BLACK BOOK 2

barriers on the internal market

Ministry of Economic Development, Labour and Technology

Jarosław Gowin

Minister of Development, Labor and Technology

Dear Sir/Madam,

In January 2020 we published the Black Book, based on the information provided by the Polish entrepreneurs operating on the EU's single market.

Since it is extremely important for Polish entrepreneurs to use the freedoms guaranteed in the Treaty, we have used the conclusions from the Black Book in talks with the European Commission and during bilateral meetings with other Member States. Cases described in the Black Book showed our interlocutors that the full implementation of the entrepreneurs' rights in the EU still requires a lot of work, both on the part of the European Commission as the „guardian of the Treaties" and of individual Member States.

Despite the difficult and unique situation on the internal market in 2020 caused by the Covid-19 pandemic, we have decided to publish the next edition of the Black Book. The pandemic has clearly demonstrated the importance of the internal market's efficient functioning for the entire EU economy. There still are severe - albeit temporary - restrictions related to Covid-19. We need to think not only about removing these restrictions, but above all about deepening and improving the single market as one of the ways to combat the current crisis.

The single market is one of the EU's greatest achievements and is of great value, especially when facing global competition in the world market. Its smooth and undisturbed functioning is even more important for the European countries during the pandemic. The solidarity that is indispensable at this point also means working together to rebuild the single market.

This second edition of the Black Book. Barriers on the Internal Market is intended to serve this purpose and it is our intention that it supports the European discussion on obstacles that EU entrepreneurs experience in their cross-border operations. We want to make our interlocutors aware of the above-mentioned barriers, so that the understanding of their harmfulness convinces our EU partners to eliminate them.

In this discussion, we also count on your voice as Polish Entrepreneurs and on your remarks, comments and further information on the barriers you encounter. Your voice and support emphasize the importance of the conclusion drawn from the Black Book - an effective market is a market without internal barriers.

Yours faithfully,

Table of contents

Introduction

For a year since the publication of the first Black Book, the internal market has been under severe pressure from the COVID-19 pandemic. EU GDP will decrease by around 7.4% in 2020[1], which is more than during the global financial crisis in 2009.

As a result of the current crisis, the trend towards protectionist measures has increased, due to an economic impact the pandemic has had on domestic producers and service providers.

The existing ‚old' barriers have not disappeared, while new ones, in principle only temporary and pandemic-related, have begun to emerge. Some Member States have introduced, for example, restrictions at internal borders, which have often threatened supply chains across the EU. In order to protect national markets, many other restrictions have been introduced in favour of national economic operators, which is evident in particular in the agri-food sector. The pandemic situation has clearly shown how important it is for the internal market to operate smoothly and how much still needs to be done to enable a truly free use of the fundamental freedoms, in particular the freedom to provide services and the free movement of goods.

On the other hand, the 2021 began with a shock associated with the effects of Brexit, which caused enormous logistical, administrative and regulatory difficulties. As a result, it has become apparent what the internal market and the possibility of free trade mean in practice, and what huge losses may be caused by the abandonment of this achievement.

In the second Black Book – as in the first one - we present examples of barriers hindering the cross-border activity of Polish entrepreneurs on the EU market. Most of these cases have been reported directly by entrepreneurs. We can say that barriers are of different, often complex, nature, which translates into difficulties in eliminating them, as it was also concluded in first Black Book. Case studies – as in the first Black Book – have been anonymised. However, it should be noted that the problems identified in the Book are raised in bilateral contacts and in discussions with the European Commission representatives.

A lot has changed recently also at the EU level. New important rulings of the Court of Justice of the EU (CJEU), new rules on the posting of workers in the provision of services, and new initiatives have emerged. Below, we provide concise information in this regard.

[1] Click on the link, to get acquainted with Report by the Policy Department for Economic, Scientific and Quality of Life Policies of the European Parliament on behalf of the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO): The impact of COVID-19 on the Internal Market, p. 17

What has changed?

DEVELOPMENT OF THE CASE-LAW OF THE COURT OF JUSTICE OF THE EU ON BARRIERS

Despite the increasing number of secondary legislation acts laying down rules for cross-border economic activities, the case-law of the Court of Justice of the EU continues to be of major importance in determining the rights and obligations of entrepreneurs. The Court of Justice of the EU interprets EU rules with a view to avoiding discrepancies in their application. While secondary law, that is, in particular, Directives and Regulations, is becoming increasingly detailed, the rulings of the Court of Justice of the EU often provide clarification on the application of EU law's fundamental principles, such as the principle of proportionality.

In this respect, the preliminary ruling procedure is of particular importance, where, a national court may request the Court of Justice of the EU (CJEU) to clarify its doubts when deciding a case on the basis of EU law. The CJEU's interpretation given in the particular case is binding not only on the national court which made the request but also on other national courts should they have to resolve an identical or very similar problem. It is important that all the parties to the proceedings before that court, the Member States as well as the EU institutions may take part in proceedings brought before the Court of Justice of the EU. Thereby, a number of the EU law's key principles have been formulated on the basis of preliminary rulings, which are often requested by first-instance national courts. The rulings of the Court of Justice of the EU have de facto the force of a precedent in EU law, so knowing them can help assert the rights deriving from the fundamental freedoms of the internal market. This is also true, of course, for entrepreneurs seeking to defend their rights before the courts of the Member States.

The case-law of the Court of Justice of the EU concerning barriers hindering entrepreneurs' rights in exercising the internal market freedoms is, by its very nature, fragmented, as it depends on the national court actually using the preliminary ruling procedure. However, in recent years too, the Court of Justice of the EU has ruled on a number of important matters.

Among others, by virtue of Austrian courts' actions, the problem of a significant abused by certain Member States freedom to lay down penalties, sanctions and safeguards regarding the posting of workers has been at the centre of its attention. Member States that have laid down similar rules, justified them by the need

to combat fraud and prevent abuse. Even though, they acted within their competences, the Court of Justice of the EU pointed out that they remain bound by the principle of proportionality.

In Case C-33/17 *Čepelnik*[2] the Court of Justice of the EU found Austrian provisions, which imposed on a national ordering party that was using services of a contractor from another Member State an obligation to suspend the payment of part of the remuneration to this contractor for the services provided and to establish a security in the amount of the outstanding remuneration, to be incompatible with the Treaty freedom to provide services (Article 56 ff. TFEU). The purpose of the security was to guarantee payment of a potential financial penalty for a breach of the labour law of the host State. Importantly, the Court of Justice of the EU itself assessed the proportionality of the restrictions applied and concluded that they went beyond what was necessary to achieve the objectives of workers' protection, combating fraud and preventing abuse.

In Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18 *Maksimovic and Others.*[3] The Court of Justice of the EU assessed the admissibility, under the freedom to provide services, of particularly severe penalties imposed in the event of a breach of formal obligations in the posting workers to Austria. The Court of Justice of the EU ruled incompatibility with the EU law of national sanctions, which amount, among others, could not be lower than that prescribed by law, which were imposed cumulatively on each worker and which, in the event of non-payment, might be converted into imprisonment. The Court of Justice of the EU made it clear that such regulation went beyond what was necessary to respect administrative obligations in the field of labour law and to achieve the intended objectives regarding protection of workers' rights.

The ruling to the above-mentioned case defined the direction of the Court's position on an extremely important issue but did not allay all the doubts concerning imposition of sanctions by the host State on an entrepreneur from another EU Member State. For this reason, further requests for preliminary rulings, aimed at resolving the remaining doubts regarding, among others, the proportionality of the sanctions imposed by Austrian legislation on foreign companies posting employees, are now waiting to be decided by the Court: C-219/20 Bezirkshauptmannschaft Hartberg-Fürstenfeld and Österreichische Gesundheitskasse[4] (on the proportionality of the prolonged limitation period for infringements of workers' rights) and C-205/20 Bezirkshauptmannschaft Hartberg-Fürstenfeld[5] (on the direct application of the penalties proportionality requirement as laid down in Article 20 of Directive 2014/67/EU and the requirement for courts and administrative authorities to include the proportionality of penalties criteria for infringements related to the posting of workers as an interpretation supplementary to national legislation).

In view of the fact that the problem of excessively severe penalties imposed on cross-border entrepreneurs still exists, the Court's ruling

[2] Click on the link, to get acquainted with Ruling of the Court of 13 November 2018, Čepelnik d.o.o. v Michael Vavti, C-33/17

[3] Click on the link, to get acquainted with Ruling of the Court of 12 September 2019, Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei, Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18

[4] Click on the link, to get acquainted with Case pending, documentation available on the website of the Court of Justice of the EU

[5] Click on the link, to get acquainted with Case pending, documentation available on the website of the Court of Justice of the EU

in Case C-205/20 and thus the establishment of a constant case-law line will be of particular importance. With regard to the interest of Polish entrepreneurs, the Government of the Republic of Poland took part in the written procedure in this case and presented its position stating that Article 20 of Directive 2014/67/EU laying down the requirement of proportionality of penalties did not meet the conditions to be directly applied, whereas if it proved impossible to apply a pro-Union interpretation of national legislation laying down penalties, the national court should have refrained from applying them. The ruling of the Court in this case is likely to be delivered in late 2021 or early 2022. We believe that the Court's decision ensures effective application of the principle of proportionality of penalties.

The problem concerning the qualification of an entrepreneur's cross-border economic activity by the host State authorities remains another fundamental issue that needs to be clarified by the Court. Although the current case-law already provides guidance on the distinction between the freedom to provide services based on temporary and occasional activities and the freedom to run business in a permanent manner, this issue, in practice, remains controversial. Evidently, the classification of foreign entrepreneur activities as permanent involves much broader obligations and requirements. We hope that the Court clarifies this matter in response to the new preliminary ruling request in Case C-502/20 *Institut des Experts en Automobiles*[6].

The ruling in Case C-66/18 *Commission v Hungary*[7], issued in October 2020, in which the Court of Justice of the EU adopted a broad interpretation of the concept of economic activity where, as the Court emphasised, the rights in relation to the freedom to provide services enshrined in Article 16 of the Services Directive (Directive 2006/123/EC) were exercised, gave some important guidelines. The Court of Justice of the EU stated that it was not necessary to carry out an active and actual activity in the country of establishment.

[6] Click on the link, to get acquainted with Case pending, documentation available on the website of the Court of Justice of the EU

[7] Click on the link, to get acquainted with Ruling of the Court of 6 October 2020, European Commission v Hungary, C-66/18

MOBILITY PACKAGE

On 31 July 2020, three EU legal acts were published in the Official Journal of the EU, comprising the so-called Mobility Package I (Directive (EU) 2020/1057 of the European Parliament and of the Council, Regulation (EU) 2020/1054 of the European Parliament and of the Council, Regulation (EU) 2020/1055 of the European Parliament and of the Council). During all the years of work on reform concerning the EU road transport legislation, the Polish Government made efforts to counteract the protectionist tendencies of some Member States and to ensure the proper functioning of the transport services market in the EU. Unfortunately, the solutions adopted in the EU are not only detrimental to Polish transport undertakings, but also, in the opinion of the Government of the Republic of Poland, are in many respects incompatible with EU law.

In particular, a negative opinion should be given on discriminatory solutions concerning the division of operations into those subject to rules on posting of workers (cross-trade and cabotage) and those excluded from these rules (bilateral and transit activities), the mandatory return of a vehicle to the country of establishment and restrictions imposed on cross-trade and cabotage operations. As equally unfavourable should be assessed also the solutions which fail to give drivers the freedom to choose the place of return where they will be able to rest and forbid to use regular weekly rest periods in vehicles without solving a problem concerning the shortage of proper infrastructure in the EU. The new rules fail to ensure a level playing field between EU and third-country carriers, which is especially problematic, as carriers from third countries will not be subject to strict EU law. An increase in empty journeys, which will result from the application of the new legislation, will also lead to a significant increase in carbon dioxide emissions, which clearly contradicts the EU's climate objectives. A study published by the European Commission in February 2021 showed[8] that the implementation of the adopted legislation, in particular the provisions concerning the regular obligation to return to headquarters, will result in an increase in CO_2 emissions by 3.3 million tonnes.

In view of the above reservations, the Polish Government has decided to bring an action before the Court of Justice of the EU for annulment of certain provisions of the EU legal acts included in the Mobility Package. The complaint was lodged in October 2020 and is currently awaiting the Court's decision. Individual complaints were also lodged by Bulgaria, Cyprus, Hungary, Lithuania, Malta and Romania.

POSTING OF WORKERS

The posting of workers within the provision of services remains extremely important and problematic due to the increasing complexity of the current provisions in this regard. In 2020, the European Labour Authority (ELA) started to operate; it is to take over most of the matters related to posting of workers, in particular

[8] Click on the link, to get acquainted with the study.

those regarding the provision of full information to entrepreneurs.

As a result, the Committee of Experts on Posting of Workers, active since 2009, will be wound up. The European Commission will remain responsible for the interpretation and proper application of EU legislation in this area, although it is still not clear how the work previously carried out jointly by the European Commission and the Member States within the Committee shall be continued.

In view of the importance of posting of workers to Polish entrepreneurs, representatives of Poland in the ELA Management Board are in favour of creating a group devoted to this area (not yet provided for by ELA), which should also include representatives of the European Commission. This group should pay equal attention to both the rights of workers and the rights of entrepreneurs that provide cross-border services.

INITIATIVES AT THE EU LEVEL

On 10 March 2020, the European Commission published a package of initiatives comprising: *Communication identifying and addressing barriers to the Single Market* (COM(2020)93)[9] and *Communication - Long term action plan for better implementation and enforcement of Single Market rules* (COM(2020)94)[10]. The first one presents the most commonly encountered barriers and the reasons behind them. It also indicates that barriers are not only of a regulatory or administrative nature but also of a practical nature. Entrepreneurs, when operating across the borders of EU countries, often face several restrictions at the same time. The second Communication sets out a number of actions to improve the implementation and enforcement of Single Market legislation across the European Union.

In these Communications, the European Commission announced the establishment of the Single Market Enforcement Task-Force (SMET). SMET is a group composed of repre-

[9] Click on the link, to get acquainted with Communication from the commission
[10] Click on the link, to get acquainted with Communication from the commission

sentatives of the Member States and the European Commission, which will be primarily tasked with the following:

- to assess the state of compliance of national law with Single Market rules,
- to prioritise actions to tackle the most urgent (major) barriers,
- to address horizontal issues regarding the enforcement of EU law and monitoring the implementation of the Communication on the Action Plan.

Until April 2021, for almost a year, SMET's work focused on organisational and pandemic-related issues which, although very important, are not and should not be the sole tasks of this group. Given the European Commission's declarations and the expectations of the Member States, its work should be speeded up in the near future and SMET should become a forum capable of providing quick and effective solutions.

On 21 September 2020, the Council adopted *Conclusions on a deepened Single Market for a strong recovery and a competitive, sustainable Europe.*[11]. The Member States were asked to better implement and enforce Single Market rules and to remove barriers to Union cross-border trade. The Council called, among other things, to simplify and digitise administrative procedures and access to public procurement. At the extraordinary European Council meeting on 1 and 2 October 2020, the EU leaders stressed that a fully functioning Single Market should be restored as soon as possible. They endorsed the Council's Conclusions of 21 September 2020 and called, among other things, for strict implementation and enforcement of Single Market rules and removal of unjustified barriers, especially in the field of services.

Nonetheless, neither the previous nor the current Commission's Work Programmes include concrete actions or announce legislative proposals aimed at removing barriers and deepening the internal market. The E-card[12] the services notification procedure[13] proposals have been withdrawn due to a lack of agreement.

[11] Click on the link, to get acquainted with Conclusions on...
[12] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the legal and operational framework of the European services e-card introduced by Regulation....[ESC Regulation]....COM(2016)823 and Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a European services e-card and related administrative facilities COM(2016)824 final
[13] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System COM(2016)821

Transport

1. Problems of Polish carriers

In Member State X located in Western Europe, checks on Polish carriers are being intensified and even minor formal deficiencies, such as a missing stamp on a document, are treated particularly restrictively. Although the way in which the EU legal acts in this area are implemented, including the choice of supervisory measures and sanctions, has been left to the discretion of the Member States, it should be noted that, in accordance with the general principles of EU law, measures applied must not be discriminatory and must comply with the principle of proportionality. Particularly frequent checks aimed at detecting the slightest deficiencies on the part of carriers from one Member State do not seem to comply with those rules.

Furthermore, Member State X has made it compulsory for drivers of light commercial vehicles weighing no more than 3.5 tonnes GVW to have a night's rest outside the vehicle in conditions defined as ‚safe, comfortable, hygienic'. In fact, this means that every night must be spent in a hotel. A violation of this obligation results in high fines. In practice, fines are imposed if the driver does not have evidence of a night accommodation outside the cab of the vehicle, e.g. in the form of a hotel bill. The way in which fines are enforced in Member State X also raises concerns for entrepreneurs – the payment of fines is required immediately, under the threat of immobilisation of the vehicle until the penalty is paid.

Member State X's rules constitute a particularly difficult obstacle for drivers, especially in current sanitary crisis, due to the lack of sufficient infrastructure for vehicles providing hotel facilities and safe and properly equipped parking lots. Drivers must also keep in mind the safety of the goods carried. The need to provide such accommodation at any night during the journey through Member State X remains a significant burden.

Regulation (EU) No 2020/1054, adopted in July 2020, amends the basic Regulation (EC) No 561/2006 on social matters in international road transport. It extends, as of 1 July 2026, the scope of EU social legislation in transport to cover vehicles of more than 2.5 tonnes GVW. However, EU legislation requires the driver to spend only weekly rest periods outside the cab of the vehicle, in a suitable accommodation, and not daily rest periods. In view of the fact that the legislation of Member State X goes far beyond the social standard set at the EU level and given the existing shortage of appropriate accommodation facilities and the methods of control and sanc-

tioning, it appears that such provisions are too great a burden for entrepreneurs. These rules are therefore seen as an example of overly demanding social standards, which unfortunately do not go hand in hand with properly designed infrastructure to meet the requirements.

2. A special marking obligation of all heavy commercial vehicles and coaches

Effective from January 2021, Member State X made it compulsory to mark all heavy commercial vehicles above 3.5 tonnes GVW and coaches, also those registered in other Member States, with special stickers affixed on both sides and at the back of the vehicle, containing blind spot information. This obligation was introduced in a statute and its detailed rules were set in a regulation, which specifies the models of stickers, dimensions, colours and the way in which they need to be placed.

The penalty for a missing sticker may be up to several hundred euros. The detailed instructions concerning stickers must also be strictly followed. It is only during a transitional period in the first year that the presence of stickers on both sides and at the back of the vehicles is sufficient to avoid the penalty, strict application of the guidelines specified in the regulation will be required afterwards. Stickers can be purchased on the website of the national association of international carriers.

These detailed rules apply to all vehicles on Member State X's roads, including those registered and permitted entry into service in other Member States. Member State X justifies new rules with the need to ensure road safety for vulnerable road users, such as cyclists. Member State X also made a technical notification of the legislation in question, thereby respecting the obligation imposed by Directive 2015/1535. In the notification, it further specified that heavy commercial vehicles equipped with a mechanism to mark blind spots on the sides and at the back of the vehicle in accordance with another EU Member State's legislation already fulfils this obligation.

Despite the above, this piece of legislation of Member State X must raise doubts, in particular as to the practical aspect of compliance with its obligations by vehicle owners registered in other EU Member States. Different marking requirements for road transport vehicles in each Member State would in fact result in a total prevention of free transport within the EU. The legislation of Member State X can therefore be considered justified for reasons of safety. It is however unduly burdensome for economic operators, as such detailed requirements are valid only in one Member State. In order to avoid such obstacles, the marking of all vehicles at the EU level would need to be comprehensively regulated at the EU level. The provisions of Regulation 2019/2144, which concern, inter alia, blind spots for the specified classes of new vehicles, are currently awaiting application.

The legislation of Member State X seems to contradict also the provisions of the 1968 Vi-

enna Convention on Road Traffic, which that State also signed. The Convention seeks, in principle, to facilitate international road traffic and improve road safety by adopting uniform traffic rules.

3. Parking time limits for heavy commercial vehicle drivers

In Member State X, a regulation is in force that limits to 25 hours the heavy commercial vehicles parking in public rest areas along motorways. This regulation was adopted on the grounds of social dumping that transport companies employing drivers from Central and Eastern Europe and non-European countries were supposed to practise. It was pointed out that transport companies from these countries were reducing costs, as their drivers were practically camping in public car parks at motorways.

The above regulation is therefore another example of restrictions that hinder foreign carriers' activities. Indeed, setting prohibitions and restrictions alone, without the development of an appropriate infrastructure for drivers, does not seem to be the right solution. Companies registered in a Member State other than Member State X need parking and accommodation facilities to operate and to comply with EU requirements on driving and rest times. Increasing these requirements without providing adequate parking lot base seems to be disproportionate and restricting the freedom to provide services guaranteed by EU law in the area of access to international road transport within the meaning of Regulation (EC) No 1072/2009.

4. Covid-19-related hindrances for drivers from other Member States

Member State X requires carriers and drivers to complete relevant forms before entering the country. Different forms and documents are used, depending on the country from which the driver enters Member State X.

Drivers from specific countries are obliged to undergo Covid-19 testing. Compliance with this requirement means extra time and extra distance necessary to travel to a testing facility. The requirement applies even though

the proportion of positive test results in the group of drivers is very low. Separate pass-by corridors, without the need to undergo testing, are intended only for drivers from Member State X.

Moreover, there is still a curfew in place in Member State X, which restricts movement. Drivers are excluded from its application. Nevertheless, the authorities of Member State X still require submission of a certificate confirming that a driver of a heavy commercial vehicle full of cargo performs official duties when driving during the curfew.

All these administrative hindrances force transport companies to appoint employees whose sole duty is to report drivers 24/7 by completing the relevant forms and certificates.

Although the justification for these restrictions on grounds of public health is generally accepted, the form of the requirements, particularly severe for drivers from other Member States, in the general opinion remains disproportionate to the scale of the risk involved.

Posting / services

5. Restrictions on the posting of third-country nationals

Freedom to provide services warrants the possibility of posting own personnel to work in another Member State. Such personnel may include third-country nationals provided that their stay and employment in the sending State is legal and that they are properly posted. This principle has been unequivocally confirmed by the ruling of the Court of Justice of the EU C-43/93 *Vander Elst*[14], in which the Court concluded that the host State cannot require such a posted worker to obtain a work permit if they hold a valid work permit issued in the sending State. Moreover, in its subsequent ruling in Case C-244/04, *Commission v Germany*[15] the Court held incompatibility with the Treaty freedom to provide services of the requirement laid down under German legislation for a posted worker to be employed in the posting undertaking for at least one year. The Court also gave a similar assessment of the requirement for a third-country national to have an indefinite contract of employment with a posting undertaking (C-168/04 *Commission v Austria* [16]).

In Member State X, the provisions regarding the work permit requirement for third-country nationals properly posted by an undertaking established in another Member State, were abolished, in accordance with the case-law of the Court of Justice of the EU. However, the barrier is related with the provisions preventing a legal stay of posted workers in the territory of Member State X, if they do not have a long-term resident status in Poland. Achieving this status requires a legal stay in Poland for a minimum period of 5 years (prior to posting).

In practice, this means the introduction of a requirement, unknown under EU law, for a five-year legal stay in another Member State before being posted to Member State X. National labour law is not the source of this problem, but the regulations on the stay of third-country nationals, which are at the discretion of the Member States. Nonetheless, such provisions lead to incompatibility with the freedom to provide services enshrined in Article 56 TFEU, as was further specified in the Court's established case-law. Moreover, they also appear to be incompatible with the principle of proportionality, as the protection of posted third-country nationals can be achieved by less restrictive measures.

6. Problems with ‚chain posting'

The European labour law allows for ‚chain

[14] Click on the link, to get acquainted with Ruling of the Court of 9 August 1994, Raymond Vander Elst v Office des migrations internationals, C-43/93
[15] Click on the link, to get acquainted with Ruling of the Court of 19 January 2006, Commission of the European Communities v Federal Republic of Germany, C-244/04
[16] Click on the link, to get acquainted with Ruling of the Court of 21 September 2006, Commission of the European Communities v Republic of Austria, C-168/04

posting', which is clearly provided for in the ‚Practical Guide on Posting' published by the European Commission in September 2019 [17]. In such a case, a worker posted by a temporary employment agency to a user undertaking in another Member State is subsequently posted to another user undertaking in yet another Member State. The worker is in this case deemed to be posted by the temporary employment agency, with which this worker has an employment contract. The agency is therefore obliged to comply with all the rules on the posting of workers

In practice, this type of activity may encounter problems. Documents issued by the sending user undertaking, including primarily A1 certificates, are not recognised in Member State X. This may be due to the solutions adopted to coordinate social security systems. However, this leads in some cases to fragmentation of the social security accounting periods of employees (periods of insurance). This approach seems to be inconsistent with the wording of Recital 13 of Directive 2018/957 amending the Posting of Workers Directive, which requires the protection of workers hired by a temporary employment undertaking or an employment placement agency to work in a user undertaking and sent to the territory of another Member State within the transnational provision of services.

7. Problems with temporary cross-border service activities

The freedom to temporarily provide cross-border services in another Member State originates in the provisions of the Treaty (Article 56 TFEU), the established case-law of the Court of Justice of the EU and the provisions of Directive 2006/123/EC *on services in the internal market*. The posting of workers within the framework of the provision of services is also a permitted activity, as regulated by Directive 96/71/EC, as amended by Directive 2018/957. The approach taken by authorities to undertakings posting workers within the framework of the provision of services is also governed, among other things, by the provisions of Directive 2014/67. In accordance with Article 9 (1) and (2) of that Directive, any requirements and supervisory measures imposed by Member States in connection with the posting of workers must be justified and proportionate.

However, in practice, the administrative requirements and supervisory measures applied in a Member State may seriously infringe the principle of proportionality. The authorities of Member State X claim that Polish entrepreneurs which post workers when providing services are, in fact, engaged in continuous and permanent activities in Member State X, so their activities should be registered in Member State X. Temporary activities are discouraged in multi-faceted and organised ways. First of all, such undertakings are subject to very frequent checks. Such checks often result in the undertaking being reported to the public prosecutor who – notably – refrains from taking any further action. Conversely, domestic companies are also discouraged from using the services of foreign entrepreneurs; the national authorities contact local companies which cooperate with foreign entrepreneurs and claim that, as unregistered foreign entrepreneurs in Member State X, they use ‚illegal

[17] Section 2.11 of the Guide, p. 14; see also Recital 13 of Directive 2018/957

work'. The local companies are then threatened with joint liability. Unfortunately, deterring business relations in this way has become the most effective manner of discouraging foreign companies from operating in Member State X since, when local companies cancel their orders, such operation becomes impossible.

It appears that the true aim of such actions is not to combat irregularities, as the existence of irregularities is not confirmed in judicial proceedings, but to put pressure on Polish companies and force them to permanently relocate some or all of their activities, and thus the contributions and taxes they pay, to another country.

8. Institutions' activities to coordinate social security systems

Polish entrepreneurs operating across borders often complain about the activities of foreign institutions in applying EU legislation on the coordination of social security systems. Although the overriding objective of such legislation is to guarantee the implementation of the Treaty-based free movement of persons, including posted workers, their application in practice is a hindrance for entrepreneurs. Particular problems arise when applying Title II of Regulation No 883/2004 and Title II of Regulation No 987/2009, which indicate the country in which a person moving within the EU is insured.

Current reports identify three main barriers faced by Polish entrepreneurs in the internal market regarding the application of Regulations No 883/2004 and No 987/2009:

- Some Member States de facto require the A1 certificate to be possessed from the first day of posting or require it to be presented during a check. In Member State X, penalties are imposed in principle if the A1 certificate is missing, but these are waived if, during the check, it can be shown that an application for the A1 certificate has been filed and the certificate itself it issued within the next 2 months.
- The authorities of some Member States issue decisions which state that a worker/

entrepreneur has been included within their foreign social security system, despite the Polish Social Insurance Institution (ZUS) having confirmed that they hold the A1 certificate. Such decisions are based on the foreign institution's interpretation of the legal provisions governing the coordination of social security systems.

- It is a continuing problem for entrepreneurs to find easily-accessible and comprehensible information on the rules for reporting workers and paying contributions to foreign social security systems in other Member States.

As seen from the above, the lack of adequate information and the excessively restrictive interpretation of European legislation are both sources of problems for entrepreneurs.

The dual-track nature of EU legislation on posted workers can also be seen as a significant obstacle. This means that the same phenomenon (i.e. the posting of workers) is treated differently in different contexts. As regards labour law, the provisions of Directive 2018/957, Directive 2014/67 and Directive 96/71 apply when defining the conditions of employment, whereas as regards social security, the provisions on the EU's coordination of social security systems (i.e. Regulations No 883/2004 and No 987/2009) apply. For example, a ‚classic' posting, as defined in the Directives, can last for a maximum of 12 months, with an option to extend for a further 6 months, whereas a posting within the meaning of the coordination legislation can last for a maximum of 24 months, with the option to extend by way of a special agreement concluded between the social security institutions of the Member States concerned.

Legislative work on the provisions currently negotiated at the EU level, to amend the Regulations on the coordination of social security systems, may also give rise to concerns about the emergence of potential new barriers. In particular, it is envisaged that there will be an obligation to pre-notify the posting of workers and a new method of determining a company's place of establishment for the purposes of applying the coordination provisions.

9. Restricting accommodation options for migrant workers in parts of Member State X's municipalities

Some municipalities in Member State X have introduced provisions which restrict accommodation options for temporary workers. Such limitations are not explicit but arise in practice from local spatial development plans. For instance, Member State X's legislation requires a person to register in the municipality after living there for a defined period. The person must provide a copy of their lease agreement and the owner's consent to the registration, however, it will not be possible if the above-mentioned plans do not allow temporary workers to live in the municipality.

Such regulations also make it impossible to obtain a special individual ID number, which is required in order to carry out work legally. To obtain this number, the applicant must provide their lease agreement. Anyone who declares a short stay in Member State X (up to 3 months) obtains this number immediately.

In conclusion, the lack of accommodation options prevents posted workers from registering their permanent residence, which in turn makes it virtually impossible to carry out an economic activity in Member State X, despite this being permitted by the Treaty.

This is an excellent example of a situation where national legislation adopted at a local level can, in practice, prevent the exercise of the Single Market's fundamental freedoms.

The problem of short-term registration of foreign undertakings in Member State X has already been resolved. Any company can now register for a short period, using the address of the non-resident registry, plus the company's actual address. However, a problem remains regarding long-term registration, as a company's registration expires if it operates in Member State X for 4 consecutive months and does not change its address to a ‚normal' one within the population register.

10. Excessively high penalties for administrative errors regarding posted workers

Penalties for non-compliance with requirements regarding posted workers are set at the national level. The Member States' discretion in this area is confined by the limits and principles laid down in the Posting of Workers Directives which provide, among other things, that penalties should be effective, proportionate and dissuasive. Nevertheless, recent years have seen a tendency for some Member States to impose excessively rigorous sanctions for any posting-related errors. This explains the increasing number of requests for preliminary rulings from the Court of Justice of the EU, to which we referred in the Introduction.

In Member State X, the penalties imposed for various administrative errors regarding posted workers have increased for several years. At present, for example, providing a worker with poor accommodation conditions is punishable by a penalty of EUR 4,000 per worker, up to a maximum of EUR 500,000.

An additional problem for entrepreneurs wishing to provide cross-border services in Member State X are penalties which may be imposed on local customers who use a foreign company's services. Member State X's legislation imposes de facto supervisory obligations on foreign companies' customers, which can result in high penalties being imposed for non-compliance. If a customer fails to check the contractor's compliance with all formalities, such as the prior submission of a posting declaration or the appointment of a representative in Member State X, this can result in a cumulative penalty being imposed on the customer of EUR 4,000 per posted worker. Such rules effectively discourage domestic companies from cooperating with service providers from other Member States.

11. Problems with the insurance coverage required for ski instructors

This problem concerns an almost six-fold increase in the amount of third-party liability insurance required to be held by ski instructors. It was introduced shortly before the ski season began in Member State X's mountain regions. The insurance coverage amount increased from EUR 1,050,000, which had previously applied for many years, to EUR 6,000,000. An instructor must possess such insurance before they can obtain a temporary work permit.

On the Polish insurance market, no company offers third-party liability insurance for ski instructors to the value of EUR 6,000,000. Moreover, it is not possible to insure Polish companies or instructors for such a sum on foreign markets. It is not possible for Polish instructors to take out the same insurance as is used by local instructors in Member State X, as the product is offered solely to the trade union of instructors from Member State X and is unavailable to instructors from other countries, even if their qualifications are recognised and do not cause concern in Member State X.

Member State X's amended insurance regulations are not overtly discriminatory, but their practical result is that Polish ski instructors are unable to provide services in one of Europe's most popular skiing regions. The Services Directive (2006/123/EC) does not preclude the possibility that Member States may impose insurance requirements, but merely prohibits the requirement for insurance to be taken out from a provider established in the host State. This seeks to avoid the protection of national financial institutions.

However, a steep increase in the guarantee amount (600%) makes it practically impossible for instructors to purchase individual insurance. In reality, anyone seeking to comply with this obligation must join a professional association in Member State X, which is incompatible with the provisions of the Directive (Article 16 (2) (b)). Moreover, the new provisions are fundamentally incompatible with the necessity and proportionality requirements enshrined in both Articles 15 and 16 of the Services Directive. It is certainly possible for this dubious requirement to be replaced with less restrictive measures. Significantly less restrictive measures previously applied for a long time and no justification exists for replacing these with more restrictive measures at the present moment.

Practising a profession / recognition of qualifications

12. Language requirements for practising a profession

A Polish citizen obtained recognition of her qualifications, acquired in Poland, to practise as a physiotherapist in Member State X. This does not concern the recognition of qualifications as such, but rather the acquisition of the right to practise the profession. Member State X's legislation states that a person who is qualified to practise as a physiotherapist (pursuant to a qualification acquired in their home country or via recognition) must also know Member State X's language, even though the physiotherapist provides services to English-speaking customers (and claims to have sufficient knowledge of English to conduct their professional activity with English-speaking customers).

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications lays down certain minimum requirements for the recognition of professional qualifications. However, this does not mean that national legislation is incapable of laying down additional requirements – not regarding the recognition of qualifications per se but as regards acquiring the right to practise as a physiotherapist. However, any such requirements must be objectively justified and proportionate.

In this particular case, there appears no objective justification for Member State X's authorities refusing to allow a physiotherapist to provide professional services to English-speaking customers. If customers are unable to communicate with this particular physiotherapist in Member State X, they can always use the services of other physiotherapists.

13. Mountain guide

A Polish citizen obtained professional qualifications in Poland to become a class II mountain guide in the Tatra Mountains. Subsequently, he applied for a European Professional Card (EPC) to enable him to provide services temporarily and occasionally in Member State X. As Member State X has not reserved for itself the right to conduct prior checks of qualifications (Article 7 (4) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications), the Polish authorities verified the qualifications and issued a positive decision together with the EPC.

However, when providing services in Member State X, the guide was informed that, as he was not a member of an association within the International Federation of Mountain Guides Associations UIAGM/IVBV/IFMGA, he was unauthorised

to work in that Member State (Member State X's Mountain Guides Association requested that the EPC be suspended or withdrawn until he provided an additional document to confirm his membership in the Association).

In the absence of prior checks, Member State X's authorities have no right to verify an applicant's qualifications. The host Member State is required to accept an EPC issued by the home authority unless there are justified grounds for questioning the decision taken by the home Member State. Incidentally, it should be noted that the Member State X's law has recently changed, so as to enable it to conduct prior checks on qualifications pursuant to Article 7 (4) of Directive 2005/36/EC.

An additional problem arises because some Member States divide mountain guides' qualifications into two groups, namely mountain guides and high mountain guides. In Poland, there is only one regulated profession, namely a mountain guide („Mountain Guide" specified in the Regulated Professions Database). The assignment of a Polish mountain guide to a specific mountain area (The Tatra Mountains, The Beskid Mountains or the Sudetes) also significant impedes the recognition of qualifications in other Member States.

Some Member States have reserved, pursuant to Article 7 (4) of Directive 2005/36/EC, the right to conduct a prior check of qualifications. Although some Member States have not reserved such a right for themselves, in practice they often reject the EPC of a mountain guide, as issued by their home country.

Moreover, some Member States take the stance that a mountain guide's EPC can only be obtained by persons who are members of the International Federation of Mountain Guide Associations (UIAGM/IVBV/IFMGA). In Poland, training based on UIAGM/IVBV/IFMGA standards is not a pre-requisite for access to the regulated profession of a mountain guide. However, some Polish mountain guides decide to undergo training according to the UIAGM/IVBV/IFMGA standards in addition to the qualifications needed to gain access to the profession of mountain guide (in Poland, persons holding the UIAGM/IVBV/IFMGA high mountain guide licenses are not entitled to provide mountain guide services in Poland, nor entitled to be granted a mountain guide EPC, if they do not also possess the mountain guide license, granted by way of an administrative decision issued by the relevant voivodship's mayor, as Poland would be unable to certify that such a person has the necessary qualifications to be a guide).

One way to resolve this problem would be to harmonise the qualifications of mountain/high mountain guide at the EU level and to unify the interpretation of the term ‚mountain guide'/'high mountain guide'.

Finance/banking/ tender procedures

14. Requirement for foreign entrepreneurs to open bank accounts for tax purposes

Polish entrepreneurs have informed us that they do not receive orders from entities in Member State X, because such entities require foreign service providers to open a special account ('account Y'). The funds kept on such accounts are blocked and may be used solely to pay taxes. Before opening an account for tax purposes, it is necessary to enter into an agreement involving three parties, i.e. the operator/supplier, the bank in which the operator/supplier plans to open the special account (account Y) and the tax and customs authorities. Companies may open an account for tax purposes (account Y) if certain conditions are met. One such condition is to own a company account in one of Member State X's banks. Banks decide which companies may open accounts with them, and they are often reluctant to open accounts for clients from other EU Member States (non-residents). Consequently, companies from other EU Member States are unable to enter Member State X's market if an account for tax purposes is required (account Y).

15. Technical issues resulting in a failure to ensure a level playing field regarding participation in tender procedures

Entrepreneurs have informed us that the e-tendering platform does not accept bids signed with a qualified electronic signature (QES). Article 22 (1) of Directive 2014/24/EU on public procurement requires that tools and equipment used for electronic communication, including their technical characteristics, must be non-discriminatory, generally accessible and interoperable with ICT products in general use. It also states that tools and equipment used for electronic communication must not restrict economic operators' access to procurement procedures. In this case, Article 22 (6) (c) read in conjunction with Article 22 (1) of the Directive was infringed when a Polish economic operator was unable to submit a tender, even though it had used a qualified electronic signature based on a qualified certificate issued by a certification service provider included on the trusted list contained in Commission Decision 2009/767/EC, created with or without a secure signature creation device (subject to compliance with all conditions laid down in Article 22 (6) (c) of the Directive). However, it is difficult to say who is at fault for this infringement. The economic operator informed us that the procedure was conducted via the platform, so it is difficult to attribute the infringement to the contracting authority itself. Most likely, the fault lies with the platform provider.

Certification/ extra product requirements

16. Difficulties in acquiring certificates of compliance with national standards

Member State X has a mandatory rule, arising from collective agreements, which requires companies to confirm that they follow appropriate procedures and comply with tax rules and employment conditions. Moreover, the documentation of such procedures is only available in the language of Member State X.

This creates a problem, particularly for small-sized enterprises, by generating extra costs to apply for an audit (which must be carried out in both Member State X and in Poland). It is uneconomical to seek certification for one or two orders, but traders which do not possess the certificate are excluded from the market.

17. New rules on construction products

Member State X plans to enact a complex set of rules including a wide range of additional national requirements which will apply to harmonised products. The new rules would mean that harmonised construction products bearing the CE mark and having a declaration of performance will no longer be capable of being placed and used on the market unless they also comply with multiple additional national requirements. The proposed extra requirements give rise to legitimate concerns regarding the practical implementation of the freedom of movement of goods.

18. New rules on product labelling

Certain Member States plan to introduce national product labelling requirements to convey information on the sorting of waste packaging (i.e. how to collect, reuse or recy-

cle waste packaging). Different labelling requirements within the Member States may constitute an obstacle to the free movement of goods on the EU market, as manufacturers will need to provide separate packaging (or separate stickers) for each market (product labels which are different for good sold in Member State X from those sold in Member State Y etc.). This entails extra costs, for example due to the need to adapt production lines or print different label designs for the same products. Such different labelling rules may also confuse consumers, especially at the European and global level. Consumers may be surprised as to why the same products have different labels in different markets. Furthermore, consumers can buy products from online stores in different Member States or buy products when visiting other Member States. The information contained in labels should be understood by all potential consumers (in all Member States).

Such labelling arrangements should be introduced at the EU level, and the European Commission envisages work in this area as part of the next review of Directive 94/62 on packaging and packaging waste in 2022. The actions of certain Member States, by introducing requirements for labels to contain information on the sorting of waste packaging, seem premature and problematic from the perspective of the free movement of goods.

Agricultural sector

19. Legislative work to increase the share of national food

Legislative amendments planned in Member State X include proposals to set a minimum quota of nationally-produced food products to be made available on the shelves in certain supermarkets. The mandatory quota of domestic food availability in selected product categories is expected to increase incrementally. The new rules would apply to a wide range of products (including vegetables, fruit, various kinds of meat, fruit juices, various dairy products, oils, sweets, bread and pastry, eggs etc.). The proposed changes would adversely affect Polish producers which export food to Member State X and give rise to serious doubts as regards their compatibility with EU law, including the free movement of goods (Article 26 (2), Article 34 TFEU) or the freedom of economic activity (Article 49 TFEU). The European Commission is also aware of, and critical of, the rules currently under discussion, and hopes that they will ultimately not be adopted.

20. Attempts to protect domestic agriculture in light of the COVID-19 crisis.

Member State X's Parliament has amended its law to introduce an obligation for self-service retail chain stores to display food which is produced domestically from local materials. The obligation requires large-chain stores to arrange a separate, appropriately designated space to accommodate fruit and vegetables, dairy, meat products and honey produced in the district where the store is located, or in neighbouring districts. Non-compliance can result in stores receiving high penalties. Member State X explains that the measures are only temporary and related to the pandemic.

The European Commission has commenced infringement proceedings, as the new rules undermine the free movement of goods, as enshrined in Article 34 TFEU by creating more favourable and competitive commercial conditions for domestic food products, discriminating against similar imported products. They also violate the freedom of economic activity, as laid down in Article 49 TFEU, restricting retailers' freedom to decide on the product ranges they offer, the layout of their sales areas and their supply chains.

Conclusion

Clearly, it is a difficult task to strengthen the internal market and overcome barriers therein, as has been confirmed by recent events (i.e. the pandemic crisis). The growing protectionist tendencies adopted by certain Member States in response to the crisis is concerning. The restrictions adopted in many Member States must be lifted quickly. Importantly, pandemic-related barriers must not obscure those which have been in existence for a long time.

This problem is on the EU's agenda, but the discussion thus far has not focused on tackling specific barriers. The internal market is discussed in abstract, general terms, but a more practical, hands-on approach is required. Worse still, there seem to be no ideas on how to overcome the current impasse. This year's work programme of the European Commission lacks any information about action plans in this respect. Last year's March package was a step in the right direction (comprising, among other things, the Communication on barriers and the Communication on an action plan for the enforcement of EU law), but the failure to prioritise of a number of barriers and actions identified therein means that it remains a theoretical document, an unrealised idea.

In order for the internal market to function properly and benefit citizens and businesses, decisive action is needed.

Efficient procedures, close cooperation and dialogue between the Member States and the European Commission at different levels are crucial. Member States' engagement is also essential, which will become easier with greater knowledge and understanding about the barriers and the harm that such restrictions cause. The European Commission's role in this process should be visible. The European Commission is obliged to intervene in certain cases, where the Member States have irreconcilable positions or fail to take necessary action. Moreover, the absence of remedies and action by the European Commission, the lack of information that the Commission is investigating a problem[18], can encourage other Member States to adopt similar protectionist approaches. In such cases, the impression is created that there is a tacit consent to similar conduct. It would help to have a more efficient and transparent[19] complaints system to the European Commission about barriers, to offer entrepreneurs a quick response regarding obstacles which results from incompatibility with internal market rules. The optimum solution would be for interim measures to be applied until a case is resolved, so as to safeguard as

[18] The European Commission has the right to refuse to make documents available if the disclosure would harm the public or private interests listed in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. These include, but are not limited to, information documents on pending infringement cases (including within the EU-Pilot communication system).

[19] Through regular information on the number of complaints concerning barriers encountered by entrepreneurs in the Single Market, the problems affecting them and information on their verification by the European Commission or on no need for the same.

far as possible the interests of entrepreneurs who incur real losses during each day that unlawful barriers remain in effect.

The role of businesses is also crucial. Without the involvement of economic operators, the Member States, and the European Commission, may not be able to properly respond to their needs, as information may be missing and problems may remain undiagnosed. Moreover, the absence of information is viewed as meaning that no problem exists. We seek to improve the flow of information with entrepreneurs and to exchange ideas for improving the functioning of the internal market.

Please help us, by reporting any further barriers encountered by Polish entrepreneurs in the internal market (the email address: sekretariatDSE@mrpit.gov.pl is constantly active). We guarantee full anonymity.

Entrepreneurs and EU citizens are able to complain about other Member States' practices which are incompatible with the internal market, both via the informal SOLVIT system and via an official complaint to the European Commission. We have been informed that the European Commission's work can take too long for entrepreneurs.

However, please note that the more signals the Commission receives from various sources, the greater attention it gives to the reported problem.

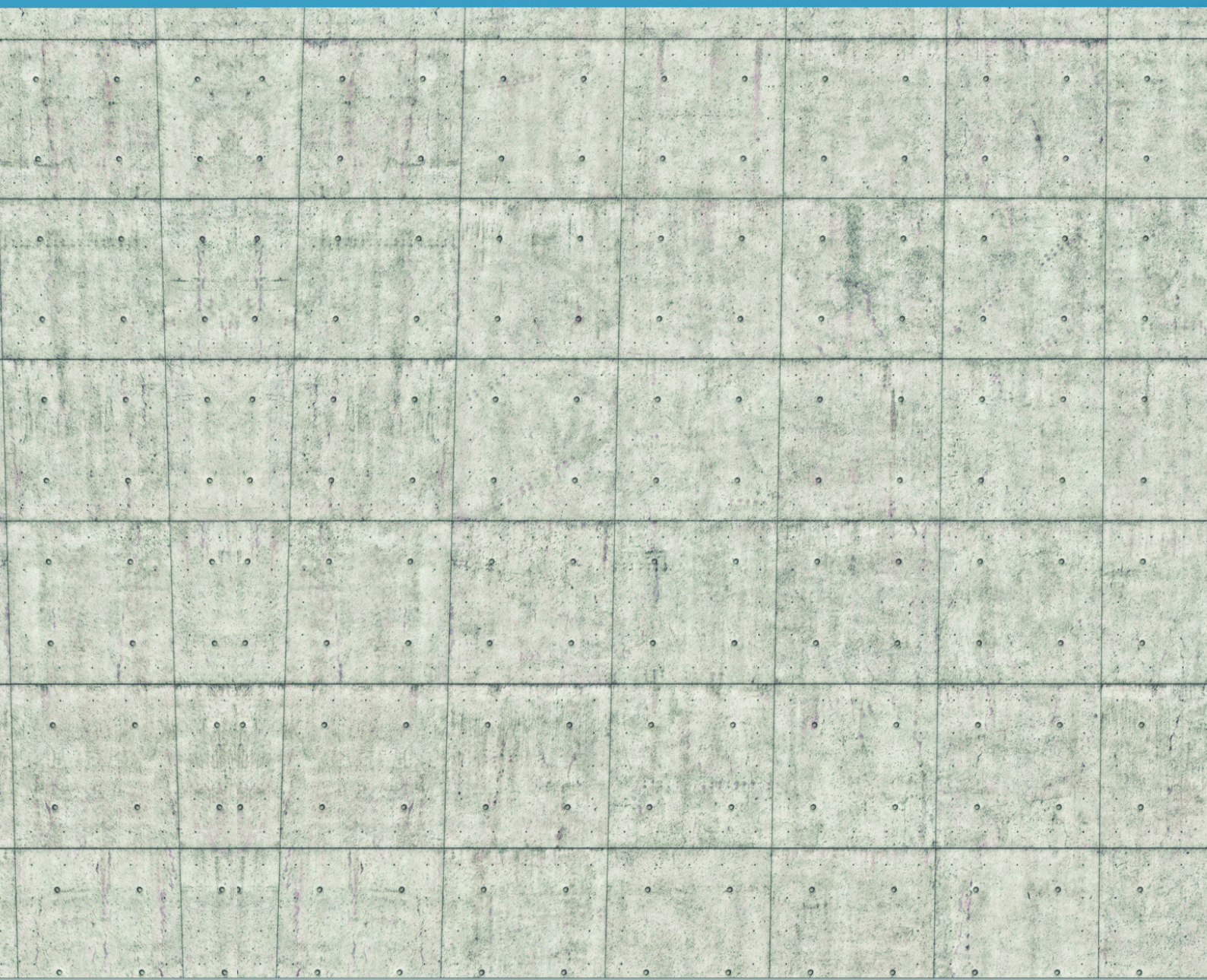
The SOLVIT Poland Centre, operating within the Ministry of Economic Development, Labour and Technology[20] is part of the informal SOLVIT network; its staff (from all of the Member States, plus Iceland, Liechtenstein and Norway), together with representatives of the European Commission, display great commitment and efficiency in their work.

Additionally, economic operators (like Member States) can continuously monitor draft technical rules notified under the TRIS tool. In the event of doubt as to whether proposed technical regulations may adversely affect the free of movement of goods, entrepreneurs may directly submit their comments/opinions within the three-month standstill period or, alternatively, to notify us of their objections sufficiently in advance so that Poland is in a position to intervene (i.e. to submit a detailed opinion within the technical notification procedure).

It is crucial that entrepreneurs and business associations participate in public consultations, concerning both Polish and EU legislation. If a Member State makes proposals which would restrict commercial activities, such participation will enable them to become aware of the consequences those measures would have on entrepreneurs. Such activity by business associations (which certainly easier for organisations than for their individual, small and medium-sized members) is needed to influence the desired shape of EU-wide proposed solutions. Moreover, active cooperation in national and international business organisations impacts enormously on the European Commission's activities and on the tailor-made solutions it proposes to meet the real needs of businesses.

[20] SOLVIT is an EU system that helps citizens and entrepreneurs from the EU and Iceland, Liechtenstein and Norway to solve problems resulting from the incorrect application of EU law. To learn more, click on the link: https://www.gov.pl/web/rozwoj-praca-technologia/solvit, https://ec.europa.eu/solvit/index_en.htm

Warsaw, April 30, 2021



Ministry of Economic Development,
Labour and Technology