The Relevance Pay and Time in Matters of the Posting of Workers[1]

Some Thoughts on the Draft Directive on the Posting of Workers COM (2016) 128 Final

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Abstract: *This paper treats, after a short general introduction to the topic and the underlying conflicting interests, two aspects of the posting of workers: First, the notion of pay that is to be guaranteed by the host states to workers posted to its territory. Second, the relevance of time for the posting of workers as in the draft directive the inclusion of a time limit of 24 months for the application of the labour laws of the home Member State is proposed.*

Key words: *EU labour law, posting of workers, applicable law, minimum rates of pay*

Ustrezno plačilo in čas trajanja v primeru napotitve delavcev – nekaj misli o predlogu Direktive o napotitvi delavcev COM (2016) 128 final

Povzetek: *Članek se po krajšem splošnem uvodu in nakazanih nasprotujočih si interesih ukvarja z dvema vidikoma napotitve delavcev. Prvič, glede plačila, ki se mora zagotoviti napotenim delavcem v državi gostiteljici na njenem teritoriju. Drugič, glede ustreznosti časa trajanja*

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[1] I am very grateful to the organising committee for inviting me to present this paper at the Slovenian Congress of Labour Law and Social Security on 9th June 2017 in Portorož. An earlier version of this paper was published in German as *Risak*, Die Dinge anders angehen? - Überlegungen zum Vorschlag der Europäischen Kommission zur Änderung der Entsende-RL 96/71/EG, Das Recht der Arbeit 2016, 306 et seqq. This paper also takes into account the Progress Report of the Maltese Presidency of the Council of the European Union of 9 June 2017, ST 9882 2017 INIT - 2016/070 (COD).

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napotitve delavcev glede na to, da direktiva predlaga 24 mesecev kot najdaljše obdobje uporabe delovnega prava domače države članice.

Ključne besede: *EU delovno pravo, napotitev delavcev, veljavno pravo, minimalno plačilo*

1. BACKGROUND: FREEDOM TO PROVIDE CROSS-BORDER SERVICES VS. LEVEL PLAYING FIELD

When making use of the **freedom to deliver services** as guaranteed in Article 56 of the Treaty of the Functioning of the European Union (TFEU)[3] undertakings providing transnational services often need their employees to do so. For this purpose the undertaking delivering cross border services will post its employees temporarily to perform work to the member state where the service will be delivered, the so called host member state. This raises the question of the applicable law for the time of the posting of these workers.

Under **International Private Law**, nowadays Article 8 of the Rome I-Regulation (EC) 593/2008[4], the law applicable to employment contracts does not change if an employee is only employed temporarily or - with other words - posted to another country. Therefore the individual labour laws, especially those regulating remuneration and other working conditions, of the home member state still apply.

So far so good – but now another provision of the Rome-I Regulation comes into play: the overriding mandatory provisions that are to be applied irrespective of the law otherwise applicable to the contract under this Regulation. In the famous case ***Rush Portuguesa***[5] the European Court of Justice (ECJ) stated in 1990 in the context of the 1980 Rome I-Convention "*that Community law does not preclude Member States from extending their legislation, or collective labour agreements [...] to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.*"

[3] OJ C 115, 9.5.2008, p. 47.
[4] OJ L 177, 4.7.2008, p. 6.
[5] ECJ C-113/89 - *Rush Portuguesa*.

This lead to a certain amount of insecurity what laws of the host member States could actually apply and when these practices would restrict the freedom to provide services unduly. This unclear situation itself was seen as hindering the transnational provision of services as the service providers had to deal with complex legal situations that changed from member state to member state.

The **Posted Workers Directive** 1996/71/EC[6] tried to provide legal security. Its creation was not a "walk in the park" though, the European Commission triggered the legislative process in 1989 and it was passed only seven years later due to the difficulties finding a compromise between high-wage and low-wage countries.[7] The Directive tries to reconcile three different interests:

(1) the promotion and facilitation of the cross-border provision of services
(2) the protection of the posted workers and
(3) to ensure a level playing field between foreign and local competitors.[8]

This was achieved by stipulating a highly disputed "core set" of terms and conditions of employment of the host member state that is to be applied also by foreign service providers even if the employment contracts of the workers concerned are not governed by the law of the host member state. From an international private law perspective this core set to be applied without regard to the applicable law to the employment contract is to be qualified as overriding mandatory rules as foreseen in Art. 9 of the Rome I-Regulation.[9] In a way Art. 3 of the Posted Workers Directive includes *leges speciales* to the Rome I-Regulation.[10]

The Posted Workers Directive is flanked by the so called Enforcement Directive 2014/67/EU[11], that aims to strengthen the practical application by addressing issues related to fraud, the circumvention of rules and the exchange of information between the Member States. It had to be transposed by the member states by 18 June 2016.[12]

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6 OJ L 18, 21.1.1997, p. 1.
7 EUArbR/*Windisch-Graetz* RL 96/71/EG Art. 1 Rn. 1 et seqq.
8 Cf. Risak, DRdA 2016, p. 307.
9 See also Recital 34 of the Rome I-Regulation; *Deinert*, International Labour Law under the Rome Conventions (2017) p. 205.
10 Windisch-Graetz, ZfRV 2015, 192.
11 OJ L 159, 28.5,2014, p. 11.
12 https://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/eu-level-member-states-progress-in-transposing-enforcement-directive-on-posting-of-workers (4.6.2017).

Besides the questions of the enforcement of the core provisions of labour law and the avoidance of circumventions the European Commission detected the need for a revision of the Posted Workers Directive itself and presented a **draft directive on 8 March 2016**.[13] The Impact Assessment accompanying it points out that its general objective is to ensure the smooth functioning of the Internal Market by adapting the terms and conditions set by the 1996 Posted Workers Directive to the new economic and labour market conditions, diverting the basis of competition away from wage costs and workers' working conditions and thereby increasing the fairness of the Internal Market. It also pursues two specific objectives, namely to create a level playing field for the cross-border provision of services through equal rules on wages applicable to posted and to local workers and to improve the clarity of EU rules on posting by improving the consistency between different pieces of EU legislation.

As pointed out at the beginning of this paper I now want to concentrate on two issues treated in the Draft Directive: first the minimum rates of pay and later the duration of the posting.

2. MINIMUM RATES OF PAY

Pursuant to Article 3 paragraph 1 of the Posted Workers Directive Member States shall ensure that, whatever the law applicable to the employment relationship, workers posted to their territory are guaranteed

*"(c) the **minimum rates of pay**, including overtime rates;"*[14]

as laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable.

These "minimum rates of pay" are relevant from the following **two perspectives**:

(1) Is the host Member State entitled or even obliged to consider a certain element as being part of the minimum rate of pay and therefore ensure its payment to the posted worker (host Member State perspective)?

[13] COM(2016) 128 final; see also the progress report 2016/0070 (COD).

[14] This point does not apply to supplementary occupational retirement pension schemes.

(2) In assessing whether the amount effectively paid to the posted worker complies with the minimum rates of pay what elements of the payments actually made to the worker may be taken into account and what elements may not (comparative perspective)?

The Court of Justice of the EU has in a number of cases[15] interpreted the notion of "minimum rates of pay" and applied an **extensive understanding**. This is in line with the aims of the Posted Workers Directive as pointed out above, the protection of the posted workers and the creation of a level playing field between foreign and local competitors.

According to this case law "minimum rates of pay" are therefore to be interpreted as including all those elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he/she receives by way of remuneration for that service, on the other. Therefore only those components of pay are to be considered that do not alter the exchange relationship in the way that they remunerate the "normal" work and not additional services or particular conditions or follow other purposes.

If we look at this from the **host member state perspective** lump sum payments have to be taken into account establishing the minimum rates of pay depending on the intention of the parties to the collective agreement[16] as well as daily allowances and compensation for daily travelling time if they are also paid to workers working only in the host member state.[17] Capital formation contribution is on the other hand not to be considered as it cannot primarily be considered compensation for work but follows other purposes.[18] The ECJ also ruled that the method of calculating the minimum rates of pay and the criteria used for in that regard (e.g. on a hourly or piecework basis) is a matter for the host member state to decide.[19]

From the **comparative perspective** general bonuses of the construction industry (e.g. bonuses in respect of the 13th and 14th salary month) are to be taken into

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[15] ECJ C-342/02 – *Commission vs. Germany;* C-522/12 – *Tevfik Isbir – DB Services GmbH;* C-396/13 - *Sähköalojen ammattiliitto ry vs. Elektrobudowa Spółka Akcyjna.*
[16] ECJ C-522/12 –*Isbir.*
[17] ECJ C-396/13 - *Sähköalojen ammattiliitto ry.*
[18] ECJ C-522/12 – *Isbir.*
[19] ECJ C-396/13 - *Sähköalojen ammattiliitto ry.*

account when assessing whether the minimum rates of pay are observed.[20] On the other hand allowances and supplements which do not alter the relationship between the service provided by a worker (quality bonuses, bonuses for dirty, heavy or dangerous work)[21] as well as coverage of cost of accommodation and meal vouchers for transnational workers are not to be considered.[22] The latter follows from Article 3 paragraph 7 of the Posted Workers Directive that excludes allowances specific to the posting to be considered if they are paid in reimbursement of expenditure actually incurred.

All the cases decided by the European Court of Justice deal with generally applicable collective agreements usually in the construction sector that include complex wage schemes that go beyond simple minimum wages to be paid per hour or month. The Court applies a **broad interpretation** of the notion of "minimum rates of pay". Therefore the original term may be misleading and a more general one like "remuneration" as suggested by the Commission in its proposal may – in my view – be better suited to reflect the understanding of the Court. This approach is also maintained in the Progress Report of the Maltese Presidency[23] that also suggest to include collective accommodation for workers in order to guarantee that the same conditions apply to posted and domestic workers. It also suggests including allowance rates to cover costs incurred for travel, board and lodging expenses for workers away from home for professional reasons when the worker is required to travel to and from his regular place of work in the host Member State, or when he is temporarily sent by his employer from this workplace to another workplace in the host Member State.

3. THE DURATION OF THE POSTING

The second topic I want to treat in this paper is the fact that neither the Rome I-Convention nor the Posted Workers Directive does include any clear provision on when a change in the applicable labour law will take place. The Directive uses the notion of "a limited period" and that there is another Member State in which the worker "normally" works. The Rome I-Regulation talks about employees that

[20] ECJ C-342/02 – *Commission vs. Germany.*
[21] ECJ C-522/12 – *Isbir.*
[22] ECJ C-396/13 - *Sähköalojen ammattiliitto ry.*
[23] ST 9882 2017 INIT - 2016/070 (COD) p. 3.

are "temporarily employed" in another country. The European Court of Justice[24] considers even the long-term provision of services that may last for more than a year or even years to fall under the freedom to provide services and not under the freedom of establishment. Concerning the International Private Law the prevailing opinion in the literature considers the intention of the employee to return to the home Member State (*animus revertendi*) and the intention of the employer to take the employee back to the home member state (*animus retrahendi*) of major importance.[25]

The Posted Workers Directive 1996/71/EC now refers to the duration of the posting only in one respect, namely for those only lasting for a **rather short time**. In the case of initial assembly and/or first installation of goods the minimum paid holidays and the minimum rates of pay of the host member state do not apply if the period of posting does not exceed eight days (Article 3 paragraph 2). Beyond that Member States may provide for exemptions when the length of the posting does not exceed one month or if the amount of work to be done is not significant (Article 3 paragraph 3 – 5).

Although not mentioned explicitly the underlying argument is that these minor postings do not have a significant effect on the labour market of the host Member State and that due to the short amount of time in relation to the overall time of the employment relationship also from the perspective of the protection of the employee it is not necessary to extend the protection and thereby restrict the freedom to provide trans-border services.

On the other hand a **maximum duration** of the posting is not provided for in the Directive. This leads to the situation that workers working for months or even years are only provided the core protection of the host member state and to uneven competition between foreign and local competitors as they have to apply different sets of labour regulations. It also has to be considered that Posted Workers Directive 1996/71/EC has – since the ruling of the European Court of Justice in the *Laval*-case[26] – a "**barrier effect**" meaning that the Member States are not only obliged to apply the national core protection rules but also that they may not go beyond them. The Directive is therefore also to be seen as the final compromise between the freedom to provide cross-border services and protec-

[24] ECJ C-215/01 - *Schnitzer*; C-55/94 – *Gebhard*.
[25] *Deinert*, International Labour Law under the Rome Conventions, p. 141 with further references.
[26] ECJ C-341/05 – *Laval*.

tion of the posted workers as well as the host state's interest to ensure a level playing field that does not undercut national minimum wages and other working conditions.

This unclear situation concerning long-term postings of workers makes some look a little enviously at the **Regulation 883/2004** that deals with the posting of workers from the perspective of coordinating the national social security systems. Pursuant to Article 12 paragraph 1 of this Regulation 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 person. The Regulation thereby on the one hand includes a fixed time limit of 24 months and on the other also a provision that tries to prevent circumventions rotating different employees for the same position and thereby making use of comparatively lower social security contributions.

This comparison shows that there exists a **divergence** between the social security provisions and those protecting the posted workers as well ensuring a fair competition though they both regulate the same actual situation, i.e. the posting of workers. While the first includes a fixed maximum time limit, the latter does not. In my opinion the introduction of a time limit – regardless if it is now 24 months or shorter – would ameliorate situation often unclear for workers, employers and authorities as well as courts enforcing workers rights. It avoids often complex case-by-case assessments and ensures the appropriate social protection for the posted workers.

The introduction of a fixed time limit would – in my opinion – not change the Rome I Regulation and its provisions on the law by which an individual employment contract is governed. It would only clarify the criterion "habitually carried out" for one specific situation, namely the long term posting of workers. It would provide **more legal certainty** to employers and employees – an aim followed by the Rom I-Regulation.

And one should never forget that Art 8 of the Rom I-Convention includes an "**escape clause**": Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than the habitual place of work the law of that other country shall apply. This provides for enough flex-

ibility to deal with cases differing from the standard case as the decision of the European Court of Justice in the *Kleist*-case[27] shows quite well.

The Commission's 2016 **proposal** for the amendment includes a **fixed time limit** aligned to the length of the fixed time limit of 24 months in the Coordination-Regulation.[28] I am not too sure if this appropriately takes into account the different objectives followed by the two very different fields of law: the international private law and the coordination of social security systems. The international private law follows the principle of the closest connection – in the case of a posted worker this connection continues but diminishes over time. Also the argument to save the parties of the employment contract from frequent changes of the applicable laws looses weight over time. The aims of the Posted Workers Directive 1996/71/EC to protect posted workers and to safeguard fair competition also increase in importance over time and at a certain point one has to ask why the full protection of the host state shall not apply. Considering these factors the time limit of 24 months seems rather long and in my view it should be considered to lower it to one year.

Different time limits for the application of the individual labour law and the social security law definitely make sense if you take into account that the social security law, especially the pension law, has effects that go beyond the employment relationship. A longer timeframe for staying in the social security system of the home state therefor makes sense but does not oblige to align it with the fixed time frame for other purposes.

The Progress Report of the Maltese Presidency[29] upholds the introduction of the 24-months-timeframe but suggests taking up an amended version of a Finnish proposal: after 24 months, a posted worker is to be granted all the applicable terms and conditions of employment laid down in the legislation and collective agreements in the host Member State, with the explicit exclusion of the procedures, formalities and conditions of the conclusion and termination of the employment contract. As much as such a compromise is understandable it does

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[27] ECJ C-356/09 – *Kleist*.

[28] The Progress Report of the Maltese Presidency (p. 5)maintains the introduction of the 24-months-timeframe but suggests taking up an amended version of a Finnish proposal: after 24 months, a posted worker is to be granted all the applicable terms and conditions of employment laid down in the legislation and collective agreements in the host Member State, with the explicit exclusion of the procedures, formalities and conditions of the conclusion and termination of the employment contract.

[29] ST 9882 2017 INIT - 2016/070 (COD) p. 5.

not fit into the system of the Rome I-Regulation as there is no space for gradually applying individual labour law – it follows an "all or nothing-approach" and thereby the proposed solution is not feasible without changing the Rome I-Regulation. Therefore it can be well argued to keep up the original proposal.

Before I end with some conclusions just some thoughts on the **replacement provision** also proposed by the Commission. In order to "prevent circumvention" in case of the replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers shall be taken into account. The aim of this provision is less geared towards the protection of the individual employee but on safeguarding fair competition in the host Member State. This competition would be distorted if a permanent position would be staffed alternately by different employees that are each only posted only "temporarily". Under this aspect it is not plausible why the Proposal of the Commission only takes into account those postings that exceed six months. The explanations argue with the principle of proportionality of the restriction of the freedom to provide services. In my opinion this is not necessary though as the effect on the labour market of the host state is the same: A permanent position is staffed by employees that are not covered by the labour laws to the full extend and the length of the individual posting does not change anything.

For very short posting the respective exceptional rules of Article 3 paragraphs 3 to 5 of the Posted Workers Directive 1996/71/EC apply anyway and the rule of proportionality is thereby appropriately observed. For good reasons the Coordination Regulation does not include any minimum timeframe for applying the replacement provision. Hence I would suggest to drop the minimum length of six months for a posting of a worker to be considered for the application of the proposed replacement provision. Therefore I see it very positively that the Progress Report of the Maltese Presidency suggests the deletion of the exclusion of postings shorter than six months.[30]

4. SUMMARY

The often difficult discussions about the proposed amendment of the European Commission of the Posted Workers Directive 1996/71/EC show well the diver-

[30] ST 9882 2017 INIT - 2016/070 (COD) p. 5.

gence of interests within the European Union when it comes to the regulation of the posting of workers. The history of the evolution of the regulation of this topic shows clearly that for decades the posting did not pose too many problems and only in the 1990ies the ECJ had to make clear in the case of *Rush Portugesa* that host states may apply their minimum wage rules also to posted workers but left a lot of room for discussion. The Posted Workers Directive 1996/71/EC then made clear what rules could be applied regardless of the law governing the employment contract. The *Laval*-case then clarified that member states (and unions in their intention to conclude company collective agreements also covering posted workers) could not go beyond the core provisions of labour law enumerated in the Posted Workers Directive 1996/71/EC.

The proposal for an amendment of the Posted Workers Directive of the European Commission now tries to bring more certainty for – among others – two issues I treated in this paper: to make clear that the notion of pay is to be understood widely and to introduce a clear maximum length for the posting until a change of the applicable law has to take place. These proposed solutions are in my view to be welcome as they promote the aims of the draft directive as laid out in the impact assessment of the European Commission[31], namely to*"create **a level playing field** for the cross-border provision of services through equal rules on wages applicable to posted and to local workers;*[and to] ***improve the clarity** of EU rules on posting by improving the consistency between different pieces of EU legislation."*

[31] SWD(2016) 52 final p. 20.

Ustrezno plačilo in čas trajanja v primeru napotitve delavcev - nekaj misli o predlogu Direktive o napotitvi delavcev COM (2016) 128 final

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Povzetek

Pogosto težka diskusija o predlogu spremembe Direktive 1996/71/EC o napotitvi delavcev na delo v okviru opravljanja storitev lepo kaže na različne interese znotraj EU glede ureditve tega vprašanja. Zgodovina razvoja ureditve tega področja jasno kaže, da desetletja napotovanje ni sprožalo preveč problemov in da je šele v 90-ih letih po sodbi Sodišča EU v zadevi *Rush Portugesa* postalo jasno, da se morajo uporabljati pravila države gostiteljice glede minimalne plače tudi za napotene delavce, pri čemer pa je sodišče pustilo veliko prostora za diskusijo. Direktiva 1996/71/EC o napotitvi delavcev je nato razjasnila, katera pravila se uporabijo, neodvisno od prava, po katerem je bila sklenjena pogodba o zaposlitvi. Kasneje se je v primeru *Laval* izkazalo, da države članice (in sindikati v njihovi nameri, da bi sklenili podjetniške kolektivne pogodbe, ki bi pokrivale tudi napotene delavce) ne morejo iti preko minimalne ravni delavskih pravic, naštetih v Direktivi 1996/71/EC.

Predlog evropske komisije za spremembo direktive o napotitvi delavcev sedaj poskuša vnesti več gotovosti, med drugim glede dveh vidikov, ki sta obravnavana v tem prispevku: da bi bilo jasno, da se pojem plačila razume široko in da se jasno določi maksimalna dolžina napotitve, po kateri nastopi sprememba prava, ki se uporablja za napotitev. Te predlagane rešitve gre po mojem mnenju pozdraviti, ker uresničujejo namen pobude kot je zapisano v spremnem dokumentu evropske komisije k predlogu direktive, tj. da se "zagotovi poštene plačne pogoje za napotene delavce in enake konkurenčne pogoje med podjetji, ki delavce napotijo, in lokalnimi podjetji v državi članici gostiteljici ter izboljša jasnost zakonodaje EU".[32]

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[32] SWD(2016) 53 final, 8.3.2016, str. 2. Delovni dokument služb komisije, Povzetek ocene učinka, Spremni dokument k predlogu direktive.