Labour Mobility Initiative

Krakow, 8 May 2017

ANALYSIS OF Art.2a OF THE TARGETED REVISION OF THE DIRECTIVE ON POSTING OF WORKERS

As representatives of the Labour Mobility Initiative Association, a non-governmental think tank involved in the matters of freedom to provide services and work mobility, regarding our expertise in the academic and practical field of the issue, we would like to present the following analysis.

This analysis aims at clarification of the relation between (draft) Article 2a of the Commission's Proposal for the directive 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 (hereafter: **the Proposal**) and Art. 8 of the Regulation 593/2008/EC of The European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereafter: **Rome I**)

The need for this analysis arose from the fact that in both the Proposal and Rome I the notion of **habitual place of work** is used. The purpose is to establish if the scope and the context in which two acts use the term are consistent with each other.

KEY POINTS

I. The concept of **habitual place of work** is characteristic for Private International Law. It is crucial for determining the protection of mobile workers residing and employed in one member state and working in another member state. Thus determining habitual place of work has always been essential for the protection of posted workers' rights.

II. **The Commission's Proposal of 8 March 2016** constitutes a **clear breach of the Regulation 593/2008 Rome I**. It goes against the very spirit of that Regulation, which is based on the freedom of choice and – in the case of employment contracts - on the protection of workers.

III. **Instead of**, as the Commission puts it, ***'clarifying'*** **the notion of carrying out work in another country in a *'temporary'* manner**, **the Proposal *changes it*** and at the same time ***changes*** **a notion of 'habitual place of work'.**

'Clarifying' means something other than ***'changing'***. Law generally allows for *clarifying* (interpreting) a general provision of one legal act by an another act (a so-called *lex specialis*). However, such interpretation cannot exceed the scope of a given legal institution or its meaning – which happened in the case at issue. The Commission's '*clarification'*, by the proposed art. 2a, **changes**, and **even reverses** some of the Rome I provisions, including the concept of '*habitual place of work'*[1] arising from its art. 8.2.

[1] *'Place in which or, failing that, from which the employee habitually carries out his work in performance of the contract'.*

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IV. **The proposed changes <u>disregard</u>** the existing notion of **'temporary' provision of work**, determined in **recital 36 of Rome I.** However, its definition is purposeful and it is inextricably linked with the notion of *'habitual place of work'*. The latter **has a protective nature**, as it was established to protect the employees from the change of law. Its breach goes to the core of the Rome I.

V. **The proposed changes <u>disregard individual character of employment contracts</u>** and peer-to-peer [*inter partes*] effects of Rome I provisions in that regard.

VI. **The proposed changes breach the freedom to provide services** by deleting the distinction between "posted workers" (art. 56 of the Treaty [TFEU]) and "migrant workers" (art. 45 TFEU), without the legal basis therefor in the Treaty. As such, they introduce equal treatment, characteristic for the latter, 'through the back door', which is contrary to the primary law of the European Union.

Why is it essential for a posted worker to establish beyond doubt his habitual place of work?

The objective of Article 8 of the Rome I is **to secure protection** for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship. In each labour law system there are some provisions which may not be derogated from by agreement. The scope of these provisions however is far from universal. Recital 35 of the Rome I Preamble states that:

> *(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.*

Because **the scope of protective measures vary from country to country**, it would be possible to circumvent this rule simply by choosing the law of the Member State in which the protective measures are weaker. That is why we find the restriction on full contractual freedom to choose the law (Art. 3) when it comes to employment contracts.

> *Art. 8.1. (…) Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law (…)*
> - of habitual place of work (Art. 8.2)
> - of the employer's place of business (Art. 8.3)
>
> unless the contract shows stronger connection with another Member State (Art. 8.4).

Thus there is a cascade of indicators helping to determine which protective measures may not be derogated from by the choice of law to govern the employment contract. In the context of the Revision Proposal it must be noted that only art. 8.2. uses the notion of habitual place of work.

The protective aim of the regulation Rome I *(favor laboratoris)* is visible in the attempt **not to shift the habitual place of work to another member state if the work is carried out there "temporarily"**. First we find such intention in Art. 8.2 in fine:

> *Art. 8.2 (in fine) The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*

> *(36) Preamble:*

(…) work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.

Regulation Rome I clearly defines the notion "temporary" in recital 36. And it does so not by setting a time limit, after which the work may no longer be treated as carried out "temporarily", but by **the intention of returning to work in the country of origin** after carrying out his tasks abroad.

Art. 2a of the Proposal imposes a **fundamentally different criterion of determining where the employee's habitual place of work is**. Namely, the anticipated or effective duration of performing the work in a given Member State. Consequently, **contrary to regulation Rome I, it changes the habitual place of work *ex lege*** also for the worker who is expected to resume his work after completing the task abroad. In this sense it is in clear breach of the Rome I. In the described situation, it will be difficult to call Art. 2a of the Proposal *lex specialis* to Art. 8 of Rome I as it does not make the provision of Art. 8 clearer. It is contrary to the protective aim of Art. 8.

It goes without saying that the change of habitual place of work is not only legally possible but can be in practice observed after much shorter period of time then 24 months. Namely it will occur in every instance when the work in another Member State is permanent and the worker has no intention (or practical possibility) of returning to the country of origin to resume work. This is characteristic for migrant workers exercising the free movement of workers.

Practical implications of Article 2a

Apart from logical inconsistency, there are important practical implications of changing the habitual place of work to another the Member State.

Which (set of) rules is applicable to the posted worker?:

- If anticipated duration of his work is longer than 24 months?
- If anticipated duration of the same work at the same place (but carried out by subsequent posted workers, whose effective duration is between 6 and 24 months)?
- In a complex situation where is the habitual place of work of a single worker posted subsequently to two different Member States, when in both cases anticipated duration of work exceeds 24 month in each Member State, but he only works for 7 months in each of the two Member States.
- When neither expected nor effective period of posting exceeds 24 months the notion of the habitual place of work used in Rome I and in the Proposal remain consistent.
- When the expected or effective duration of posting exceeds 24 months, the habitual place of work according to Rome I remains in the sending Member State, whereas according to the Proposal the habitual place of work is in the receiving Member State.

In Rome I the concept of habitual place of work is used as a protective measure to prevent posted worker from losing the protection afforded to him by the law of the sending Member State.

In the Proposal the concept of habitual place of work is also used as a protective measure to prevent posted worker from losing the protection but afforded to him by the law of the receiving Member State.

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Conclusion

The greatest value of the right to choose the law applicable to employment contract envisaged in Art. 3 and Art. 8 of the Rome I lies in the fact that it opens possibility of choosing the law which both parties know best and feel comfortable with. In most cases for the posted workers it is going to be the law of the sending state, which (also in most cases) will be the same as the country where they *habitually carry out work*. Forcing a worker to change his habitual place of work goes against this feeling of security resulting from the fact that no matter which law is applicable the protection is guaranteed by the best known law. The Parties of the Rome Convention followed by the European Parliament and the Council seem to intentionally put the feeling of security and certainty of law above the real level of protection. This feeling of certainty may be replaced by insecurity arising from the fact that the posted worker will not know his rights of a protective nature embeded in the legal system of the receiving Member State. Moreover it is not certain if he may be called a "posted worker" if the period of posting is expected to exceed 24 months. Would it not be from day 1 of his task that the receiving Member State becomes his habitual place of work? And if it does, is he working there *temporarily*? Which brings us to the last fundamental question: **Can he still be covered by the Posting of Workers Directive?** If the receiving Member State becomes his *habitual place of work* (normal, permanent), it is impossible to assume that he works there *temporarily* (for a limited period). According to the definition in Art. 2 PWD:

> *Art. 2.1. A posted worker is a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.*

Thus when expected (or effective) period of posting exceeds 24 months posted worker falls out of the scope of application of the PWD and consequently becomes a migrant worker.

The notions of temporarily and habitually are antonyms. Should the worker be posted*, for a limited period,* to the Member State where he *habitually* carries out his work, we would call it a "U-turn posting". Such practice under current rules is considered as fraud. After Art. 2a of the Proposal is accepted such U-turn posting will become not only acceptable, but fueled by the directive itself. The inconsistency between Rome I and the Proposal appears when regardless of the duration of posting (even exceeding 24 months) the worker is expected to resume work in the sending country after completing the task as a posted worker.

The effect of extending the scope of provisions of the labour law of the receiving Member State applicable to posted workers would be much better achieved with the extension of the catalogue of Overriding Mandatory Provisions from Art. 3 PWD. In our opinion the full effect aimed at by the Commission in Art. 2a., i.e. the application of all labour law provisions of the receiving ember State could only be achieved if Rome I was amended in such way that the notion of temporarily is explained by the number of months and not by the intention of the worker to return to the sending country. Such provision however, just like the proposed Art. 2a would be in breach of Art. 56 TFUE.

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