

Posted or sent? in the context of the revision of social security coordination regulations

17 January 2018, Kraków

Stefan Schwarz,
Marcin Kiełbasa PhD

Summary

Why did the European Commission propose a new term of a “sent” person in addition to the existing one of a posted worker? And why does it seem to be necessary? This short article provides the in-depth comparative analysis of the notions used in Directive 96/71/EC and Regulation 883/2004/EC. Its result shows that the EU legislator uses in both documents the same notion of a “posted” while having at first sight similar, yet different situations in mind. This obviously must have led to confusion. Not only legal one, but also the one that is widespread and reflected by public opinion and the media. The current revision process of the coordination regulations seems to be a good opportunity to fix this inconsistency.

Current state of play

The notion of a “posted” worker or person is currently used both in Directive 96/71/EC and Regulation 883/2004/EC. The Directive expressly defines what a “posted” worker means, while the Regulation uses the notion of “posted” persons. The Directive determines labour law rules that apply to a posted worker. The Regulation determines the applicable social security system. Both the Directive and the Regulation constitute a legal situation of a posted worker during a specific posting period. It depends on many various factors related to the situation of the employer, the worker himself and even other posted workers who previously carried out the same work in the same place.

Directive 96/71/EC

“Posted” worker is defined as:

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 [*when his employer*]:

(a) posts him to the territory of a Member State on his account and under his direction, **under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State**, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(b) posts him to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(c) being a temporary employment undertaking or placement agency, hires out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

Regulation 883/2004/EC

“Posted” person is considered as:

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.

[or]

a person who normally pursues an activity as a **self-employed person** in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months.

[or]

a person who **normally pursues an activity** as an employed person (self-employed person) **in two or more Member States**.

The above texts clearly show that the EU legislator uses in both documents the same notion of “a posted” worker or person while having in mind **different situations**. To illustrate this inconsistency, we shall provide some practical cases in which a person carrying out work in a Member State other than the one in which he or she is

employed and normally works is treated as a posted worker only by the Regulation and not by the Directive:

- a) *A French automotive company has a subcontractor in Slovenia. The French company sends its engineers to conduct compliance inspections in a Slovenian plant. However, their work is provided to the French company and there is no service provided to the Slovenian company;*
- b) *A scholar employed at a Swedish university goes on a one-year research stay to Italy;*
- c) *A Slovakian ski instructor employed by a Slovakian tourist company provides skiing lessons in the Austrian Alps to Slovakian tourists, clients of that tourist company;*
- d) *A German project manager is sent by her German employer to an international trade fair in France, where she oversees an exhibition stand of the employer;*
- e) *A Polish construction company signed a contract to build a school in Antwerp. It subcontracted construction works to another Polish company. The latter company sends workers to Antwerp under the contract concluded with the Polish construction company, there is no service provided for any undertaking abroad.*

The above exemplary cases can be divided into three specific groups:

	“Posted” worker under the Directive	“Posted” person under the Regulation
A worker carries out work in the territory of a Member State other than the State in which he normally works, but there is no service provided abroad for any other party	✗	✓
A self-employed person carries out work in the territory of a Member State other than the State in which he normally works	✗	✓
A worker carries out work in the territory of a Member State other than the State in which he normally works, but the service is provided for a party which is not operating in that Member State	✗	✓

The most important difference compared to the Regulation is an additional criterion in the Directive that requires that it must be a service provided for a company or an individual operating in a Member State other than the one in which posted worker normally works. It significantly limits the subjective scope of the Directive.

Legal and public confusion

The notion “posted” used by the Regulation is much wider than the one used in the Directive. Not all “posted” persons under the Regulation are “posted” workers under the Directive. Some “posted” workers within the meaning of the Directive remain “posted” despite the fact that they are covered by a social security system of a

Member State other than the one sending this person. Others who are “posted” under the Regulation and obtain a PD A1 are not “posted” in the meaning of the Directive. This fact causes confusion. Not only the legal one, but also the one that is widespread and reflected by public opinion and the media. For example, in the common perception, broadly all foreign workers from low-wage Member States who perform work in high-wage Member States, particularly in construction sector, and are not employed by domestic companies, are posted workers¹. Furthermore, the EU legislator within the Regulation confused posted workers with posted self-employed persons, who are not covered by the Directive. It created an absurd situation where *de facto* not all “posted” persons according to the Regulation are “posted” workers according to the Directive and not all persons considered “posted” according to the Regulation are even workers, as some of them are self-employed persons or persons not qualifying as “workers” under the definition that applies under the law of the Member State to the territory of which the person is posted. For the concept to be well understood by the public, the worker must be classified as posted or not. One should not be a “partly-posted” or a “semi-posted” person.

New notion of a sent person

The Commission seemed to have noticed the conceptual inconsistency between the Directive and the Regulation and proposed an additional notion of a “**sent person**” in its proposal for the revision of the Regulation. The notion of “sent” persons constitutes the broadest concept, containing posted workers, self-employed persons and others who are covered by the Regulation only.

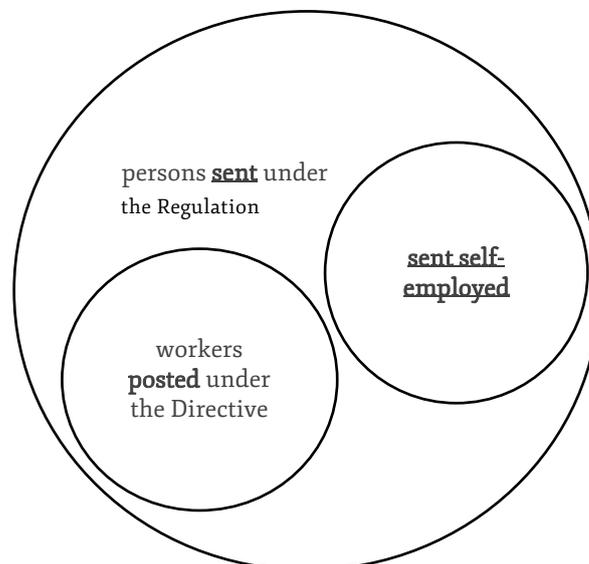


Figure 1. Mutual relationship of concepts of posted workers and sent persons

¹ A striking example was the French television program “Cash investigation”, entitled “Salariés à prix cassé : le grand scandale” [“Cheap workers: the great scandal”], aired at France 2 on 23 March 2016. It concerned *inter alia* Romanian construction workers, working at LNG Terminal in Dunkirk. They worked 11 hours a day including Saturdays, earned less than the minimum rate of pay and were hired by an Italian company, through its letter box subsidiary in France. Some of those workers did not receive their salary payments at all. Despite the fact that this is a clear example of a serious crime of human-trafficking with involvement of intra EU-migrant workers and has nothing in common with posting of workers, the situation was described as “an example of abuse in the posting of workers” and “an example of life-threatening exploitation of posted workers”.

EPSCO in its partial general approach adopted on 23 October 2017 follows the Commission's logic and goes even further. In its Art. 12(1) only the term "sent" persons is used, since posted workers are the subcategory of sent workers; so in fact there is no need to specify them separately. This renders the provision simpler, but leaves a mutual relation between the two notions unexplained. This can be solved in a different way, i.e. by addressing it in the recitals.

What seems to be the most detrimental would be to use in the Regulation only a notion of "posted" worker within the meaning of the Directive. This would *de facto* exclude from the legal framework all employed and self-employed persons who carry out work in the territory of a Member State other than the State in which they normally work, but provide no service abroad for any other party or the service is provided for a party that is not operating in that Member State.

Recommendation

In our opinion, the introduction of a new notion of a "sent" person in the revised Regulation, as the broadest concept, containing i.e. posted workers, is rational and helps to solve the existing legal and public confusion, and as such contributes to a better understanding of law.

Authors

Stefan Schwarz President of Labour Mobility Initiative

Marcin Kielbasa PhD, legal advisor of Labour Mobility Initiative

Comments are welcome

marcin.kielbasa@inicjatywa.eu

Labour Mobility Initiative Association

Plac Wolnica 13/10, 31-060 Krakow, Poland

www.mobilelabour.eu

contact@inicjatywa.eu

© 2018 Labour Mobility Initiative Association

Reproduction is authorized provided the source is mentioned.