



POSTING OF WORKERS

As stipulated in the Treaty on the Functioning of the European Union, freedom of establishment and the freedom to provide services guarantee the mobility of businesses and professionals within the EU. However, in order to ensure fair mobility and competition, there are also specific EU laws regulating the rights of posted workers.

LEGAL BASIS

Articles 54 and 56 to 62 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

A 'posted worker' is an employee sent by his or her employer to carry out a service in another EU Member State on a temporary basis. EU law on posted workers is generally regarded as a targeted effort to regulate and balance the following two principles:

- Creating a level playing field for cross-border service provision in a way that is as unrestricted as possible;
- Protecting the rights of posted workers by guaranteeing a common set of social rights in order to prevent unfair treatment and the creation of a low-cost workforce.

ACHIEVEMENTS

A. History of the Posting of Workers Directive: supporting the free movement of services

The history and legal basis of the Posting of Workers Directive (PWD) stem 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 the cross-border provision of services was brought to the forefront of the internal market debate. Following a decade of legislative gridlock, it was a judgement by the European Court of Justice (C-113/89), coupled with the accession of Austria, Finland and Sweden, that eventually triggered the adoption of a directive to regulate the situation of posted workers.

The first directive was adopted on 16 December 1996. It 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 in accordance with the host state principle. For the rest of the employment relationship, the labour law rules of the sending country would continue to apply. As regards social security, posted workers remained insured in the social security system in their home country provided the posting lasted — in general — for less than two years. As far as taxation was concerned, the right to levy income tax remained with the sending country for 183 days, moving to the receiving country only after that period had elapsed.

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

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

- Increasing wage gaps and divergence in labour costs, which made it more attractive for businesses to use posted workers; as a consequence, between 2010 and 2014 the number of postings went up by 44.4%;
- An environment conducive to malpractice, such as rotational posting or the practices of ‘letter-box companies’, which exploited loopholes in the directive to circumvent employment and social security legislation and engage in operations in other Member States;
- A lack of clarity in the established standards and weaknesses in the cooperation between authorities, both within Member States and across borders, creating problems for enforcement bodies.

In view of the social policy provisions introduced into the European Treaties since the 2007 Lisbon Treaty revision, it was questionable whether the 1996 PWD provided 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 did not provide the necessary legal clarity. As the Commission rightfully noted, the lack of a clear standard generated 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), Ruffert (C-346/06) and Commission vs Luxembourg (C-319/06), the CJEU turned 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 must 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.

B. Reforms to improve performance

In the light of these shortcomings, the Commission pursued reform in an effort to update the original PWD and strengthen enforcement. These reforms took account of updates to the European Treaties and changing mobility patterns. There were 2.8 million posted workers in the EU in 2017, a number which increased by 83% between 2010 and 2017.

The two main legislative proposals:

1. Enforcement Directive 2014/67/EU

This directive creates a common legal framework for identifying a genuine posting of workers and allows for a more uniform implementation, application and enforcement of common standards. It clarifies the definition of posting and defines the responsibilities incumbent on Member States to verify compliance with the PWD, especially in sectors with a greater risk of malpractice, such as construction or road haulage. It seeks to achieve better cooperation between national authorities in charge of posting, by enforcing the obligation to respond to requests for assistance and setting time limits for responses to information requests. Finally, administrative penalties and fines imposed on service providers by one Member State can now be enforced and recovered in another Member State.

2. Revised Posting of Workers Directive of 28 June 2018 (Directive EU 2018/957)

In March 2016, the Commission proposed a revision of the original PWD (96/71/EC) with a view to ensuring the application of the host Member State's labour law in the case of long-term posting, and addressing issues such as equal pay, the applicability of collective agreements and the treatment of temporary agency workers.

Upon publication of this proposal, 11 Member State parliamentary chambers submitted a reasoned opinion, thereby triggering a subsidiarity check — the so-called yellow card procedure. Most opinions deplored the fact that the principle of 'equal work for equal pay' would cause competitive disadvantage for their workers 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 Temporary Agency Work (TAW) Directive.

Following intensive negotiations between the Commission, the Council and the European Parliament, the Council adopted the revised Directive on 21 June 2018. Effective from 30 July 2020, the Posted Workers Amendment Directive 2018 affects the following areas:

- Long-term posting: Posting can last up to 12 months, with a possible extension of six months (the Commission had originally proposed 24 months). After this period, the provisions of the host Member State's labour law will apply;
- Remuneration: All host country rules applicable to local workers will also apply to all posted workers from day one, i.e. the principle of equal pay for the same work in the same place will apply. As regards other elements of remuneration, the revision introduces clearer rules for allowances, while travel, board and accommodation



costs are not deductible from workers' salaries. As stipulated by the Enforcement Directive, the mandatory elements that constitute remuneration in a Member State must be available on a single national website;

- Working conditions: Member States may apply large, representative regional or sectoral collective agreements. Previously this was valid only for universally applicable collective agreements in the construction sector. As regards accommodation conditions in the host country, existing national rules for local workers away from home for work must be applied;
- Posted temporary agency workers: The revised PWD ensures equal treatment of posted temporary agency workers. The same conditions applicable to national temporary employment agencies will also apply to those cross-border agencies hiring out workers;
- Transport: Directive (EU) 2020/1057, which came into force on 1 August 2020, lays down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector. It amends Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012. The Member States have to transpose the provisions of the new Directive into national law by 2 February 2022. Legislative clarification for other highly mobile workers in sectors other than road transport is still pending. In the *Dobersberger* judgment (C-16/18) of 19 December 2019, the European Court of Justice excluded workers performing on-board services on international trains from the PWD's scope of application.

ROLE OF THE EUROPEAN PARLIAMENT

The European Parliament has been a driving force in legislating on freedom of movement of people and services. Since 2004, it has been raising the issue of the need to improve the PWD (see this Parliament [study](#) of June 2016).

During the negotiations on the revision of the PWD, Parliament specifically pushed for 'equal pay for equal work' and for Member States to be able to apply regional, sectoral or industry agreements. In addition, it sought to enable Member States, by means of a review clause, to place foreign undertakings under the same national obligations in the event of sub-contracting. It has also successfully brought about a two-year transposition and application period for the directive.

Regina Konle-Seidl / Zahra Boudalaoui-Buresi
12/2020

