor of 1999; Convention No. 100 on equal pay for working men

and women for work of equal value from 1951 and Convention No. 111 on discrimination in employment and occupation of 1958.

It should be stressed that no provision of the above mentioned conventions contains, however, any definition of the concept of worker. We can only quote from the literature, that those provisions 'apply to all workers in the broadest sense of the term: that is, they apply irrespective of the kind of contractual arrangement (if any) under which individuals are engaged and, with very limited exceptions, irrespective of the sector of the economy in which they work' (Creighton, McCrystal, 2016: 706). When we look at ILO institutional activity we can have the impression that they didn't attempt to create a common definition of a worker. They rather took steps aiming at distinguishing between two concepts directly connected with workers' rights, that is 'worker' and 'employee'. We can therefore interpret from the ILO Conference Committee of the Application of Standards' findings, that the term 'worker' is broader than the term 'employee'. In its opinion, the term 'employee' is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship, while the term 'worker' can be applied to any worker, regardless of whether or not she or he is an employee. Employer is used to refer to the natural or legal person for whom an employee performs work or provides services within an employment relationship. The employment relationship is a notion which creates a legal link between a person, called the 'employee' with another person, called the 'employer' to whom she or he provides labour or services under certain conditions in return for remuneration (Creighton, McCrystal, 2016: 712; International Labour Conference, Report of the Conference Committee on the Application of Standards, 91st Sess., 2003). This is in fact the definition of a 'worker' that is applied throughout the EU Member States, according to a suitable case law of the CJEU, that is also further referred. We can thus observe that attempts for common understanding of the concept in question are thus present in the framework of the ILO, but rather by using the concept of an 'employee'. These attempts do not have a binding character, because as we can see, there is no legal definition in this area. They cannot however be denied its importance to effective implementation of the ILO conventions on the protection of workers' rights.

When we talk about international organisations of a regional character which aim to protect social rights we definitely should focus on the Council of Europe and its two agreements; that is, the European Social Charter (ESC) (Dz.U. 1999 Nr 8, poz. 67) and to some extent the European Convention of Human Rights and Fundamental Freedoms (ECHR)

(Dz.U. 1993 Nr 61, poz. 284). The European Social Charter was opened to signature by Council of Europe member states in Turin on 18 October 1961. Since than it has undergone some important changes; that is, the adoption in 1991 of a protocol reforming the system of national reports, the adoption in 1995 of a protocol introducing a system of collective complaints, and the adoption in 1996 of a revised European Social Charter. As to the ECHR it has to be stressed that its scope covers generally rights of a civil and political character and when it comes to social rights we can mention only freedom of assembly and association expressed in its Article 11. According to jurisprudence of the European Court of Human Rights this article covers also the right to collective action and the right to strike. It has been generally confirmed in the case Demir and Baykara v Turkey [2008] ECHR Appl. No. 34503/97 and the case Enerji Yapi-Yol Sen v Turkey [2009] ECHR Appl. No. 68959/01 (Ewing, Hendy, 2010: 2–51). There was however no word about how to understand the term 'worker'.

The ESC is definitely wider in its scope generally because it guarantees fundamental social and economic rights as a counterpart to the ECHR, which refers to civil and political rights. It entails human rights related to employment, housing, health, education, social protection and welfare, such as: the right to work, the right to just conditions of work, the right to safe and healthy working conditions, the right to a fair remuneration, the right to organise, the right to bargain collectively, the right of children and young persons to protection, the right of employed women to protection, the right to vocational training, the right to protection of health, the right to social security, the right to social and medical assistance, the right to benefit from social welfare services, the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement, the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, the right to engage in a gainful occupation in the territory of other contracting parties, the right of migrant workers and their families to protection and assistance. Although, as we can see, it provides some very important social rights for workers there is no legal definition of a 'worker', which can suggest that it is left to be defined by each state-party to the ESC. Its provisions thus impose obligations on states but are framed in very general terms (R. Brillat, 2010: 46). This does not however mean, that its supervisory body – that is, the ECSR – does not react when it sees that the practice of its state parties calls into question provisions of the ESC because of different understanding of concepts important for the scope of rights that it protects. As a clear example we can mention complaint No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Con-*

federation of Professional Employees (TCO) v. Sweden, which is discussed in the following paragraph, because it concerns an EU Member State that changed its legal practice to stay compliant with EU provisions on a specific type of worker; that is, 'posted workers'. Similarly to the ILO, there is no legal definition of a worker within the Council of Europe, which does not however interfere with the search for understanding of this concept by its supervisory bodies, in our case the ECSR.

The concept of 'migrant worker' on the European Union internal market

We can agree with the thesis that the EU 'is an original political project, combining 'the liberalization of economies with respect for important elements of the social state'. In this sense, the EU is some kind of European response to globalization (Mielczarek, 2004: 15; Jackoby, Meunier, 2010: 350–367). One of the EU's main aims is thus the creation of an internal market. According to Article 26.2 of the Treaty of the functioning of the European Union (TFEU) it comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Some authors even argue that the process of implementation of the above mentioned internal market freedoms can itself be called 'globalization' (especially when it comes to the widened scope of the EU market with regard to developing countries). This is mainly because 'the formerly domestic markets are becoming global *ratione personae* and *materiae*'. Internal market and globalisation are therefore two inextricably linked phenomena. (Delbrück, 1993: 25; Bartle, 2006: 16; Egan, 2001: 16).

To attain the above mentioned aim connected with the creation of the internal market, Member States of the EU have to refrain from any measures that create obstacles to its freedoms, unless they are properly justified. Those justifications can have their source in appriopriate Treaty provisions (restriction of a discriminatory nature) or mandatory requirements provided in the CJEU jurisprudence (restrictions of a non-discriminatory nature). Economic integration between Member States that implies the elimination of barriers restricting the four above-mentioned freedoms of the internal market is known as negative integration. As the opposite method of integration one has to mention the positive one, which provides the modification of existing institutions and/or provisions and the creation of new ones, together with a common understanding of some concepts that are of great importance to proper functioning of the internal.

EU citizens are free to seek employment in another Member State on the basis of Article 45 TFEU as so called 'migrant workers'. Their rights are further provided in the provisions of Regulation No 492/2011 on the free movement of workers within the European Union. We know the scope of their rights but we do not know who exactly can use them, because neither the Treaty nor the Regulations contain a legal definition of this concept. This is the reason why CJEU activity in this area deserves to be treated like an attempt for common understanding of this notion in the framework of the EU. Just look at the CJEU jurisprudence to find how this concept is understood and why EU needs its common understanding.

In case 66/85 Lawrie-Blum the CJEU stressed that 'workers' are defined as persons who carry out activities of economic value, for remuneration, under the direction of another person and in accordance with the laws of the receiving Member State (para 14). The problem arose in proceedings brought against the Land Baden-Württemberg by Deborah Lawrie-Blum, a British national. After passing at the University of Freiburg the examination for the profession of teacher at a secondary school, she was refused admission, on the ground of her nationality, by the Secondary Education Office in Stuttgart, to a period of preparatory service. This period was leading to the Second State Examination, which qualifies successful candidates for appointment as teachers in secondary school. After being refused admission to preparatory service because she did not have German nationality, Mrs Lawrie-Blum brought an action before the Administrative Court in Freiburg for the annulment of the decision of refusal on the ground that it was contrary to Community rules prohibiting all discrimination on grounds of nationality as regards access to employment.

In its earlier case 53/81 Levin, the CJEU pointed out that 'the term 'worker' and 'activity as an employed person' may not be defined by references to the national laws of the Member States but have a Community meaning. If that were not the case, the Community rules on the free movement of workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty' (para 11). Mrs Levin was a British national married to a South African national. She was refused a residence permit by the Dutch authorities because it was claimed that she was not a 'worker' within the scope of Article 39 of the previous Treaty on the European Community (now Article 45 TFEU). One of the problems was whether an individual who works part-time and earns an income less than the minimum required for subsistence as defined under national law is

included in the concept of worker in the framework of European Union law (former European Community law).

To ascertain that a person is an 'EU worker', it has to be proved that his/her work constitutes 'effective and genuine' economic activity, so simultaneously it cannot be 'purely marginal and ancillary' (Fairhurst, 2014: 364; Weatherill, 2012: 360–363; Craig, de Búrca, 2007: 747–757; Barnard C., 2013: 274–277). In case 139/85 Kempf, the CJEU has however underlined that 'effective and genuine activity' arises also in the situation when a person's remuneration is below the level of the minimum means of subsistence and he/she seeks to supplement it by other lawful means of subsistence, even if those means are obtained from financial assistance drawn from public funds in the Member State in which he/she resides (para 14). Mrs Kempf was a German national who was living and working in the Netherlands as a music teacher. Because she was giving only 12 lessons a week and was claiming social security benefits, her application for residence permit was refused. According to the national authorities her work was not 'effective or genuine'.

So to be a 'worker' we have to provide economic activity, under the direction of another person and for remuneration, which however does not have to be paid in money, but reward can also be in kind. As the best example one can mention case 196/87 Steymann, where the CJEU stated that 'activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect *quid pro quo* for genuine and effective work' (para 14). Although Mr Steymann, who was engaged in maintenance and repair work for a religious community, received no remuneration for his work, he was looked after by this community in return for his work, and it was sufficient to constitute economic activity (Horspool, Humphreys, 2014: 320). The prohibition of discrimination on grounds of nationality, which is provided in Article 45.2 TFEU means that migrant workers must be treated in a non-discriminatory way in comparison with nationals of the receiving Member State, subject to the laws of that State. In its latter case law the CJEU stressed that it is for sure its task to determine the meaning and scope of worker status. If it would not be the case it could result in unequal application of Treaty provisions concerning free movement of workers, because the concept of 'worker' can be differently understood in different Member States (case 75/63 Hoestra, para 1).

There is thus no legal definition of a 'worker' in the EU legal order. It was the reason why the CJEU proposed an autonomous understanding of this concept, which is binding for all EU Member States. There is un-

deniable need of having this uniform definition of the concept in question in the EU, because another solution could provide restrictions on the free movement of workers. If each Member State would apply its own national understanding of a 'worker', especially in case of its narrow scope compared to other Member States, it could in fact result in limiting the efficiency of the above mentioned freedom.

The concept of 'posted worker' on the European Union internal market

There is also another kind of worker who uses internal market freedoms, the so called 'posted worker'. In contrast to migrant workers, they are workers employed in the country of origin and sent by their employer to the host country for the provision of certain services. So the legal basis for their activity is Article 56 TFUE, which provides free movement of services. Article 45 TFUE does not apply, because it is reserved for the free movement of migrant workers. In contrast to the latter, posted workers 'in fact return to their country of origin after finishing work without access at any time to the labor market of the host Member State'. This definition has been provided by the CJEU in case C-113/89 Rush Portuguesa (para 15). In this case, the referring court sent to the TSUE preliminary questions that had occurred during the proceeding between Rush Portuguesa Lda, a company registered in Portugal and a French immigration office. Rush Portuguesa, a specialist in construction and public works, entered into a subcontracting contract with a French company to carry out work on the construction of a railway line in the west of France. In order to carry out these works Rush Portuguesa brought its Portuguese workers. The French immigration office demanded a special fee to be imposed on employers who employed foreign workers in a manner not consistent with the national labor code. Rush Portuguesa sought to annul the decision on the abovementioned charge, citing the free movement of services resulting from the Treaty to exclude the application of national legislation, which had the effect of forbidding its employees to work in France (van Peijpe, 2009: 83–86; Cremers, 2010: 11). A similar conclusion has been submitted also in case C-43/93 Raymond Vander Elst (para 21).

The above mentioned cases, especially the former one, showed the need to distinguish a difference from migrant workers falling within the scope of Article 45 TFEU conceptual category; that is, 'posted workers'. As a consequence of the aforementioned judicial activity of the CJEU, the Directive

96/71/EC concerning the posting of workers in the framework of the provisions of services has been adopted. According to its Article 2.2, a 'posted worker' is an employee who, for a limited period of time, performs his work in the territory of another Member State than the country where he normally works. For the purposes of Directive 96/71/EC, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. In the literature we can also find a definition providing that for the purposes of the above mentioned Directive, any person employed is regarded as an employee by the labor law of a Member State of the Union which governs the employment relationship in the Member State from which that person was posted to work in another EU Member State (Świątkowski, 2015: 172).

According to Article 3.1 of Directive 96/71/EC, posted workers are covered by the minimum conditions of employment which are applied in the host country, such as maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes, the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women, and other provisions on non-discrimination (Dølvik, Visser, 2009: 505). Because of some practical problems connected with using the institution of posted workers, this concept has been further clarified by Article 4.3 of the Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. It identifies the actual elements that should be taken into account when assessing if we are faced with 'posted worker'. Those are in particular the following ones: the work is carried out for a limited period of time in another Member State; the date on which the posting starts; the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work; the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted; the nature of activities; travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement; any previous periods during which the post was filled by the same or by another (posted) worker. The above catalog is not closed.

As we can see, attempts at a common understanding of the term 'posted workers' have taken a more concrete form; that is, the form of legal definition. It was created as a response to the new phenomena that has occurred in the internal market and which the CJEU qualified in different manner than migrant workers. The latter was first introduced to the legal order and later defined by the CJEU. The former first occurred in practice and then was introduced to the legal order together with its definition. In both cases definitions of those terms are however bending toward the EU Member States.

Practical problems resulting from potential fragmentation in respect of the concept of the worker in the law of selected international organisations

As mentioned above, even if there is no legal definition of 'worker' in such international law instruments as the specific ILO conventions or the ESC, it does not mean that its relevant control bodies do not provide understanding of some legal concepts and indicate this understanding to its state parties. As a good example of this situation we can mention the activity of the ECSR in interpreting the ESC provisions in complaint No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden. In this case, the ECSR dealt with the issue of the modification of Swedish national legislation aimed at enforcing the CJEU judgment in case C-341/05 Laval (the so called Lex Laval). This case concerned the collective actions taken by Swedish trade unions against a Latvian law firm in order to force him to pay his Latvian workers performing work in Sweden for remuneration in the amount specified in the Swedish collective agreement. The CJEU has recognized that collective action is a fundamental right that makes a part of EU legislation, but its implementation in the internal market has been seriously reduced. Collective action must thus be taken to achieve a legitimate objective compatible with the Treaty, be justified by the overriding general interest, and must be proportionate to this aim.

The ECSR investigated whether this modification in Swedish law does not hamper the implementation of the right to collective action provided for in Article 6 of the ESC, which has been raised by Swedish trade unions. The Swedish Government argued that all those legislative changes were necessary to comply with the CJEU's interpretation presented in the case C-341/05 Laval (Rocca, 2013: 265). The ECSR has stated that legal provisions relating to the exercise of economic freedoms, directly deriving from

national law or indirectly from EU law, should be interpreted in such a way as not to impose excessive restrictions on the exercise of labor rights. While assessing the Swedish legislation, the ECSR pointed to disproportionate restrictions on the right of trade unions to take collective action regarding the terms of employment of posted workers and thus insufficient recognition of the fundamental right to take collective action. The ECSR emphasized that the exclusion or limitation of the right to bargain or collective action in respect of foreign undertakings, in view of the freedom to provide services, constitutes, in accordance with the provisions of the CJEU, discrimination based on the nationality of workers. This is primarily due to more burdensome restrictions of posted workers' economic and social rights compared to the protection afforded to all other workers. According to ECSR, posted workers fall within the scope of Article 19 of the ESC, which deals with the right of migrant workers and their families to protection and assistance. They therefore have the right, during their stay and work in the host Member State, to be treated in a manner no less favorable than that of national workers in respect of remuneration, other conditions of employment, and work and the benefits of collective bargaining.

As we can see, 'posted workers' for the ECSR should be classified as a category of 'migrant workers', which in some way distorts the existence of posted workers' institution in EU law as part of the freedom to provide services, rather than the free movement of workers (Lucas, 2014: 284–286; Rocca: 14–20). The ECSR also pointed out that the assurance of freedom to provide services, which constitutes one of the fundamental economic freedoms under EU law, cannot be regarded as having a higher value than basic labor rights, including the right to collective action, provided for by the ESC provisions. On the issue of balancing workers' rights with freedoms of the internal market, the ECSR presented thus a completely different approach than the CJEU in the above mentioned case C-341/05 Laval.

It is also worth pointing out that ECSR urged state-parties of the ESC and its revised version to take appriopriate action to implement 'the principle of equal pay for equal work for all workers in the same workplace' (complaint No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, para 120–122, 140). One may wonder whether the European Commission's legislative proposal amending Directive 96/71/EC providing the replacement of minimum working conditions for workers posted to another Member State by the principle of equal pay for the same job in the same place, should not be read as a desire to improve cohesion between international and EU standards for the protection of social rights (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) 128 final). This proposal has been also commented on by EU institutions of an advisory nature, like the European Committee of Regions (Opinion of the European Committee of the Regions – The Revision of the Posting of Workers Directive, OJ C 185, 9.6.2017) and the European Economic and Social Committee (Opinion of the European Economic and Social Committee on the '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 concerning the posting of workers in the framework of the provision of services', OJ C 75, 10.03.2017).

It is thus very important how we understand specific concepts, especially of a legal character, not only 'internally' – that is within a single international organisation – but also by different international organisations operating in the globalised world. States as basic subjects of international law can thus be members of different organisations and such discrepancies can lead to negative consequences for them. They can find themselves between a proverbial rock and a hard place. Those practical problems that affect states as parties of such organisations shows that globalisation not only encourages but even requires common understanding of certain notions. So far one cannot however name any efforts or attempts taken between international organisations for such an understanding in relation to a worker.

Conclusions

Among different areas which can be touched by globalisation we can mention for sure the increased flow of workers through the world. To make this phenomena more easy, individual states conclude specific international agreements which, apart from aiming to remove barriers to free movement, cooperate also in the framework of common protection of workers' social rights. It is certainly easier to respond to emerging global problems in a coordinated and common way. This is the reason why we have quite a large number of legal instruments both of international and European nature that provide solutions for workers who have decided to look for a job in another country. They are generally agreed upon in the framework of such international organisations as the ILO, the Council of Europe or the EU. To obtain a common interpretation of its legal regulations, which seems to be particularly important for the effective application of their provisions in practice,

it would be advisable to understand some legal concepts in a similar way. When we talk about issues connected with taking up employment, the common concept of 'worker' would certainly help with applying in practice such issues as, for example, the scope of rights and obligations that are provided for workers in different legal instruments. It is however not an easy task not only in the global area, but sometimes even in the framework of a single international organisation. If we focus our efforts on groups of states that are cooperating within the above mentioned international organisations, we have to admit that none of them provides a legal definition of 'worker' (apart from 'posted workers' in the UE legal order). Each of them, however, attempts to provide such a definition in the legal activity of its supervisory or judicial bodies.

Comparing the efforts made under the ILO, the Council of Europe, and the EU in a common understanding of the concept of 'worker', we have to underline that the last one seems to be the most advanced in this area. This 'advancement' does not however depend on the number of member states involved in the cooperation, because taking into account all the above mentioned international organisations, the EU contains the smallest number of states. It is rather due to the type and intensity of cooperation in achieving common goals, which is supranational cooperation when it comes to the EU.

The CJEU provides in its jurisprudence that 'worker' means a person who is obliged to provide services for another person in return for monetary reward and who is subject to the direction and control of this person as regards the way in which the work is to be done. It is generally similarly understood by the ILO supervisory bodies and the ECSR when it comes to the ESC. The CJEU applies however this definition only to 'migrant workers' and EU law provides, in addition to the free movement of workers, also other areas of cooperation, such as free movement of services with a distinct category of workers: 'posted workers'. In EU law this is completely differently understood than 'migrant workers', which should be treated in a non-discriminatory manner on the territory of the host Member State. Because 'posted workers' in fact return to their country of origin after finishing work without access to the labor market of the host Member State, they are entitled only to minimum working conditions that are applicable in that state.

This is not the case when we are taking into account the ECSR interpretation of the ESC. In its interpretation 'posted workers' should be treated in the same way – that is, without any discrimination – as workers of the host Member States, what shows that the ECSR treats them as

'migrant workers'. This in some way calls into question the existence of the institution of 'posted workers' in the EU law. It is not an easy situation for the EU Member States that are also state-parties of the ESC or its revised version. They are thus bound by contradictory international obligations. As we can see, attempts at common understanding of some legal concepts, like the concept of 'worker' are of real importance in a globalised world. Efforts should therefore be made to work on common definitions not only in the framework of single international organisations but also between them.

NOTE

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