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The management of posted workers in the European Union

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Abstract :

The situation of the posted worker in view of the social laws of the host country is addressed by the 1974 regulation, modified in 2004, which maintains the posted worker's affiliation with the social security regime of the sending State and by the 1996 directive which endorses the application of the salary, working hours and conditions of the host country except if the standards of the sending country are more advantageous. Growing numbers of cases of fraud in a context in which there have been increasing numbers of posted workers in the wake of the enlargement of 2004-2007, the European Commission has put forward a draft implementing directive designed to prevent the circumvention of the 1996 directive.

This should help improve the monitoring of this procedure which shapes the principle of the free provision of service within the European Union, guarantees workers the most advantageous social rights and thereby contributes to the employment of more than one and a half million Europeans, who are called upon to respond to labour shortages in some areas of activity. This improvement in community law does not however aim to harmonise the cost of labour completely since it does not affect the principle of the affiliation of a posted worker to the social security regime of his country of origin.

The situation of the posted worker was codified in community law in 1996 with the adoption of a directive, notably designed to rise to the social challenges caused by the accession, 10 years earlier, of Spain and Portugal. Until then only the issue of social security regime affiliation was covered by community legislation. The directive was adopted in the European Union which then comprised 15 Member States, marked by relative convergence in terms of labour costs. Legislation has to be revised so that it takes better account of the increase in the number of posted workers, who come, in particular, from Central and Eastern Europe and of the cases of fraud which several Member States are encountering.

1. THE ORIGINAL TEXT: THE CODIFICATION OF COMMUNITY JURISPRUDENCE

For a long time the European Court of Justice's jurisprudence served as a base to define the labour law applicable to posted workers employed in a Member State different from the one where their company usually operates. The *Webb* judgment dated 7th December 1981 and then Seco and *Dequenne and Giral* on 3rd February 1982, set wage, legal and conventional minima of the host State. This jurisprudence was specified by the *Rush Portuguesa decision* [1], dated 27th March 1990. This occurred when Spain and Portugal joined the European Community – since they were countries where labour costs were very low at the time. The Portuguese company *Rush Portuguesa* posted 46 workers with Bouygues to build the Atlantic TGV which the latter was managing. The Court decided that States were justified in undertaking checks to see whether posting did not constitute labour subleasing. Moreover it insists on the fact that in terms of labour law States can apply legislation or collective agreements reached by social partners on Foreign Service providers.

Directive 96/71 of 16th December 1996 on the posting of workers codified this jurisprudence [2]. In the case of transnational service provision three types of posting are concerned: the traditional posting of workers by one company to another, posting by way of a temping agency and posting within the same group. The directive endorses the prin-

1. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61989CJ0113

2. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML

ciple of the host country's legislation. Companies which post their employees must, as a result, apply the social legislation of the country in which the contract is being undertaken, except if the sending country's law is more advantageous.

Hence the text sets out a "set core" of national rules by which companies have to abide. They involve maximum working hours, minimal periods of rest, minimal length of annual holiday, minimum salary rates, women's working conditions, more particularly regarding pregnant women, young people and children, the conditions governing a worker's posting, notably those sent by temping agencies and measures targeting safety, health and hygiene at work. These standards must be of a legislative and regulatory nature or included in generally applicable collective agreements. The set core of rules also applies to companies from third countries to the EU which post workers in the latter.

In addition to this the text provides for three exceptions. As part of the provision of a good, work related to the construction of this are excluded from the field of the directive's application if it does not exceed eight days. Member States can also dispense foreign companies of the rules governing minimum salary if the length of the posting is under one month. Finally a Member State can introduce exemptions to the rules on remuneration and the length of holiday if the work is not deemed to be significant.

Between 2007 and 2008 the European Court specified this set core of rules if it was part of a collective agreement. The *Laval* [3] judgment dated 18th December 2007 provides that it is impossible to ask companies which post workers to join collective agreements which are not generally applicable. The *Rüffert* [4] judgment on 3rd April 2008 supports this logic stressing that it is impossible to make tenderers for a public sector contract respect the measures set out in a collective agreement if they were not generally applicable. The Court deemed, with the *Viking* [5] judgment of 11th December 2007 that any collective action which aimed to force a collective agreement on a foreign company constituted an obstacle to the freedom of establishment.

2. POSTING AND SOCIAL SECURITY CONTRIBUTIONS

Although the directive highlights the principle of the host country in terms of remuneration and working conditions it does not include social security regime affiliation. This was covered originally by regulation No.1408/71 coordinating Member States' social security systems. Its replacement by regulation No. 883/2004 does not change the principle retained regarding posted workers in this area: the upkeep of the social security regime of the sending state [6]. The posting must exceed 24 months however. A worker cannot, for example, replace one of his colleagues who has reached the end of his posting. Regulation No. 987/2009 [7] stipulates that an employer must normally undertake his activity in the sending State. A period of one month must elapse between the recruitment of a worker and his posting. A two month waiting period is also provided for between two postings within the same company.

These measures aim to counter posting fraud. The gap between social security contributions from one Member State to another may encourage companies to domicile a share of their staff in a "low cost" country within a "letter-box" entity, without having any real activity in the sending country and only existing for the purpose of posting.
Beyond the cases of fraud the upkeep of the sending country principle is a real advantage for companies from countries where labour costs are relatively low. The difference between employers' contribution rates on a French employee and those on a posted worker from Poland or Luxembourg is about 30 points. There is a 20 point difference with Romania [8]. This difference is only partially compensated for by posted workers' housing costs. Posting workers indeed raises the issue of labour costs in Spain, and Italy (10 points difference with Poland) and especially with Belgium and France.

3. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0341:EN:NOT

4. http://curia.europa.eu/juris/liste.jsf?language=en&num=C-346/06

5. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:NOT

6. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF

7. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:284:0001:0042:en:PDF

8. http://www.cleiss.fr/docs/cotisations/

Table 1

Employer contribution rates in the European Union

Country	Rate
Germany	19,175 %
Austria	25,2 %
Belgium	48,65 %
Bulgaria	27,84 %
Spain	31,2 %
France	49 %
Italy	32,59 %
Luxembourg	14,9 %
Netherlands	15,14 %
Poland	22 ,67 %
Romania	28,45 %
UK	10,4 %

Source - Centre for European and International Social Security Liaison

3. A CONSTANTLY RISING PHENOMENON

The 2004-2007 enlargement coincided with an increase in posted workers within the EU. The European Commission estimated that there were 1 million posted workers in 2009. It believes that this figure might now total 1.5 million. 55% of postings involve the building industry.

With 228,000 employees in 2011, Poland is the leading "export" country of posted workers in the EU ahead of Germany with 227,000 workers in 2011 and France with more than 169,000 posted workers in 2011 [9]. Germany is the leading host country with 311,000 posted workers in 2011 followed by France with 144,500.

Table 2

Worker postings in the EU in 2011

Country	No. of workers posted out of the country	No. of workers posted in the country
Germany	226 850	311 000
Austria	28 806	76 335
Belgium	55 931	125 107
Spain	48 479	47 640
France	169 000	144 500
Italy	35 611	64 223
Luxembourg	39 385	24 925
Netherlands	25 896	105 885
Poland	227 930	16 013

9. European and internatioanl social security liaison centres (CLEISS), Rapport statistique 2011.

Pays	Nombre de salariés détachés hors du pays	Nombre de salariés détachés au sein du pays
Portugal	54 043	13 345
Romania	59 363	10 476
UK	35 368	37 247

Source : Posting of workers in the European Union and EFTA countries : Report on A1 portable documents issued in 2010 and 2011 [10]

The construction business and public works are the sectors most concerned by posting within the EU. Europe wide only 1% of postings involve agriculture and 7% transport and communication [11].

The use of posted workers matches a shortage of labour in certain sectors. The difference seen in terms of labour costs can also foster recruitment like this. These figures do not however reflect the reality of posting. Asked to undertake an audit for the European Commission about the application of directive 96/71, the institutions *Idea Consult* and *Ecorys Netherlands* pointed out that the number of posted workers had been underestimated, since not all companies respected the obligation of filling out a form for the host country's social security organisation attesting the upkeep of the sending country's regime [12]. But the number of posted workers in each Member State is assessed on this basis. For example in 2010 the French Employment Minister estimated that there were between 220,000 and 330,000 posted workers employed in France who had not been previously declared [13].

4. A LIMITED, FORMALISED MONITORING PROCEDURE

Although community legislation defines the posting of workers it does not stipulate the kind of company that can undertake postings. Hence these companies do not have to exercise any substantial activity within the sending State. Unlike the measures in the 2004 "Social Security" regulation posting is not limited in time.
The 96/71 directive also limits the question of checking the terms of a worker's posting to the establishment of administrative cooperation between Member States. The text makes it mandatory to set up liaison offices that are designed to exchange information about postings, which are causing a problem. Community legislation does not impose response deadlines however regarding these areas of cooperation. The time taken to process these cases can therefore be long and not synchronised with the duration of some projects. The introduction in March 2011, i.e. nearly 15 years after the adoption of the directive of an IT application that connects all 27 liaison offices seems in this regard to be rather a late development.

Although the directive endorses the idea of loyal cooperation this still depends on the will of the Member States to implement it. The posting of workers no matter what the terms is still a means to counter unemployment for some States.

The implementation of the directive has also been formalised by the Court of Justice. The *Arblade and Leloup* [14] judgment of 23rd November 1999 and the *Commission vs Luxembourg* judgment of 19th June 2008 [15] limits the monitoring procedure since it prohibits prior authorisation procedures, the registration of a business in the host State and the appointment of a representative of the said company in the host State.

Several cooperation programmes between Member States have tried to make the fight to counter fraud in Europe more effective as part of the framework defined by community jurisprudence. The "Joint Training of Labour Inspectors" launched in 2011 by nine States – Belgium, Denmark, Estonia, Finland, France, Luxembourg, Poland, Portugal and Romania –has led to the establishment of a European Work Inspectors' Network, whose activities focus on two areas: agriculture and the building industry.

10. http://ec.europa.eu/social/BlobServlet?docId=9675&langId=en

11. Résumé de l'analyse d'impact de la Commission européenne du 23 mars 2012 : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0064:FIN:EN:PDF

12. Study on the economic and social effects associated with the phenomenon of posting of workers in the EU : http://ec.europa.eu/social/BlobServlet?docId=6678&langId=en

13. http://travail-emploi.gouv.fr/actualite-presse,42/communiques,2138/detachement-des-entreprises,15630.html

14. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996CJ0369:EN:HTML

15. http://curia.europa.eu/juris/liste.jsf?language=en&num=C-319/06

5. POSTING FRAUD AND SOCIAL DUMPING

The weaknesses of the monitoring procedure have led to the trivialisation of posting fraud. It points to an avalanche of subcontractors spread across several countries – about ten levels can be seen in some worksites – "letter box" companies, "shell" companies. In the latter case companies do not undertake any type of significant activity within the Member State where they are established. The use of the independent status is also a way of circumventing community rules in the sectors of air transport, agriculture and the building industry. These "independent" workers are not in fact independent since they always work for the same company in the same conditions as other employees. The case of the German abattoirs highlights the recruitment of posted workers in States that have not introduced a minimum wage. The personnel in these companies mainly comprise – 80% to 90% posted workers paid on the terms of the sending country. Faced with this unequal competition Belgium lodged a complaint with the European Commission in March 2013 deeming that this did not constitute real posting.

Generally speaking the more complex the situation of the posted worker and the company for whom he works the less the set core of rule provided for in directive 96/71 is applied. The principle of the host country is then breached to the benefit, in the best scenario, of the application of social conditions in the sending State. Although affiliation to the social security regimes of the sending state already contributes to making the cost of worker attractive, fraud makes the service of a foreign company much more advantageous than that of a local business. Above all the contractor receives the service and does not recruit the employees directly. His choice mainly functions according to the overall cost of the said service.

Concern about social dumping should not mask another reality of fraud surrounding the posting of workers: deductions for housing and transport costs, unpaid wages, lack of social protection, the hazardous nature of the work undertaken, unsatisfactory lodgings. The case of Romanian agricultural workers housed in Calabria highlights the thin line between posting fraud and modern slavery.

6. THE EUROPEAN COMMISSION'S DRAFT IMPLEMENTING DIRECTIVE

Increasing infringements led the European Commission to put forward a draft implementing directive [16]. The choice of this legal instrument might come as a surprise. By doing this the Commission wanted to guarantee the *acquis* of the 1996 text, notably regarding the set core of terms. A total revision of the initial directive would indeed have led to a challenge made to the existing measure by a certain number of States, in the ilk of the UK or those who joined after 2004.

The Commission aim is to strengthen the means to prevent and to counter posting fraud and to integrate, in a community standard, the main lessons learned from the Court of Justice's jurisprudence.

Firstly the text aims to typify posting situations. The monitoring authorities in the Member States are allowed to collate a certain number of details that are designed to assess whether the company which is posting workers really does operate in the country where it is established. A non-exhaustive list is therefore provided for in article 3 of the draft. The draft implementing directive also enhances administrative cooperation since Member States now have to respond within the two weeks following the reception of a request for information.

The codification of community jurisprudence in terms of monitoring is provided for in article 9 of the Commission's draft. This defines a precise list of measures that can be set by a host Member State on a foreign company which posts workers on its territory. It can be made to declare a posting, at the beginning of the service provision at the latest. It is obliged to keep and provide the work contract for the entire duration of the posting, likewise pay slips, time sheets or proofs of payment to employees. Finally the company must appoint a representative who is responsible for negotiating with the host country's social partners on behalf of the employer. No other measure can be imposed on a posting company. The impact of these measures will be analysed by the European Commission three years after their entry into force.

16. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF

Finally the Commission provides for a system of appeal and sanction in the event of the infringement of directive 96/71. Hence article 12 introduces a mechanism of joint and several liability of the contractor in the building industry. The contractor thereby substitutes his direct subcontractor and can be held responsible for the non-payment of a minimum salary, of any back payments and undue deductions.

Article 9 and 12 crystallised debate over these texts within the Council Ministers of the European Union for months. Some Member States like France, Germany, Belgium, Spain, Finland and the Netherlands campaigned for an open list of control measures in article 9. The same group of States also wanted to extend the mechanism of joint liability regarding the set core of terms to all sectors of activity and also to the entire subcontracting chain. Opposite them the UK and most of the Member States that came with the 2004-2007 enlargement insisted in maintaining article 9 as it was. These countries also said they did not want article 12 to be obligatory.

However the Council did manage to come to a compromise over these two articles on 9th December 2013. Regarding article 9 an open list of document can be demanded of a company that posts workers. The measures decided on by the government on their own territory will however have to be declared to the European Commission who will check whether they are "proportionate". The compromise covers the French positions over the joint liability mechanism applicable to the contractor which will apply to the entire subcontracting chain but only in the building industry. Rather than implementing a mechanism like this Member States will also be able to take steps that will enable effective, proportionate sanctions against a contractor. The rallying of Poland to this compromise helped overcome some stumbling blocks. The UK, Estonia, Hungary, Latvia, Malta, the Czech Republic and Slovakia voted against it however.

The agreement that was found on 9th December 2013 [17] will be used as a base for the Council representatives during debate with those from the European Parliament [18] as of 15th January 2014 and which should last three months in principle. The aim is indeed to achieve the adoption of a final text before the European elections on 22nd-25th May 2014. The main problem will probably involve the joint liability of the contractor, since the European Parliament has extended the mechanism to all sectors of activity. The European Parliament's position does not provide for an alternative solution unlike the compromise found by the Council.

The opening of the labour market to Bulgarian and Romanian citizens that became effective on January 1st 2014 should not make the problems already observed any worse. Bulgarian and Romanian companies can already provide services in various parts of the European Union. In principle they are governed by directive 96/71. France, Germany, Belgium and Italy are the main destination countries for workers from these States unlike the UK. 14 Member States had already opened their labour market totally to Bulgarian and Romanian citizens before January 1st 2014. France, Germany, Austria, Belgium, Spain, Italy and the Netherlands have partially opened theirs. Only Ireland, Malta and the UK are limiting their opening.

Table 3

Number of Bulgarian and Romanian posted workers in the EU in 2011

Countries	No. of Bulgarian workers	No. of Romanian workers
Germany	2 938	31 609
Austria	134	871
Belgium	1 003	3 396
Spain	141	1 139
France	5 744	13 159
Italy	405	6 677
Netherlands	918	2 765
UK	143	285

Source - Posting of workers in the European Union and EFTA countries : Report on A1 portable documents issued in 2010 and 2011 [19]

17. *http://www.consilium.europa.eu/homepage/highlights/council-agrees-on-the-posting-of-workers?lang=en*

18. *http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0061(COD)*

19. *http://ec.europa.eu/social/BlobServlet?docId=9675&langId=en*

CONCLUSION

The rise in the cases of fraud over the last few years should not condemn a measure that enables the free provision of services within the European Union. The directive on posting helps answer real labour requirements in certain sectors and therefore help the employment of 1.5 million Europeans. The adoption of an implementing directive within the next few weeks should both guarantee the principle of the most advantageous social law for posted workers and counter more effectively those who try to circumvent this mechanism. Improved monitoring will not do away with the major differences between some Member States as far as labour costs are concerned since the principle of the affiliation of wages to a social security system in the sending country has not been challenged.

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