

SECTION: EUROPEAN LAW AND PUBLIC POLICIES

CONSIDERATIONS ON THE CROSS-BORDER POSTING IN THE EUROPEAN UNION

Iuliana, Cebuc¹

Abstract:

The freedom to provide services on the territory of Member States is one of the basic principles of the Single European Market provided for under Art. 56 TFEU, which includes the right of companies to provide services on the territory of another Member State and to temporarily post its employees to the territory of that Member State for that purpose. The implementation and enforcement of this principle is a constant concern of the Union through action taken at the European level aiming at achieving a balance between the provision of fair competition conditions to businesses and the maintenance of an adequate level of protection for cross-border posted workers, in compliance with the application of the terms and conditions of employment provided for by national law.

At European level, the rules on the cross-border posting of employees within the EU and the rights they enjoy during the posting period, including the laws on labour relations, are covered by Directive 96/71 / EC on the posting of workers in the framework of the provision of services, as last amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018.

Key words : cross-border posting of workers, companies, the protection of posted workers

JEL classification : K31, K33

1. The posting as a contemporary social and economic reality

The establishment and the development of the European Single Market has allowed the setting up of a favourable and dynamic environment enabling the freedom to provide services within the territory of the Member States. The freedom to provide cross-border services has determined an increasing number of companies to temporarily postpone their own employees to the territory of a Member State, other than the State in which they are employed, so that they provide services which are contracted by their employer, hence the concept of cross-border posting.

Posting is a reality with a social and economic impact that creates benefits for all the actors involved, the importance of posting at European level being sustained by the increasing number of posted employees. In 2016, posted employees accounted for 1% of the workforce in the European Union.

The effects of cross-border posting are not limited to companies posting and to the posted workers but they influence the labour market in the hosting state by replacing national employees with posted employees. In the Preamble to Directive 96/71 / EC, the European Commission highlighted the fact that posting allows companies to exploit competitive advantages outside the country where they are based and to manage downtime, while giving employees the opportunity to increase work quality.

According to the data provided by the Commission in the Posting of Workers: Report on A1 portable documents issued 2016, in the year 2016, a total of 2.3 million PDs A1 were issued by reporting Member States. Compared to 2015, the total number of PDs A1 issued increased by some 12%.

Approximately 1.6 million PDs A1 were applicable to postings to one specific Member State. Compared to 2015, the overall number of postings increased by 8.6%. After a slowdown in 2015, the annual growth rate has risen again.

¹ Ph. D Lecturer, Constantin Brâncoveanu University of Pitești, iulianacebuc@yahoo.com

In 2016, on average 45% of PDs A1 were issued to posted workers employed in the construction sector. Also, 29% of the forms were issued for activities in the service sector and 24% for other industrial activities (excluding the construction field). Finally, only 1.5% of PDs A1 were issued to provide services in agriculture and fishing.

The duration of the posting period was on average 101 days in 2016. The differences between the salaries of local workers and posted workers vary from 10 to 50%, depending on the country of origin and the field of activity.

2. The current European legal framework

Cross-border posting refers to such situations when a company based in a Member State of the European Union, in the context of the transnational services provision, posts its own employees to the territory of another Member State, under certain given circumstances.

This type of posting involves the overlapping of three systems of law (the law in the state of origin of the company performing the posting, the law in the state in whose territory the work is done, plus the European legislation). This situation may generate for the posted employee a major uncertainty about his rights.

The need to protect the rights of posted workers while ensuring fair competition conditions for companies and adjusting to the new economic and social conditions has been a constant concern of the European institutions.

The rules on the cross-border posting of workers within the European Union and the rights they enjoy during this period, including the legislation applicable to employment relationships, are governed by Directive 96/71 / EC of the European Parliament and of the Council as of 16 December 1996 concerning the posting of workers in service provision, published in the Official Gazette of the European Communities (JOCE) no. L 018 as of 21 January 1997.

The legal framework has been continuously improved and has been further supplemented by adopting Directive 2014/67 on enforcement of Directive 96/71, which sets out the modalities for the implementation of Directive 96/71 on the posting of workers, with a view to preventing fraud, the exchange of information between Member States and Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 published in the Official Journal of the European Union no. L 173/16 of 9 July 2018 aiming at the uniform application of existing rules at European level in order to achieve real social convergence.

The European regulation on transnational posting is also based on the Court of Justice's solutions, relevant in this respect being the decision of the Court in *Rush Portuguesa* case, given on 27 March 1990. Actually, a Portuguese company entered into a subcontracting agreement with a French company to provide services for the execution of construction works for a railway in France. In order to execute the contract, the Portuguese company used its own employees, who had Portuguese citizenship.

Under the exclusive right provided by Article L 341.9 of the French Labour Code, only Office national d'immigration could recruit third-country nationals in France. As the Portuguese company infringed the abovementioned provisions, Office national d'immigration notified it of a decision requesting it to pay a special contribution owed by an employer who hired foreign workers in breach of the provisions of the Labour Code.

In defense, *Rush Portuguesa* claimed that they had the freedom to provide services within the Community, the provisions of Articles 59 and 60 of the EEC Treaty rendering inapplicable the application of national legislation which would have the effect of prohibiting the posting of their own employees in France.

The Court stated 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 a company based in Portugal which provides services in the field

of construction and public works in another Member State may move with its own staff from Portugal during the execution of the mentioned works. In such a case, the authorities of the Member State on whose territory the works are to be carried out cannot impose conditions on the service provider concerning the employment of the workforce or the obtaining of a work permit for the Portuguese staff. "(ECLI : EU: C: 1990: 107)

Directive no. 96/71 was adopted in 1996 and was transposed and implemented by the Member States by the end of 1999. In Romania, the transposition was done with EU accession, through the adoption of Law no. 344/2006 on the posting of employees in the framework of the provision of transnational services published in the Official Gazette no. 336 of 24 July 2006 and entered into force on 1 January 2007.

The Directive regulates three types of posting: the direct provision of services by a company on the basis of a service contract, the intra-group posting and the posting through a temporary agency established in another Member State. The posting period shall not exceed 24 months, and a worker may not be posted to replace another posted worker.

According to Article 3 (1) of the Directive, companies which post workers to another EU State are required to provide posted workers with the same working and employment conditions as in the Member State on whose territory the workers are posted, considering the following aspects: (a) maximum periods of work and minimum rest periods; (b) the minimum duration of paid annual leave; (c) minimum wage, including overtime pay; (d) the conditions for the provision of workers, in particular by temporary employment companies; (e) occupational safety, health and hygiene; (f) protective measures applicable to the working and employment conditions of pregnant women or women who have recently given birth, children and young people; (g) equal treatment of men and women and other provisions on non-discrimination.

Regarding the social security system applicable to posted workers (pension insurance, occupational accidents and occupational diseases, health insurance, family benefits) and tax obligations, they are subject to the legislation of the state of origin.

Directive 2014/67 on enforcement of Directive 96/71, adopted on 15 May 2014, sets out the arrangements for the implementation of Directive 96/71 on the posting of workers by establishing a common framework of common provisions, measures and appropriate control mechanisms, including measures to prevent and sanction any violation and circumvention of the applicable rules, the control being mainly exercised by the authorities of the host Member State.

The Directive seeks to improve access to information for both Member States and service providers, the information being transparent, free of charge, in an accessible format and published on a single official website in several languages, taking into account labour market demands in the host countries. In the same context, cooperation between Member States is also expected to be improved through the use of the Single Internal Market Information System.

At the same time, the Directive offers a number of safeguards to protect the rights of posted workers and to remove unjustified obstacles to the freedom of services provision, imposing a series of obligations on Member States: to ensure that posted workers can submit complaints and initiate judicial or administrative proceedings, recognize procedural capacity for trade unions or other organizations that justify an interest in bringing proceedings on behalf of members, with their agreement, mentioning that the employer is responsible for any contractual obligations: contractual debts, overdue payments, and tax reimbursements.

In Romania, the Directive was transposed by Law no. 16 of 17 March 2017 on the posting of employees in the framework of the provision of transnational services published in the Official Gazette no. 196 of 21 March 2017.

The most recent amendment to European legislation in this field was made by Directive (EU) 2018/957 of the European Parliament and of the Council as of 28 June 2018

on the amendment of Directive 96/71 / EC on the posting of workers in the framework of the provision of services. This amendment seeks to ensure a higher level of protection of employees' rights under a loyal competition on the single market.

Member States have the obligation to transpose the provisions of this Directive into their national law by 30 June 2020, until Directive 96/71 / EC remains applicable in the previous form. At the same time, according to the constant jurisprudence of the Court of Justice of the European Union, Member States are required, during the transposition period of the Directive, not to adopt measures which could lead to the impossibility of achieving the objectives pursued by its adoption.

One of the changes following the adoption of the Directive concerns the establishment of the rule that posted workers must be entitled, during their posting, to working and employment conditions regulated in the host Member State by means of laws, regulations and administrative provisions, as well as by collective agreements or arbitration sentences that have been declared with general application. This obligation is currently only envisaged in the construction sector, with Member States deciding whether to apply it in other areas or not.

Thus, the most important change following the adoption of the Directive (which has also caused important controversies at European level) concerns in forcing employers to grant / guarantee a regulated remuneration in the host Member State to posted workers, posted workers and the local ones being thus subject to the same wage rules. By contrast, the current regulation provides that posted workers are entitled to a minimum wage.

The notion of remuneration shall be that established by the domestic law / national practices of the host Member State and shall include all the component elements of remuneration which are mandatory under the laws, regulations and administrative provisions and, where applicable, collective agreements or arbitration sentences with general application. Member States will need to make clear the elements of remuneration on their territory and those laid down by law or by collective agreements of general application will have to be taken into account when deciding the salaries of posted workers.

Regarding the posting related allowances, according to the provisions in force currently, they are considered to be part of remuneration insofar as they are not granted for reimbursement of the actual costs of posting (transport, accommodation and meals). In this respect, the amended Directive provides that if the enforcement of working conditions does not provide which elements of the allowance are allocated to the reimbursement of the posting-related costs, and which elements are part of the remuneration, it will be presumed that the posting allowance is granted as a reimbursement of expenses (and therefore cannot be taken into account when determining remuneration).

Considering the reimbursement of transport, accommodation and subsistence expenses for posted workers who are temporarily posted from their usual workplace in the host Member State to another place of employment, the rule applied shall be established by the legislation of the host Member State.

New rules are also introduced for temporary employment agencies by establishing the principle of equal treatment between temporary workers seconded by a temporary employment agent and workers recruited directly by the company located on the territory of the host Member State. Under these conditions temporary employment agencies are required to ensure, during the posting period, that posted workers are entitled to the working conditions applicable on the territory of the host Member State in accordance with Art. 5 of Directive 2008/104 / EC of the European Parliament and of the Council on temporary employment agencies (which establishes the principle of equal treatment between temporary workers and those employed directly by the concerned company).

The aforementioned rules also apply if, in the context of the transnational provision of services, temporary workers made available to a user are sent to work temporarily on the territory of a Member State other than that on whose territory they normally perform their work.

It is also reiterated and emphasized the obligation for Member States to publish on the unique national website the information on employment and employment conditions applicable on their territory (including on the component elements of remuneration without undue delay and in a transparent manner)

In order to guarantee the freedom to provide services within the territory of the European Union, Member States may, subject to the principle of equal treatment, impose conditions of employment and employment recruitment covering aspects other than those covered by Directive 96/71 / EC only if it is a matter of public policy.

There are also changes to long-term posting, with employers being obliged, if the posting exceeds 12 months (18 months as an exception), to observe, in relation to posted workers, all working and employment conditions applicable in the host Member State, with the exception of the provisions on: (i) the procedures, formalities and conditions for the conclusion and termination of employment contracts, including non-competition clauses, respectively (ii) supplementary occupational pension schemes. At present there is already a provision in the legislation on the coordination of social security schemes with regard to the over 24 months postin, which has the effect of subjecting posted workers in such a situation to several essential provisions of labour law in the host Member State such as health, safety and hygiene, or equal treatment between men and women.

3. The posting of employees within the framework of transnational provision of services throughout Romania

The posting of employees in the framework of the provision of transnational services is currently regulated in Romania in accordance with the European rules in the matter, by Law no. 16/2017 on the posting of employees in the framework of transnational services published in the Official Gazette no. 196 as of 21 March 2017 and Government Decision no. 337/2017 for the approval of the Methodological Norms for the application of Law no. 16/2017 regarding the posting of employees in the framework of the provision of transnational services published in the Official Gazette no. 411 as of 31 May 2017.

The law establishes a common framework of provisions, measures and control mechanisms that apply in Romania in the case of the posting of employees in the framework of the provision of transnational services, including measures for preventing and sanctioning any abuse or circumvention.

The legal provisions aim at guaranteeing an adequate level of protection of employees, in particular by ensuring compliance with the application of the terms and conditions of employment provided for by national law, while facilitating the freedom of companies to provide services, promoting a climate of fair competition and supporting thus the functioning of the internal market.

According to the provisions of art. 6 of the law, the employees posted on the Romanian territory benefit, irrespective of the labour law applicable, of the working conditions provided by the Romanian legislation and / or the collective labour agreement concluded at sectoral level, extended to the whole field of activity in terms of the maximum length of working time and the minimum period of regular rest, the minimum duration of paid annual leave, the minimum wage including supplementary compensation or payment, the conditions for the provision of employees by temporary employment agencies, health and safety at work, protective measures applicable to working conditions for pregnant women or those who have recently given birth, as well as for children and young people, equality of treatment between men and women and other provisions on non-discrimination.

The allowance specific to the posting is intended to ensure the social protection of employees and is granted to compensate for the inconveniences caused by the posting, which consists in removing the employee from his usual environment.

A number of control mechanisms are also introduced on the basis of which the Labour Inspectorate is the body empowered to carry out checks and control actions on transnational posting situations, including any non-compliance or abuse with regard to the applicable rules on transnational posting.

Thus, the Methodological Norms set out the factual elements on the basis of which the Labour Inspection will assess whether a transnational posting is real, with the help of some factual elements determined by the law.

In compliance with the provisions of art. 2 paragraph 1 of the Government Decision no. 337/2017, factual elements to determine whether a company really carries out significant activities (other than those of internal management and/ or administration) in the host member state, other than Romania and, if necessary, also in Romania, such as: i) the place where the company has set up its headquarters, the place where the offices are located, the place where it pays its taxes and social security contributions and, if applicable, the place where it is authorized to exercise its activity or is registered with the Chamber of Commerce or professional body of the host member state, ii) the place where the company carries out its basic activity, as well as the place where it employs its administrative staff, iii) the number of contracts signed and/ or the size of the turnover made in the host member state, as well as the activity carried out, together with the specific situation of newly- incorporated companies and SMEs, and other considerations)

These factual elements (along with the other provisions of the Norms) will also be taken into account in the inspections carried out by the Labour Inspection, by the territorial labour inspectorates and by the companies established in Romania posting workers in the provision of transnational services.

Paragraph 2 of art.2 includes the factual elements which characterize labor and the situation of employees posted to Romania which must be taken in consideration during inspections, include in particular: whether the employee's activity is carried out in Romania for a limited period of time, the beginning and the end date of the posting , whether the posting is made to Romania from another EU member state or from the Swiss Confederation, where the employee regularly performs his or her activity, consistency between the skills and qualifications of the posted employee and the scope of the service agreement, the means of ensuring travel expenses, meals and accommodation for the posted employee.

At the same time, in order to ensure the effectiveness of the control mechanism, a number of obligations are established for companies, set up on the territory of a member state, which post workers on the territory of Romania, regarding the obligation to submit to the territorial labour inspectorate, in whose territorial range the activity is to be carried out, a statement drafted in Romanian on the posting of their own employees, on the working day prior to commencement of work, at the latest; the obligation to hold and make available copies in electronic or paper format, of the working documents (labour contract, attendance sheets, proof of salary payment, etc.) to labour inspectors, at their request, and to keep them in an accessible and identifiable place on the territory of Romania, during the period of transnational posting, to designate a person to ensure the connection with the competent national authorities and to send and receive documents and / or notices, if applicable.

Companies are responsible under Romanian law for failure to comply with working conditions.

4. Conclusions

Posting is an economic, social and legal reality that produces multiple effects both for companies which post workers and for posted workers as well as for the state in which work is

being done, where changes in the labour market occur, as well as advantages for the state where workers settle in terms of tax collection, contributions and taxes related to cross-border work.

The recent amendment of Directive 96/71 / EC, and in particular the application of the principle according to which posted workers shall be entitled to the same payment as local employees, will determine, on the one hand, higher wage costs for companies posting workers and distortions of the single market, by objectively taking into account the economic differences between Member States, jeopardizing the competitiveness of workers in Central and Eastern Europe. It will also significantly increase the administrative effort and expenditure of SMEs on informing and enforcing matters of the labour law in that state, with each country having extensive labour relations regulations.

On the other hand, the changes made will reduce social dumping, increase the social protection of posted workers, stimulate the provision of cross-border services based on innovation, specialization and skills and will improve the existing legal framework at European level.

Bibliography

1. I. Dumitru, Detașarea lucrătorilor în Uniunea Europeană, între realitate juridică și demagogie politică, in Revista Universul Juridic no. 9, 2017, pp. 36-49
2. J. Pacolet, F. De Wispelaere, Network Statistics FMSSFE, European Commission, Brussels, december 2017.
3. Volosevici Dana, Detalarea transnațională. Aspecte teoretice si practice, Prouniversitaria, 2017
4. Decision of the Court of Cauza 27 march 1990, C-113/89 Rush Portuguesa c. Office national d'immigration, , ECLI:EU:C:1990:107
5. Directive 96/71 / EC of the European Parliament and of the Council on the posting of workers in the framework of the provision of services ' Directive 2014/67 / EU of the European Parliament and of the Council on ensuring compliance with Directive 96/71 / EC on the posting of workers in the framework of the provision of services the framework for the provision of services and amending Regulation (EU) No. 1.024 / 2012 on administrative cooperation through the Internal Market Information System ("IMI Regulation").
6. Law no. 344/2006 on the posting of employees within the framework of transnational provision of services, Official Journal of Romania no. 336 of 24 july 2006
7. Government Decision no. 337/2017 for the approval of the Methodological norms of application of Law no. 16/2017 on the posting of employees within the framework of transnational provision of services, Official Journal of Romania no. 411 of 31 May 2017.
8. Law no. 16/2017 on the posting of employees within the framework of transnational provision of services, Official Journal of Romania no. 196 .of 21 March 2017.
9. www.curia.europa.eu
10. www.ec.europa.eu/eures
11. www.m.muncii.ro