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The implementing directive on posted workers: and what now?

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Abstract:

On 15th May 2014 the European Union adopted an implementing directive that meant to define the rules for the application of directive 96/71 concerning posted workers [1]. This text is supposed to prevent the risk of fraud in a context that is marked by an increasing use of this arrangement [2]. The new text is notably being completed by national initiatives in Germany and France. The European Commission is drafting a new text to be published on 8th March, a further reform of the 1996directive [3].

1. THE IMPLEMENTING DIRECTIVE

The implementing directive 2014/67 dated 15th May 2014 is mainly the result of a Council compromise between the States which were against a review of the measures in force – firstly the UK and the countries of Central and Eastern Europe – and countries which supported a strengthening of upstream controls, like France. For a long time articles 9 and 12 typified these difficulties between States.

The initial draft of article 9 provided for a codification of community jurisprudence in the area of checking/controls. Hence it provided a precise list of measures that could be set by the host Member State on a foreign company that posted workers on its territories: obligation to declare and keep, work contracts, pay slips, time sheets and proof of payment to workers, for the entire duration of the posting. A person to liaise on behalf of the employer with the competent authorities in the host State had to be appointed. No other measure could be imposed on a company that posted workers. A certain number of Member States, like France, Germany, Belgium, Spain, Finland and the Netherlands campaigned for an open list of controls. It was a question of being as responsive as possible in the face of increasing complex fraud schemes. The final draft of article 9 mainly matches this demand. The principle of an open list has been acknowledged. The Commission has to be informed any new measure, without however this being focus of pre-authorisation.

Article 12 of the draft directive introduced a mechanism of joint liability on the part of the employer, limited to the direct subcontractor. This involved increasing the protection of workers in the building industry, which is the one mainly affected by the phenomenon of subcontracting. France and its partners wanted the joint liability mechanism on the part of the subcontractor to be extended to all sectors and also to the entire subcontracting chain. The text that was adopted is less ambitious. The joint liability mechanism is restricted to the building industry, which does not reflect the use of posting in sectors like agriculture, transport and events. The implementing directive does however allow a Member State to extend this measure to other sectors, since the goal of European harmonisation has not been achieved. The scope of this mechanism has been further reduced: only the relationship between the contractor and the direct subcontractor has been included. The entire subcontractor chain has not therefore been included in the new measure. The contractor can be held liable for the posted worker regarding wages and the payment of social contributions. If the mechanism provided for in the implementing directive is not applied, the

1. *Directive 2014/67/UE dated 15th May 2014 regarding the implementing directive 96/71/CE involving posted workers as service providers and modifying regulation (EU) n°1024/2012 regarding administrative cooperation by the internal market's information system.*

2. *cf Sébastien Richard, The Management of Posted Workers in the European Union, Robert Schuman Foundation – European Issue n°300, 27th January 2014. http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-300-en.pdf*

3. *http://www.lesechos.fr/monde/europe/021718450678-travail-detache-bruxelles-va-reclamer-des-garanties-sur-le-niveau-des-salaires-1202426.php*

State can introduce other implementing measures leading to effective and proportionate sanctions. The issue of the size of the subcontracting chain is no long addressed. The limit of this can however be set by the Member States, as has been undertaken in Germany and Spain. Measures like this help to reduce the risk of fraud.

Beyond these two articles we should note that some progress has been made.

Article 4 provides that the competent authorities in the Member States will assess a certain number of elements in view of checking whether the company that posts its workers is really performing substantial activities in the host country: domicile of the parent company, place of recruitment, place of business activity, the number of contracts undertaken or the turnover made in the Member States of establishment notably. This bundle of elements is designed to check both on the reality of posting, as well as the effective existence of the business. Again this is an open list, in spite of the reticence expressed by certain Member States which wanted to lighten the red-tape borne by businesses. The time limit for the transmission of documents is 25 days, with an emergency procedure that enables an exchange of information over two days (article 6).

Article 4 especially includes a reference to the Rome Convention [4]. This defines the law that is applicable to workers employed outside of their country of residence or the country of establishment of their company. Under the so-called Rome I regulation [5], which transposes this convention into European law, an employee cannot be denied the benefit of the obligatory measures granted to him by the Member States in which or from which he habitually undertakes his work. Since the professional and political environment has a direct influence on his activity the respect of the labour protection rules provided for by the laws of that country prevail. The implementing directive provides that the Rome I regulation applies if the posting cannot be totally characterised.

Article 11 of the implementing directive offers professional trade unions, employees' trade unions and associations the opportunity of lodging complaints in certain cases, on behalf of or in support of a posted worker, with his prior agreement. Given the pressure placed on certain workers, this facility is vital. It implies both the defence of the situation of posted workers, which is sometimes close to modern slavery, but it is also a guarantee of the interests of certain professions, which are weakened by this unfair competition.

This significant improvement to the measure does not erase the sizeable gaps between some Member States regarding labour costs, since the principle of the workers' affiliation to the social security system of the country of establishment is not brought into question. Although the directive promotes the principle of the host country regarding remuneration and working conditions, it does not include the affiliation of social security systems. Initially this was covered in regulation n°1408/71 coordinating the Member States' social security systems. Its modification in 2004 did not change the principle selected for posted workers in this area: the upkeep of the social security of the State of establishment. The posting cannot extend beyond 24 months however [6].

The transposition of the implementing directive to the Member States' national legislation will continue until 18th June 2016. In expectation of the new text by the European Commission it seems urgent already that Member States transpose the measure adopted in May 2014 in order to counter more effectively posting fraud and social dumping. France integrated the implementing directive into national legislation in July 2014 [7].

2. NATIONAL RESPONSES: THE CASE OF THE TRANSPORT SECTOR

The transport sector particularly that of road haulage, provides a good example of national measures in view of countering worker posting fraud have been strengthened. The liberalisation of international

4. Rome Convention 1980 on the law applicable to contractual obligations

5. Regulation (CE) n°593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)

6. Regulation (CE) n°883/2004 of 29 April 2004 on the coordination of social security systems

7. Law n° 2014-790 of 10th July 2014 aiming to counter unfair social competition.

deliveries in 1992 and the adoption of European measures in terms of cabotage contributed to the upheaval of national markets and facilitated the use of companies from other European Union Member States. The use of vehicles in return journeys between two countries is the centre of today's difficulties. Indeed for the European legislator it involves avoiding empty returns which are costly to business.

An initial European regulation dating back to 1993 allowed hauliers to take on freight operations in other Member States if these services were undertaken on a temporary basis. No time limit was then set. A 2009 regulation then ironed out this imprecision by defining the practice of cabotage [8]. This is now limited to three operations within the seven days following the total delivery of goods that originally led to international haulage. A cabotage operation is allowed in each Member State covered by the return journey, if the vehicle crosses the border empty. This operation has to be undertaken within a time span of three days following the vehicle's entry into the said State and a maximum 7 days after the delivery of goods, which were the object of the incoming journey. However, there is nothing to prevent a haulier from transferring goods between two States of which he is not a citizen on the return journey. Operations like this, considered as international deliveries, therefore enable him to recover his full cabotage rights within the State where he unloads (three operations over seven days). On-line freight trading enables hauliers to direct their vehicles towards demand and to optimise the latters' use. The issue of social standards applicable to these operations remains. In terms of a recital of the 2009 regulation, the measures included in the 1996 directive on the posting of workers applies to transport companies undertaking cabotage. However this reference is not taken up in the regulation corpus.

Regulation 2009 leaves the door open to permanent cabotage (home trade). The crossing of a border mechanically opens up the right to cabotage on the return journey. The idea of a return journey loses incidentally all of its sense if further international operations can then be undertaken during that journey, which open further rights to the territories crossed, which in turn allow lorries to "trade" for seven days on the territory of the State of unloading. A Romanian haulier who sets off to make a delivery in France can optimise the return journey by undertaking three cabotage operations in France, then three in Italy, then three in Austria and three in Hungary before returning home. There is nothing to prevent him either from starting his return journey the opposite way round, taking a delivery from Austria or Italy for another State, Belgium or Germany for example. Given the wage differential linked in part to differences in labour costs, this semi-permanent cabotage distorts competition on the internal markets of the States being crossed.
It was in this context that Germany decided on 1st January 2015 that the minimum wage that it was introducing (8.50€ per hour) would apply to all workers in Germany, where ever their employer might be domiciled. By doing this it is respecting the convention of Rome. Mobile workers are obviously concerned by this measure. Fines of up to 500,000€ are in place to sanction any contravening businesses. We should note that before the entry into force of the minimum wage Germany was one of the countries practising cabotage the most. Drivers from the former East German Länder were indeed not as well paid as their fellow countrymen in the West. 10% of European cabotage was undertaken by German hauliers prior to 2015, 12% by the Dutch and 18% by the Poles. France is twenty times more "cabotaged" than it is engaged in cabotage itself. The German "cabotaged"/caboteur ratio lies at around 3.3% [9].

The German initiative was the source of reticence on the part of its partners. A delegation of 14 Member States (Bulgaria, Croatia, Spain, Estonia, Greece, Hungary, Ireland, Lithuania, Poland, Portugal, Czech Republic, Romania, Slovakia and Slovenia) communicated their doubts to the European Commission. Under the circumstances the latter launched a preliminary procedure to check whether the German procedure was in line with European law and to ask for clarifications to this effect of the

8. *Regulation (CE) n°1072/2009 of 21st October 2009 establishing joint rules for access to the international road freight transport market*

9. *Le droit en soute ? Le dumping social dans les transports européens, report n°450 (2013-2014) by Éric Bocquet, on behalf of the French Senate's European Affairs committee*

German government. Give this response the German government partially suspended its project on 30th January 2015. The suspension only involved transit operations on its territory. Deliveries undertaken in Germany and cabotage still have to be remunerated according to German rules. The decision is also temporary since the government is also waiting on the European Commission's response to complaints lodged by its partners.

France hoped to remove the ambiguity surrounding the issue of cabotage. A decision in 2010 designed to transpose the 2009 European regulation provides that businesses established outside of France, which undertake cabotage, should not be obliged to make a posted work declaration [10]. The absence of any prior declaration limited monitoring possibilities and the application of a hard core of rules provided for by the 1996 directive. The law on growth, activity and equal economic opportunities, the so-called "Macron Law" dated 6th August 2015 enables the closure of this loophole, since it provides that employers must issue a "posting" certificate (article 281) [11]. This must inform drivers of their rights, notably regarding wages. A joint liability mechanism on the part of the employer has also been established. This is the effective application of article 12 of the implementing directive which allows States total flexibility in this area.

3. WILL THERE BE A NEW TEXT?

- What the European Commission aims to do

The 33rd recital of the implementing directive insists on the need to promote a more integrated approach in terms of labour inspection. The text is therefore an invitation to define common standards in view of the implementation of comparable methods, practices and minimal standards across the Union. This declared goal is extended in the proposed decision that aims to create a European platform designed to improve cooperation across the Union to prevent and counter undeclared work more effectively as put forward by the European Commission in April 2014, at a time when discussions between co-legislators regarding implementing directive were being completed [12]. Indeed the European Commission believes that undeclared work establishes unfair competition and blights public finance. It notes that this question is not addressed in a coordinated manner within the European Union. It recalls, in justification of its intervention that until 2013 more than one European in ten admitted that they had acquired goods or asked for services using undeclared work over the previous year and 4% of them admitted of having undertaken undeclared work. This project also provides a response to the European Parliament, which said in its resolution of 14th January 2014 that it wanted to improve cooperation between labour inspection services [13].

In this respect the European Commission proposes to bring together the various competent national authorities to counter undeclared work under the same roof: labour inspectorates, tax offices, social security authorities and migration control offices. Social partners would also be included in this measure. Firstly this would involve the creation of a space designed for the pooling of information and good practice. The European Commission also hopes to use this platform to examine the means to finding solutions to joint problems. Hence it quotes false independent work or undeclared work within subcontracting chains, which is notably to be found in cases of fraud in posted work. It intends to improve the exchange of data between national authorities, develop joint training sessions, exchanges of staff or inspectors and the establishment of common principles and guidelines in terms of inspection to counter undeclared work.

Moreover the European Commission indicated in its work programme 2015 that it intended to put forward a package on workers' mobility [14]. In a context marked by negotiations with the UK its presentation was finally postponed. The new measure is due to be unveiled on 8th March. It is said to comprise a communication on the mobility of labour, a targeted review of the posted workers' directive and a review of social security coordination

10. *Decision n°2010-389 of 19th April 2010 regarding cabotage in road and river transport*

11. *Law n°2015-990 of 6th August 2015 for growth, activity, equal economic opportunities*

12. *Proposed decision establishing a European platform with the aim of enhancing cooperation and to prevent or discourage undeclared work (COM (2014) 221 final)*

13. *European Parliament resolution 14th January 2014 on effective labour inspection in virtue of a strategy to improve working conditions in Europe (2013/2112 (INI))*

14. *Commission Communication: Commission Work Programme 2015 – A New Start (COM (2014) 910 final)*

regulations. Great reserve should be noted regarding review. The previous European Commission chose to put forward a draft implementing directive. The choice of this legal instrument might have caused surprise. By doing this the European Commission aimed to guarantee the *acquis* of the 1996 text. A full review of the initial directive might lead to a challenge being made to existing measures by a certain number of States.

Seven governments including France supported the proposal to revise the directive in a letter addressed to Marianne Thyssen, European Commissioner for Employment and Social Affairs on 5th June 2015 [15]. In this document ministers insisted on the principle of equal pay in the same place of work. This in fact means going beyond the "hard core" of minimal rules that in practice led to the application of a minimum wage for posted workers, regardless of their qualifications or the technical nature of their work. Conversely, nine governments expressed their opposition to any type of review in a letter also addressed to the European Commissioner [16]. They stressed that the implementing directive had not been completely transposed and deemed that any review might challenge the freedom to provide service and weaken the internal market. They also recall their attachment to maintaining the affiliation of the social security system of the country of establishment, insisting on the impact on family members of posted workers in the event of regular changes in system.

- France's contribution to the debate

The Economic, Social and Environmental Committee (ESEC/CESE) consulted by the Prime Minister on 22nd September 2015, presented ideas for a precise review of the European measure which it considers a priority [17]. In its opinion the implementing directive does not get to the bottom of the issue. Beyond the review of the text the CESE advocates a consolidation of the legal system applicable to posted workers, which is both a matter involving labour law and European social security law, at risk of contradiction.

The CESE would like the principle of equal treatment put forward by the seven employment labour ministers in their letter of 5th June 2015 to form the heart of the directive. It insists that the text provides that service providers which use posted workers take on board any possible travel, food and lodgings expenses.

At the same time it is promoting a review of the 2004 social security system coordination regulation. Two amendments to the present measure would involve the systemisation of the dispatch of the posting declaration (form A1) to the authorities of the host country before the start of each operation and a better management of workers posted in their own country of residence. The "social security" regulation should also integrate the idea of significant activity of the posting company, an idea that was already selected for the directive and any posted worker should be registered with the social security system of the country of establishment for at last three months. We should note at this stage that a 2009 regulation already provides that the employer must habitually undertake his activity on the territory of the country of establishment [18]. This directly targets "letterbox" companies or administrative offices. The posted worker must effectively be affiliated to the social security system of the country of establishment. As a result he cannot be recruited and immediately posted. A time span of one month must in effect go by between recruitment and posting. An organic link between employer and posted worker must also be proven during the entire duration of the posting. A time span of two months is set between postings within the same company.

The CESE also advocates non-legislative solutions like the definition, as part of European social dialogue, of the duration of a posting, which would be flexible depending on the sectors of activity. The CESE would like to see the introduction of enhanced cooperation as planned in the Treaties to improve administrative cooperation between voluntary States, via improved sharing of data or the introduction of joint control operations. It would like the introduction of a European posted workers'

15. *Austria, Belgium, France, Germany, Luxembourg, Netherlands and Sweden.*

16. *Bulgaria, Estonia, Hungary, Lithuania, Latvia, Poland, Romania, Slovakia and the Czech Republic.*

17. *Les travailleurs détachés, French Economic, Social et Environmental Council, presented by Jean Grosset, rapporteur with the support of Bernard Cieutat, September 2015.*

18. *Regulation (CE) n°987/2009 16th September 2009 setting the means for the regulation's implementation (CE) n°883/2004 on the coordination of social security systems*

charter, thereby enabling an improved identification of those involved and information sharing. The "Macron" law introduces a measure like this in the construction sector [19].

The French Senate's joint information mission on public procurement called, in its report dated 14th October 2015, for the direct recovery of social contributions by the host States. The idea here is to strengthen the control over the reality of posting, since social contribution fraud is often the direct extension of labour law fraud [20].

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The implementing directive of May 2014 therefore seems to be the first stage before the targeted review of the 1996 directive on posted workers. A goal like this might seem ambitious since negotiations over the implementing directive has brought divisions within the Council to light, which we also find in the debate on the implementation of German legislation on the minimum wage on road hauliers from other Member States. As legitimate and as desirable as it might be, a new text that aims to counter fraud and social dumping within the context of posting would not lead to a total harmonisation of labour costs, since the principle of an affiliation by the posted worker to the social security system of his home State will be maintained.

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19. *Chapter IX of the law n° 2015-990 6th August 2015 for growth, activity, and equal economic opportunities*

20. *Passer de la défiance à la confiance : pour une commande publique plus favorable au PME. Information Report n°82 (2015-2016) by Martial Bourquin on behalf of the French Senate's joint information mission on public procurement.*