Effective prevention of circumvention the provisions of posting of workers with the usage of letterbox companies

Letterbox 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
Social security of an employed person shall be subject to the legislation of a **single** Member State only.

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 (post) by this employer to another Member State to perform work there for this employer, remains subject to the legislation of the home Member State (i.e. 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 employee.

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/C17/12), 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 construction company "X" GmbH, registered and operating in Germany, signed a contract to build a new school in Berlin. It subcontracted various construction works to "X" POLAND Sp. z o. o. <u>The registered owner and a board member of both companies is the same person.</u>*

b) *An IT company "Y" SARL employs 200 software developers in its head office in Paris. It outsources various software development services to "Y" PORTUGAL SA. "Y" PORTUGAL SA is a subsidiary of "Y" SARL. All of its income in Portugal is generated <u>by services provided for its parent company "Y" SARL.</u> "Y" PORTUGAL SA. also posts workers to its parent company "Y" SARL.*

Analysis:

It is necessary to find practical features that distinguish **undertakings carrying out normal economic activity** on a commercial basis from bogus companies operating as **posting platforms**.

Sample simple characteristics of a **normal undertaking** carrying out its economic activity on a commercial basis:

- it has more than one client;
- its clients change (new contracts are concluded, others are terminated);
- it promotes its brand, advertises and pursues active sales of its products or services in home Member State.
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Sample characteristics of a **bogus company** operating as a posting platform:

- provides services to one (or a group of) permanent client(s);
- is linked personally or financially with its client(s);
- its income in the host Member State is generated by sales to one (or a group of) permanent client(s);
- it does not promote, nor advertise or pursues any active sales in home Member State.

Proposed solution

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

- a company exclusively or predominantly posts workers to related entities; or
- the whole or a predominant part of income in the host Member State is obtained by providing services for related entity(ies).

Those criteria, of course, cannot replace the currently used criteria characterizing the activities carried out normally in the home Member State. They shall supplement them.

Advantages:
- quick and easy verification by the competent authority certifying A1

form, on the basis of the information given by undertaking during the application process;
- 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:
- does not solve a problem of 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 letterbox companies. In particular, this refers to the most common abuse, i.e. posting platforms.

A major advantage of this criterion is its practical accuracy. It seems impossible that, taking into account normal free market mechanisms, an independently operated undertaking which provides services exclusively or predominantly to related entity(ies) (e.g. a parent company or subsidiary), could be considered as "normally caring out its activities in the host Member State".

Authors:

Stefan Schwarz; stefan.schwarz@inicjatywa.eu
President of Labour Mobility Initiative Association

Marek Benio, PhD; marek.benio@inicjatywa.eu
Vice - President of Labour Mobility Initiative Association
Cracow University of Economics