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## Effective prevention of circumvention the provisions of posting of workers with the usage of letter-box companies

Letter-box companies are one of the most problematic violations of the provisions on the posting of workers in the framework of the provision of services. Their detection is difficult, because the law lacks an effective definition that would enable the competent authorities to objectively and effectively distinguish them from legally operating companies.

### Features of legal activities

A person who works as an employed person in the territory of a Member State on behalf of an undertaking which **normally carries out its activities** in that Member State, and who is sent by this employer to another Member State to perform work there for this employer, remains subject to the legislation of the home Member State (the country from which he/she was posted).

In determining whether the undertaking **normally carry out its activities in the posting State** various criteria must be taken into account. They are the following factors:

- the place where the posting company is headquartered
- the place where posted workers are recruited
- the place where the majority of contracts with clients are concluded
- turnover achieved by the posting undertaking in the posting State
- the number of contracts fulfilled by the posting undertaking in the posting State
- whether the undertaking is posting its actual employer

### Circumvention

A typical example of circumvention in **normally carrying out activities in the posting State** is a situation where a company operating in a State with high labor costs sets up a company in a State with low labor costs, but with the major aim to employ and post workers to the parent company.

This is confirmed by the opinion of the Committee of the Regions (2013 / C 17/12), which states that one of the most common mechanisms to circumvent the provisions of posted work are:

- **fake companies** registered in a country that supposedly is the posting State;
- common method used by some large corporations is to create **platforms of posted workers** in the form of subsidiaries registered in the country of tax and social legislation favorable from a financial point of view, which then post workers.

Examples:

- a) A German construction company "X" SERVICE GmbH, registered and operating in Germany, pursues a contract to build a school. As part of the contract it uses the services of the subcontractor "X" SERVICE POLAND Sp. z o. o., which conducts various construction works. The registered owner and a board member of both companies is the same person.
- b) A large IT technology enterprise "Y" SERVICE FRANCE SARL, employs 200 software developers in its office in Paris. They are assisted by the company "Y" SERVICE PORTUGAL SA, to which the software development service is outsourced by "Y" SERVICE FRANCE SARL. The former is a consolidated subsidiary company. "Y" SERVICE PORTUGAL S.A. makes only 20% of turnover in the area of Portugal. The remaining 80% is achieved from services delivered for "Y" Service FRANCE SARL.

Analysis:

It is necessary to distinguish the features of **undertakings carrying out normal economic activity on a commercial basis** from fake companies serving only as platforms for posting workers.

Sample characteristics of a company carrying out normal economic activity on a commercial basis:

- has more than one client;
- its clients in the host country change (some contracts end, others are concluded);
- it promotes its brand, advertises its services and conducts active sales in the State of employment.

Sample characteristics of a fake company operating on the basis of a posting platform:

- provides services to one or a group of permanent contractors;
- is linked personally or financially with their foreign contractors;
- the structure of the undertaking's revenue outweighs sale to one or a group of permanent clients in the receiving State;

- the undertaking does not promote its brand, it does not advertise its services and does not have an active sales in the posting State.

Proposed solution:

In order to determine whether the posting undertaking is not a letter-box company, it should be determined if:

- a company exclusively or predominantly posts workers to related entities;
- or
- the whole or a predominant part of turnover in the receiving State is obtained by providing services for related entities.

Those criteria, of course, cannot replace the currently used criteria characterizing the activities carried out normally in the posting State. They are only to supplement them.

Advantages:

- quick and easy verification by the competent authority certifying A1 form, on the basis of the information given by undertaking in the application;
- objective evaluation criteria on the basis of quantitative analysis provided by the invoices and contracts;
- circumvention possible only through very complex mechanisms;
- the solution is based on the definition of *financially or personally related entities* set out in tax legislation;
- can be reviewed back on the basis of accounting records;

Disadvantages:

- lack of a clear interpretation of the term "substantial activity";
- possibility of circumvention by establishment of chains of many undertakings or establishment of undertakings run by substituted persons

**Summary:**

The proposed criterion seem to be an objective, effective and relatively simple in use additional tool to combat posting of workers by the letter-box companies. In particular, this refers to the most common fake companies and platforms for posting workers.

A major advantage of this criterion is its accurateness. It seems impossible that in the normal free market mechanisms, an independently operated undertaking which provides services exclusively or predominantly to related equity/equities (e.g. a parent company), could be considered to “normally carry out its activities in the posting State”.

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