

Limited cumulative period of posting in the revised Posting of Workers Directive – in search of a legal justification

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Stefan Schwarz
Marcin Kiełbasa, PhD
Marek Benio, PhD

Summary

Posting of a worker is temporary by its nature. So, in the targeted revision of the Posting of Workers' Directive, the EU legislator decided to impose a definite time limit for duration of a posting. Political compromise has determined that it has to be just 12 months with possible extension to 18 months. After this period almost all host Member State labour law regulations will apply to the posted worker. This time limit is, according to the EU legislator, a protective measure "justified by reasons of public interest". Not everyone has noticed that it actually applies not only to the period of posting of a single worker, but cumulatively to all posted workers performing the same task under the same address, so in certain circumstances they will also apply to a worker who has been posted for a few weeks. In this paper we undertake to answer whether this provision can really be "justified by reasons of public interest" in line with the EU law and CJEU rulings.

Boundaries of the freedom to provide services

In accordance with the Treaty, further specified by the Directive 2006/123, known as the Services Directive¹, the right of undertakings to provide services in a Member State other than that in which they are established shall be respected. With one exception. This principle does not prevent Member States from imposing requirements with regard to the provision of a service activity, where they are *justified for reasons of public policy, public security, public health or the protection of the environment*. Nor shall that Member States be prevented from applying their *rules on employment conditions*, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work².

However, the above requirements shall always respect the following conditions:

- a) **Non-discrimination:** requirements must be neither directly or indirectly discriminatory according to nationality or location of the registered office.
- b) **Necessity:** requirements must be justified by an overriding reason relating to the public interest. More specifically “overriding reason relating to the public interest” means any reasons “recognised as such in the case law of the Court of Justice including those which it goes on to list”³.
- c) **Proportionality:** requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain the objective and it must not be possible to replace those requirements with other, less restrictive measures.

Importantly, the above mentioned *rules on employment conditions* do not mean the labour law as a whole⁴.

Applicable labour law for workers posted or sent abroad

The rules on the choice of applicable labour law for posted workers are provided by the Rome I Regulation⁵. First of all, Rome I prevents the situation where workers posted or sent abroad are deprived of the protection granted to them by the law of a sending Member State. The protective aim of Rome I Regulation (*favor laboratoris*) is visible in prohibition of changing worker’s habitual place of work to another Member State if the work is carried out there *temporarily*. We find this in Art. 8.2 *in fine*:

“(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.”

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36-68.

² Article 16 of Directive 2006/123/CE (‘Freedom to provide services’).

³ These are ‘public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives’ - see the Opinion of the Advocate General Cruz Villalón in C-357-359/10 *Duomo Gpa Srl*, para 39.

⁴ Opinion of the Advocate General Wahl in C-33/17 *Čepelnik d.o.o. v Michael Vavti*, para 50.

⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

Rome I Regulation defines the notion of *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 back to work in the country of origin after carrying out the tasks abroad:

“(…) 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.”

The greatest value of freedom of choice of law applicable to employment contract, expressed by Art. 3 and Art. 8 of Rome I Regulation, consists in the fact that it makes possible to choose the law which both parties know best and feel comfortable with. In most cases for the posted workers it is the law of the sending Member State. This freedom of choice is to be respected as far as possible⁶.

However, a derogation from the freedom of choice of law in favour of the law of the host state is admissible, but **only** on the basis of *public policy and overriding mandatory provisions*⁷.

Temporariness of the freedom to provide services

In respect of the duration of the activity, it should be borne in mind that the concept of temporary provision of services within the meaning of the Treaty includes also those services “which are provided over an extended period”⁸. Only “an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, does not fall within the Community provisions concerning [temporary] provision of services”⁹.

In other words, time is not crucial in determining whether a service provided abroad is temporary or not. Time may be one of the premises, but never the only one.

Temporariness of the posting of workers

Posting of a worker has always been limited in time. The reason is that it is supposed to last only for the time necessary to deliver a service abroad. Some services take longer, others shorter time to be completed. This is the reason why the maximum period of posting has never been defined by a precise time limit.

Regardless, in 2016 the European Commission noticed that longer postings lead to the creation of a “*link*” between a posted worker and the labour market of a host Member State. Its creation would justify, by reasons of *public interest*, subjecting such worker to the host Member State’s labour law after certain time.

In the consequence of the above, the European Commission in its proposal for targeted revision of the Posting of Workers Directive¹⁰ introduced a **game-changing provision** according to which after 24 months of a posting

⁶ Opinion of the Advocate General Wahl in C-396/13, *Sähköalojen ammattiliitto ry*, para 42.

⁷ Rome I Regulation, rec. 37.

⁸ Judgments of the CJEU in C-215/01 *Schnitzer* [2003] ECR I-14847, para 30 and 31. See also judgments in C-171/02 *Commission v Portugal* [2004] ECR I-5645, para 26; C-208/07 *von Chamier-Glisczynski* [2009] ECR I-6095, para 74; Case C-97/09 *Schmelz* [2010] ECR I-10465, para 42; and Case C-458/08 *Commission v Portugal* [2008] ECR I-11599, para 85. Cf. also the Opinion of Advocate General Cruz Villalón in C-357 - 359/10 *Duomo Gpa Srl*, para 33.

⁹ Judgments of the CJEU in 196/87 *Steyman* [1988] ECR 6159, para 16; *Schnitzer*, para 27 to 29; and in C-456/02 *Trojani* [2004] ECR I-7573, para 28.

¹⁰ Already published as Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173/16 of 9 July 2018, hereinafter also as ‘revised PWD’.

period almost all provisions of the host Member State's labour law would apply. Later, the political compromise determined that the time limit should be shortened to 12 months with a possible extension to 18 months.

It is worth noting, that in this case the EU legislator has taken this protective function so far that it has **de facto changed labour law applicable to such a worker**. It does not matter which law the parties chose. Thus, the EU legislator has equated workers posted for longer periods with migrant workers. This is unprecedented.

Selling off concerns about restricting the right of service providers to exercise the freedom to provide services, the EU legislator explains that better protection of posted workers is actually necessary to safeguard this freedom, so it is *justified by overriding reasons of the public interest* and it is proportionate and necessary [to protect workers]¹¹.

What's meaningful, the **EU legislator does not mention a word about possible economic motives of such restriction**. In that regard, it must be borne in mind, that the period of 12 months with possible extension to 18 months is a pure political compromise, which **hasn't been based on any empirical study**.

Therefore, it may be doubted whatever this measure genuinely pursues the objective of protecting workers, which has created a "*link*" with local labour markets, because **no one** in the legislative process had even tried to determine after what time the *link* is actually formed.

Cumulative period of postings

One can argue that the provision according to which a worker posted for a long period creates a "*link*" with the local labour market and, if so, subjecting them to local labour law is *justified*.

However, the most important is, that the EU legislator decided to go even further and introduced an additional provision which extends the time restriction not only to a single worker, but **to cumulative period of posting of all workers carrying out the same task in the same place**. In many cases it may *de facto* equal to the total time of a service provided in the same place.

In this case, it is **difficult to find the argument that the provision is in no case about protecting a workplace** in the receiving Member State against being occupied by foreign workers.

The legislator does not explain in what way restricting cumulative period of posting is *justified by reasons of public interest*, therefore it seems appropriate to maintain the argumentation applied in the case of long-term postings.

Time-limit for the cumulative period of postings will result in **treating workers posted even for few days**, whose period of posting, counted cumulatively with other postings exceeded 12 months, **as if they were posted for a long period**. Though, in such case, there is no "*link*" between such worker and the labour market of a host Member State at all. Moreover, posting is without any doubt *temporary*.

A question arises then, whether a time-limiting cumulative period of successive postings complies with the Treaty and the CJEU rulings? Or, in other words:

What reasons of public interest justify applying to a worker posted for few days almost all regulations of the host Member State's labour law?

¹¹ *Tiret* 10 of the preamble to Directive 2018/957/EU.

The CJEU case law states that such change in legislation (which governs both the rules of labour law and social security) should be avoided for the sake of clarity of law and **for the protection of workers**¹².

Moreover, Rome I Regulation clearly defines in which country a worker *habitually carries out their work*, as opposed to countries in which they carry it out *temporarily*. This principle is based on the strongest connection between a worker and their country of origin. Breaking this connection **will lead to "disembedding" of a posted worker, which is contrary to their protection**¹³.

Applying almost all regulations of host Member State labour law to workers posted for short periods, but to the same place where previously another posted worker(s) carried out the same task, seems to have purely economic aim, as it does not result from the situation of posted workers themselves, but only from the duration of the service.

And yet, CJEU held on a number of occasions that **"an economic aim" cannot constitute a reason justifying the restriction on freedoms of the Single Market**¹⁴. According to the EU law doctrine, the Court may also control if the expressed aim is genuinely economic or whether, viewed objectively, the rules actually serve another legitimate objective¹⁵. However, in the revised PWD **this will be impossible to ascertain**, as no explanation in this regard is offered by the EU legislator.

Conclusions

The EU law enables the freedom to provide services to be restricted to protect workers under very specific conditions, but it does not allow to exceed the scope of this restriction to pursue economic aims. However, the purpose of Article 3 (1a) of the revised Posting of Workers' Directive seems to be to discourage service providers from scheduling tasks in such a manner that they last over 12 months in one place, even though the Treaty guarantees them such possibility.

Article 3 (1a) seems not to comply with the principle of proportionality, because in the case of workers posted for a short period of time, it goes beyond the purpose, which, according to the Commission, is to extend the scope of host country labour law provisions to workers posted for a long period of time, for whom a "link" with the labour market of the host country arose.

It is not difficult to imagine that Article 3 (1a) of the revised PWD may discourage posted workers from defending their rights before a labour court in a host Member State, both because they do not know its law and also due to ambiguities concerning the relevant jurisdiction.

Therefore, Article 3 (1a) of the revised PWD seems to directly violate freedom to provide services since the aim of the provision at hand is not to protect workers. In case of workers posted for a short time, it simply hinders or even prevents them from using the protection thus provided by Rome I Regulation.

Given the above, the implementation of the revised Posting of Workers Directive into national laws of the EU countries will *de facto* cause the situation where the implemented provisions will infringe, by their very nature,

¹² Judgement of the CJEU in C-64/12 Schecker v. Boedeker.

¹³ A.A.H. van Hoek, *Re-embedding the transnational employment relationship - can the Commission proposal deliver?*, Amsterdam Law School Legal Studies Research Paper No. 2016-69; p. 3, 6 et seq.

¹⁴ Judgments of the CJEU in C-398/95 SETTG, C-347/09 Dickinger.

¹⁵ C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford 2013, s. 533.

the protective measures of the Rome I Regulation and the case law of the Court of Justice of the EU on freedom to provide services.

To sum up, this provision violates the Treaty, introduces an unprecedented incoherence in European law and will have a negative impact on the situation of posted workers, whom it was meant to protect.

Authors

Stefan Schwarz, President
Marcin Kielbasa PhD, Legal Advisor
Marek Benio, PhD, Vice-President

Comments are welcome

marcin.kielbasa@inicjatywa.eu

Labour Mobility Initiative Association

Plac Wolnica 13/10, 31-060 Krakow
www.mobilelabour.eu

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