BARRIERS ON THE INTERNAL MARKET

BLACK BOOK

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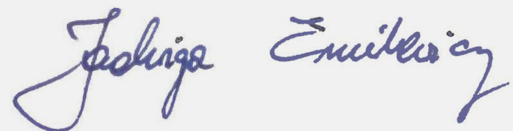
Poland has come a long way since its accession to the EU in 2004 – we are catching up to Europe in many aspects. Currently we find ourselves at a completely different level in terms of economic and social growth than fifteen years ago. Polish entrepreneurs are appreciated not for low labour costs, but primarily for the quality, flexibility and accessibility of their services.

We see the need to search for solutions that would support Polish companies on the European market. That's why today we would like to present to you the Black Book, key elements of which are reports regarding barriers – abuses and limitations resulting from practices or regulations in force in certain Member States which were not introduced for that purpose, but which stand in the way of Polish entrepreneurs. In this way we want to initiate a broader, Europe-wide discussion regarding barriers related to conducting cross-border activities on the internal market. We count on your support, remarks and knowledge.

I would like to invite Polish entrepreneurs to report other examples which, in their opinion, hinder cross-border operations.



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Introduction

Entrepreneurs from Member States which acceded to the EU in 2004 and after had to face the competition of companies from Western Europe. They had been building their position on the internal market for many years. However, after the last ten-odd years of our presence on the internal market, entrepreneurs from Central and Eastern Europe have become more competitive. It is not low costs, but rather quality, creativity and flexibility that have become our strength. Unfortunately, this has led to uncertainty and fear among entrepreneurs from Western Europe, which have become accustomed to the established order and power structure.

We have observed first indications of a rise in protectionist sentiments in the European Union in the years 2012-2015. In northern and western countries of Europe, this problem pertained in particular to the free movement of people and services (e.g. the British debate regarding the restriction of the freedom of movement for workers – one of the effects of which is BREXIT, allegations of controls discriminating Polish companies in France, the scope of German minimal pay in international transport, excessive and unjustified information made public about Polish companies from other Member States, collected in the RUT register in Denmark). On the other hand, information from the Visegrád Group member states indicated stricter obligations being imposed on food importers and distributors as well as controls targeting Polish agricultural and food products.

The wave of protectionism that hinders cross-border operations in other Member States unfortunately has yet to slow down. New regulations have been adopted concerning the posting of workers in the framework of the provision of services, which reverse existing, previously established facilitations for EU entrepreneurs. On the EU forum, works are still pending on the Mobility Package and changes to the social coordination system – which, unfortunately, indicate further barriers and complications which will have to be faced in the near future by not only Polish entrepreneurs, but all EU entrepreneurs. These internal barriers lower the external competitiveness of the EU in a globalising economy.

Many stereotypes and prejudices were voiced during the debate on the posting of workers in which we actively participated to represent Poland. They erroneously equate the posting of workers with labour market pathologies. The term "social dumping" was used especially often – incorrectly, as dumping was used to describe actions taken by entrepreneurs in compliance with applicable provisions (in particular those concerning the obligation to pay minimum wage) and unjustly – including in the economic aspect. Studies

conducted by the French government showed that the posting of a Polish worker to France is more expensive than the employment of a local worker, with the assumption that remuneration remains at the same level. **Arguments used in the debate on amendments to posting must, therefore, be deemed misguided and inaccurate. However, their consequences will be borne by all EU entrepreneurs**.

The most recent studies show that the principles of free movement of goods and services as well as regulations in that area generate benefits estimated to amount to EUR 985 billion per annum[1]. That is why further integration with simultaneous elimination of existing barriers may generate even greater benefits. In reference to the services sector, it has been pointed out that its liberalisation would generate an economic growth of approx. 2% in the EU[2].

For that reason, the Ministry of Economic Development in cooperation with the Labour Mobility Initiative decided to prepare the Black Book of unlawful practices which are used against cross-border entrepreneurs and inhibit the freedom to provide services (including the posting of workers) and other freedoms on the internal market: freedom of movement of goods, persons and capital.

1 http://www.europarl.europa.eu/factsheets/pl/sheet/33/rynek-wewnetrzny-zasady-ogolne za, Poutvaara P. et al., "Contribution to Growth: Free Movement of Goods. Delivering Economic Benefits for Citizens and Businesses" [Wkład we wzrost gospodarczy: swobodny przepływ towarów. Zapewnianie korzyści ekonomicznych obywatelom i przedsiębiorstwom] (2019), prepared by Policy Department A at the request of the IMCO Committee, http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/631063/IPOL_IDA(2019)631063_EN.pdf and Pelkmans J. et al., "Contribution to Growth: The Single Market for Services. Delivering economic benefits for citizens and businesses" [Wkład we wzrost gospodarczy: jednolity rynek usług. Zapewnianie korzyści ekonomicznych obywatelom i przedsiębiorstwom] (2019), prepared by Policy Department A at the request of the IMCO Committee, http://www.europarl.europa.eu/RegData/etudes/STUD/2019/631054/IPOL_STU(2019)631054_EN.pdf

2 See: https://www.copenhageneconomics.com/publications/publication/making-eu-trade-in-services-work-for-all, similarly "An unconscious uncoupling" The Economist, September 14th 2019.

Freedom to provide services

The starting point for the term "freedom to provide services" in the EU is the concept of internal market, which pursuant to Article 26 of the Treaty on the Functioning of the European Union (TFEU) comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Therefore, the freedom to provide services and the freedom of establishment guarantee the mobility of entrepreneurs within the EU.

All four freedoms are designed to work in a parallel way, yet the current degree of integration of individual EU markets is very diversified. Particular attention should be currently paid to the European services market which remains much more fragmented than the goods market. Recently prepared reports regarding the internal market (e.g. the aforementioned Copenhagen Economics report) are consistent that further integration of the services market will bring tangible benefits for all Member States. A gradual elimination of barriers in that area – in which they are definitely too abundant – must therefore become our objective for the upcoming years.

A cornerstone of freedom to provide services are provisions laid down in TFEU, in particular Articles 56 to 62. Article 56 of TFEU is of primary importance in this matter, as it establishes a general prohibition on restriction on freedom to provide services within the EU in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Pursuant to Article 57 of TFEU, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

These general treaty provisions were the subject of interpretation by the European Court of Justice, and currently by the Court of Justice of the EU, since the very beginning of existence of European Communities. This way, the Court of Justice has derived many principles knowledge of which is essential to fully exercise rights by nationals of Members States in respect of the freedom to provide services. At the same time, acts of secondary

legislation were drafted to codify, to a large extent, the rich case-law of the Court of Justice.

THE DEFINITION OF SERVICE

Having regard to the uniform application of EU law, the Treaty does not refer to this extent to national definition, but rather autonomously establishes the definition of service. **Treaty provisions specify the following characteristics of a service on the EU market:**

- **a valuable consideration;**
- **a cross-border dimension (both the service provider and service recipient, or even the service itself, have the freedom of movement);**
- **a temporary nature of activity – services are provided temporarily and for the purpose of performing a specific undertaking, following the completion of which the service provider returns to the State of its registered office.**

It is important to note that pursuant to the case-law of the Court of Justice (inter alia judgements C-215/01 Schnitzer, C-208/07 von Chamier Glisczinski, C-97/09 Schmelz, C-357/10 – 359/10 Duomo et al.), it is not possible to specify, in abstract terms, the period and frequency after which the provision of a service no longer enjoys the freedom provided for in the Treaty – services within the meaning of the Treaty include services of various nature, including services provided for a longer period of time, even several years.

Treaty provisions concerning freedom to provide services do not apply to: transport, banking and insurance services.

ACTIVITIES SUBJECT TO PROTECTION

All activities of the service provider aimed to prepare and perform a service are protected by EU law, this means primarily movement to the host state as well as advertising, installation of necessary equipment and exercising rights arising from the relationship with the service recipient. This list goes on, e.g. the provision of cross-border services should not, in principle, be restricted by any indirect regulations, e.g. referring to taking loans or purchasing real

property. It is all the more essential considering that according to the Court of Justice (inter alia in C-63/86 EC v Italy, C-55/94 Gebhard, Opinion of Advocate General Cruz Villalón C-342/14 X-Steuerberatungsgesellschaft) in order to provide cross-border services it is necessary to have a certain infrastructure in the host state.

Movement together with personnel for the purpose of providing a service, referred to as the posting of workers, is also a right protected under provisions concerning freedom to provide services.

DIRECTIVE 2006/123/EC ON SERVICES IN THE INTERNAL MARKET

The directive on services in the internal market is an act of EU law the purpose of which is to facilitate operation for entrepreneurs providing services or using services in the EU. It concerns, in particular, the cross-border provision of services and the establishment of business activity in the services sector. The directive constitutes, to a large extent, the codification of earlier case-law of the Court of Justice. Unfortunately, despite the fact that December 2019 will mark 10 years since the date set for Member States to introduce provisions laid down in the directive into effect, its provisions are still yet to be fully implemented.

Provisions laid down in the directive do not apply:

- to certain types of activities (including financial services, transport services, health services, audiovisual services and gambling activity);
- in the event of conflict with provisions of other acts of EU law governing specific aspects of service activity or specific professions (e.g. in the case of posting of workers in the framework of the provision of services, provisions laid down in Directive 96/71/EC concerning this type of activity prevail).

Key provisions of the directive refer to the admissibility of applying different kinds of requirements to service providers, dividing them into prohibited requirements and requirements subject to assessment (see also page 8 – Provisions of the service directive concerning restrictions). In addition, the directive orders Member States to simplify procedures and formalities concerning access to, and exercise of, service activity, including to ensure electronic access to procedures.

PERMISSIBLE RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES

Member States were not fully deprived the ability to impose certain restrictions and requirements on service providers from other Member States. However, in order to ensure that this action is not deemed to be in violation of EU law, it must fall within the framework established by Treaty provisions and case-law of the Court of Justice, partially codified by the service directive. In order to determine whether a restriction is permissible, it is therefore necessary to check whether it is permitted in light of exceptions provided for in Article 52 of TFEU (it applies both to the freedom of establishment and freedom to provide services) or justified by overriding reasons relating to the public interest.

TREATY BASES – DISCRIMINATORY RESTRICTIONS

Pursuant to Article 52 of TFEU, it is permitted to apply national regulations providing for special treatment of foreign nationals, if these provisions are justified on grounds of public policy, public security or public health. Therefore, by means of derogations provided for in the Treaty, it is possible to treat service providers from other Member States discriminatorily. However, it should be noted that for this exact reason exemptions stipulated in the Treaty are subject to very narrow interpretation and their list is exhaustive.

UNWRITTEN BASES – THE SO-CALLED OVERRIDING REASONS RELATING TO THE PUBLIC INTEREST

Non-discriminatory restrictions – i.e. restrictions applicable to all persons or entrepreneurs conducting activity in the territory of a specific state in the same way – have a broader basis for justification in the so-called overriding reasons relating to the public interest developed in the case-law of the Court of Justice. Member States may rely, *inter alia*, on: the protection of workers and consumers, environmental protection, prevention of unfair competition, fraud prevention, protection of the integrity of commercial transactions.

Nevertheless, it is essential that the Court of Justice keeps consistently rejecting the possibility of justifying restrictions on freedom to provide services by economic reasons, such as the protection of domestic entrepreneurs.

PROPORTIONALITY TEST

The so-called proportionality test constitutes an integral part of controlling the compliance of national measures restricting each of the Treaty freedoms with EU law. Therefore, national regulations of a specific Member State must be applied to service providers established in another Member State in a way that guarantees achievement of the intended objective of these regulations and does not go beyond what is

necessary to attain that objective.

PROVISIONS OF THE SERVICE DIRECTIVE CONCERNING RESTRICTIONS

Article 16 (2) of the Directive referring to classic cross-border service activity codifies the most important prohibited requirements originating from case-law, including the obligation to have an establishment in the territory of the host state, the obligation to an authorisation or an entry in a register in the host state, a ban on setting up infrastructure needed in order to supply the services in question in the host state. In areas where provisions of the service directive apply, overriding reasons relating to public interest have been restricted pursuant to Article 16.3 to: public order, public security, public health and environmental protection.

EXAMPLES OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES CONSIDERED IMPERMISSIBLE

Member States continue to apply different types of restrictions on freedom to provide services, thus the case-law of the Court of Justice concerning the permissibility of these restrictions keeps constantly developing.

It is important to keep in mind that Treaty provisions concerning freedom to provide services have direct effect, therefore entities may rely on them in cases before national courts. If a national court has doubts as to the correct interpretation and assessment of the facts based on EU regulations, in accordance with Article 267 of TFEU it may raise a question before the Court of Justice. The majority of judgements considered as milestones in case-law regarding freedom to provide services, and two judgements cited below, have been issued based on that procedure.

An important judgement in that area is the judgement of the Court of Justice in case C-33/17 "Čepelnik" from November 2018, in which the Court of Justice deemed Austrian provisions imposing an obligation on a national contracting party using the services of an entrepreneur from another Member State to allocate a portion of remuneration payable to the contractor to establish a security to guarantee a fine that might be imposed on the contracting party for violating national regulations as inconsistent with freedom to provide services stipulated in the Treaty. The said fine could be imposed in the event of violating provisions referring to the posting of workers.

In September 2019, the Court of Justice issued a judgement in joint cases C-64/18, C-140/18 and C-148/18 "Maksimovic and Others", in which it deemed Austrian provisions imposing unproportionally high fines for violating formal obligations related to the posting of workers on foreign companies as impermissible. The Court of Justice based its decision directly on the freedom to provide services stipulated in Article 56 of TFEU, despite the fact that the establishment of national sanctions remains within the competencies of individual states. However, these competencies cannot be used in a way that makes it de facto impossible to exercise freedom to provide services.

It is also necessary to note the number of other cases concerning Austrian regulations which have been registered in the Court of Justice,

especially as a result of pre-judicial questions of Landesverwaltungsgericht in Styria. In four cases – C-645/18, C-712/18, C-713/18 and C-227/19 – that Austrian court raised questions concerning the imposition of very high fines, especially high minimum fines for the violation of certain formal obligations related to the posting of workers, by Austrian authorities.

In four other cases – C-138/19, C-139/19, C-140/19 and C-141/19 – apart from the issued mentioned above, doubts raised by the referring authority were also focused on: the obligation to notify authorities in the event of early termination or suspension of the period of posting to Austria (which did not specify a time limit within which such notification should be made, thus carrying a risk of being open to interpretation); the provision specifying that the submission of appropriate and relevant documents within a reasonable ex post period does not meet the requirement of "access to" documents according to the Enforcement Directive (i.e. 2014/67/EU), and the obligation to present additional documents, exceeding beyond the scope specified in Article 9 of Directive 2014/67/EU.

Description of the problem

The concept and functioning of the internal market depends, to a large extent, on the readiness of entrepreneurs from the EU to operate and their ability to expand. However, depending on the specific nature of EU states, economies and communities, we have different views as regards the needs of entrepreneurs and what may constitute a restriction for them.

This document presents examples of barriers inhibiting cross-border activity of Polish entrepreneurs on the European market that have been reported to us. **Problems presented below illustrate struggles with restrictions of a legal, administrative and interpretative nature.** Examples presented in this document rarely consist in the violation of EU law by incorrect implementation of its provisions to legal orders of Member States or in the violation of national regulations of states in whose territory services are provided. It would have been difficult to present them to the European Commission or the Court of Justice as a complaint. We have gathered unobvious signals resulting from administrative practices or interpretation of regulations which are severe enough that they inhibit the provision of services.

We have managed to explain or solve only some of these problems thus far. One of the reasons for this is the lack of ability to present our respondents with a fact-based, actual severity of barriers, a summary of costs and losses for entrepreneurs operating in a specific sector.

However, one thing is for certain –a restriction on freedom to provide services does not lead to the elimination of disparities in standards of living in the EU, but rather – on the contrary – entrenches them. It is the application of all freedoms of the internal market that provides an opportunity for economic growth and growth in prosperity in less prosperous Member States that acceded to the European Union in 2004 and later. The consequences of adopted EU provisions, developed in the atmosphere of stereotypes, populism, fear of entrepreneurs from Central Europe growing in strength will be felt by all entrepreneurs and all citizens of the European Union.

The Black Book is intended to support arguments presented by Poland as regards the prevention of protectionist practices. In our opinion, shedding light on actual problems will help identify errors in such way of thinking and their harmfulness – for us all. Arguments presented in the Black Book will be used during work on the direction of new EU provisions as well as help find solutions to specific problems. Information presented below include one of the first cases reported to us and subjected to initial analysis in cooperation with experts from other ministries.

1. Fines for lack of A1

The control authority in country X require that the A1 document be presented without delay or made available electronically during a control.

Article 9 (1)(b) of 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 specifies the types of documents that should be kept and made available during posting. They do not include A1 document which are of a declaratory nature only. None of the documents mentioned in the aforementioned provision must be made available "without delay".

The absence of need for prior notification was noted by the Advocate General of the Court of Justice, Prof. M. Szpunar, in his recent Opinion in case C-16/18, who indicated the following in the context of posting to Austria: "I do not see why employers should declare one week in advance who is posted" (point 102 of the Opinion).

In addition, **provisions do not provide for the obligation to have an A1 document at the moment of commencing the posting.** The proposal to "pre-notify", i.e. to issue an A1 document prior to commencing work abroad, has appeared only recently in the draft amending Regulation 883/2004/EC. **The national act allows to present a confirmation of filing an application for an A1, rather than the document itself.** However, information concerns the interpretation and practical application of that provision by national control authorities.

2. New procedures concerning installation works

In accordance with regulations in force in country X, an entrepreneur performing installation works must have a number of documents for each worker separately, including a list of works necessary to perform the contract, with prices included, a confirmation of insurance for each worker (A1), a professional resume, a payroll, and a maintenance note. According to the reporting entrepreneur, administrative procedures are hostile.

A wide range of information does not constitute an infringement of EU provisions concerning the posting of workers in itself, in particular it does not constitute a violation of Article 9 of Directive 2014/67/EU, which clearly defines the scope of information which Member States may require of entrepreneurs posting workers. **The requirement to submit such an extensive set of documents for each worker in practice entails a time commitment and costs of legal service, which makes cross-border activity less attractive.**

3. Securing amounts for future tax

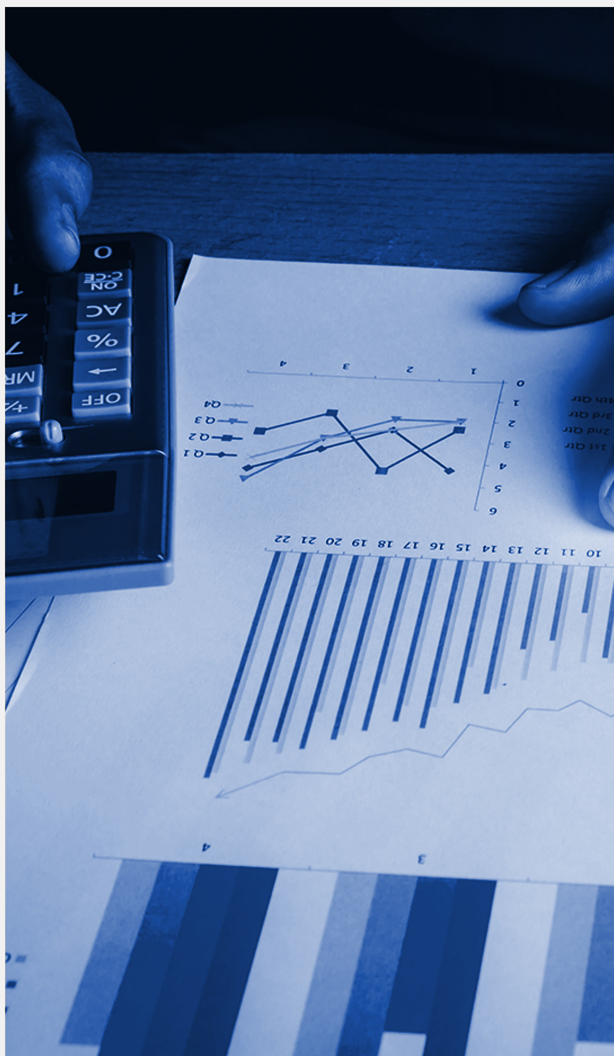
In country X, there is the so-called "withholding tax" which consists in the national contracting party placing a hold on part of the amounts due for work performed (20% of wages due to a worker posted to country X towards securing any unpaid taxes).

Despite the submission of appropriate documents confirming the actual payment of levies and necessary to release secured amounts to national authorities, funds remain under a hold for a long time, which hinders current operations of an entrepreneur.

Conducted analyses do not indicate that the tax collection system in place in country X is inconsistent with EU law. The tax collection system remains within the competencies of EU Member States and, according to obtained information, the provisions in question are not of a discriminatory nature – they do not apply only to Polish entrepreneurs. Provisionally, it needs to be considered that, in light of case-law of the Court of Justice, adopted measures do not constitute prohibited, arbitrary discrimination nor a hidden restriction on free movement of capital.

Unfortunately, a double taxation convention between the Republic of Poland and country X does not provide for instruments of international cooperation that could lead to the release of an entrepreneur from the obligation to establish a security towards income tax. **The problem in this case seems to be primarily the practice adopted by national authorities and long periods needed to return secured funds, rather than legal regulation, which results in restriction on freedom to provide services.** That is: non-release and delayed refund of securities established for tax purposes despite the settlement of tax by the Polish entrepreneur. Therefore, the issue of actual compliance with national regulations to that extent in relation to Polish entrepreneurs (and entrepreneurs from other Member States) is of key importance.

IMI (Internal Market Information System) is an online information exchange system in the internal market that enables the exchange of information with public authorities involved in the implementation of EU law. IMI helps public administration to fulfill their international cooperation obligations in many areas related to the internal market.



4. Non-recognition of Polish work permits issued to Ukrainian employees of a Polish entrepreneur

In the reporting entrepreneur's opinion, authorities in country X inhibit the provision of construction services in its territory to a Polish company which employs Ukrainian nationals and posts them, as workers of a Polish company, to country X on the basis of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

The presented description of the facts indicates that Ukrainian workers have a work permit in the territory of Poland, but do not have a similar document issued by the authorities in country X. In addition, the said description of the case indicates that the A1 document was issued to Ukrainian workers on basis that they pursued activity as an employed person in two or more Member States, rather than on the basis of posting.

One of the key issues concerning the determination of applicable legislation is the distinction between posting (situations covered by Article 12 of Regulation No 883/2004) and pursuit of simultaneous or alternating activities in two or more Member States (situations covered by Article 13 of Regulation No 883/2004).

It cannot be clearly stated that the national administration violated EU law with regard to the reported problem. Directive 2011/98/EU lays down a single application procedure for issuing a single permit for third-country nationals to reside for the purpose of work in the territory of a Member State, in order to simplify the procedures for their admission and to facilitate the control of their status, and a common set of rights to third-country workers legally residing in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State. **At the same time, the provisions of Article 1 (2) of that Directive clearly states that it is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour markets.** It should be noted that pursuant to Article 3 (2)(c) this Directive does not apply to third-country nationals who are posted.

As regards the provisions laid down in the EU Charter of Fundamental Rights, it is necessary to point out that Article 15 (3) of said Charter states that nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. Therefore, the acquisition of rights arising from that provision is conditioned upon holding a permit to work in the territory of a Member State to which said provision applies.

5. Control of trade unions

Enterprises from the construction sector operating in the territory of country X are facing difficulties from trade unions in that country which consist in Polish companies being "pestered" during their work hours, which hinders the performance of works. National trade unions accuse Polish entrepreneurs, among others, that they perform works using subcontractors (which pursuant to a collective agreement for the construction industry should imply equal wages for workers performing the same kinds of tasks) and trade representatives do not have direct access to workers (making it impossible to obtain information regarding employment terms and conditions directly from them; the employer is suspected of prohibiting their workers from talking to union representatives).

In the opinion of entrepreneurs, the interpretation of a collective agreement applied by said trade unions exceeds beyond what has been stipulated therein and some of the allegations raised are unfounded. The allegation of hindering Polish workers from contacting trade unions is unfounded. Even if the employer would be preventing workers from talking to trade union representatives during work hours, they are not able to control who workers talk to or topics of discussions they have in their free time. Polish workers are not interested in joining trade unions for two reasons: 1. they do not see benefits in joining a trade union; 2. trade union dues are approximately EUR 160 (after conversion) per month, whereas unemployment insurance costs half that amount. Therefore, cultural and mental differences are causing a growing dispute between non-members and trade unions, who put the blame on employers.

Polish entrepreneurs also point out that the cause of this conflict may be generational change, retirement of workers from country X and, therefore, lower financing for trade unions as a direct consequence of the diminishing number of its members. The inflow of workers from other states, who do not necessarily see the benefit

in participating in such a trade union model, is perceived not only as a threat to workers in country X, but also to that specific model of labour market organisation, which keeps slowly eroding away.

In light of regulations currently in force, the operation of national trade unions consisting in enforcing the application of collective labour agreements which have not been declared universally applicable may constitute a restriction on freedom to provide services, especially until 30 July 2020 (until Directive 2018/957/EU comes into force). In order to better explain the case, it would be necessary to have more in-depth knowledge regarding the kind and nature of said collective agreement in place in country X.

A confirmation of such assessment can also be found in case-law of the Court of Justice. In case C-346/06 "Dirk Ruffert", the Court of Justice stated that Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed. The Ruffert case pertains to a different situation, but also proves that the application of collective agreements to posted workers has its limitations.

6. Definition of posted worker

A new definition in country X introduces a requirement stating that a posted worker must be habitually (generally) employed with the posting employer prior to being posted. This condition prevents the employment of a worker for the purpose of posting them to country X, if they have been unemployed or have worked for another employer. In particular, it becomes impossible to post a worker for temporary work.

It is necessary to bear in mind the "Guidance on the posting of workers" published by the European Commission on 25.09.2019. The Commission's position is that Directive 96/71/EC applies even if the employment relationship was not established for a specific period of time before posting. In addition, in the Opinion in Joint Cases C-37/18 and C-370/17 Vueling Airlines of July 2019, Advocate General H. S. ØE reminded that according to the Court's case-law, the mere fact that a worker was recruited with a view to being posted does not in itself preclude his coming within the rules on posting. **The only conditions applicable to that extent are that the employment relationship must exist from beginning to end of posting and that a worker must return to the state of origin after the period of posting is completed.**

This kind of restriction cannot be justified by reasons relating to the public interest or workers' rights. On the contrary, it prevents workers from access to the labour market of the posting state, if the service provider would like to supplement its staff in order to perform a contract in country X.

7. Obligation to pay contributions to the holiday pay fund

Polish entrepreneurs should have the right to be exempt from the obligation to pay contributions to the paid holiday pay fund in country X, if they grant their posted workers the right to paid leave in that country during the period of posting on terms and conditions at least equivalent to those guaranteed by law applicable in country X. The dispute related to the holiday pay fund concerns the interpretation of legal regulations, in particular the specification which legal texts constitute basis to determine equivalence (when comparing legal positions regarding paid leaves and demurrage, only legislation and collective agreements are taken into consideration, rather than employment contracts and internal regulations). The Polish employer (building contractor) is obliged to pay contributions towards paid leaves and demurrage for workers in country X, while also having to pay the equivalent for paid leaves in Poland under the Polish employment contract.

Article 3 (1)(b) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services requires Member States to guarantee workers posted to their territory the terms and conditions of employment covering, among others, minimum paid annual holiday leave which in the Member State in which work is performed is determined by legal provisions, regulations or administrative provisions and/or collective agreements or arbitration awards which have been declared universally applicable (in accordance with current legislation, provided that they pertain to construction works specified in the annex to the Directive).

Therefore, it seems that **the obligation to pay contributions towards the holiday pay fund while being exempted from that obligation if a posted worker is guaranteed the right to paid leaves on terms and conditions at least equivalent to those stipulated by the legislation of country X** is not, in principle, inconsistent with the requirements laid down in Directive 96/71/EC, which imposes an obligation to guarantee the terms and conditions of employment concerning minimum paid leave in accordance with the legislation of the state in which work is performed by a posted worker.

8. Additional certification requirements

Insurance companies in country X require for construction products to have national certificates. In such case, the CE marking is not recognised (it is insufficient).

In accordance with Article 8 (3) of Regulation 305/2011 laying down harmonised conditions for the marketing of construction products, for any construction product covered by a harmonised standard, or for which a European Technical Assessment has been issued, the CE marking shall be the only marking which attests conformity of the construction product with the declared performance in relation to the essential characteristics, covered by that harmonised standard or by the European Technical Assessment. In this respect, Member States shall not introduce any references or shall withdraw any references in national measures to a marking attesting conformity with the declared

performance in relation to the essential characteristics covered by a harmonised standard other than the CE marking.

In accordance with Article 8 (4) of the aforementioned Regulation, **a Member State shall not prohibit or impede, within its territory** or under its responsibility, **the making available on the market or the use of construction products bearing the CE marking, when the declared performances correspond to the requirements for such use in that Member State.**

TRIS (Technical Regulation Information System) is an online system through which Member States notify the Commission of legislative proposals regarding technical regulations and information society services, and the Commission analyzes them in the light of EU law. Member States participate in the procedure on an equal footing with the Commission and can also issue opinions on notified projects (https://ec.europa.eu/growth/tools-databases/tris/en/).

9. Controlling the correctness of posting by an unauthorised entity

In country X, foreign employment agencies established in another Member State are "controlled" by an association of employment agencies in country X. The association requests entrepreneurs to provide full information on employment and employee records (failure to provide full information is subject to a fine of EUR 1,500 per each day of delay) and to pay pension fund and social fund contributions. In the case of refusal to provide access to documentation in accordance with the collective agreement, the association brings civil actions against entrepreneurs.

In the opinion of entrepreneurs, the association is neither a body governed by public law, a "competent authority" nor a "liaison office" within the meaning of Article 2 (a) in connection with Article 3 of Directive 2014/67 and, therefore, does not have labour inspectorate privileges. In accordance with Article 10 (4) of the Enforcement Directive, the association only has the right to monitor compliance with appropriate terms and conditions of employment of posted workers. Albeit the Directive allows monitoring to be performed by

social partners, controls may be carried out only by state institutions (labour inspectorates), i.e. bodies governed by public law. Social partners could entrust the monitoring of terms and conditions of employment to an association appointed by them. They could not, however, transfer any control powers which they themselves do not have.

One of the Polish entrepreneurs contested this practice applied by country X in a complaint in the SOLVIT system. According to explanations provided to that entrepreneur by authorities of country (through the Ministry of Economic Development), the legal status of the association in question in country X was the subject of proceedings before a court in that country. The said court ruled that the association cannot be deemed a public body. Therefore, it can be concluded that country X did not exercise the opportunity to appoint the association as an entity authorised to perform functions set out in Directives 96/71/EC and 2014/67/EU, which arises from the definition included in Article 2 (a) of the Enforcement Directive ("competent authority" means an authority or body designated by a Member State). In light of the above, its powers exceeding beyond the area of monitoring terms and conditions of employment seem even more debatable.

The control of terms and conditions of employment should focus on the contractual relationship with the employer, rather than the entirety of contractual relations with a worker. Moreover, requests for access to complete employee records and related civil actions bear the hallmarks of anti-competitive activities being conducted by national agencies which are members of the association.

The collective agreement concerned is very extensive and access to that agreement as well as interpretation of its provisions are hindered. In effect, it is not easy to verify what control powers are held by the association with respect to foreign temporary employment agencies under

SOLVIT is a system in which public administration in EU countries as well as Iceland, Liechtenstein and Norway help citizens and entrepreneurs in solving problems resulting from incorrect application of EU law (https://ec.europa.eu/solvit/what-is-solvit/index_en.htm).

10. Issuing construction IDs

As of 1 July 2016, construction sector workers in country X are required to have a special identification card. The purpose of introducing that system was primarily to raise the level of work safety at construction sites and limit illegal employment in construction (all present at the construction site must have an ID card). The card should harmonise the work systems for all entrepreneurs operating in country X in the sector concerned. Nevertheless, in connection with an agreement reached between trade unions in 2019, **there has been a certain case of discrimination regarding requirements which must be met by workers from Poland**. Firstly, an obligation to replace all card of their workers has been imposed on entrepreneurs providing construction services in country X (including those recently issued and paid for). **The new system does not provide for a compensation scheme in respect of cards that have already been paid for and issued for a specific period. In addition, there was an issue with the non-recognition of Polish identity cards issued before 1 March 2015 as identity documents.** The reason for non-recognition of Polish identity cards is the fact that information required by the company when scanning the document is located on both sides of the Polish identity card. For this reason, workers of Polish companies are forced to apply for and obtain a passport. The company issuing ID cards confirmed that "institutions (and their workers) scanning documents are not duly secured to collect data from both sides of the Polish document (this concerns the reliability of institutions commissioned to scan documents)". At present, there are no plans to adjust the system so that it can recognise Polish documents issued before 1 March 2015.

The system is based on an agreement made between trade unions and employers' associations in the construction sector (there are no statutory nor administrative provisions constituting basis for new regulations). In April 2019, all companies participating in the system have been informed that previous cards will become invalid as of 20 June 2019 and that they should file applications for new cards as soon as possible (said deadline was extended to January 2020). At this moment, there are no sanctions for not having the new ID card. In addition, a transitional period to replace cards has not been foreseen.

11. Hindered access to information on posting on websites

A website in country X via which posted workers are reported is not transparent enough. National rules, provisions set out in collective agreements and procedures for posting are available only in the language of country X.

Despite the fact that there is no obligation to translate the aforementioned regulations into English (as stated by the EC), **the absence of translations constitutes a major barrier for entrepreneurs posting workers.**

12. Obligation for a transport company to have a representative

The requirement imposed on foreign transport companies consists in the need to have a representative in country X regardless of frequency with which services are provided in that country. It is burdensome and costly for companies which perform only several orders to that country per annum.

The obligation for a transport company to have a permanent representative in the host Member State does not seem to be consistent with EU regulations, especially Article 9 of Directive 2014/67/EU concerning administrative requirements and control measures applied in the host Member State. In accordance with Article 9 (1)(e), a Member State may impose an obligation to appoint a person to liaise with its authorities on foreign companies. This requirement is interpreted by the EC as an obligation to have a permanent representative throughout the entire period of posting.

However, the fact is that **for a transport company which conducts only very limited and occasional activity in the host Member State, compliance with this requirement in practice leads to excessive barriers** and cannot be considered necessary in order to effectively monitor the compliance of a foreign company with provisions set out in the Posting Directive. Article 9 of the Enforcement Directive leaves Member States a wide margin of discretion, however given all obligations imposed on foreign companies a proportionality test should be performed. This stems directly from the first sentence of Article 9 (1).

"Lighten the Load" (https://ec.europa.eu/info/law/better-regulation/lighten-load) - through the online form on this page, anyone can suggest how to improve EU law and reduce regulatory burden.The REFIT platform is a forum where the Commission, national authorities and other stakeholders hold regular meetings to improve existing EU law.

13. Different national regulations on the emissions of formaldehyde from furniture

Several countries have introduced national regulations concerning emissions of formaldehyde from wood-based materials/furniture that regulate permissible limits of concentrations in different ways and stipulate different other requirements regarding these emissions (e.g. specific markings).

Although **such actions taken by Member States** are not in principle inconsistent with EU law (albeit there is still the issue of proportionality of the applied measure), it should be noted that they **may cause barriers in the trade of products in question on the internal market**. It seems that the solution to this problem could be to ensure harmonisation on EU level, i.e. to establish an EU-wide limit of concentration for formaldehyde in wood-based furniture products.

Conclusions

Cross-border barriers faced by entrepreneurs on the EU market may take different forms and be of a different nature. **Examples presented in the report show that they result from non-compliance with EU provisions by Member State (including incorrect interpretation of said regulations by public authorities, i.e. more advantageous for a specific Member State) and the absence of information or the fact that it is made available to foreign entrepreneurs in a way that makes it difficult to access.** Member States also often create above-average requirements that seem to be inconsistent with the principle of proportionality when exercising their freedom to shape national regulations. At the same time, it can be observed that the issue of Member States permitting certain private entities to exercise some of its governmental authority is becoming more apparent (an example may be relations between foreign entrepreneurs and private entities from another Member State which appropriate the "monitoring" role in certain situations).

The above indicates the need for a more in-depth reflection on provisions being introduced into force (both on EU and national level) as well as a reasonable and open debate that would take into consideration differences between States that arise from cultural and social considerations. The said debate should also give voice to enterprises themselves, as according to The Economist[3] as many as 83% of EU enterprises have concerns regarding the administrative complexity that must be handled when crossing borders. Freedom given to Member States cannot contribute to the creation of differences that go against European ideas.

A better functioning of the single market should be the objective of all of its members. That is why EU enterprises and citizens have the ability to file a complaint against practices of other Member States that are contrary to the principles of the single market, both through the informal **SOLVIT** system and by means of an official complaint filed with the European Commission. However, **it is not only the European Commission that has the tools to counteract such irregularities.** Each Member State may verify technical requirements and requirements imposed on service providers that are being introduced to the national regulations of other Member States on an on-going basis (system **IMI and TRIS**). **Member States are under an obligation to report technical standards and requirements arising from**

3 "An unconscious uncoupling" The Economist, September 14th, 2019.

the Service Directive along with a statement of reasons indicating the proportionality of measures being implemented. Other Member States may contest them and mobilise the Commission to take appropriate steps. In addition, **each citizen that encounters administrative barriers resulting directly from EU regulations has the right to file an appropriate application online** (via the **"Lighten the Load"** website). All applications that meet the criteria are analysed by members of the **REFIT** Platform, who formulate recommendations for the Commission on the basis of that analysis.

That is why we encourage Polish entrepreneurs to report any barriers faced on the single market (sekretariatDSE@mr.gov.pl). Using tools at our disposal we can effectively eliminate them.

We hope that this report will contribute to the currently on-going debate on the European forum regarding the internal market's future and help find solutions to improve its functioning. We plan to further expand this report with additional information provided by entrepreneurs.