Economic Insights – Trends and Challenges	Vol.VII(LXX) No. 4/2018	25 - 33

Considerations on the Posting of Workers in the Framework of the Provision of Services

Dana Volosevici

Petroleum-Gas University of Ploieşti, Bd. Bucureşti 39, 100680, Ploieşti, Romania
e-mail: dana.volosevici@vplaw.ro

Abstract

Posting is an important social, employment and legal matter in the EU. Mandatory rules have been implemented to set the terms and conditions of employment to be applied to posted workers, in order to guarantee that their rights and working conditions are protected throughout the EU and to ensure a level-playing field and avoid social dumping where foreign service providers can undercut local service providers for reasons related mainly to lower labour standards. The paper aims to present the general legal regime which governs the posting in the EU, as it has been amended by the Directive 2018/957.

Keywords: *employment; posting; services; internal market*

JEL Classification: *J21; K31*

Trade in services accounts for almost 70 per cent of GDP and employment within the European Union. Some of these services are performed by posted workers, the posted worker being defined as 'a person who, for a limited period of time, carries out his or her work in the territory of an EU Member State other than the state in which he or she normally works'. Data on posted workers are not systematically collected in all Member States, therefore, at EU level, only estimates are available. In 2015, a total of 2.05 million PDs A1 were issued by the reporting Member States. Compared to 2014, the overall number of PDs A1 issued increased by roughly 7% (Pacolet, 12). In 2014, there were over 1.92 million postings in the EU, up by 10.3% as compared to 2013 and by 44.4% with respect to 2010 (SDW, p. 6). In absolute numbers, Germany (414,200), France (190,850) and Belgium (159,750) have been the Member States receiving the highest number of postings in 2014. All Member States are senders of posted workers, but their incidence on domestic labour markets varies across the Member States. Poland (266,700), Germany (232,800) and France (119,700) record the highest absolute number of postings sent. One year later, the main sending Member States are the same, but figures are relevant for proving a certain evolution of the phenomenon in Poland: Poland (463,174 PDs A1 issued), Germany (240,862 PDs A1 issued) and France (139,040 PDs A1 issued) (Pacolet, p. 13).

As regards the impact of posting on sectors, the construction sector absorbs 43.7% of total postings, thus proving the most relevant sector for the provision of cross-border services. The service sector makes up 32.9% of total postings, which can be further disaggregated into personal services (education, health and social work), business services (finance and insurance,

real estate, administrative, professional and technical services, including temporary agency work), and transports (including road transport and information and communication systems), as well as other services, such as wholesale and retail trade (1.4% of total postings) and food and accommodation services (0.4%). Industrial sectors, such as the metalworking industry, account for about 21.8% of total postings. Agriculture employs 1.6% of total posted workers in the EU (Pacolet, p.7).

Throughout the European integration, Member States have been reluctant to liberate the cross-border provision of services due to the far-reaching impacts a free service market might have on their national economies. The posting of workers is grounded on the provisions of the Directive 96/71/CE, which was primarily aimed to ensure the freedom to provide services. The ruling of the European Court of Justice in Rush Portuguesa Case was constructed around the Articles 59 and 60 of the EEC Treaty.

Rush Portuguesa Lda is an undertaking established in Portugal specializing in construction and public works, and the Office national d'immigration. Rush Portuguesa entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in the west of France. For that purpose, it brought its Portuguese employees from Portugal. However, by virtue of the exclusive right conferred on it by Article L 341.9 of the French Labour Code, only the Office national d' immigration may recruit in France nationals of third countries. 3 After establishing that Rush Portuguesa had not complied with the requirements of the Labour Code relating to the activities of employed persons, carried on in France by nationals of non-member countries, the Director of the Office national d'immigration notified Rush Portuguesa of a decision by which he required payment of a special contribution, which an employer employing foreign workers in breach of the provisions of the Labour Code is liable to pay (C-113/89, para. 2,3).

Rush Portuguesa submitted that it had freedom to provide services within the Community and that, accordingly, the provisions of Articles 59 and 60 of the EEC Treaty precluded the application of national legislation having the effect of prohibiting its staff from working in France.

The Court ruled that „Articles 59 and 60 of the EEC Treaty and Articles 215 and 216 of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese work-force."

The freedom of movement for workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). The freedom to provide services includes the right of undertakings to provide services in the territory of another Member State and to post their own workers temporarily to the territory of that Member State for that purpose. In accordance with Article 56 TFEU, restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

At the same time, the Union is to promote social justice and protection (Article 3 TFEU) and, in defining and implementing its policies and activities, to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health (Article 9 TFEU).

The issue at stake remains to assure that the European laws strike the right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other.

The freedom to provide services. Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions (Article 57 TFEU).

Whether the provision of services falls within the articles 56-62 of the TFEU, depends on the services being provided for remuneration. It is to be pointed out that the remuneration does not have to come from de recipient of the services, as long as there is remuneration from some party (Case 352/85).

In order to benefit from the right to provide services, the person in question must already have a place of establishment within the European Union (Case C-290/04). Under European law, there is no right for a company established outside the European Union to provide temporary services within the EU. However, such company can establish a permanent economic base within a Member State.

The restrictions on the free movement of services rely on the express exceptions for public policy, security and health, but also on a justificatory test, created by the ECJ in Van Binsbergen (Case 33/74).

However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — in particular rules relating to organization, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State (Case 33/74, para 12).

In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics (Case 33/74, para 14).

The test for justification contains several conditions which must be satisfied by a restriction on the freedom to provide services.

Firstly, the restriction must be created in pursuit of a legitimate public interest which is compatible with EU aims.

Secondly, the restriction shall be also applicable and without discrimination to persons established within the Member State.

Thirdly, the restriction shall be proportionate to the need to respect the legitimate rule. The proportionality test requires the examining if the restrictive measure is suitable and appropriate in achieving the declared aim and if that aim could not be satisfied by some less restrictive measures.

Fourthly, the restriction should not infringe fundamental rights.

In the European Court of Justice case law, there are three lines of case law related to restrictions on free movement of services: posted workers, cross-border access to health-care and direct taxation rules.

The posting of workers. The posting of workers caused a number of legal debates, mainly related to the wage differentiation between posted and local workers in host countries. "Posting workers allows companies to exploit their competitive advantage across borders", recognises the European Commission in a report issued in 2014. Under the provisions of the Directive 96/71/CE, posting companies need to comply with a core set of rights of the host country, including minimum rates of pay. Under the rules defined by Directive 96/71/EC the posted workers obtain an equal or most of the time a higher income compared with what they would obtain if employed in their Member State of origin. Especially workers posted from EU-13 to a EU-15 Member State will reach a higher income given that the average and minimum wages vary significantly across Member States. Thus, the gap between Member States on minimum wages has constantly increased since 1996, from a ratio of 1:3 to 1:10. The main cause was the enlargement of the EU, with an accession of low-wage states. As a result, workers from low-wage Member States are posted to high-wage Member States in a view to obtain higher wage levels and covered expenditures for travel and housing (Caro et al., 2015).

Under the Article 3 paragraph 1 (c) of the Directive 96/71/CE, the Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable [...] the minimum rates of pay, including overtime rates. The concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

This provision caused significant wage differentiation between posted and local workers in host countries, estimated to range from 10% up to 50% depending on countries and sectors. The consequences were both at economic and social level. Firstly, the wage differentiation distorted the level playing field among companies, by conferring a labour cost advantage to sending companies over local companies in host Members States. Secondly, workers performing the same activity under the same conditions were unequally paid. Or, the principle of equal pay includes the prohibition of any measures which directly or indirectly discriminate on grounds of nationality.

Moreover, the ECJ case law established some mandatory guidelines in interpreting the notion of "minimum rates of pay" its composing elements. In Sähköalojen ammattiliitto ry, the ECJ ruled that:

"Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that:

- it does not preclude a calculation of the minimum wage for hourly work and/or for piecework which is based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify;
- a daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned;
- compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be

regarded as part of the minimum wage of posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify;
- coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage;
- an allowance taking the form of meal vouchers provided to the posted workers is not to be regarded as part of the latter's minimum salary; and
- the pay which the posted workers must receive for the minimum paid annual holidays corresponds to the minimum wage to which those workers are entitled during the reference period."

In order to 'rebalance' this situation, the Directive 2018/957 introduced the principle "equal rules on pay for equal work", and no longer only require the paying of minimum wages and extend to all sectors of the reference to universally binding collective agreements. Under the new rules, the pay applicable to posted workers would include all the elements of remuneration that are paid to local workers if they are laid down by law or by collective agreement which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, or by collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory.

Moreover, Member States shall publish the information on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the official national website, including the constituent elements of remuneration and all the terms and conditions of employment.

Under the Directive 96/71/CE, as amended by the Directive 2018/957, the legal regime of the rights of a posted worker is established by the mean of law, regulation or administrative provision, as well as collective agreements or arbitration awards which have been declared universally applicable or otherwise apply. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned. Under Romanian law, the social partners cannot conclude a collective agreement applicable at national level. For such cases or in addition to a system for declaring collective agreements or arbitration awards to be of universal application, Member States may base themselves on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory. The aim of such decision is that their application ensures equality of treatment.

Equality of treatment shall be deemed to exist where national undertakings in a similar position are subject, in the place in question or in the sector concerned, to the same obligations as undertakings posting employees as regards the matters stated in the Article 3 paragraph 1 and, where applicable, as regards the terms and conditions of employment to be guaranteed posted workers in accordance with paragraph 1a of the Article 3, and are required to fulfil such obligations with the same effects.

The Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual leave;
(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
(e) health, safety and hygiene at work;
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination;
(h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
(i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. This provision is applicable exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work.

Article 3(7) of Directive 96/71 provides that paragraphs 1 to 6 are not to prevent application of terms and conditions of employment which are more favourable to workers. However, in Laval [80], [81] and Rüffert (33), ECJ pointed out that "nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness. Therefore — without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable — the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision."

On the other hand, ECJ advocates for a unique European interpretation of the concepts employed in social legislation. In Dellas**,** "the Court has also held that the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States".

All the matters stated in the Article 3 paragraph 1 are regulated by European directives, which were transposed in the national legislation by all the Member States and interpreted by the ECJ casa law.

Thus, as regards the maximum work periods and minimum rest periods, the Directive 2003/88/CE defines 'working time' as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. In accordance with the ECJ case law, even if the employees are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances,

only time linked to the actual provision of primary care services must be regarded as working time within (Simap, 50).

The characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under those rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance (Simap, 48).

The 'rest period' means any period which is not working time. As pointed out in Dellas, the Directive does not provide for any intermediate category between working time and rest periods [43].

Article 6 provides that Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers: (a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry; (b) the average working time for each seven-day period, including overtime, does not exceed 48 hours. Member States are allowed to lay down a reference period not exceeding four months.

The Article 7 of the Directive 2003/88/CE provides that Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. Moreover, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

According to the ECJ case law, Article 7(1) of Directive 2003/88 has a direct effect. Article 7 of Directive 2003/88 imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave.

"Even though Article 7 of Directive 2003/88 leaves the Member States a degree of latitude when they adopt the conditions for entitlement to, and granting of, the paid annual leave which it provides for, that does not alter the precise and unconditional nature of the obligation laid down in that article. It is appropriate to note in that regard that Article 7 of Directive 2003/88 is not one of the provisions of that directive from which Article 17 thereof permits derogation. It is therefore possible to determine the minimum protection which must be provided in any event by the Member States pursuant to that Article 7." (Case C-282/10, para 34-35)

Health, safety and hygiene at work is mainly regulated by the framework Directive 89/391/CEE, which aims to introduce measures to encourage improvements in the safety and health of workers at work.to that end, The Directive contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.(article 1 (2). As the ECJ pointed out in Commission v. Netherlands, „ the aim of the Directive is not solely to improve the protection of workers against accidents at work and the prevention of occupational risks; it is also intended to introduce specific measures to organise that protection and prevention." [Case 441/01, para 38].

Council Directive 92/85 /EEC introduced important measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Its provisions shall be supplemented by the provisions of the Directive

2006/54/CE in case of other forms of discrimination occurring during pregnancy. (Barnard, 458).

The minimum requirements for the protection of young people at work are laid down by the Council Directive 94/33/EC on the protection of young people at work. The Directive applies to any person under 18 years of age having an employment contract or an employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.

Directive 2006/54/EC implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The general framework for equal treatment in employment and occupation is established by the Directive 2000/78/EC, whose aim is to **c**ombat discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Further, the Directive 2000/43/CE implements the principle of equal treatment between persons irrespective of racial or ethnic origin.

The Member States are bound to adopt and publish, by 30 July 2020, the laws, regulations and administrative provisions necessary to comply with the Directive 2018/957. A significant case law which has been taken into consideration by the directive may support an accurate and comprehensive transposition of the European provisions into national law. The social partners may also play a substantial role into building national and transnational collective agreements regulating the matters related to the posting of workers.

References

1. Barnard, C., 2006. *EC Employment Law*, Third Edition, Oxford University Press.
2. Case 33/74, *Johannes Henricus Maria van Binsbengen v Bestuur van De Bedrijfsvereniging Voor de Metaalnijverheid*, ECR 1974 Page 01299.
3. Case 352/85, *Bond van Adverteerders and others v The Netherlands State*, European Court Reports 1988 -02085.
4. Case C-113/89, *Rush Portuguesa v Office national d'immigration*, ECLI:EU:C:1990:142.
5. Case C-441/01, *Commission of the European Communities v. Kingdom of the Netherlands*, ECLI:EU:C:2003:308
6. Case C-290/04 FKP, *Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel*, ECLI:EU:C:2006:630
7. Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, ECLI:EU:C:2015:86.
8. Case C-14/2004, *Abdelkader Delias*, ECLI:EU:C:2005:728
9. Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809
10. Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, ECLI:EU:C:2008:189
11. Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33
12. Caro, E., Berntsen, L., Lillie, N. and Wagner, I. 2015. *Posted Migration and Segregation in the European Construction Sector*, *Journal of Ethnic and Migration Studies*, Vol. 41, No. 10, p. 1600-1620.
13. Commission Staff Working Document, *Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD(2016) 52 final.
14. Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, Official Journal, L 183.
15. Directive 92/85 /EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Official Journal, L 348.

16. Directive 94/33/EC on the protection of young people at work, Official Journal, L 216.
17. Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal, L 18.
18. Directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal, L 180.
19. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Official Journal, L 303.
20. Directive 2003/88/CE concerning certain aspects of the organisation of working time, Official Journal, L 299.
21. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) Official Journal, L 204.
22. Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal, L 173.
23. European Commission, 2014. *Employment and Social Developments in Europe 2014*, DG EMPL, Brussels.
24. Fondazione Giacomo Brodolini (FGB) and COWI, 2016, *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, on behalf of the European Commission – DG EMPL.
25. Morin-Chartier, E. and Jongerius, A., European Commission, 2016. *Report on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, COM(2016)0128 – C8-0114/2016 – 2016/0070(COD).
26. Pacolet, J. and De Wispelaere, Fr., 2016. *Posting of workers. Report on A1 portable documents issued in 2015,* European Commission, Directorate-General for Employment, Social Affairs and Inclusion.