

Posting Directive – the start of a new approach

The issue of temporary posting of workers from one EU Member State to another is finally being clarified after two years of discussions

The Posting Directive 96/71/EC defines the rules that apply when a company decides to provide its services on a temporary basis in a different Member State (the host country) from the one where it usually operates (the home country).

The rationale behind it is that as it is a temporary provision of services, the “posted” workers concerned should not be completely assimilated with the local ones.

The Directive therefore establishes a set of core elements such as, for example, the minimum rate of pay, the health and safety rules, the working time, etc, for which the legislation of the host country applies. For other aspects, in particular social security, it is the legislation of the habitual place of work of the worker – the home country – that continues to apply.

The Posting Directive was introduced in 1996, in a European Union composed at that time of 15 Member States, with relatively similar socio-economic profiles. The expanding of the EU that followed brought a different perspective to the issue of posting, bringing to the political

agenda issues such as the famous “Polish plumber”.

Although statistics clearly indicate that the predicted flood of Eastern workers towards Western countries in fact never happened, evidence has shown that posting has been (mis)used by unscrupulous companies for circumventing the existing social legislation, and thereby on the one hand providing an unfair form of competition against genuine companies and, on the other, depriving workers of their rights.

ILLEGAL PRACTICES

For FIEC, most of the problems identified in relation to posting are linked, on one side, to difficulties or shortcomings in the application and enforcement of the existing legislative framework and, on the other side, to illegal practices.

They are also a result of the difficulties in undertaking efficient controls by labour inspectorates or the competent body – in particular in cross-border operations. These require access to data or information in other countries as well as an efficient co-operation between authorities.

It is therefore on these problems that priorities must be concentrated before considering possible changes to the legislative framework itself.

The European Commission however decided to present a proposal for revising the existing Posting Directive 96/71/EC in 2016.

At the end of February, after two years of discussions and negotiations, the European co-legislators (the European Parliament and the Council of Ministers) reached a provisional agreement regarding the revision of the Posting Directive.

Without entering into all the legal details, here are some of

the main changes that were introduced.

With remuneration, the principle of “the same pay for the same work at the same workplace” was accepted by both co-legislators. The aim is to ensure that posted workers can benefit from the same rules as local workers from day one.

This means that it will now be the overall amount of remuneration received by a posted worker that must meet the level of remuneration laid down in the host Member State, and not just the “minimum rate of pay” as is the case today.

The mandatory elements that constitute remuneration in a Member State must be available on a single national website – the same website as the one in the Enforcement Directive of 2014 – so that companies that post workers are fully aware of which elements are applicable to these workers.

If a company is penalised for not having applied an element that was not published on the website, this will have to be taken into account by the authorities when deciding on possible sanctions.

DURATION OF POSTING

The duration of the posting has also been considered.

The current Directive states that in order to be considered as “posting”, a provision of service in

another Member State must be “temporary”, but without giving a definition of what is meant by “temporary”.

The agreement reached now states that the maximum duration is 12 months, with a possible extension of six months via a notification of the company to the competent authority in the host country.

After this limit, all the provisions of the labour law of the host country will have to apply and not just the core elements as defined in the Posting Directive.

It has to be noted that this does not affect the provisions related to social security contributions, which are defined in a separate EU legislation.

When it comes to allowances, the agreement clarifies that expenses made for travel, board and lodging are to be viewed separately from remuneration, paid for by the employer and are not deductible from workers’ salaries.

Furthermore, they will be paid according to the rules applicable in the host country.

Member States will have a maximum of two years to transpose and implement the new provisions into their national legislation.

Both the European Parliament and the Council of Ministers have now to approve the content of this provisional agreement before it becomes effective. It is therefore too early to assess the impact it will have on posting in general and, more particularly, in the construction sector, as well as on the fight against the various forms of frauds observed.

What is clear is that it sets the beginning of a new approach to the provision of services within the Internal Market, and that the issue will certainly continue to remain among the highest political priorities on the EU agenda.

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