Labour Mobility Initiative

17 March 2017

Amendment proposal for Article 2a of a Directive amending Directive 96/71/EC on posting of workers [COM(2016) 128]

As representatives of the **Labour Mobility Initiative Association**, a non-governmental think tank involved in the matters of intra-European work mobility, regarding our expertise in the academic and practical field of the issue, after the analysis of the concept of *"habitual place of work"* in the context of regulation Rome I (art. 8) we have come up with the amendment suggestion to the Commission's proposal concerning the amending of Directive 96/71 (see below).

On one hand it **delivers the political goals** to time limit postings by triggering change of the *"habitual place of work"* for workers posted for the periods longer than 24 months. On the other hand, it **addresses concerns of the opponents of the Commission's proposal**, who emphasise that it is unclear and inconsistent with the EU law, especially regulation Rome I and regulations on coordination of social security systems, and violates the worker protection principles grounded in it and in the ECJ / CJEU jurisprudence.

Text of the Commission's proposal	*Text of the recommended amendment*
~~*Article 2a*~~ ~~Posting exceeding twenty-four months~~ ~~1. When the anticipated or the effective duration of posting exceeds twenty-four months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out.~~ ~~2. For the purpose of paragraph 1, in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, with regard to workers that are posted for an effective duration of at least six months.~~	*Article 2a* Habitual place of work A Member State to whose territory a worker is posted shall be deemed to be a country in which his work is habitually carried out if he is subject to social security legislation of that country.

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Justification

The European Commission through its proposal aims to align the provisions on posting of workers with the provisions on coordination of social security rules[1]. For this purpose, **the Commission used the rule which has been functioning** within the coordination of social security systems in Regulation 883/2004 (see below) and introduced it in the Article 2a of its proposal.

> *Article 12*
> ***Special rules***
>
> *A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.*

However, duplicating that rule to the Posting of Workers Directive will result in the **parallel existence of confusingly similar rules**, interpreted **separately** for the purposes of labour law and social security coordination. This will lead to unprecedented legal uncertainty and chaos, including the situations when:

1. A posted worker will be subject to a social security system of a sending Member State, but at the same time, on the basis of the Commission's proposal his "*habitual place of work"* will be in a receiving Member State and therefore he will be subject to labour law provisions of that State. **This will *de facto* create a new phenomenon of "half-posted workers".**

2. On the basis of the Commission's proposal the *"habitual place of work"* of a posted worker for the purpose of labour law in many cases will be in a different Member State than the one determined according to regulation Rome I and the one, for the purpose of coordination of social security rules. This will lead to a unprecedented legal confusion for businesses, workers and competent institutions.

3. For workers repeatedly posted for longer periods to two or more Member States, **many countries will be considered their *"habitual place of work"* at the same time, but none of them will be the country determined according to regulation Rome I**. This will result in inconsistency within various provisions of the EU law.

4. A truck driver running the same route for years will **have his *"habitual place of work"* in each country through which he passes**, if he stayed on its territory for a total of 24 months or more. Even if he did not, one can argue that **another "posted" driver was carrying out the same work in the same place, because he was running the**

[1] *Cf. Commission Staff Working Document Impact Assessment, SWD/2016/052 final, p. 16.*

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same route as a truck driver. At the same time, in accordance with regulation Rome I driver's *"habitual place of work"* will be in his country of origin. By that very fact the Commission's proposal distorts the concept of *"the habitual place of work"*, which is based on the principle that it **can be only in one place (i.e. country) at the same time** and that the "*temporary*" provision of work in another country must not change it.

One should bear in mind that in case of carrying out work in another Member State which has a temporary character (e.g. as a posted worker) changing legislation which governs both the rules of labour law and social security must be avoided **for the sake of clarity of law and for the protection of workers**[2]. Moreover, regulation Rome I clearly defines in which country a worker "*habitually carries out his work"*, as opposed to countries in which he carries it out "*temporarily*". This principle is based on the strongest connection between a worker and his or her country of origin.

Triggering frequent changes of *"habitual place of work"* is against the provisions of regulation Rome I and violates the worker protection principles grounded in it and the ECJ / CJEU jurisprudence. As a result of the Commission's proposal, the Member State in which posted worker ***temporarily*** carries out his work may become his "***habitual place of work"***. It is a matter of a simple logic to say that the place of work can be either temporary or habitual. Never both.

Conclusions

The amendment we suggest – similarly to the Commission's proposal – is based on **aligning the provisions of the Posting of Workers Directive with the provisions on social security coordination**. However, instead of duplicating it, it **refers to it directly**. This guarantees sound protection to posted workers while **keeping the rules simple and consistent**, which is what stakeholders expect, including employers and sending Member States.

Simple and clear rules would contribute to the **better understanding** and **improving public perception of posting**, which is now undermined by the ambiguity of the current rules that make difficult to distinguish posted workers from self-employed persons, permanent migrants and undeclared workers. The Commission's proposal would only deepen this problem through **a new phenomenon of "half-posted workers"**.

Please, take a moment to consider this amendment as the first one which could lead the stakeholders and policymakers to compromise in this complicated and ever controversial issue. We are ready to answer all the questions you might have regarding this amendment.

Stefan Schwarz
President

dr Marek Benio
Vice-president

[2] *Cf.. e.g. ECJ judgement in C-64/12 Schecker v. Boedeker, published in the electronic Reports of Cases (Court Reports - general).*

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KEY POINT SUMMARY

the Commission's proposal	*the suggested amendment*
• duplicates the provisions on social security coordination without their clarification; • leads to a new ambiguous phenomenon of "half-posted workers" through inconsistency within various provisions of the EU law, i.e. Rome I and 883/2004 regulations; • leads to the situation when various competent institutions will determine the "*habitual*" and "*temporary*" place of work of a posted worker irrespective of each other in parallel for the purpose of labour law and social coordination; • leads to the situation when at the same time one place of work of a posted worker may be considered "*habitual*" and "*temporary*" or/and more than one place of work can be considered "*habitual*", which is a violation of the worker protection principles grounded in regulation Rome I and the ECJ jurisprudence;	• directly refers to the provisions on social security coordination which are thoroughly clarified by the Administrative Commission for the Coordination of Social Security Systems; • delivers the political goal of introducing a 24-month time limit for posting with replacement restriction; • constitutes that the "*habitual*" and "*temporary*" place of work of posted worker both for labour law and social coordination is determined by one competent institution by issuing PD A1; • makes the extension of the 24 months' period of posting possible with the consent of the receiving Member State; • keeps various provisions on posting of workers simple and consistent

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