Public interest issues arising in the field of labour law

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Legal terms are definitely not able to fully cover the contents of the notion of public interest, thus cannot define it completely. In this context, therefore, a particular law or rule of law itself is nothing else than public interest made explicit, converted into norm. This is in harmony with the classic proposition according to which politics take precedence over law. Also, public interest slips through the fingers of political ideologies and philosophies, in so far as none of these has absolute authority over the notion of public interest, i.e. none of them is able to define the contents thereof in a neutral manner.[1] Therefore the notion of public interest is devoid of content in itself, but is an essential link between politics and law.

From another approach,[2] „the notion of public interest – along with its political relatives such as national interest, public benefit and raison d'état – serves for the repression, restriction of private interest and privacy; or, to be more accurate, is used as an argument readily cited to unfairly favour certain private interests and groups." The bases of these theories, although not so exaggeratedly, appear in certain fields of labour law as well. The objective of this study is to focus on these issues and make suggestions for the solution of the detected problems.

1. Temporary employment agency activities as service

The first of the before mentioned fields is temporary employment agency activities and the question arising in connection with it is the following: is it possible to consider temporary employment agency activities as service? Based on section 60 of the EC treaty, the Rome Treaty (hereinafter referred to as: Treaty), „services" shall be deemed to be services normally supplied

[1] Balázs Zoltán: *A közérdek az alkotmánybíráskodásban, 2012-2014.* In: Gárdos-Orosz Fruzsina és Szente Zoltán (szerk.): Jog és politika határán: alkotmánybíráskodás Magyarországon 2010 után, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2015, 77.

[2] Sajó András: A közérdek-fogalom, értelemadási kísérlet. In: Lamm Vanda és Csizner Ildikó (szerk.): Van és legyen a jogban: tanulmányok Peschka Vilmos 70. születésnapjára, Budapest, Közgazdasági és Jogi Könyvkiadó - Magyar Tudományos Akadémia Jogtudományi Intézete, 1999, 241.

for remuneration, to the extent that they are not governed by provisions relating to the free movement of goods, capital and persons. This issue required interpretation by the European Court of Justice (hereinafter referred to as Court), partly because this definition is obviously practically tautology and contains no real constituting elements to add up to a term, thus can be construed rather flexibly. On the other hand, it should be evaluated separately that temporary employment agency activities are affected by regulations related to the free movement of persons, since the main point of service here is not the activity performed by the employees provided (e.g. building works), but the provision of the employees itself.[3]

The Court ruled in the Webb case of 1980[4] that when an undertaking provides manpower to another undertaking for remuneration, and the employees remain in its employment, and no employment contract is concluded with the user undertaking, such an activity is deemed a service. This is not influenced by the fact that through the placement of manpower the activity of the undertakings also falls within the scope of regulations related to the free movement of persons. According to the interpretation of the Court, the special nature of certain services does not exclude them from the principle of the freedom of the provision of services.

The significance of this ruling lies within the acknowledgement of the two-faced nature of temporary employment agency activities, and the declaration that those activities concern both labour market and services market. This conclusion implies that member states are allowed to restrict undertakings based in other member states in bringing posted workers to their territories only within the framework of the Treaty. Such restriction may only be maintained if justified by public interest, and if it does not discriminate between service providers with regard to the location where they are based. Therefore public interest justifying restriction is manifested in the sensitive effect of the activity exerted on labour market and the workplace concerned.[5]

It is important to point out that the Court did not determine in particular what conditions a member state may set for giving permission, only acknowledged that conditions serving the protection of the before mentioned public interest are permissible. The Court's later ignored this argument in

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[3] Kártyás Gábor: *Munkaerő-kölcsönzés Magyarországon és az Európai Unióban*, Budapest, WoltersKluwer Kft., 2015, 76.

[4] Alfred John Webb Case no. 279/80.

[5] Kártyás Gábor: *A határon átnyúló munkaerő-kölcsönzés.* In: Ásványi Zsófia – Nemeskéri Zsolt (szerk.): A nemzeti, illetve határokon átnyúló munkaerő-kölcsönzés alakulása, hatása a foglalkoztatásra és a gazdasági folyamatokra, Paks-Pécs, Dél-Dunántúli Humánerőforrás Kutató és Fejlesztő Közhasznú Nonprofit Kft., 2010, 218.

its case-law. In the Rush Portuguesa case[6] the Court declared that posting workers in the framework of provision of services cannot be considered as if the employees became part of the labour market in the recipient state. Due to the nature of posting, such workers do not wish to enter that labour market, and, upon the completion of their work, they return to the territory of the member state having posted them.

However, the Court's current practice considerably restricts the wide authorisation provided in the Rush Portuguesa case, with regard to the scope of what regulations may be extended to foreign employers. Based thereon, four requirements may be established: the regulation shall not discriminate between domestic and foreign employers; the restriction shall be justifiable by the protection of public interest; the restriction shall represent actual benefit for employees; the restriction shall be proportionate to the objective to be attained.[7] It is worth mentioning that practically the same requirements were imported to written law by directive 2006/123/EC of the European Parliament and the Council on services in the internal market (hereinafter referred to as: Services Directive).[8]

Directive 2008/104/EC of the European Parliament and the Council on temporary agency work (hereinafter referred to as Posted Workers Directive) calling for a review and approximation of laws in the labour law systems of the member states, specified particulars closely connected with the above mentioned.

According to the provisions thereof, the application of bans or restrictions regarding temporary employment agency activities may only be justified if, with regard to public interest, they are aimed at protecting posted workers, ensuring health and safety at workplace and the operation of the labour market as well as preventing abuses.[9]

Of the restrictions and bans applied in domestic regulations, one should be of particular interest, namely that no temporary agency workers shall be used in cases provided by a rule of law related to employment relationship.[10] This rule only partly covers provisions included in the former Labour Code which prohibited the use of temporary agency workers for working activities

6 Rush Portuguesa Lda v Office national d'immigration Case C-113/89.

7 DAVIES, Paul: The Posted Workers Directive and the EC Treaty, *Industrial Law Journal, Vol. 31.,* 2002/3, 301-302.

8 The Services Directive sections 16-17 contain relevant provisions, but section 17 names numerous exceptions too.

9 Posted Workers Directive, section 4(1).

10 This provision is contained in Act I of 2012 on the Labour Code (hereinafter referred to as Mt.), section 216(1) a).

which came into conflict with a ban provided by a rule of law. The current regulation authorises the parties entering a collective agreement or provides opportunity for them to specify deviations, bans, even beyond the provisions of the regulation, for the use of temporary agency workers. In my opinion this regulation continues to reflect the obsolete attitude that the employees' interests representing organisations operating at the user undertaking are interested in having collective agreement which restricts the possibilities of using temporary agency workers. As opposed to that, especially with regard to further expansion of temporary employment agency activities, the promotion of the protection of temporary agency workers' interests may be a viable strategy for trade unions. However, the Posted Workers Directive expressly urges the reduction of bans, restrictions – an objective which may contradict the authorisation given to the parties to restrict the use of temporary agency work in certain fields in a collective agreement.

At Community level, regulations related to temporary employment agency activities are rather different in individual member states, and as the Posted Workers Directive expressly permits the maintenance of administrative requirements imposed on temporary employment agency activities, most probably the question which will emerge from time to time in the future is whether the protection of employees is ensured at the same level in two different member state's regulatory system.

In my opinion, apart from the above, it would be necessary to specify in regulations at Community level the public interests justifying restrictions in relation to temporary employment agency activities as a type of services, also with due consideration of the current regulation by the directive.

2. Data protection, data handling at workplaces

Data protection at workplaces is a critical issue within the protection of personal data in which there is permanent endeavour to find balance between employee and employer rights. Contrary to the issues discussed above, the identification of problems is easier in this field; it is enough merely to examine domestic regulations. The provisions of the Labour Code, for example, put clearly emphasise the protection of employers' interests at the expense of the protection of basic rights.

The Labour Code in force does not make up for the regulatory deficiencies of data protection at workplaces.

A peculiarity of data and privacy protection at workplaces is that the employee makes use of his/her workforce, knowledge in the employee's

interest, therefore the employer has right to a certain level of control. At the same time, employees necessarily also perform acts at the workplace belonging to their private lives, and employees may assert their right to the protection of privacy, with special regard to personal data, at a workplace as well. The frequent conflicts of the two rightful interests make workplace data protection a critical regulation area of informational self-determination right. The domestic legal regulation of data protection is based on Act CXII of 2011 on informational self-determination and the freedom of information (hereinafter referred to as: Infotv.).

Infotv. contains conditions of restriction of personal data protection, further guarantees of the protection and, in this context, the rules of access to data of public interest. In addition to that, regulations regarding individual types and handlers of data are contained in sectoral rules of law. Supervision and data handling performed under employment, however, are not regulated in detail either in sectoral regulations or in Mt. Employers are also in a state of permanent uncertainty as it is not specified how far they may reach with control; to the employees, on the other hand, there are few right enforcement opportunities available against unjustified supervision and restriction of privacy. In order to find solution to the problem, it is worth mentioning that in connection with hiring, supervision of work and the examination of the employees' personalities there is an elaborate data protection practice of the International Labour Organisation (ILO), along with relevant recommendations, and the relevant literature also provides appropriate points of departure.[11]

Regarding data handling, at the level of basic rights, public interest lies with the right to property, the right to the freedom of enterprise, the inherent rights of the employer (as such), on the employer's part, and the requirement of equal judgement, the right to fair (appropriate) working conditions, on the employee's part. When these are examined in detail, the opposition of employer and employee rights and the endeavour to find the above mentioned balance become obvious. On the employer side, information about the employee's skills (position, mobility, loadability, working style), disposition, habits (loyalty, confidence, integration in the company policies, vulnerability), convictions (religion, politics, safeguarding of interests), behaviour (both at workplace and outside), private life (marital status, plans regarding the future) become available. On the employee side, however, the employer is

[11] Szabó Máté Dániel – Székely Iván: *A privacy védelme a munkahelyen.* In: Szabó Máté Dániel – Székely Iván (szerk.): Személyes adatok-védett adatok, Budapest, BME ITM, 2005, 115-134.

expected to handle all data that protect his/her rights (worktime, performance requirements, wage, etc.), and not to handle anything belonging to his/her private life taken in a wider sense (convictions, any ideas about future, any kind of orientation, the things he/she takes interest in, habits, etc.). In my opinion, with regard e.g. only to employees' convictions, it would be desirable to extend the section of Mt. about general behavioural requirements to include a statement and specification of factors deemed to be public interest.

A little diversion from engagement in employment relationship is disclosure requests for and supply of data of public interest by persons acting in official functions of agencies performing public duties.

They include all public servants employed by the government in service relationships, persons employed in various service relationships, irrespective of their positions, categories, the place occupied in the state organisation by the agency employing them. The Infotv. does not differentiate between such persons, only regulations regarding the individual forms of employment do so.[12] In the course of complying with data supply obligations, it is important for the employer to examine, regarding such employees, the connection thereof with the position held. In this regard the employer should take into account the Constitutional Court's decision 60/1994. (XII. 24.) AB directly reflected by Infotv. According to that, „for those exercising executive power or undertaking public role, persons', especially voters', right to access to data of public interest takes precedence over the protection of such personal data of the former which may be significant from the viewpoint of their public activities and the judgement thereof."

It is a significant problem regarding persons performing public duties that the definition of persons affected is not clear-cut. In my opinion, it would be important to insert in Infotv. a relevant detailed list to assist employer data supply, and to supplement the recommendations of the Hungarian National Authority for Data Protection and Freedom of Information.

3. Protection of persons making notices of public concern

Important tools in fighting corruption and protecting public interest is the right to make notices of public concern, and, in this connection, the protection of employees' workplace status. Mt. makes it considerably difficult to reveal employers' behaviour contradictory to public interest.

[12] Kiss-Kálmán Anita: A közérdekű adatigénylés munkajogi vonatkozásai, *HR & Munkajog*, 2016/5, 23.

Pursuant to Mt. section 8(1), employees shall not jeopardize the employers' rightful economic interests with their behaviour. Separate regulations may provide exemption therefrom. Such regulations typically include Act XIX of 1998 on Criminal Procedure or Act CXXX of 2016 on Civil Procedure. However, Act CLXV of 2013 on complaints and notices of public interest (hereinafter referred to as Pkbtv.) does not – and shall not, in my opinion, – authorise notices resulting in prejudice to rightful business interests.

Mt. section 8(4) ensures confidentiality in connection with rightful economic interests, and provides, as exception thereto, data supply and information obligation related to data of public interest and data declared public with regard to public interest. However, it may lead to contradictions during the application of these regulations that pursuant to section 8(1), regulation may entitle employees to behave in such a manner that might already jeopardize employers' rightful economic interests. In particular cases pending, regulation may even authorise the removal of restrictions regarding trade secrets.

Hungary ratified the European Council's Civil Law Convention on Corruption,[13] section 9 of which provides that each party „[…] shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

The protection of employers' good reputation and trade secrets is a legitimate law application objective, at the same time, Mt. provides opportunity in a limited manner for employees to act lawfully against abuses and irregularities experienced at workplaces. Currently, Mt. makes the protection of persons making notices uncertain.

Act CLXIII of 2009 on the protection of fair procedure and on relevant amendments was designed formerly to strengthen the rights of persons making notices of public concern. According to the Act, if an employee was aware, or assumed on reasonable grounds, that any injury to public interest occurred or might have occurred at the employer because of the employer's behaviour, or due to reasons within the scope of his operations, he/she could make a notice to the employer, or to an employer organ entitled to supervise the employer's activities, or, if procedure rules are in place at the employer to handle such notices, to an organ specified by such procedure rules.

Also, the Act provided that against the person making a notice, no sanctions shall be applied because of violation of confidentiality based on the contents of the notice, except, if the notice was made in bad faith. Compared to the foregoing, Pkbtv. overruling Act CLXIII of 2009 enacted only a direct, so-called

[13] Civil Law Convention on Corruption – CETS No. 174.

employer abuses reporting system. Directness in this case means that the employer, and their owner operating in the form of a business association, may, under conditions provided by Mt. section 9(2),[14] establish behaviour rules for the employer's employees to protect public interest or important private interests, and the employer shall make them public, along with a description of the relevant employer procedure, in a manner accessible by anybody. So, according to the current regulation, employees may no longer apply to an employer organ entitled to the supervision of the employer's activities, or to an organ specified in rules of reporting procedure, only directly to the employer. In my opinion, the restoration of former opportunities in current regulations should be considered.

4. Further observations, suggestions

As far as temporary employment agency activities are concerned, it would be necessary to specify particular factors defined as public interest and having direct influence on labour and services markets with regard to which this legal institution as a service may be restricted. They may include e.g. simply construable written documents, records that are accepted as standard for efficient authority inspections. Also, it would be deemed a progress if contracts contained opportunity to meet the regulations of the recipient state, and also the comparable regulations of the member state as per the location where the service provider (user undertaking) is based.

In connection with the issue of data protection and data handling at workplaces, it may be stated that supervision and data handling performed in employment relationship are not regulated in detail either in sectoral regulations or in Mt. In my opinion, it is justified to draw up the rules of workplace data protection in more detail at the level of norms.

Finally, regarding the protection of persons making notices of public concern it would be practical to supplement the Labour Code with a regulation containing provisions for the particular protection of such persons. This would make it clear that not only data of public interest constitute exemption from employee confidentiality obligation, but also the right to reveal other types of information about injury to public interest. It would also be practical to include this in Mt. because the right to make notices of public concern and the related protection would become known to a wider public.

[14] Employees' personal rights may be restricted if the restriction is absolutely necessary for reasons directly connected with the objective of the employment and proportionate to the attainment of the objective. About the manner, conditions and expected duration of the restriction of personal rights, employees shall be informed in advance.