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The impact of Covid-19 on posted workers: the new 'posting framework'

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FOREWORD

We live at a time of deep and radical transformations. The pandemic has accelerated many of the changes that were already underway and has brought new challenges to the surface. Among the most affected realms of our societies, we undoubtedly find work and the freedom of movement of people. In Europe, it is precisely at the intersection of these two elements that the posting of workers lays. In this field, we are also at a crucial moment because the pandemic arrived just a few months before the deadline for the implementation of the changes related to the revision of the Posting of Workers Directive. Hence, it has become even more urgent to understand how all these changes have impacted the posting of workers as well as propose solutions to facilitate workers and companies in this adaptation path. That is key if we are to safeguard an important instrument of the European single market. This is exactly the merit of this article and its two co-authors: offering a first and clear account of the characteristics of posting of workers during the pandemic, identifying the main challenges faced by Member States, EU institutions and businesses, while also identifying some potential future developments, despite the climate of great uncertainty surrounding us.

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Until a year ago, in a more and more interconnected world - and notably in an "ever closer Union[1]" – the mobility[2] of workers (and companies) was increasing and the posting of workers was a constantly growing "hot-topic".

Since March 2020, however, the world has suddenly changed because of the pandemic and the effects it has brought. The posting of workers (hereinafter also referred to simply as "postings") changed too. Travelling for work purposes, that until yesterday was obvious and the rule in many sectors and for many categories of workers, became less evident and started to turn into an exception, only authorized under strict conditions.

The impact of Covid-19 on international assignments has been extensively analysed both by legal scholars and by the press[3]. The present contribution focuses on the effect of Covid-19 on posted workers, who are subject to specific regulations in the European Union and which, according to the OECD in 2017 numbered 1.6 million[4]. Some of our observations will be applicable to the broader picture of international assignments. However, we believe that focusing on the situation of posted workers in Europe will enable companies to develop a deeper understanding and better manage the future of workforce mobility. The aim of this contribution is to outline the most visible and immediate impacts of the recent pandemic crisis on the phenomenon of posted workers by giving some critical and constructive reflection, from an employment law perspective. In these exceptional circumstances, it is particularly challenging to draw a black and white picture, since the circumstances and the rules are changing very rapidly. It is, however, important to observe the changes that have been noticed, so far, to provide a better understanding of the context in which we live and work.

Pursuant to the definition of the initial Posting of Workers Directive (EC) 96/71 (hereinafter: "PWD"), posted workers are sent by their employers to temporarily carry out a service in another EU Member State. The definition assumes that posted workers

[1] Article 1 of the Treaty on the European Union ("TEU") states: "This Treaty marks a new stage in the process of creating an ever-closer union among the peoples of Europe."
[2] The term "mobility" is here only intended to be used as geographical movement and circulation of labor forces, not in the occupational sense. On the difference between geographic mobility and occupational mobility, see J. Long, J. Ferrie, "Labour Mobility", Oxford Encyclopedia of Economic History, 2003.
[3] See, for example, S. Robin-Olivier, "Free Movement of Workers in the Light of the Covid-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility", European papers, 16 May 2020. M. Scheele, "Was bedeutet Corona für den Auslandseinsatz?", Frankfurter Allgemeine Zeitung, 23 May 2020.
[4] OECD, International migration Outlook, 2019.

stay in the Host State only temporarily and should not integrate[5] into the labour market of the Host State[6].

Three posting constellations are described in the PWD: a posting in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency[7].

At European level, the posting of workers is particularly widespread in sectors such as construction, which counts for more than 40% of the total number of postings, as well as road transportation, agriculture, machine installations and software development[8]. These are sometimes services that are unlikely to be provided by teleworking[9]. However, the posting of workers is also of interest in other economic sectors, such as industry (21.8%) or commercial services (10.3%). It should also be noted that, according to Eurostat, more than half of all postings are between neighbouring countries[10].

I. IMPACT ON POSTED WORKERS

First, the Covid-19 crisis has affected posted workers due to legal measures which have been adopted by Member States to prevent the spread of the virus. In fact, some of these measures do not explicitly address posted workers, even though they have a considerable impact on them. Migration rules (e.g. border controls), as well as health and safety measures (e.g. quarantine obligations) are worth being mentioned in this context. Most of these measures are meant to limit movement across borders, including international postings.

Three categories of measures can be identified: measures taken by Member States, the EU bodies and private companies:

1. Measures to combat the spread of Covid-19

a) Measures taken by Member States

Among measures adopted by Member States to avoid the spread of the coronavirus, it is possible to differentiate, on one hand, those aiming to reduce mobility and, on the other hand, those facilitating the postings. While the prevailing number of measures has been introduced to limit people's movement (contra-posting measures), some of the adopted measures facilitate postings during the lockdowns (pro-posting measures).

Contra-Posting Measures

The free movement of people in the EU, within the framework of the internal market and the Schengen agreements are closely linked, but not totally correlated. Not all EU Member States are members of the Schengen area, however, all EU Member States have to observe the four fundamental "constitutional" freedoms of movement[11], of goods, capitals, services and people.

If free movement is a fundamental *acquis* of European construction[12], Member States retain the right to reintroduce border controls.

As soon as the World Health Organization described the situation caused by Covid-19 as a "pandemic", many Member States adopted exceptional measures seeking to contain the spread of the virus , including:

- Reintroduction of border controls or closure of borders with other Member States (on March 11, 2020 Austria had already closed its borders with Germany, Italy, Slovakia and the Czech Republic);
- Introduction of quarantine obligations, which were eased (for instance in Germany, Italy, France and Spain), but most recently reintroduced in some EU States (like in Belgium)[13];
- Requirement to prove negative Covid-19 test results (currently in the majority of the Member States).

These measures have affected postings dramatically, since they may have discouraged companies to post workers or send them on short-term and on "non-essential" trips. These measures have created an "indirect" impact by the Covid-19 crisis on postings within the EU, because they aimed to guarantee health protection and have not addressed posted worker regulations directly[14].

In light of these additional restrictions, in particular the 14-day quarantine obligations, short trips are barely possible. In this situation, employers might face additional costs because of such additional restrictions.

[5] During their postings, posted workers remain employees of the Home company and are subject to the active employment contract with the Home Company. In addition, posted workers remain in the social security law system of the Home State.

[6] Please note that the PWD does not differentiate between a posting and a business trip. This differentiation is typically made by companies to distinguish between short-term assignments (i.e., business trip) and long-term assignments (i.e., postings). However, most business trips are postings within the meaning of the PWD, as the duration does not matter for the qualification as posting. For this reason, the following contribution uses the term 'posting' to cover both type of assignments.

[7] Sec. 1 para. 3 of PWD states explicitly that the Directive shall apply to undertakings taking one of the following transnational measures: "(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting."

[8] European Parliament, "Posted workers: the facts on the reform (infographic)".

It might be the case, for instance, for accommodation costs in the Host State, during quarantine prior to the start of work, as long as the laws in force or the terms of the assignment contracts require this. In some other cases, claims for reimbursement of these costs may cause legal disputes between employers and employees.

Pro-Posting Measures

However, the reintroduction of border controls did not entirely hinder postings, since if there were urgent reasons, so-called 'essential' postings were allowed and took place. This is particularly so since the new 'essential' travel requirements have been treated flexibly by Member States, although many have required a negative Covid-19 test or have introduced quarantine requirements. Measures that have directly addressed postings to facilitate mobility, though they exist, are rather exceptional.

Some Member States have addressed the unpredictability of the pandemic and its negative effects on postings, they have adopted *ad hoc* national measures to avoid any additional burdens resulting from requirements applicable under normal circumstances. They have lightened administrative burdens for posted employees under these extraordinary circumstances.

In Italy, for instance, a temporary regime was introduced by the Italian Social Security Institute ("INPS") at the end of April 2020 to extend the validity of the A1 certificates[15], which were to expire in the period between 31 January 2020 and 31 July 2020, until the end of the state of emergency, should a posted worker remain longer than scheduled in the Host State[16].

In Belgium, the government decided that the period of homeworking performed by posted workers as a result of the Covid-19 emergency would not require a change of notification to the authorities. Normally, any changes concerning the terms of posting (e.g. place of work) must be reported to the Belgian authorities. At the same time, employees who habitually work cross-border while residing in Belgium do not need to be registered if they are working from home in Belgium[17].

b) Measures taken by EU Bodies

Since March 2020, the European Commission has adopted several communications[18], which have set a balanced political framework in which posted workers can continue working cross-border despite the Covid-19 restrictions and lockdowns.

On 30 March 2020, the Commission published two communications with the ambitious goal of ensuring that free movement is restricted in compliance with EU law[19]. The first communication "*Covid-19 Guidance on the implementation of the temporary restriction on non-essential travels to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*[20]" does not explicitly mention the postings. However, by making recommendations on the introduction of temporary travel restrictions to apply to all non-essential travel from third countries, the European Commission has acknowledged the national limitations of assignments coming from a non-EU country[21]. The European Commission has further requested that any decision on refusal of entry be proportionate, non-discriminatory and implemented in a way that ensures full respect of the human dignity of the persons concerned. Considering the complexity of the notion of "proportionality", the Commission has taken the opportunity to define explicitly that measure should be deemed proportionate if the health authorities have considered it as suitable and necessary to attain the public health objective.

In the second communication "*Guidelines concerning the exercise of the free movement of workers during Covid-19 outbreak*[22]," the EC made a direct reference to border workers, posted workers, as well as seasonal workers that "*[…] are crucial for their host Member States, for instance for the health care system, the provision of other essential services including the setting up and maintenance of medical equipment and infrastructure, or ensuring the supply of goods.*" The EC has called on the Member States to adopt a coordinated approach at EU level, aiming to facilitate the crossing of the EU internal borders. According to

[9] This may vary, of course, on the basis of the specific services to be performed, as well as on the basis of the required skills, even within the same sector. In the construction sector an engineer can, in principle, be posted or perform certain services remotely, while a construction employee does not have this prerogative.

[10] European Commission, EU factsheet on posted workers.

[11] Despite the rejection of the Treaty Establishing a Constitution for Europe in 2004, the term "constitutional freedoms" is used to highlight how the internal market is intrinsically grounded on the concept of four freedoms. According to N. Nugent and L. Buonanno, "the language used by the Treaties has changed a little over the years, but the essential intent has remained constant." See N. Nugent, L. Buonanno, Policies and Policy Processes of the European Union, Palgrave Macmillan, 2013, p. 150.

[12] European Parliament, "Schengen: a guide to the European border-free zone".

[13] See the announcement of the Polish government according to the press, "Gov't considers reintroducing quarantine for people returning to Poland", 30 July 2020.

[14] See S. Robin-Olivier, cit., p. 2. The author argues that "In this context of rampant, if not illegal, restrictions, […] some workers continued to benefit from free movement, as their mobility from State to State was considered just as necessary as the mobility of some workers within Member states. But what remained, in terms of mobility, was the result of a selection: only the most needed, the most necessary, continued to have a right (or sometimes an obligation) to move. This selection of the types of work mobility to be preserved, in the crisis, can be regarded as an indication of what the future looks like: a dramatic regression."

the EC, to achieve this purpose, health screenings for border and posted workers should be carried out under the same conditions as for nationals exercising the same occupations. Furthermore, "*Member States should allow frontier and posted workers to continue crossing their borders to their workplace if work in the sector concerned is still allowed in the host Member State*."

Moreover, on 15 May 2020, the European Commission issued a further communication "*Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls - Covid-19*." The European Commission requested that Member States allow workers, in particular transport, border, posted and seasonal workers, and service providers to cross borders and have unhindered access to their place of work.

In April 2020, some Member States and private companies[23] approached the European Commission and asked for an extension of the transposition deadline of the revised Posting of Workers Directive (EU) 2018/957 (hereinafter: "Revised PWD") which broadens the range of working conditions for posted workers. The revised PWD extends the array of working conditions to be observed for posted workers. The European Commission excluded an extension of the transposition period and underlined the importance of the new rules, especially the shift from minimum pay rates to comparable remuneration (also called "Equal Pay Principle") during these difficult times. The deadline for implementation of the revised PWD in Member States remained 30 July 2020. In addition, on 8 December 2020 the European Court of Justice (CJEU) rejected the annulment actions brought by Hungary and Poland against the revised directive.

c) Measures taken by Private Companies

Significant changes have occurred in the private sector. Due to Covid-19 and measures at national and EU level, many companies providing transnational services have rethought their way of doing business and providing cross-border services. Many companies have discontinued postings including short-term business travel for an indefinite period of time in reaction to the Covid-19 crisis. Even if companies have not banned travel activities, employees themselves have been reluctant to travel, further reducing mobility.

2. Characteristics of Postings during Covid-19 Pandemic

The following features typically characterize postings during the health crisis:

- Postings are conducted only if the company can prove systematic relevance or inevitability of the activity to be performed by the posted worker in the Host State[24];
- Posting terms, in particular duration, may change at short notice. Some postings have been cancelled, postponed or extended at the very last minute;
- Lockdowns have forced posted employees to prolong their stay in the Host State either due to the impossibility to perform the intended work or due to physical lack of means of transportation to return to their Home State (e.g. accessible flights). This situation has fostered the emergence of the concept of remote working;
- In a continuously changing environment, companies have faced difficulties to evaluate whether a posting is feasible in a reliable way due to the necessity to conduct a case-by-case legal assessment of whether the posting is permissible. The necessary assessment inevitably involves additional costs and imposes time constraints on the conduct of such postings. Even if an individual posting is permissible, companies may decide not to post workers so as to avoid all these efforts. In addition, the context of legal uncertainty implying continuous and sudden changes of national rules have made it harder for companies to plan postings and provision of cross-border services as they did in the past.

II. PREDICTABLE SCENARIOS IN THE FUTURE

All developments, illustrated and discussed above, have all been observed within a quite short period of time. Despite the start of the vaccination campaign in Europe, it is still difficult to anticipate both the development of the pandemic and the recovery which

[15] *The A1 certificate is a document which proves which country's social security laws apply to the employee during the assignment abroad. The certificate is issued by national social security authorities upon request of the posting company in the Home State.*

[16] Message No. 1633 of April 25th, 2020

[17] *F. Verbruggen, «* Télétravail suite au coronavirus dans le cadre d'un travail international : Faut-il revoir le régime de sécurité sociale applicable? *».*

[18] *EC´s communications or statements are non-binding legal instruments, but they have a strong political influence..See, for further details, J. P. Jacqué, Droit institutionnel de l'Union européenne, Dalloz, 2018, p. 556.*

[19] *As a general rule, it is important to keep in mind that according to Article 45 of the Treaty on the Functioning of the European union ("TFUE"), public health grounds can justify limitations to the free movement of workers by Member States.*

[20] Communication from the Commission, 30.3.2020

[21] *For instance, many Member States, including Germany, require the registration of posted employees from non-EU countries.*

[22] Communication from the Commission, 30.3.2020

[23] *Posting of workers directive -* Letter *from Markus J. Beyrer to EU Commissioner Nicolas Schmit, 14 April 2020.*

[24] *In compliance with the definition given by the Commission in the communication of 30 March 2020.*

will follow. However, it is necessary to draw some conclusions from the experiences described in the first part and to highlight some of the trends to be followed.

1. More intensive national inspections

One interesting development is that national authorities are tending to apply stricter controls of posted workers. In any case, the risk of national inspections has notably increased due to the border controls. Before Covid-19 national inspections happened more randomly. Now, additional audits are in place alongside with border controls and/or hygienic safety precaution measures, while the compliance requirements have remained the same before and during pandemic.

Apart from specific circumstances related to the Covid-19 pandemic, further increases in national inspection activities should be expected with the implementation of the revised PWD in the prevailing number of Member States[25]. It is barely surprising that companies receiving services from foreign service providers insist more often that foreign service providers ensure compliance with all requirements for posted workers, including the new ones included in the revised PWD. In fact, in many Member States, the Host Companies share responsibility with Home Companies for non-compliance with posting regulations.

2. Decrease of short-term postings

According to many observations, decrease of mobility in the EU is being caused by the Covid-19 crisis. However, postings, in particular, short-term postings, are unlikely – at least in the near future – to return to the high numbers they reached before the pandemic crisis. The following reasons account for this trend:

- Sanitary measures will remain in place for some time;
- For certain sectors, other forms of work and service, such as remote business management (via virtual meetings), have proved to be sustainable and cost-effective alternatives. In this context, it should be noted that while a business trip consisting only of meetings is not considered to be a posting, a person who will be working on a project as part of his or her trip will be considered a posted worker[26].

The posting of employees takes place in particular in sectors where the employees' activities, because of their specific nature, cannot be performed remotely, since they require the worker to be physically present at the workplace. It is the case, for instance, in the construction and transportation sector. For these types of work, the pandemic has had immediate impact: first, some posting companies were, notably at the beginning of the crisis, forced to postpone or cancel some scheduled postings and reviewed some of their assignment plans. Many construction sites, for instance, were closed in response to the lockdown[27]. This has made posted workers particularly vulnerable to the negative impacts of the crisis, both in terms of health and socio-economic consequences. This was coupled with the unpredictability of travel conditions.

The crisis has, *inter alia*, revealed the specific importance of certain workers for the survival of the economy and social life; this is particularly evident for posted workers in sensitive areas, such as truck drivers and other workers in the transport sector as well as in the health and food industry[28]. At the same time, these are the typical posted workers to whom the concept of remote work does not correspond.

The economic consequences should not be underestimated. Some of the companies that used to post employees abroad systematically, have faced severe financial difficulties which has forced them to reduce their business activities, including posting employees to other Member States[29].

In this critical context, national authorities' inspections and controls have been increasing and therefore employers have become increasingly aware of the necessity to comply with all posting rules including registration of posted employees with local authorities of the Host Countries, as we will illustrate in the next chapter. In fact, if posted employees are more likely to be controlled on the borders and asked to justify their purpose of travel, proof of posting registration is likely to become an important instrument in order to be able to pass the border. In this sense, the crisis may have increased awareness among stakeholders regarding the registration obligations.

[25] *The adoption of the revised PWD serves to ensure that controls and inspections become more effective and efficient. According to Whereas 29: "Member States should ensure that sufficient staff are available with the skills and qualifications needed to carry out inspections effectively."*

[26] *KPMG, Revised Posted Workers Directive and its impact on Global Mobility.*

[27] *See, as an example, the Austrian case, illustrated in the study of the European Centre for Social Welfare Policy and Research, by L. Geyer, S. Danaj and A. Scoppetta, "The impact of COVID-19 on the posting of workers and their workplace safety".*

[28] *See S. Robin-Olivier, cit., p. 6.*

[29] *On consequences for sensitive sectors such as construction and transportation, including job loss and job prospects, see Z. Rasnača, "Essential but unprotected: highly mobile workers in the EU during the COVID-19 pandemic", ETUI Policy Brief, N°9/2020, European Economic, Employment and Social Policy.*

III. RETHINKING THE POSTING FRAMEWORK: CHALLENGES & CHANCES OF THE NEW NORMAL

1. New Compliance Requirements for Posted Workers as of 30 July 2020

As mentioned above, the compliance requirements and inspections in the field of the PWD in its initial and revised version have not been suspended or discontinued. In addition to the current border controls companies have to comply with existing social security and tax obligations and ensure that postings within Europe are registered in a timely manner with the competent Labour Authorities of the Host State. Otherwise, companies may be exposed to sanctions and fines which may reach severe dimensions in some EU Member States.

Furthermore, companies are required to observe much more than a formal procedure when fulfilling the PWD registration obligations. As of 30 July 2020, the revised PWD has brought considerable changes related to working conditions, widely captured and known under the term Equal Pay-Principle, which needs to be granted to posted workers as a mandatory right. In particular, the array of applicable working conditions to posted workers has been extended, such as the extension of remuneration terms, as laid down in generally binding collective bargaining agreements. In the future, not only minimum wage rates need to be observed, but so does total remuneration, which comprises the following components:

- Basic salary;
- Any remuneration components, which are granted depending on the performance of work duties, qualification, and/or the professional expertise of the employees;
- Any other allowances such as overtime pay and benefits-in-kind.
- The revised PWD prevents the offset of payments received for board, lodging, travel, or accommodation against the remuneration granted to posted workers.
- Should the postings last longer than 12 months (with a one-time extension possibility of six months), all other terms and conditions of employment under the local law of the Host State – in addition to remuneration and minimum working conditions – must be applied except for termination law and company pension scheme law.
- The Covid-19 crisis has not caused any delay in the implementation of the revised PWD[30]. At the same time, Covid-19 has brought about intensive national inspections, decreased the number of postings, provided a new form of service provision and working, as well as increased compliance awareness, all this against the background of tightened compliance requirements resulting from the revised PWD.

2. Considerations for Companies

a) Shift from Short-Term Postings to Long-Term Postings?

Undoubtedly, companies will need to review the working conditions of their posted workers regardless of the duration of the posting. Unlike short-term postings, long-term postings are less likely to be affected by Covid-19. Given the concrete obstacles resulting from Covid-19, such as border controls and quarantine obligations, we expect a slight shift from short-term postings to more long-term postings in a bid to keep burdens to a predictable level. This trend is further fostered by the fact that alternative forms of service provision have proven to acceptable for clients and cost-saving for posting companies in many cases. For instance, client meetings abroad, in person, which made up a great portion of postings before Covid-19, have been easily replaced by virtual meetings. Online platforms have become the most widespread new meeting room.

In the case of long-term postings, companies should urgently ensure that the required working conditions under the local law of the Host State are met. The longer the assignment lasts in the Host State, the greater the risk of inspections, this regardless of possible controls on the borders.

From an employment law and social security perspective, a company may evaluate under which conditions long-term postings should be structured by using local

[30] At the moment of the finalization of the present article, over two-thirds of Member States have transposed the revised PWD. The status of transposition measures in the Member States concerning the revised PWD can be monitored here.

contracts with an employer in the Host State instead of assignment agreements with the Home Company. The revised PWD does not force companies to choose the entire law of the Host State. It extends the working conditions and applies almost all local employment law rules only to postings lasting more than 12 months (with one extension option of six months). Other important provisions such as termination and company pension scheme rules are exempted. However, tax and immigration considerations may urge companies to use local contracts.

b) Remote Working & Postings

Due to lockdowns, some posted workers found themselves stranded in the Host States in which they were providing services in situation of remote working . Many companies faced this situation rather involuntarily as they were forced to deal with a range of compliance requirements such as change of notification to Labour authorities, social security and tax implications.

In some cases, Covid-19 has forced the creation of remote working situations, in others it has revealed remote working as a normal form of working.
The latter has induced observers to claim that the remote work concept may become a future alternative form of work or even the future of work from home. While in the long term the spread of telework will depend on a range of factors, such as its effect on productivity, as well as, as highlighted by the European Commission, "its contribution to policy objectives such as the digital and ecological transitions". As a matter of fact, the number of employees working remotely is increasing and may further increase in the future, meaning that workers will not necessarily work from their home in the Home State, but from another State. Linking this trend to posting, one of the major concerns for companies will be the challenges they will face in terms of whether telework is subject to the rules applicable to posted workers.

The typical forms of postings within the meaning of the PWD are assignments of employees to carry out services on behalf of the Home Company towards a service recipient or to another undertaking of the group in another State or an independent beneficiary. Remote workers normally provide services to their Home Companies regardless of the place of residence. Due to the lack of a foreign service recipient, which is the main characteristic of remote mobility, remote workers may not be considered as posted workers and would not be subject to posted workers obligations such as PWD registration obligations. The situation will be different if the remote workers provide services on behalf of the Home Company to a service recipient in the Host State, in which they live. In other words, remote workers may be posted workers under certain conditions, normally, however, they would not qualify under the PWD.
Even if the rules of the PWD do not typically apply to remote workers, a company must comply with the local employment laws of the Host State. This results from the application of the Regulation (European Commission) 593/2008 (Rome I) which provides rules on applicable employment law in a given situation. As remote workers habitually carry out their work in performance of the contract in the Host State and no posting situation is given, the entire local employment laws need to be complied with - according to Art. 8. Under these terms, companies should avoid establishing the employment relationship with remote workers on the base of the laws of the Home Company. If companies choose the law of the Home Company as the ruling law, the employment relationship with the remote worker will be subject to the legal regimes of both Home Company and Host State due to the Rome Regulation I. The more beneficial rules for the employee will then prevail. This type of employment relationship makes the legal situation more complicated than the establishment of the employment relationship on the base of the laws of the Host State, since only the latter shall be observed. This would mean following the Host State's specific work rules and other mandatory work conditions.

Apart from posted worker rules and employment law, other compliance areas such as social security and tax implications may be affected and need to be carefully evaluated by companies.
In any case, remote working is not at odds with the posting concept. From a pure employment law

perspective, remote working does not pose other challenges for companies as the ones resulting from the traditional homeworking. In addition, given the fact that remote working appears to be an attractive mode for employees and companies alike in the context of Covid-19, we might expect remote working to gain in popularity and acceptance among employers.

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As discussed above, the pandemic has brought about intensive national inspections, a decreased number of postings (especially short-term postings) along with alternative forms of service provision and working. At the same time, the health emergency has dramatically increased compliance awareness, all of this against the background of incremented compliance requirements resulting from the revised PWD.

The protection of public health is amongst the foundations of public interest under EU law, according to the treaties and notably the Charter of Fundamental Rights of the European Union. However, caution should be exercised regarding national measures limiting the free movement of people. It is not the first time that health protection has been used as an argument to justify restrictive measures imposed by Member States, as the case law of the European Court of Justice shows[31]. The danger that the public health argument might be made by Member States to justify measures to protect national markets is not abstract[32]. Such an argument would not be fully compliant with the EU internal market principles either. According to the jurisprudence of CJEU, the argument of health protection shall "*not constitute a means of arbitrary discrimination or a disguised restriction*[33]."

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[31] See, for example, the following decisions of CJEU addressing health protection: CJEU, 19 January 1999, Criminal proceedings v. Donatella Calfa, C-348/96, CJEU, 18 May 1982, Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State, joined cases 115 and 116/81, CJEU, 19 February 1981, Criminal proceedings v. Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 130/80, CJEU, 26 June 1980, Criminal proceedings v. Herbert Gilli and Paul Andres, 788/79.

[32] On this discussion, please see M. Benio, "No force will stop protectionism in Europe" Euractive, 30 November 2017. Generally speaking, it is not uncommon to see protectionist measures being advocated to protect national labor markets in EU Member States. For instance, discussions about the so-called "Molière clauses" (imposing French language to workers posted to France) have been identified as protectionist. In particular, French judges held that the national measure "was adopted not to ensure the protection of the health and safety of employees, but to exclude workers posted from regional public procurement and favour regional companies", Administrative Tribunal of Lyon, 13 December 2017, decision n. 1704697.

[33] CJEU, Aragonesa, de Publicidad Exterior SA et Publivía SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, joined cases C-1/90 and 176/90.

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