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Posting of Workers in the EU

I. Introduction

The EC Directive 96/71[1] on posting of workers is obviously more important for countries with a huge influx of foreign service providers (such as Germany) than it is in other parts of Europe. On the other hand, countries interested in furthering their service – providing undertakings might find it relevant too, as this Directive tries to balance the economic interests of sending and receiving countries alike. It intends to further the transnational provision of services in a "climate of fair competition", – that is to be understood as guaranteeing both freedom to provide services and preventing social dumping. From a political standpoint, this duality of purposes brings about a certain ambiguity. On the one hand, the directive intends to create worker protection by guaranteeing a person sent out to fulfil his contractual obligations abroad a standard of minimum working conditions. This standard should be characterised by conditions at least partially comparable to those given to nationals of the host country, aiming to ensure comparable working conditions for workers at the same workplace. On the other hand, the Directive wishes to promote the transnational provision of services and facilitates cross-border competition. At least in principle, this established allows service providers to compete with companies situated in the receiving country by undercutting prevailing terms and conditions in the labour market of the host State. Then again, such economic freedom has been restricted explicitly by the Directive for worker protection purposes. In the end, the foreign service provider is bound only by a rather limited number of provisions in the host country which set mere minimum standards, not replicating the level of working conditions that applies to service providers situated in the host country. Additionally, a foreign service provider is almost completely exempted from the industrial relations in that country. The ambiguity of aims is responsible for difficult, sometimes even contradicting standards which have been deduced from the provisions of the Directive. The tools for the EU to achieve this duality of goals are to somehow co-ordinate Member States' legislation on the one hand and to lay down in this Directive so-called "hard core"[2] rules of the host country which undertakings must respect mandatorily when assigning their employees to work in that State.

The **material scope** of application of this Directive relates to undertakings established in one Member State which post workers to the territory of another State. Posting can come in one of three forms:[3]

- services provided under a contract concluded between the undertaking which posts workers and the recipient of the services provided,
- posting workers to an undertaking owned by the group of undertakings which provides services ("intra-group mobility"),

[1] Official Journal 1997, L 18 p. 1.
[2] Recital 14 Directive 96/71 EC; Art. 3 I Directive 96/71 EC.
[3] Art. 1 I Directive 96/71 EC.

- posting by a temporary employment agency to another undertaking operating in the host country, as long as the worker remains employed by the agency during assignment.[4]

The applicability of the Directive to all three forms depends on the existence of an ongoing employment relationship between the posted worker and the service providing undertaking which is established in a Member State other than where the service is provided (cross-border-assignment).

The **personal scope** of the Directive relates to the notion of "workers", for which the Directive itself does not provide a definition. Instead, the definition has to be taken by the relevant law of the host State. Quite different from Regulation 1408/71/EC[5] on Social Security, it is for the receiving State – instead of the sending State – to define whether a person is a worker or self-employed. This allows the host State to secure minimum working standards without being hampered by circumventive measures by mock self-employed persons. Due to such different approaches between labour and social security rules, it may very well happen that a posted worker would be regarded as self-employed for social security matters and as employee with regard to labour conditions. Additionally, a grey area of economically dependent working persons emerged who cannot clearly be sorted into the traditional notions of either employee or self-employed, even if the standards of the host country apply.

As a legal consequence of the applicability of the Directive, the service provider must guarantee posted workers the host country's hard core terms and conditions of employment, whatever law is otherwise applicable to the employment contract. This outcome deviates from the result to be achieved under Conflict of Law-Rules, where the law applicable to the contract would normally remain the sending State's law. Terms and conditions of employment would then be the standards set in the home State, thereby maintaining the lower wages and working conditions of that State as a competitive advantage over undertakings established in the host State. While furthering the goal of freedom to provide services, this outcome could allow deteriorating working conditions in the host country. In order to prevent "social dumping", the Directive need to find solutions different from the application of general conflict of law-rules now enshrined in the Rome I-Regulation.

II. Relationship between the Directive and the Rome I-Regulation[6]

The relevant Regulation (applicable on rules concerning the law of contractual obligations) states as its governing principle the choice-of-law rule for application on contracts, Art. 8 Rome I-Regulation. The basic rule is that a contract is governed by the

[4] *Barnard*, EC Employment Law, 3rd edition 2006, p. 281.
[5] Official Journal 1971, L 149 p. 2.
[6] Official Journal 2008, L 177 p. 6.

law chosen by the contracting parties.[7] Over and above that principle, for labour contracts some special conditions apply. According to those, the choice of law made by the contracting parties must not have overly burdensome consequences for the employee. Effectively, the employee may not be deprived of protection by mandatory rules of the law applicable in absence of such a choice of law. If a worker would have been better protected by rules of that country's law meant to objectively govern the labour relationship concerned, any choice of a different law is invalid in this respect. In a posting situation, this basic rule would not be of much help to the worker, though. It all depends on what set of law in fact is applicable "objectively" to a contract, - and that would be the law of the State where the work is habitually carried out.[8]

According to conflicts- of- law- rules, only one alternative solution remains: Certain mandatory rules of the Member State to where the worker is temporarily posted may be applied no matter which law is otherwise applicable to the contract, Art. 9 Rome I-Regulation. The mandatory rules that may have such an overriding effect are not defined by the Regulation. But the Posting of Workers-Directive designates at Community-level such mandatory rules for trans-border posting situations[9] and the Regulation explicitly states that it does not interfere with the Directive. This has the effect, that the hard core provisions of the Directive are applicable to a labour contract of posted workers independent from the law governing this contract otherwise. "Hard core employment conditions" include:

- maximum work periods and minimum rest periods,
- minimum paid holidays,
- minimum rates of pay,
- conditions for hiring out of workers,
- health and safety at work, hygiene standards,
- maternity protection and
- non-discrimination provisions.

III. Setting of Minimum Standards

Member States are free to lay down their relevant minimum standards by law, regulations or administrative provisions, and collective agreements which have been declared universally applicable. This is the precondition for them, to be observed mandatorily by all undertakings in the relevant geographical area and in the profession concerned. In countries like Sweden, Denmark, or the UK which do not use universally applicable collective agreements, implementation may be based on such collective agreements "generally applicable" to all similar undertakings in the relevant area and the profession concerned. That this possibility remains rather unclear in the precondition it demands, is explained better when looking at the famous "Laval"-case before the ECJ (to be discussed later).

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7 Art. 3 I Rome I-Regulation.
8 Art. 8 II Rome I-Regulation.
9 Art. 3 I Directive 96/71 EC.

The uncertainty grows with respect to the fact that the Directive announces that such hardcore provisions represent only **minimum standards**. Therefore, Member States in principle should be allowed to apply terms and conditions of employment on a higher standard to national and foreign undertakings, laid down by law or in collective agreements. Many Member States obviously understood the Directive this way but found themselves corrected by a different approach followed by the ECJ: Any higher standards are admitted only when complying with the freedom to provide services under the EU-Treaty. In the understanding of the Court (Com./ Luxembourg C-319/06)[10] this does not allow for the host State to **impose** higher standards than those pre-defined minimum standards on foreign undertakings. Only domestic undertakings sending their workers abroad may legally be required to provide more favourable working conditions to their workers. On the other hand, this does not prohibit different standards in different countries. If a State decides set terms and conditions for all undertakings doing business on its territory at a level higher than other countries, it may still do so. But only one single "minimum standard" that could be imposed on foreign service providers is allowed in any given branch or area of professional qualification.

Moreover, the ECJ is critical of the **choice of actors** allowed to set such standards. Where labour conditions are not governed by law but more or less exclusively by collective agreements, such countries have huge difficulties to meet the ECJ's expectations. Even though the Directive does not oppose setting minimum standards through collective agreements in general, the problem remains how foreign undertakings get bound by such agreements concluded in the host country. If States provide for a solution by way of government intervention, for example a declaration of universal applicability, this difficulty is overcome. Other countries not relying on State intervention would have to resort to collective bargaining measures including industrial action instead. Towards such a solution, the ECJ developed rather restrictive preconditions, as will be shown when discussing "Laval".[11] The remaining way how an undertaking gets bound by such collective agreements providing for higher working conditions is that they voluntarily enter into it.

Alternatively, the Directive allows host States to regulate labour rights above the minimum standard for posted workers only in case that such rules in fact constitute "public policy provisions". A State that wishes to do so must expressly announce this but is not allowed to deliberately decide what constitutes "public policy". In the understanding of the Court, this exemption does not give much discretion on the part of the Member State. Only such provisions constitute "public policy" in the meaning of Community law which are deemed to be so crucial for the protection of the political, social, or economic order in the Member State as to require compliance by all persons present on national territory. The exemption is only applicable in cases of a genuine and sufficiently serious threat to a fundamental interest of society. This constitutes an

[10] ECR 2008, p. I-04323.
[11] ECJ C -341/05, ECR 2007, p. I-11767.

extremely narrow definition of public policy. The Court insisted on this understanding due to the fact that a "public policy"-provision is an exception, even derogation, from the fundamental freedom to provide services.

To understand the importance of these provisions, especially the conflict between the right to collective bargaining in the host country on the one hand and the fundamental freedom to provide services of a foreign undertaking on the other, the ECJ's Laval case must be highlighted in a more detailed way (ECJ, C-341/05):[12]

A Latvian company, Laval, won a contract to refurbish a school in Vaxholm, a suburb of the Swedish capital Stockholm. Laval brought its own Latvian workers to carry out the contractual obligations in Sweden. Labour conditions according to the contract between Laval and its Latvian workers were such that workers earned 40 % less per hour than the Swedish standard, set out in the relevant collective agreement between the Swedish construction trade union and the Construction Employers' Federation. The Swedish union approached Laval to apply the Swedish national agreement, which Laval refused, referring, inter alia, to the fact that they worked under a collective agreement entered into with a Latvian union earlier on. Consequently, the Swedish union blocked the school site, not letting the Latvian workers in, and called the Swedish electricians' union to sympathy action. The Swedish Labour Court, to which Laval turned immediately, concluded that actions aimed at forcing an undertaking into an add-on to the relevant national agreement was not going against good labour market practices. Having concluded a collective agreement abroad would not safeguard Laval from industrial action on the part of Swedish unions which are not under a peace obligation due to a foreign collective agreement they have not participated in.

When the Case was finally heard in Luxembourg, the ECJ decided differently. Laval could invoke here an unjustified infringement of its freedom to provide services, because that freedom can be restricted legally only insofar as an industrial action is in compliance with the Posting-of-Workers-Directive. Under the Directive, though, collective agreements may only be used for setting minimum standards for the hard core labour conditions under the circumstances specified in the Directive itself. As we have seen, it would have been necessary to show the general applicability of the relevant collective agreements' terms and conditions, and such conditions must not include other topics than the directive's hard core provisions. The foreign service providers must know in advance conditions which they have to apply. No such preconditions could be met by the Swedish system so that the Court declared the boycott and sympathy action illegal. Any attempt to force a foreign service provider into a national collective agreement is deemed an illegal infringement of transnational provision of services as long as it is not in compliance with the Posting of Workers Directive. Here the duality of purposes of this Directive is conflicting with the right to collective bargaining. Even though it is understandable from the perspective of the fundamental freedom to

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12 ECR 2007, p. I-11767.

provide services that this freedom could be limited only under narrow exceptions, the fundamental right to collective bargaining follows different rules. To restrict collective bargaining (and the right to industrial action attached to it) to seek only minimum working conditions is obviously no comprehensive solution. Whether the ECJ will be able to present an interpretation aiming at a better balance between fundamental freedoms and fundamental rights remains to be seen.

IV. Remedies

The Directive requires Member States to "take appropriate measures in the event of a failure to comply". Those measures must ensure that adequate procedures are available for the enforcement of obligations under the Directive. Hereby Member States have a wide margin of discretion in determining the details. They can apply public law enforcement procedures, some States even opt for penalty sanctions next to private enforcement through the claim for damages by the workers concerned. One precondition is set in the Directive itself, though: Once it is the worker who seeks enforcement by judicial proceedings, he may do so in the Member State to whose territory he is – or was – posted. This is a privileged situation compared to the otherwise applicable Community Regulation (Brussels I)[13] that lays down the principle that employers may be sued by their employees either in the employer's State of domicile or in the State where the employee **habitually** carries out his work. None of the two alternatives would allow to sue in the State to which the employee was temporarily posted – but only this state will be interested in enforcing the employer's obligations under the Posting of Workers Directive.

V. Furthering Cooperation between Member States

The Directive[14] obliges Member States to take appropriate measures to inform foreign service providers and their workers about the terms and conditions of employment in the host country. This aims at greater transparency in the process of trans-border provision of services. Not all foreign undertakings which in fact do not comply with host country's minimum standards do so on purpose, some may simply lack the necessary knowledge of the content of its obligations under foreign law. Here the shortcomings in transposing the Directive are most visible because rather simple measures are still lacking or are only insufficiently provided for:

- information via internet,
- improving accessibility and clarity of content,
- information in different languages,
- "liaison offices" need more staff and resources.

[13] Official Journal 2001, L 12 p. 1.
[14] Art. 3. 4 II, IV Directive 96/71 EC.

Co-operation between national administrations also falls short to the obligations. Of special importance would be the creation of a monitoring authority that can reply to requests on whether the service provider is truly established in the sending state and is not a mere letterbox undertaking; or whether the worker truly is a worker according to the national standards of the sending/receiving State. The European Commission is emphasising those problems and trying to further co-operation between Member States by providing for surveys of best practice examples.

VI. Assessment

The Directive is not an instrument of harmonising the rules of trans-border posting of workers among Member States. Not even the hard core conditions of employment must be provided for at an identical level. The Directive merely prescribes that guestundertakings must respect and comply with those core labour conditions of the host country at any level deemed appropriate by the host State concerned. But when giving the hard core conditions a closer look, it becomes quite obvious that many of those relate to fields with intense regulating activities of the EU. A common minimum standard may therefore already exist through provisions in a Directive. If a common core standard already had been created through EU intervention, this could always become a fall back-level for minimum conditions. On the other hand, Member States remain free in setting minimum standards above such level under the specific conditions described above.

So if the Directive bases itself more on co-ordination than on harmonisation purposes, will it fulfil its objectives? From business side it is to be heard that the trans-border provision of services is hindered instead of furthered by the imposition of additional organisational and financial burdens. From labour side it is to be heard that setting just minimum standards will neither stop social dumping nor harmonise costs. Restricting collective bargaining through the imposition of narrow limits to industrial action does not help, either. The Directive therefore represents a compromise which the relevant organisations from both sides of industry obviously rather dislike, as they do not see their respective interests secured. The Directive's relative success can be assessed under an additional perspective, too. From the ECJ's perspective, the Directive's objective is the protection of individual workers, giving employees the right to secure working conditions at least comparable to those received by co-workers from the host country alongside whom they are carrying out their work. If this would have been the Directive's main purpose, it finally could be regarded as a success.

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Monika Schlachter: Kiküldött munkavállalók az EU-ban

A szerző (az e számunkban közölt, az osztrák munkajogi helyzetet bemutató másik tanulmányhoz) a 96/71/EK irányelv rendelkezéseit, illetve ezeknek a közösségi gazdaságra és

munkaerőpiacra kifejtett hatásait elemzi dolgozatában. (A dolgozat tárgyában tartott előadást korábban a PTE Állam- és Jogtudományi Kar Doktori Iskolájában is.) A tanulány a munkavállalók kiküldésének három formáját különbözteti meg az irányelv tárgyi hatályának körében. A személyi hatály kapcsán rámutat arra a sajátosságra, hogy a munkavállaló fogalmát a fogadó állam joga szerint kell értelmezni. A dolgozat külön figyelmet szentel a kérdés nemzetközi magánjogi vonatkozásának, mégpedig az ún. Róma-I. szabályozással való kapcsolata bemutatásával. A minimális munkafeltételek alkalmazásának körében tárgyalja a közelmúltbeli Laval ügy jelentőségét, illetve kitér a tagállamok jövőbeli együttműködésének kérdésére is az irányelv alkalmazásában.