

Posting of workers in the context of Directives 2018/957 and 2014/67

Delegowanie pracowników
w kontekście dyrektyw 2018/957 oraz 2014/67

SOPHIE ROBIN-OLIVIER

La Sorbonne school of law

University Paris 1 (Panthéon Sorbonne) / Uniwersytet Paryż 1 (Panteon Sorbona)*

Sophie.Robin-Olivier@univ-paris1.fr

Summary: *The contribution analyses two recent EU directives (2018/957 and 2014/67) regulating the posting of workers in the framework of the freedom of provision of services. It focuses on two central issues: the extension of posted workers' rights, and the improvement of administrative cooperation to combat fraud more efficiently. It concludes that recent legislative evolutions concerning posting of workers should lead to improvement in posted workers' situation, in particular if cooperation between Member States' administrations is buttressed by the new European Labour Administration.*

Key words: *posted workers, labour law, directive 2018/957, directive 2014/67, social rights, administrative cooperation, European Labour Authority*

Streszczenie: *W artykule analizuje się dwie ostatnie dyrektywy UE (2018/957 i 2014/67) regulujące delegowanie pracowników w ramach swobody przepływu usług. Rozpatrywane są dwie główne kwestie: rozszerzenie praw pracowników delegowanych oraz usprawnienie współpracy administracyjnej dla skuteczniejszego zwalczania nadużyć. Analiza prowadzi do konkluzji, że ostatnie zmiany legislacyjne dotyczące delegowania pracowników powinny doprowadzić do poprawy sytuacji tej grupy pracowników, w szczególności jeśli nowo powstały Europejski Urząd Pracy przyczyni się do wzmocnienia współpracy między odpowiednimi instytucjami państw członkowskich.*

Słowa kluczowe: *pracownicy delegowani, prawo pracy, dyrektywa 2018/957, dyrektywa 2014/67, prawa socjalne, współpraca administracyjna, Europejski Urząd Pracy*

Introduction

This brief contribution focuses on recent legislative developments concerning posting of workers within the EU.

It does not concern social security, but labour law issues that were addressed in Directive 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers¹ and Directive 2014/67

of 15 May 2014 on the enforcement of Directive 96/71².

I have chosen to insist on two important evolutions resulting from these two texts: first, the domain of posted workers' rights, which Directive 2018/957 intends to expand; second, the need to combat "frauds" more efficiently, in order to curb growing criticism against posting.

* La Sorbonne School of Law – IREDIES, 1 Rue Glacière, Bât.01 – 3ème étage – Bur. 01, 75 013 Paris, tél. 33 (0)1 87 02 50 34, iredies@univ-paris1.fr

¹ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9.7.2018, p. 16.

² Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28.5.2014, p. 11.

Posted workers' rights

Whether posted workers can benefit from equal treatment and, more precisely, equal pay, in the country where the service is provided is one of the most important (and yet unsolved) questions concerning the regime of posting (A). In addition, it has become quite clear that posted workers could only be efficiently protected if they had access to courts, and could obtain remedies in the country where they temporarily work (B).

A right to equal treatment?

The preamble of Directive 2018/957 is explicitly mentioning the need to revisit the balance between posted workers' rights and free provision of services. According to recital four of the Directive: "more than 20 years after its adoption, it has become necessary to assess whether Directive 96/71 still strikes 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".

This need to pay more attention to workers' rights is connected to the principle of equal treatment, in the preamble, which mentions, at point 6, the historic importance of "the principle of equal treatment and the prohibition of any discrimination on grounds of nationality". The principle of "equal pay" is also mentioned, together with its implementation through secondary law "not only between women and men, but also between workers with fixed term contracts and comparable permanent workers, between part-time and full-time workers and between temporary agency workers and comparable workers of the user undertaking". The preamble of the Directive insists that "those principles include the prohibition of any measures which directly or indirectly discriminate on grounds of nationality".

More precisely, recital eight contends that "posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, should receive at least the same allowances or reimbursement of expenditure to cover travel,

board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State. The same should apply as regards the expenditure incurred by posted workers required to travel to and from their regular place of work in the host Member State". Although the language of the preamble suggests that equal pay for equal work is sought, the provisions of the Directive are not consistent with this objective.

To be sure, according to article 3 (1), Member States must ensure that posted workers benefit "on the basis of equality of treatment" from "the terms and conditions of employment" in certain matters, when these working conditions are laid down, in the Member State where the work is carried out, by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable" (or otherwise apply across the board).

And the new Directive added new items to the list of working conditions applicable to posted workers: "remuneration, including overtime rates" (c); the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work (h); allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons (i).

The Directive also makes it clear the expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons are those "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". As far as the concept of remuneration is concerned, article 3 indicates that it is to be determined by "the national law and/or practice of the Member State to whose territory the worker is posted", and includes "all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or

arbitration awards which, in that Member State, have been declared universally applicable”.

Last but not least, the Directive also requires publication of information on the terms and conditions of employment, including the constituent elements of remuneration and all the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in Article 5 of Directive 2014/67/EU.

However, all these provisions of the Directive do not ensure “equal pay for equal work”: equal treatment only applies to the elements of the remuneration determined by the law or other generally applicable rules. Where remuneration depends on measures adopted at company level, either through collective agreements, work contracts or unilaterally, by the employer, the Directive does not apply. Thus, it cannot constitute a legal basis to argue that posted workers should benefit from “equal pay”, understood as the same pay as other workers, not posted, who do the same work at the same place.

This solution contrasts with the one that applies to temporary agency workers. As far as these workers are concerned, article 3 (1) b of the Directive mentions that “temporary work agencies must guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104 to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out”.

To be sure, this reference to Directive 2008/104 limits the scope of equal treatment to “basic” working and employment conditions. But basic working conditions include remunerations. It thus makes no doubt that temporary agency workers are, in this regard, better protected than other posted workers, and it becomes all the more important to distinguish cases of posting through temporary work agencies from other situations.

The particular regime of posting, for temporary workers, is fully warranted, for diffe-

rent reasons. For one thing, it is a pragmatic solution: for temporary agency workers, it is indeed possible to compare their remuneration to the remuneration of the permanent workers of the user undertaking. To facilitate equal pay, the Directive mentions that the user must inform the temporary agency of the terms and conditions of employment that it applies regarding the working conditions and remuneration of its own permanent workers. In addition to being pragmatic, the specific treatment of some of the most precarious workers is also rational in terms of social justice and market fairness: it ensures protection of some of the most precarious workers, and fair competition between temporary agencies established in different Member states.

However, in comparison, other posted workers still lag behind, and it is rather uneasy to imagine how equal pay for equal work could be achieved, when there are no comparable workers working for the same “employer” in the host State.

Actions in courts

As many other social Directives, Directive 2018/957 is concerned with enforcement: effectiveness of the Directive is not abandoned to the “procedural autonomy” of Member States. Monitoring, control and enforcement is dealt with at article 5, which requires that Member States “lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive and take all measures necessary to ensure that they are implemented”. As ever, “penalties provided for shall be effective, proportionate and dissuasive”.

The crucial issue of jurisdiction was already addressed by article 6 of Directive 96/71, an article which was not amended by Directive 2018/957. According to this provision, “in order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State”.

Posted workers are thus allowed to take action before courts, in the host State. This is indeed preferable when the benefit of labour law of the host State is claimed: local courts are in a better position to enforce national labour law. But the difficulty lies in the situation of posted workers, which do not necessarily stay long enough on the territory to have time to initiate and participate to, judicial procedures, if only they have the resources for such an enterprise.

In this regard, the decision of the European Court of justice in the case *Sähköalojen ammattiliitto*³ is particularly useful. In this decision, the Court considered that the law of a Member State (where the firm posting the workers is established), under which the assignment of claims arising from employment relationships is prohibited, cannot bar a trade union (in the host state) from bringing an action before a court of the host Member State to recover claims that have been assigned to it by posted workers. The solution is grounded, namely, on the right to an effective remedy laid down by the Charter of Fundamental Rights (article 47). This decision makes it clear that there are ways through which posted workers' claims can be effectively brought to courts. Involvement of trade unions or other NGO in the host States stand out as an efficient method.

Combating frauds

Frauds, defined as the use of free provision of services in order to circumvent national legislation, both in the field of labour law and social security, has led to many critics to the EU single market.

Quite unusually, EU single market rules became a topic for political debate and, because of fears that posting would lead to a race to the bottom through regulatory competition, in some Member States, pressure was put on the governments of these States, not only to ensure fair competition and more equal conditions between posted workers and others, but also to make sure that posting was genuinely taking place in the framework of

free provision of services. To this end, Directive 2014/67 has striven to lay down the elements characterizing “genuine posting” (A), and set up mechanisms of cooperation between Member States in order to facilitate this characterization (B).

Defining “genuine posting”

Posting, in the framework of free provision of services, must fulfil three conditions mentioned at article 4 of Directive 2014/67 which concerns “identification of a genuine posting and prevention of abuse and circumvention”: the employer must be established in a Member State, which is not the State where the service is provided; workers must be working temporarily on the territory of that State; and they must be employed as a worker by the service provider.

Establishment in another Member state

According to article 4(2) of Directive 2014/67, elements to determine whether an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities, in the Member State of establishment include, in particular:

- a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;
- b) the place where posted workers are recruited and from which they are posted;
- c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;
- e) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter

³ ECJ, C-396/13, (2015).

alia, newly established undertakings and SMEs.

As the text mentions, this list is only indicative: the elements that it includes should be taken into account, and they should help determine if the service provider is an undertaking developing its economic activity in the Member State of origin. The overall objective is to exclude letterbox companies from the benefit of posting.

Temporary employment

To identify “temporary employment”, that is to say, assess whether a posted worker temporarily carries out his work in a Member State other than the one in which he normally works, article 4(3) of the Directive indicates that “all factual elements characterising such work and the situation of the worker” should be taken into account, including in particular:

- whether the work is carried out for a limited period of time in another Member State; the date on which the posting starts; the fact that posting takes place in a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation 593/2008 (Rome I);
- whether the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted; the nature of activities;
- whether travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- whether there is any previous periods during which the post was filled by the same or by another (posted) worker”.

Again, these elements are only indicative: the list is neither limitative, nor cumulative, but it should serve as a yardstick.

Worker

To determine whether a person falls within the applicable definition of a worker, article 4(5) of Directive 2014/67 requires, first, that the definition be in accordance with Article

2(2) of Directive 96/71, and, second, that “Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties”. Consistently with the definition of worker framed by the Court of justice, the Directive excludes formalism and insists that the definition relies on the factual situation and concrete conditions of work.

Cooperation

Given the necessary assessments to ensure that the activity takes place in the framework of free provision of services, avoiding frauds requires cooperation between national administrations. Directive 2014/67 is precisely meant to ensure the enforcement of Directive 96/71, namely through cooperation between Member States.

The Directive imposes, in particular, that administrative cooperation takes the form of mutual assistance (article 6). Member States are required to work in close cooperation and provide each other with mutual assistance, without undue delay, in order to facilitate the implementation, application and enforcement in practice of Directive 2014/67 and Directive 96/71/EC. Cooperation consists, in particular, in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations, including the investigation of any non-compliance or abuse of applicable rules on the posting of workers. Requests for information include information with respect to a possible recovery of an administrative penalty and/or fine, or the notification of a decision imposing such a penalty and/or fine.

The same article includes details on the expected behaviour, in case of difficulty in meeting a request for information or in carrying out checks, inspections or investigations: the Member State concerned must, without delay, inform the requesting Member State with a view to finding a solution, and, in the event of any persisting problems in the

exchange of information or a permanent refusal to supply information, the Commission being informed, where relevant by means of IMI, the State must take appropriate measures.

Further details concern the modality of information: Member States must supply the information requested by other Member States or the Commission by electronic means within precise time limits (2 working days in urgent cases requiring the consultation of registers, such as those on confirmation of the VAT registration, for the purpose of checking an establishment in another Member State; maximum of 25 working days from the receipt of the request in other cases).

Member States must also ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, can also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States, in so far as these registers are listed by the Member States in the IMI.

Respective roles of Member states in the framework of administrative cooperation are stated at article 7 of the Directive. According to this article, the Member State of establishment of the service provider must assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71 and where there are facts that indicate possible irregularities, a Member State must, on its own initiative, communicate to the Member State concerned any relevant information without undue delay.

Competent authorities of the host Member State can also ask the competent authorities of the Member State of establishment to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules.

On combatting fraud through cooperation, the recent adoption of Regulation 2019/1149 on the European Labour Authority⁴ (ELA) must also be mentioned. The domain of ELA interventions covers "labour mobility across the Union and the coordination of social security systems", and in particular, mobility in the field of Directive 96/71/EC and Directive 2014/67/EU. The goal of the ELA is to contribute to "effectively enforcing EU rules across the Member States", which requires structured cooperation and exchange between competent national authorities, as well as resources for common activities, such as organising "joint inspections or training national staff to deal with cross-border cases".

Thus, one of the central objectives of the ELA is to "facilitate cooperation and the exchange of information between Member States with a view to the consistent, efficient and effective application and enforcement of relevant Union law". ELA contribution to cooperation should be substantial as it constitutes a new authority to help combat frauds and abuses related with workers mobility through cooperation between Member states, and introduces new instruments to solve disputes between Member states concerning workers' mobility, among which a mediation system.

Conclusion

Recent legislative evolutions, concerning posting of workers, should lead to improvement in posted workers' situation, in particular if cooperation between Member States' administrations is buttressed by the new ELA.

But it is too soon to know whether ELA, and the new instruments available to combat frauds, will be successful in curbing the critics that free provision of services is a factor of regulatory competition and social dumping.

⁴ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L 186, 11.7.2019, p. 21.

LEGAL ACTS

Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L 186, 11.7.2019, p. 21.

Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9.7.2018, p. 16.

Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28.5.2014, p. 11.