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ABOUT THE PUBLICATION

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One of the four freedoms enjoyed by EU citizens is the free movement of workers. This includes the rights of movement and residence for workers, the rights of entry and residence for family members, and the right to work in another Member State and be treated on an equal footing with nationals of that Member State. Restrictions apply in some countries for citizens of new Member States. The rules on access to social benefits are currently shaped primarily by the case law of the Court of Justice.

**LEGAL BASIS**

Article 3(2) of the Treaty on European Union (TEU); Articles 4(2)(a), 20, 26 and 45-48 of the Treaty on the Functioning of the European Union (TFEU).


Case law of the Court of Justice (CoJ) of the European Union.

**OBJECTIVES**

Freedom of movement for workers is one of the founding principles of the EU. It is laid down in Article 45 of the TFEU and is a fundamental right of workers. It entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

**ACHIEVEMENTS**

At the end of 2014, according to Eurostat data, 3% of EU citizens (15.3 million people) resided in Member States other than those of which they are citizens. According to a 2010 Eurobarometer survey, 10% of people polled in the EU replied that they had lived and worked in another country at some point in the past, while 17% intended to take advantage of the right to free movement in the future.

**A. Current general arrangements on freedom of movement**

Any national of a Member State has the right to seek employment in another Member State in conformity with the relevant regulations applicable to national workers. He or she is entitled to receive the same assistance from the national employment office as nationals of the host Member State, without any discrimination on grounds of nationality, and also has the right to stay in the host country for a period long enough to look for work, apply for a job and be recruited. This right applies equally to all workers from other Member States, whether they are on permanent contracts, are employed as seasonal or cross-border workers or provide services. Workers may not be discriminated against, for example with regard to language requirements, which may not go beyond what is reasonable and necessary for the job in question.
These rules do not apply to posted workers, who are not availing themselves of their free movement rights: instead, it is the employers who are making use of their freedom to provide services in order to send workers abroad on a temporary basis. Posted workers are protected only by the Posting of Workers Directive (Directive 96/71/EC), currently under revision, which provides for certain minimum terms and conditions of employment in the host state, and by the associated enforcement directive (Directive 2014/67/EU), in order to prevent the undercutting of local service providers (2.1.13).

1. Workers’ rights of movement and residence

Directive 2004/38/EC introduces EU citizenship as the basic status for nationals of the Member States when they exercise their right to move and reside freely in EU territory. For the first three months, every EU citizen has the right to reside in the territory of another EU country with no conditions or formalities other than the requirement to hold a valid identity card or passport. For longer periods, the host Member State may require a citizen to register his or her presence within a reasonable and non-discriminatory period of time.

Migrant workers’ right to reside for more than three months remains subject to certain conditions, which vary depending on the citizen’s status: for EU citizens who are not workers or self-employed, the right of residence depends on their having sufficient resources not to become a burden on the host Member State’s social assistance system, and having sickness insurance. EU citizens acquire the right of permanent residence in the host Member State after a period of five years of uninterrupted legal residence.

Directive 2004/38/EC amended Regulation 1612/68/EEC with regard to family reunification and extended the definition of ‘family member’ (formerly limited to spouse, descendants aged under 21 or dependent children, and dependent ascendants) to include registered partners if the host Member State’s legislation considers a registered partnership to be the equivalent of a marriage. Irrespective of their nationality, these family members have the right to reside in the same country as the worker.

2. Employment

As regards working and employment conditions in the territory of the host Member State, workers who are nationals of another Member State cannot be treated differently from national workers because of their nationality. This applies in particular to matters pertaining to recruitment, dismissal and remuneration, and to occupational training and retraining measures. Nationals of one Member State working in another have the same social and tax benefits and access to housing as national workers, and are entitled to equal treatment in respect of the exercise of trade union rights.

The right to remain in the host country after stopping work is now laid down in Directive 2004/38/EC. Job seekers have the right to reside for a period exceeding six months (CoJ, Case C-292/89 Antonissen) without having to meet any conditions if they continue to seek employment in the host Member State and have a ‘genuine chance’ of finding work; during this time they cannot be expelled. After acquiring the right of permanent residence in the host Member State, EU citizens are no longer subject to any conditions (such as sufficient financial means) but can, if necessary, rely on social assistance in the host Member State in the same way as its nationals can.
Since the introduction of EU citizenship, the CoJ has extended access to social benefits for EU citizens residing in another Member State (Cases C-184/99 Grzelczyk, C-224/98 D’Hoop). The status of first-time job seekers is currently the subject of intense discussion, as they do not have a worker status to retain. In Cases C-138/02 Collins and C-22/08 Vatsouras, the CoJ found that such EU citizens had a right of equal access to a financial benefit intended to facilitate access to the labour market for job seekers; such a benefit consequently cannot be considered to be ‘social assistance’, to which Directive 2004/38/EC excludes access. However, Member States may require a real link between the job seeker and the labour market of the Member State in question. The CoJ further clarified the situation of previously employed workers in its Alimanovic judgment (C-67/14). The individuals concerned had worked, and had consequently retained their worker status for a further six months after becoming unemployed (Article 7(3)(c) of the directive). However, the CoJ held that following the expiry of this period EU citizens can only claim equal treatment with nationals, and thus access to social assistance, if their residence in the Member State concerned complies with the conditions of the directive. Although Article 14(4)(b) of the directive prohibits the expulsion of unemployed EU citizens as long as they continue to seek employment, Article 24(2) expressly allows a Member State to refuse to grant social assistance to EU citizens whose right of residence is based solely on this non-expulsion provision. The CoJ further held that — contrary to expulsion decisions for which the individual situation of the EU citizen concerned has to be taken into account — no individual assessment is necessary when it comes to access to social assistance.

Conversely, the claiming of benefits by economically inactive EU citizens can be made dependent on their legal residence — which in itself presupposes sufficient financial means. However, the CoJ held in the Brey judgment (C-140/12) that the mere fact of claiming a benefit is not sufficient to prove that a person is not self-sufficient, and the particular circumstances of each case need to be considered when assessing the burden that granting a benefit would place on the national social assistance system. In Brey, the CoJ restated its Trojani case law (C-456/02), whereby as long as an economically inactive citizen has not been expelled, his or her right to equal treatment in relation to social benefits remains intact. However, the CoJ recently retreated considerably from this case law in rejecting the right to benefits of an inactive EU citizen who had entered the host Member State solely for the purpose of claiming benefits (Case C-333/13 Dano): it held that the right to equal treatment, which would include access to benefits, presupposes legal residence under Directive 2004/38/EC, which the claimant did not have owing to a lack of sufficient financial means. The CoJ confirmed the precedents of case law in 2016 (Case C-308/14, Commission v UK), holding that there is nothing to prevent the granting of social benefits to EU citizens who are not economically active being made subject to the substantive condition that those citizens meet the necessary requirements for possessing a right to reside lawfully in the host Member State.

By doing so, the CoJ appears to allow Member States to withhold equal access to social benefits without needing to terminate the inactive citizen’s residence right. This new approach could endanger social cohesion in host Member States, as it creates a subclass of EU citizens who cannot be expelled but have to make do without the social assistance received by nationals of that Member State who are in the same situation. In view of the law being shaped through the CoJ in such a way, the Commission, in its
Finally, Article 35 of the directive expressly grants Member States the power, in the event of abuse or fraud, to withdraw any right conferred by the directive.

B. Restrictions on freedom of movement

The Treaty allows a Member State to refuse an EU national the right of entry or residence on the grounds of public policy, public security or public health. Such measures must be based on the personal conduct of the individual concerned, which must represent a sufficiently serious and present threat to the fundamental interests of the state. In this regard, Directive 2004/38/EC provides for a series of procedural guarantees.

Under Article 45(4) TFEU, free movement of workers does not apply to employment in the public sector, although this derogation has been interpreted in a very restrictive way by the CoJ, according to which only those posts involving the exercise of public authority and of responsibility for safeguarding the general interest of the state concerned (such as its internal or external security) may be restricted to its own nationals.

During a transitional period after the accession of new Member States, certain conditions can be applied that restrict the free movement of workers from, to and between those Member States. These restrictions do not concern travel abroad or self-employed activity, and they may differ from one Member State to another. The remaining transitional periods applicable to the accession of Bulgaria and Romania in 2007 were lifted on 1 January 2014. There are currently transitional periods for Croatian nationals, which must be lifted by July 2020 at the latest.

C. Measures to encourage freedom of movement

As a basic principle, any EU citizen should be able to practise his or her profession freely in any Member State. However, the practical implementation of this principle is often hindered by national requirements for access to certain professions in the host country. The system for recognition of professional qualifications has been reformed to help make labour markets more flexible, and to encourage more automatic recognition of qualifications. Directive 2005/36/EC (as modernised by Directive 2013/55/EU) on the recognition of professional qualifications consolidates and updates the 15 existing directives covering almost all recognition rules (2.1.6), and provides for innovative features such as the European professional card and the mutual evaluation of regulated professions.

The EURES (European Employment Services) cooperation network involves the Commission, the public employment services of the EU and EEA member states and other partner organisations, and Switzerland (see 2.3.3). Through Regulation 2016/589 (replacing former Regulation 492/2011), EURES from 2016 has further improved the self-service tools on its digital platform so as to become a real Europe-wide job mobility portal, introducing automated matching of job seekers’ skills and job openings. Member States should now make available to the EURES portal all job vacancies and job applications published at national level, and the portal should provide general information on living and working conditions in the country of destination, including language courses, and provide more personalised career and recruitment advice. It will also better involve social partners in the network and provide better support for cross-border partnerships.
The EU has made major efforts to create an environment conducive to worker mobility. These include:

— a European health insurance card and a directive on cross-border healthcare;
— the coordination of social security schemes thanks to Regulation (EC) No 883/2004 and implementing Regulation (EC) No 987/2009, currently under revision (2.3.4);
— the adoption in April 2014 of Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights;
— the adoption in April 2014 of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, which specifically provides for new means of redress for workers discriminated against.

To strengthen labour mobility, the Commission is working on a proposal to establish a European Social Security Number in spring 2018. This would aim to simplify the interactions of mobile citizens with public authorities and facilitate administrative cooperation across national borders.

**ROLE OF THE EUROPEAN PARLIAMENT**

The European Parliament considers all employment-related topics to be among the EU’s main priorities, and has always stressed that the EU and its Member States should coordinate their efforts in this regard and promote the free movement of workers as one of the objectives of the completed internal market. Parliament plays a dynamic role in establishing and improving the internal market, and has always energetically supported the efforts of the Commission in this area.

In its resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU, Parliament recalled that the right of free movement for work purposes cannot be associated with abuse of social security systems (see also CoJ judgment in Case C-413/01 Ninni-Orasche), and called on the Member States to refrain from any actions that could affect the right of free movement.

As regards social security coordination, in its January 2014 resolution on social protection for all, Parliament called on the Commission to review the legislation and monitor the implementation and coordination of social security systems in order to safeguard EU migrant workers’ benefit entitlements.

Marion Schmid-Drüner
02/2018
2 - FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES - [2.1.4.]

As stipulated in the Treaty on the Functioning of the European Union and reinforced by the case-law of the European Court of Justice, the freedom of establishment and the freedom to provide services guarantee mobility of businesses and professionals within the EU. For the further implementation of these two freedoms, expectations concerning the Services Directive adopted in 2006 are high, as it is of crucial importance for the completion of the internal market.

LEGAL BASIS

Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

Self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may: (i) carry on an economic activity in a stable and continuous way in another Member State (freedom of establishment: Article 49 TFEU); or (ii) offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (freedom to provide services: Article 56 TFEU). This implies eliminating discrimination on the grounds of nationality and, if these freedoms are to be used effectively, the adoption of measures to make it easier to exercise them, including the harmonisation of national access rules or their mutual recognition (2.1.6).

ACHIEVEMENTS

A. Liberalisation in the Treaty

1. ‘Fundamental freedoms’

The right of establishment includes the right to take up and pursue activities as a self-employed person and to set up and manage undertakings, for a permanent activity of a stable and continuous nature, under the same conditions as those laid down by the law of the Member State concerned regarding establishment for its own nationals.

Freedom to provide services applies to all of those services normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital and persons. The person providing a ‘service’ may, in order to do so, temporarily pursue her or his activity in the Member State where the service is provided, under the same conditions as are imposed by that Member State on its own nationals.

2. The exceptions

Under the TFEU, activities connected with the exercise of official authority are excluded from freedom of establishment and provision of services (Article 51 TFEU). This exclusion is, however, limited by a restrictive interpretation: exclusions can cover only those specific activities and functions which imply the exercise of authority; and a whole
profession can be excluded only if its entire activity is dedicated to the exercise of official authority, or if the part that is dedicated to the exercise of public authority is inseparable from the rest. Exceptions enable Member States to exclude the production of or trade in war material (Article 346(1)(b) TFEU) and to retain rules for non-nationals in respect of public policy, public security or public health (Article 52(1)).

B. Services Directive — towards completing the internal market

The Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market), which strengthens the freedom to provide services within the EU, was adopted in 2006, with an implementation deadline of 28 December 2009. This directive is crucial for completing the internal market, since it has a huge potential for delivering benefits for consumers and SMEs. The aim is to create an open single market in services within the EU while at the same time ensuring the quality of services provided to consumers in the Union. The full implementation of the Services Directive could increase trade in commercial services by 45% and foreign direct investment by 25%, bringing an increase of between 0.5% and 1.5% in GDP (Commission communication ‘Europe 2020’). The directive contributes to administrative and regulatory simplification and modernisation. This is achieved not only through the screening of the existing legislation and the adoption and amendment of relevant legislation, but also through long-term projects (setting up the Points of Single Contact and ensuring administrative cooperation). The implementation of the directive has been significantly delayed in a number of Member States in relation to the original deadline. Its successful implementation calls for sustained political commitment and widespread support at European, national, regional and local levels.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has been instrumental in liberalising the activities of the self-employed. It has ensured a strict delimitation of the activities that may be reserved for nationals (e.g. those relating to the exercise of public authority). It is also worth mentioning the case that Parliament brought before the Court of Justice against the Council for failure to act with regard to transport policy. That case, brought in January 1983, led to a judgment of the Court (Case No 13/83 of 22 May 1985) condemning the Council for failing to ensure free provision of international transport services or lay down conditions enabling non-resident carriers to operate transport services within a Member State. This was in breach of the Treaty. The Council was thus obliged to adopt the necessary legislation. The role of Parliament has grown with the application of the codecision procedure provided for in the Treaty of Maastricht, and now of its successor, the ordinary legislative procedure, to most aspects of freedom of establishment and provision of services.

Parliament also played a crucial role in the adoption of the Services Directive, and is closely following its implementation. In addition, it is putting pressure on the Member States to fulfil their obligations under the directive and to ensure its proper implementation. On 15 February 2011, Parliament adopted a resolution on the implementation of the Services Directive 2006/123/EC[1], and on 25 October 2011 a resolution on the Mutual Evaluation Process of the Services Directive[2]. Following the Commission communication of 8 June 2012 on the implementation of the Services Directive, Parliament’s Committee on the Internal Market and Consumer Protection

(IMCO) prepared a report on ‘Internal Market for services: state of play and next steps’, which was adopted in plenary on 11 September 2013[3].

On 7 February 2013, Parliament also adopted a resolution with recommendations to the Commission on the governance of the Single Market[4], emphasising the importance of the services sector as a key area for growth, the fundamental character of the freedom to provide services, and the benefits of full implementation of the Services Directive.

Parliament has, as a matter of priority, worked on legislative proposals concerning telecommunications services, such as a regulation on electronic identification and trust services for electronic transactions in the internal market (Regulation (EU) No 910/2014) and a regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent (COM(2013) 0627, leading to adoption of Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union). Parliament is concerned with financial services in the area of access to basic payment services[5] and consumer credit and mortgage credit (Directive 2014/17/EU), and also with package travel and assisted travel arrangements (COM(2013) 0512). The Mortgage Credit Directive (2014/17/EU) will increase consumer protection by enforcing minimum regulatory requirements that Member States are required to meet to protect individuals with credit agreements on residential property. This directive should be implemented by the Member States by March 2016 and will help to ensure that consumers are informed and financially capable of paying their mortgage loan. Additionally, the Directive on Better Regulated and Transparent Financial Markets (2014/65/EU) aims to ensure regulation and transparency of EU-wide financial markets. Parliament is also involved in legislating on innovative services such as the life-saving in-vehicle emergency eCall (COM(2013) 0316), and in the verification of implementation of the Universal Service Directive and the 112 emergency number[6]. On 28 April 2015, Parliament voted to make eCall technology mandatory in all new vehicles after April 2018.

For more detailed information please consult the study prepared for the IMCO committee on 'EU Mapping: Overview of IMCO-related legislation'.[7]

Mariusz Maciejewski / Kendra Pengelly
11/2017

3 - THE MUTUAL RECOGNITION OF DIPLOMAS - [2.1.6.]

The freedom of establishment and the freedom to provide services are cornerstones of the single market, enabling the mobility of businesses and professionals throughout the EU. Implementing these freedoms supposes the overall recognition of nationally delivered diplomas and qualifications. Different measures for their harmonisation and mutual recognition have been adopted, and further legislation on the subject is under way.

LEGAL BASIS

Articles 26 and 53 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

For self-employed persons and professionals to establish themselves in another Member State or offer their services there on a temporary basis, diplomas, certificates and other proof of professional qualification as issued in the different Member States need to be mutually recognised, and any national provisions governing access to different professions need to be coordinated and harmonised.

ACHIEVEMENTS

Article 53(1) TFEU provides that the mutual recognition of the diplomas and other qualifications required in each Member State for access to the regulated professions can be used to facilitate freedom of establishment and provision of services. It also addresses the need to coordinate national rules on the taking-up and pursuit of activities as self-employed persons. Paragraph 2 of the same article subordinates the mutual recognition, 'in cases where such harmonisation is a difficult process', to the coordination of the conditions governing exercise in the various Member States. The harmonisation process evolved through a number of directives from the mid-1970s. On these bases, legislation on mutual recognition is adjusted to the needs of different situations. It varies in completeness according to the profession concerned, and in recent cases has been adopted using a more general approach.

A. The sector-specific approach (by profession)

1. Mutual recognition after harmonisation

Harmonisation progressed faster in the health sector, for the obvious reason that professional requirements, and especially training courses, did not vary much from one country to another (unlike in other professions), meaning that it was not difficult to harmonise them. This harmonisation developed through a number of directives from the mid-1970s through to the mid-1980s, which regulated, with regard to freedom of establishment and provision of services, a substantial number of professions (e.g. doctors, nurses, veterinary surgeons, midwives and self-employed commercial agents). The Professional Qualifications Directive (2005/36/EC) aimed to clarify, simplify and modernise the existing directives, and to bring together the regulated professions of doctors, dentists, nurses, veterinary surgeons, midwives, pharmacists and architects in one legislative text. This directive specifies, among many other things,
how the ‘host’ Member States should recognise professional qualifications obtained in another (‘home’) Member State. The recognition of professionals includes both a general system for recognition and specific systems for each of the abovementioned professions. It focuses, among many other aspects, on the level of qualification, training and professional experience (of both a general and a specialist nature). The directive also applies to professional qualifications within the transport sector, and to insurance intermediaries and statutory auditors. These professions were previously regulated under separate directives. On 22 June 2011, the Commission adopted a Green Paper on Modernising the Professional Qualifications Directive (COM(2011) 0367), proposing a legislative initiative to reform the systems for the recognition of professional qualifications, with a view to facilitating the mobility of workers and adapting training and current labour market requirements. On 19 December 2011 the Commission published a proposal for a revision of the Professional Qualifications Directive (COM(2011) 0883) based on the outcome of the various consultation processes. The most important key proposals included: the introduction of the European professional card; harmonisation of the minimum training requirements; automatic recognition for seven professions, namely architects, dentists, doctors, nurses, midwives, pharmacists and veterinary surgeons, as well as the introduction of the Internal Market Information System allowing for enhanced cooperation in diploma recognition. The proposal’s main objectives were to facilitate and enhance the mobility of professionals across the EU and to help alleviate personnel shortages in some Member States. The directive (2013/55/EU) was adopted on 20 November 2013.[1]

2. Mutual recognition without harmonisation

For other professions for which differences between national rules have prevented harmonisation, mutual recognition has made less progress. The diversity of legal systems has prevented the full mutual recognition of diplomas and qualifications that would have secured immediate freedom of establishment on the basis of a diploma obtained in the country of origin. Council Directive 77/249/EEC of 22 March 1977 granted lawyers the freedom to provide occasional services; free establishment otherwise requires a diploma from the host country. Directive 98/5/EC of 16 February 1998 was a significant step forward, stating that lawyers holding a diploma from any Member State may establish themselves in another Member State to pursue their profession, with the proviso that the host country can require them to be assisted by a local lawyer when representing and defending their clients in court. After three years operating on this basis, lawyers acquire the right (if they so wish) to full exercise of their profession, after passing an aptitude test set by the host country and without having to take a qualifying examination. Other directives have applied the same principle to other professions, such as road haulage operators, insurance agents and brokers, hairdressers and architects.

B. The general approach

The drafting of legislation for mutual recognition sector by sector (sometimes with more extensive harmonisation of national rules) has always been a long and tedious procedure. For that reason, the need for a general system of recognition of equivalence of diplomas, valid for all regulated professions that have not been the subject of specific Union legislation, became apparent. This new general approach changed the

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perspective. Before, ‘recognition’ was subordinated to the existence of European rules concerning ‘harmonisation’ in the specific regulated profession or activity. Afterwards, ‘mutual recognition’ became almost automatic, under the established rules, for all the regulated professions concerned, without any need for sector-specific secondary legislation. From that moment, both the ‘harmonisation’ and the ‘mutual recognition’ methods continued to be used under a parallel system, with, in some cases, situations where both have been used under a complementary system taking the form of both a regulation and a directive (see the Council resolutions of 3 December 1992 and 15 July 1996 on transparency of qualifications and vocational training certificates). The host Member State may not refuse applicants access to the occupation in question if they possess the qualifications required in their country of origin. However, if the training they received was of a shorter duration than in the host country, it may demand a certain length of professional experience, and if the training differs substantially, it may require an adaptation period or aptitude test at the discretion of the applicant, unless the occupation requires knowledge of national law.

ROLE OF THE EUROPEAN PARLIAMENT

On 15 November 2011, Parliament adopted a resolution on the implementation of the Professional Qualifications Directive (2005/36/EC)[2] calling for the modernisation and improvement of that directive and encouraging the use of the most efficient and appropriate technologies, such as the introduction of a European professional card, which should be an official document recognised by all competent authorities, in order to facilitate the recognition process.

In response to Parliament’s resolution, on 19 December 2011 the Commission presented a proposal for a revision of the Professional Qualifications Directive. After successful trilogue negotiations, Parliament secured the changes it had called for, including the introduction of a voluntary professional card, the creation of an alert mechanism, clarification of the rules regarding partial access to a regulated profession, rules regarding language skills, and the creation of a mechanism for mutual evaluation of regulated professions to ensure greater transparency. This led to the adoption on 20 November 2013 of Directive 2013/55/EU of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications[3].

For more detailed information, please consult the study prepared for the IMCO Committee entitled ‘EU Mapping: Overview of IMCO related legislation’[4].

Mariusz Maciejewski
11/2017

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4 - POSTING OF WORKERS - [2.1.13.]

As stipulated in the Treaty on the Functioning of the European Union and reinforced by the case-law of the European Court of Justice, the freedom of establishment and the freedom to provide services guarantee the mobility of businesses and professionals within the EU. However, with regard to the posting of workers as a specific type of cross-border labour mobility, there is a need to balance internal market freedoms with measures guaranteeing respect for the rights of workers. Currently, the 1996 rules on the posting of workers are being revised to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner.

LEGAL BASIS

Articles 56 to 62 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

The Posting of Workers Directive 96/71/EC (PWD) is generally regarded as targeted effort to regulate and balance two principles with regard to the specific case of posted workers. On the one hand, the PWD is supporting the free movement of services and ensuring a level playing field for cross-border service provision in a way that is as unrestricted as possible, and on the other hand, it is trying to protect the rights of posted workers by guaranteeing a common set of social rights.

However, since 1996, the experience and implementation of the PWD has revealed a lack of balance between those two principles where the internal market freedoms in the case law of the Court of Justice (CJEU) have prevailed over the social rights of workers, and where the existing laws have facilitated unfair practices. Today, reform efforts are focused on bolstering the social rights of posted workers, with a commitment to the idea of ‘equal pay for equal work’.

ACHIEVEMENTS

A. History of the PWD: Supporting the Free Movement of Services

The history and legal basis of the PWD stems from the freedom to provide services (Article 56 TFEU) and the EU’s commitment to removing obstacles to the free cross-border movement of services within the internal market. As the European Union expanded in 1986, with the accession of Spain and Portugal, the issue of cross-border provision of services was brought to the forefront of the internal market debate.

In 1990, the landmark CJEU case Rush Portuguesa (C-113/89) concluded that the Treaty articles on freedom to provide services must be interpreted as meaning that an undertaking established in Portugal may move with its domestic labour force to the host Member State for the duration of the provision of services. In such a case, the host Member State may not impose on the supplier of services the obligation to obtain work permits for the Portuguese work-force, as this would discriminate against that supplier in relation to his competitors established in the host country who were able to use their own staff without restrictions. After this key decision, and following the accession of
Austria, Finland and Sweden in 1995, the previous decade of legislative gridlock on this issue was broken and the PWD was adopted on 16 December 1996.

The PWD was negotiated to support and clarify this specific case of cross-border provision of services (Article 56 TFEU): self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may offer and provide their services in other Member States on a temporary basis while remaining attached to their labour market of origin.

The PWD sought a regulatory balance between two principles:

— Creating a level playing field for cross-border service provision in a way that is as unrestricted as possible; and

— The principle of social cohesion in the sense of protecting the rights of posted workers by guaranteeing a common set of social rights in order to avoid unfair treatment and to avoid creating a low-cost workforce.

In trying to balance these principles, the PWD established a set of ‘hard core’ minimum terms of employment and working conditions (such as maximum work periods, minimum paid annual holidays, minimum rates of pay, health and safety at work etc.) which must be respected according to the host state principle; for the rest of the employment relationship, the labour law rules of the sending country continue to apply. As regards social security, posted workers remain insured in the social security system in their home country provided the posting lasts – in general – for less than two years. As far as taxation is concerned, the right to levy income tax remains that of the sending country for 183 days and only then moves to the receiving country.

Accordingly, labour cost differentials between local and posted workers, who are on average posted for a period of between 3-4 months, can be considerable, depending on wage level, social security contributions and income tax to be paid.

B. The evolution of the PWD 1996-2016

In the years following the adoption of the PWD, the implementation, legal interpretation and regulation of the special case of posted workers exposed three specific challenges:

— A widening gap of wage differentials between Member States created adverse incentives: labour cost differentials between countries with the highest and lowest minimum wage levels, have changed from a factor of 1:3 in 1999 to 1:10 in 2015. As wage gaps continue to widen, and the overall labour costs continue to diverge between countries there is an increasing financial incentive, based on wage competition, for businesses to use posted workers. This incentive is seen in practice with a 44.4% increase in the number of postings between 2010 and 2014.

— Legal uncertainties and regulatory loopholes facilitated an environment conducive to malpractice: the PWD does not set out clear criteria to define the temporary nature of work or what constitutes a genuine posting from an ‘established’ firm in a Member State to an undertaking in a host Member State. These ambiguities have led to many concerns about the potential misuse of the PWD to circumvent employment and social security legislation through various loopholes such as rotational posting and letter-box companies.

— In view of the social policy provisions introduced into the European Treaties since the 2007 Lisbon Treaty revision, it is questionable whether the 1996 PWD provides an adequate legal instrument for ensuring a level playing field for free cross-border
service provision while at the same time delivering an adequate foundation for the social rights of workers. In cases where the PWD leaves implementation and enforcement of minimum standards of employment to Member States, it relies on CJEU rulings to interpret the terminology in the PWD. However, CJEU rulings since the adoption of the PWD have not provided the necessary legal clarity. As the Commission rightfully notes, the lack of a clear standard generates uncertainty about rules and practical difficulties for the bodies responsible for the enforcement of the rules in the host Member State; for the service provider when determining the wage due to a posted worker; and for the awareness of posted workers themselves about their entitlements. In addition, with its four judgments in 2007/2008 in the cases Viking (C-438/05), Laval (C-341/05), Rüffert (C-346/06) and Commission vs. Luxembourg (C-319/06), the CJEU has turned the employment standards originally conceived as minimum standards in the PWD into a ‘maximum ceiling’ of terms and conditions of employment. In the meantime, though, the CJEU has issued two judgments with a more protective effect for posted workers: in the Sähköalojen ammattiliitto case (C-396/13), it ruled that categorising workers in different pay groups which are universally binding and transparent in a collective agreement has to also be applied to posted workers. More recently, it ruled in the Regio-Post case (C-115/14), that Member States can require tenderers of public procurements and their subcontractors to pay their employees a set minimum wage.

C. The Enforcement Directive and current reform efforts

These last years, new reform efforts have been and are being pursued in order to address malpractice and strike a new balance between the free movement of services and the social protection and equal treatment of posted workers.

Given the problems experienced in the implementation of the PWD, along with updates in the European Treaties, the first major reform undertaken was of Directive 2014/67/EU on the enforcement of the PWD, which sought to address the previous legal inadequacies of the PWD through creating a common legal framework to identify genuine posting and allow for more uniform implementation, application and enforcement of common standards. The 2014 Enforcement Directive was an important step forward in terms of giving the PWD the legal certainty and structure for administrative coordination required for successful implementation. However, the Enforcement Directive did not touch on the substantive aspects of the PWD. So, a second path to reform is specifically targeted at bolstering the social rights of workers in the PWD and facilitating a better balance with economic rights of free service provision.

D. Current state of play: Proposed reform on revising the PWD

1. The Commission proposal

Among other changes, the Commission proposal of 8 March 2016 entails the following changes:

— Presumptions on long-term posting: workers posted for longer than two years would have the host Member State’s labour law conditions applied to them, if no other choice of law was made by the parties;

— Including a proposed change from ‘minimum rates of pay’ to ‘remuneration’ in order ‘to promote the principle that the same work in the same place should be rewarded in the same manner’;
— Rendering applicable to all sectors, not just to the construction sector, rules regarding terms and conditions of employment, such as remuneration, set by universally applicable collective agreements;

— Giving Member States the option to oblige companies to subcontract only to providers (national or foreign) that respect the applicable conditions of remuneration;

— Introducing a mandatory equal treatment clause for posted temporary agency workers: the conditions to be applied to cross-border agencies hiring out workers must be those that are applied to national agencies hiring out workers, see Article 5 of Directive 2008/104/EC on Temporary Agency Work (TAW).

2. The yellow-card procedure

Upon publication of this proposal, 11 Member States’ parliamentary chambers submitted a reasoned opinion, thereby triggering a subsidiarity check, the so-called yellow-card procedure. Most reasoned opinions deplored the fact that the principle of ‘equal work for equal pay’ would cause competitive disadvantage for their workers, that the applicability of collective agreements would then apply to all sectors instead of the construction sector only, and that Member States would lose their right to decide on the basic working and employment conditions of posted temporary agency workers as provided for in the 2008 TAW Directive.

The Commission, after carrying out a subsidiarity review, in June 2016 decided that its proposal did not breach the subsidiarity principle and therefore maintained the proposal unchanged.

3. Parliament’s position

Parliament’s focus in its revision is strengthening the commitment to guarantee a common set of social rights in order to avoid unfair treatment by extending the legal basis to Article 153 TFEU. Its legislative mandate, adopted 23 October 2017, includes the following changes to the Commission proposal:

— Remuneration: All of the host country’s rules on remuneration, set by law or collective agreements, should apply to posted workers, and Member States should be obliged to publish all elements of their national remuneration policy, as well as information on collective agreements, on a special website.

— Parliament has extended the conditions of employment posted workers enjoy on a par with workers in the host state to the conditions of workers’ accommodation and allowance rates to cover travel, board and lodging expenses for workers away from their habitual place of work.

— Collective Bargaining: Host Member States could opt to apply regional or sectorial collective agreements, instead of national ones, if they offer more favourable conditions for posted workers.

— The Commission’s presumption on long-term posting is being taken up, subject to the possibility to grant extensions to undertakings based on a reasoned request made to the competent authority of the Member State where the worker is posted.

4. Council’s position

Finally, the Council has two core revisions at the heart of its general approach:
— Shorter postings: reduce the possible length of postings from 24 months (as proposed by the Commission) to 12 months with a possibility of a 6-month extension.

— Collective bargaining: the Council is not going as far as Parliament in only applying universally applicable collective agreements to posted workers across all sectors.

Tripartite interinstitutional negotiations (trilogues) between the Commission, Parliament and Council have started with the hopes of reaching a first-reading agreement.

ROLE OF THE EUROPEAN PARLIAMENT

The European Parliament has been a driving force in legislating on the freedom of movement for people and services and has played a decisive role in the debates on regulation and rules for posted workers, namely having raised the issue in eight resolutions since 2004 to improve the PWD, see the study prepared for the EMPL committee on ‘Posting of Workers Directive – current situation and challenges’ of June 2016.

Marion Schmid-Drüner
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THE EUROPEAN UNION AT A GLANCE

The aim of the Fact Sheets is to provide an overview of European integration and of the European Parliament’s contribution to that process.

Created in 1979 for Parliament’s first direct elections, the Fact Sheets are intended to provide non-specialists with a straightforward and concise – but also accurate – overview of the European Union’s institutions and policies, and of the role that Parliament plays in their development.

The Fact Sheets are grouped into six chapters:

• **How the European Union works**, which addresses the EU’s historical development, legal system, institutions and bodies, decision-making procedures and financing;

• **Citizens’ Europe**, which describes individual and collective rights;

• **The internal market**, which explains the principles and implementation of the internal market;

• **Economic and Monetary Union**, which outlines the context of EMU and explains the coordination and surveillance of economic policies;

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Drafted by the Policy Departments and the Economic Governance Support Unit, the Fact Sheets are reviewed and updated at regular intervals throughout the year, as soon as Parliament adopts any important positions or policies.


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