Posting – The legal panorama of european labour and social security law*

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I. The basic rules of posting

When we have a look at European legislation, in particular conflict of laws, labour law and social security law in respect of posting, at first glimpse everything seems to be clear and in full harmony. It is common ground in all the three legal sources that when it comes to define the contents and the conditions of the contract of employment the place in which the service is carried out is the determining factor. This is what we call the *lex loci laboris* principle. We use this principle since the place of the work is the strongest link to the service carried out. But there is an important exception to this principle. When happens what we call posting the applicable law does not change. In this way Art. 8 para. 1 Reg. 593/2008 quite simply states: "The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country." On principle Dir. 96/71 and Reg. 883/2004 follow suit, though Dir. 96/71 declares some areas of the host state applicable.

From the provisions in the three legal acts we can gather that a common and central element is the temporary character of the change of the place of work. But here ends the commonality of the wording. Whereas Art. 12 Reg. 883/2004 clearly states the time horizon (24 months), the other two provisions do not specify the time limit. In the area of conflict of laws the work carried out in another country is regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. In other words the decisive factor is thus not time alone but rather the intention of the parties: Whether or not there is an intention to return or to recall the employee (*animus retrahendi*)[1].What a limited period is, the term Art. 2 Dir. 96/71 uses for the definition of a concept of posted worker, is open for question, a precise time-limit is not fixed.

The provisions on posting are guided by what is laid down in primary law, i.e. guaranteeing the freedom to provide services. In one of its first judgments, in a social security case, the ECJ pointed out that the posting provisions aim at "overcoming obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organizations"[2]. It is uncontested that the freedom to provide services includes the rights of undertakings to provide services in another Member State, to which they may post their own workers temporarily[3].

That posting is nothing out of the ordinary, rather daily routine in carrying out services abroad has long been obvious. So we understand the remarks by the AG in his conclusions in the case Manpower in 1970. To the question of what the draftsmen of the Coordination Regulation No. 3 in 1958 thought when they drafted the posting provision he answered[4]: "The circumstances with

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[1] See Preamble to Reg. 593/2008 Recital 36; *Deinert*, Internationales Arbeitsrecht, 2013, § 9 para. 103.

[2] ECJ 35/70 (Manpower), EU:C:1970:120 para. 10.

[3] Leading cases ECJ C-113/89 (Rush Portuguesa), EU:C:1990:142; C-43/93 (Vander Elst), EU:C:1994:310.

[4] Opinion AG 35/70, EU:C:1970:104 ECR 1970, p. 1261.

which they wanted to deal are patently much more simple and common: for example that of an industrial undertaking which when delivering a machine abroad has it accompanied by a technician to take care of that installation and the trials and to assist for a short time the personnel of the utilizing undertaking in using it". 40 years later the world seems to have changed profoundly. More and more criticism has been voiced vis-à-vis the law on posting and its practical application. The French president called in a press conference in 1913 the posting of workers and the economic and social tensions which it engenders "une question de premier ordre". There are mainly two strands of criticism. The first one identifies a problem of equality. A French labour lawyer writes[5]: "Cette importance reconnue à la question du détachement ne peut s'expliquer uniquement par ses effets économiques, difficiles à mesurer. Elle se nourrit d'autre chose. Le détachement des travailleurs illustre, très crûment, que les droits les plus importants qui découlent de l'intégration européenne, loin de bénéficier à tous les citoyens sont, en réalité, exercés par une minorité d'entre eux, et peuvent mettre en danger certains biens essentiels, dont l'emploi et les droits sociaux. Il donne à voir une Europe qui menace ceux qui, parce qu'ils sont sédentaires, ne sont pas en mesure d'en tirer avantage, et représente, pourtant, la majorité des citoyens européens. Cette Europe pose problème parce qu'elle commence, avant de chercher à la réglementer, par autoriser une forme d'invasion d'autant plus difficile à admettre que ceux qui en sont les initiateurs sont autorisés à déroger à nos règles (ou du moins à certaines d'entre elles). L'Union européenne a fait naître une classe de privilégiés, constituée par des opérateurs économiques indépendants, capables de tirer profit de la libéralisation des activités économiques. En octroyant des droits particuliers à ceux qui, venant d'ailleurs, peuvent faire exception à nos lois, l'Europe met à mal une certaine idée de l'égalité. Cela contribue, sans nul doute, à attiser l'exaspération française."

A second line of critical argument accepts the legal consequences of posting but severely condemns misuse and abuse of the posting rules since such behaviour violates "a climate of fair competition and measures guaranteeing respect for the rights of workers"[6]. Against this background of critical voices my paper is a legal analysis of the current legislation and its application in practice.

In the following I try to give an explanation of the causes which have led to the situation we lament about when we consider law and practice of posting. Perhaps it is helpful to tell you the structure of my analysis in advance. To begin with emphasis is laid on posting in terms of social security as the oldest regulation. I shall show that in this area we have reached high quality in substantive law. Unfortunately substantive law was and is not accompanied by adequate procedural law which is the reason for non-compliance with posting provisions. The analysis is continued in the area of European labour law. The necessity to do this results from the fact that the European legislator has become aware that the strict separation of both regulatory schemes is an essential cause of the problems we face in posting.

II. The factual elements of posting – a comparison between Art. 1 para. 3 of Dir. 96/71 and Art. 12 para. 1 of Reg. 883/2004

Art. 1(3) of Dir. 96/71 provides for three forms of posting:

– Posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended

– Posting to an establishment or an undertaking owned by the group (intra-firm or intra-group mobility)

[5] *Robin-Olivier*, Vers un nouveau régime du détachement des travailleurs?, in: Revue de Droit du Travail, 2014, 134.

[6] This is in particular the stand of the European Commission which tries to counteract against misuse and abuse via amended posting rules, see below under IV.

– Posting by a temporary employment or placement agency to a user undertaking established in another Member State

Article 12 of Reg. 883/2004

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 posted person.

Compared to the definition of the three instances laid down in Art. 1 para. 3 of Dir. 96/71 the definition of posting in Art. 12(1) Reg. 883/2004 is more vaguely worded. Reference is made to a person who is posted by an employer to another Member State to perform on that employer's behalf. Nevertheless with regard of wording the instances there is no difference between both provisions. Practical cases and cases submitted to the ECJ show that there was never a problem in the application of Art. 12(1). Nevertheless it is a right step when the Commission in its proposal for an amendment of Reg. 883/2004 offers a change of wording of Art. 12(1) inserting the formula "a person who is posted within the meaning of Directive 96/71/EC". In its explanation the Commission expresses its intention to clarify that the term posted worker shall be given the meaning given within the Dir. 96/71/EC without changing the personal scope of this Article, but only aligning the notions used in both legal texts[7].

Both provisions are also in accordance with each other insofar as they require as a key feature that an employment relationship exists between the posted worker and the service provider which is established in a Member State other than that where the service is provided.

A significant difference of both provisions concerns the requirements with regard of the posting undertaking/employer. Art. 1 para. 3 of Dir. 96/71 contains no specification of the posting undertaking whereas Art. 12 para. 1 of Reg. 883/2004 refers to an employer which normally carries out its activities in the State from which posting takes place. Later on we shall see which problems result from this difference in wording.

Finally, the most visible difference between both schemes is the precise definition of the temporary character of posting in Art. 12 of Reg. 883/2004 (24 months), whereas Art. 2 para. 1 uses an undefined term ("for a limited period").

III. Developments in the application of posting rules in social security coordination

The wording of Art. 12 para. 1 of Reg. 883/2004 seems clear and simple and misuse and abuse seem to be excluded. But the actual application of these provisions tells us a different story. At the end of the 1990s cases reached the ECJ which document which problems resulted from the application of the posting provisions. I shall present the two leading cases which are typical of the problems which we face up to this day. Between the parties involved, i.e. the posting employer and the social security institutions of the Member State of the seat of the employer and that of the host Member State in which the service is carried out, litigation very often takes place about to which social security institutions contributions should be paid.

In the Case Fitzwilliam[8] the question has been raised between Fitzwilliam Ltd., an Irish temporary work agency established in Dublin, and the Dutch social security institute concerning employers' contributions payable under the Netherlands' social security system in respect of temporary workers employed in the Netherlands on Fitzwilliam's account. The Dutch institution ar-

[7] COM (2016) 815 final under 5. Point 16.
[8] ECJ C-202/97, EU:C:2000:75.

gued that the requirements for posting laid down in Art. 12(1) Reg. 883/2004 were not satisfied by Fitzwilliam arguing that Fitzwilliam did not normally carry out its business in Ireland in which it is established. It contends that it is necessary to make a comparison between the volume of Fitzwilliam's activity in Ireland and the volume in the Netherlands to which it posts workers. In contrast to this the Irish government, which expressed its opinion in the proceedings, submitted that it suffices that the undertaking normally carries on its activity in a Member State if it carries on a genuine activity there. Following this line of reasoning the purpose of the "activity" condition is only to prevent 'brass plate' companies from abusing the exception provided for in Art. 12 Reg. 883/2004.

In its answer to the referring national court the ECJ stresses that only an undertaking which habitually carries on significant activities in the Member State in which it is established may be allowed the benefit of the advantage afforded by the exception provided for by Art. 12. In order to determine whether an undertaking habitually carries on significant activities the competent institution of that state must examine all the criteria characterising the activities carried on by that undertaking. Those criteria include the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned. The list – the ECJ goes on – cannot be exhaustive – the choice of the criteria must be adapted to each specific case.

The judgment in Fitzwilliam was ground-breaking. The next case Plum[9], the judgment of which followed only a few months later, was therefore easy to decide on the basis of the verdict in Fitzwilliam. Nevertheless I will remind of the facts of this German case since it reveals the typical strategies employers choose in order to make use of the posting provisions whereby their application is very doubtful. Mr Plum owns two construction companies, both of which operate in the construction sector and have their registered offices in Germany. He founded a company incorporated under Dutch law having its registered office in the Netherlands. His purpose in founding this company was to meet the increasing competition within Germany from Dutch construction companies, whose labour and social costs are lower than those of German undertakings. Over the course of subsequent years the Dutch company founded by Plum, received all of its orders from his two German undertakings. It carried out building projects exclusively in Germany using its own workers who were resident in the Netherlands or in Germany. The Dutch company maintained an office at its place of registration which was occupied by the lesser of the business premises, who was also a manager of that company. He answered telephone calls and received and dealt with the post himself or passed it on to be dealt with by Plum's German undertakings. The Dutch firm's books were kept at that office and the employment interviews were conducted there. Plum paid social security contributions to the competent institution in the Netherlands, but the German social security carrier requested payment to it arguing that the legal conditions of posting were not met.

It was easy for the ECJ to give the answer. It referred to the principles laid down in Fitzwilliam and held: "It follows that a construction company, established in one Member State, which sends its workers to the territory of another Member State in which it performs all its activities, with the exception of purely internal management activities, cannot rely on Art. 12 Reg. 883/2004".

As is often the case the case-law of the court was codified. We can now find the principles developed by the ECJ in part in Art. 14 of the Implementing Reg. 987/2009 and in part completed by the Decision No. A 2 of the Administrative Commission. For reasons of time I do not read out the whole text of these two documents. It may suffice to underline that we now have got a clear

[9] ECJ C-404/98, EU:C:2000:607.

basis of the instance of posting in terms of substantive law. Nevertheless the problems persist and we have to ask why this is so. The answer is: the current state of procedural law is not appropriate to enforce the whole body of substantive law. We have to realise that neither Reg. 2004/883 nor the Implementing Regulation contain effective control mechanisms. Only in Decision A 2 of the Administrative Commission do we find attempts to establish control mechanisms, but on a very modest level. Point 6 of this document is rather an appeal to the competent national institutions to assess and monitor the situations covered by Art. 12 of Reg. 883/2004 and provide employers and workers with all the appropriate guarantees so as not to impede the freedom to provide services and the freedom of movement of workers. Another point encourages cooperation between the competent authorities in Member States for the purpose of implementing Art. 12 mentioning exchange of information, experience and good practice when fixing and grading the criteria for assessing the situation for undertakings and workers, and in connection with the control measures put into place. Needless to say that these two points are far from contributing to an effective system of control and enforcement of posting provisions.

IV. The developments of posting rules in European labour law

Compared to the regulation of posting in social security coordination the wording of Art. 1 para. 3 of Dir. 96/71 is far from being instrumental to the prevention of misuse of posting provisions. In particular there is a complete lack of description of the qualities of the posting undertaking. As far as procedural law is concerned the Directive is as vague and ineffective as the comparable provisions in social security coordination. It is well known that in this respect Dir. 96/71 offers only modest help for securing proceedings aiming at the enforcement of the "hard core" of provisions which the Directive has in its mind. Art. 4 to 6 of this Directive indicates the essential aspects for its implementation (cooperation on information, measures in the event of failure to comply with the Directive, the right to institute proceedings in another state). But these provisions are too vague and experience shows that many Member States did not adequately transpose them. It comes as no surprise that misuse and abuse of posting provisions by employers persisted. From 2012 onwards more and more Member States requested to remedy this dissatisfying state of law.

The Council reacted with the adoption of Dir. 2014/67. Reading the preamble to this directive we quickly learn that the enforcement of Dir. 96/71 consists – as far as substantive law is concerned – in the creation of provisions on the identification of a genuine posting and preventing abuse and circumvention. To this end recital No. 7 states: "In order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide service enshrined in the TFEU and/or of the application of Dir. 96/71/EC the implementation and monitoring of the notion of posting should be improved and more uniform elements, facilitating a common interpretation, should be introduced at union level". With Art. 4 of Dir. 2014/67 the European legislator has made the decisive step to realise this task. Art. 4, entitled "Identification of a genuine posting and prevention of abuse and circumvention" offers a detailed description of the factual elements of what constitutes posting and overcomes in this way the insufficient definition of posting in the Dir. 96/71. In doing this use was made of the experience and the legislative acts in social security coordination. In Art. 4 para. 2 and 3 Dir. 2014/67 we find all the elements which are available in the case-law of the ECJ, in Art. 12 para. 1 of Reg. 883, in Art. 14 para. 1 and 3 of Reg. 987/2009 and in the Decision A 2. At this place it is not possible to present and analyse all the factors and aspects contained in these provisions[10]. It may suffice to single out one of the most important elements. Since one crucial aspect of the enforcement task is combating letter-box companies, the provisions in Art. 4 para. 2

[10] For a detailed analysis see *Defossez*, La directive 2014/67/UE relative à l'exécution de la directive 96/71/CE concernant le détachement de travailleurs: un premier pas dans une bonne direction, Revue trimestrielle de droit européen, 2014, 833 (837 et seq.).

lit. d) and e) Dir. 2014/67 are of the utmost importance. In tune with the criteria developed in social security coordination the competent authorities have to examine the place where the undertaking performs its substantial business activity and where it employs administrative staff, the number of contracts performed and/or the size of the turnover realised in the Member State of establishment. In performing this spill-over of social security control tools to the area of European labour law an important step forward was made to if not completely harmonise, at least approximate the elements and tools of examination of genuine posting in terms of labour and social security law. In this respect Art. 4 para. 1 of Dir. 2014/67 establishes that for the purpose of implementing, applying and enforcing Dir. 96/71, the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary, including, in particular, those set out in para. 2 and 3 of this Article.

But Dir. 2014/67 made another decisive step. To overcome the shortcomings of Dir. 96/71 mentioned before it put the accent quite rightly on the crucial points. It improved the substantive provisions, but the largest part is dedicated to procedural law, which comprises more than two thirds of the whole text. I restrict myself and highlight only the subjects which form the heart of the chapters II to VII of Dir. 2014/67[11]. Rules are provided for monitoring proceedings in Member States, for access to information on terms and conditions of employment, for administrative court operations and mutual assistance between Member States, for effective and adequate labour inspections, for subcontracting liability[12], for recovery of cross-border administrative penalties. Even a fleeting look at these provisions shows that this time the European legislator means business. In contrast to what is done in Dir. 96/71 the Directive of 2014 distinguishes itself by the concreteness of the contents of the aforementioned provisions. We can say that Brussels and Strasbourg did their job, now it is up to the Member States to put the written law into reality. In this respect apart from the implementation of the provisions into national law a decisive factor for the success of the new law will be the willingness of Member States to deploy sufficient personnel in order to meet the obligations of the Directive. In the past very often this was not the case in numerous Member States. More personnel means to increase the financial burden, and more rigid controls may detect abuse of posting provisions by employers which, as a consequence, lead to less tax revenues and less social security contributions in the Member State of origin. This may be seen as a disincentive by Member States from which frequently posting takes place, in particular low-wage countries.

To summarize my short comparative analysis I might say that social security coordination and posting provisions in the new Directive are now on the same level as far as substantive law, the wording of the posting instances, is concerned (although I do not overlook that some criticism has been put forward arguing that some criteria in Art. 4 give too much leeway to apply them[13]). Unfortunately social security coordination remains behind the Dir. 2014/67 with regard to measures and instruments needed for enforcement. This prompts me to add a more general critique. I think a good opportunity was missed to encourage administrative concentration in the enforcement proceedings. In most Member States there are different authorities which discharge the task of monitoring and control of and compliance with posting provisions. Since the factual

[11] The Articles of these chapters are analysed in detail by *Defossez*, op.cit., 833 (p.841 et seq.).

[12] The importance of this new provision is outlined by *Muller*, Face aux abus et contournements, la directive d'exécution de la directive détachement est-elle à la hauteur?, Droit social, 2014, 788 (793 et seq.). The ECJ had declared the accordance of national rules on subcontracting liability with the freedom to provide services before the adoption of Dir. 2014/67, see ECJ C-60/03 (Wolff&Müller), EU:C:2004:610.

[13] For this argument see *Muller*, op.cit., 788 (795 et seq.). One of the unresolved problems is the timespan which satisfies the term „for a limited period" in Art. 2 para. 1 of Dir. 96/71. Art. 4 para. 3 lit. a) of Dir. 2014/67 only repeats this formula without giving clear guidance. In German doctrine an author in a Commentary on Art. 2 para. 1 of Dir. 96/71 argues that the timespan of 24 months in Art. 12 para. 1 of Reg. 883/2004 should be used as a yardstick to suggest that employment beyond this time-limit should be regarded as a rule as not corresponding to the term „for a limited period", see *Rebhahn* in: Franzen/Gallner/Oetker, Kommentar zum Europäischen Arbeitsrecht, 2016, Art. 2 of Dir. 96/71 para.1.

elements of posting in both areas now are identical or at least very similar a single body could operate at least when it comes to establish the factual elements of posting. This would lead to more effectiveness and less administrative costs and avoid divergent results of assessment.

V. The A 1 document

My last topic is a very important one, although it is seemingly only about a document. I refer to the form A 1 the wide use of which, be it in its print form or as an electronic document, plays a central role in the administration of the posting provisions. The A 1 form attests that the employee or self-employed person is subject to the social security law of the posting Member State. The A 1 form could become even more widely used with effects also in labour law since Recital 12 of Dir. 2014/67 states that the lack of this certificate may be an indication that the situation should not be characterised as one of temporarily posting to a Member State other than the one in which the worker concerned habitually works in the framework of provision of services. This document (legal base in Art. 19 para. 2 Reg. 987/2009) states the affiliation of the posted worker to the social security system of the Member State of origin and is binding on the social security institutions of the host Member State. On principle this is a useful tool for the posting management and quite rightly in the Fitzwilliam judgment the ECJ said that the document is aimed at facilitating freedom of movement for workers and freedom to provide services. So we understand that even Dir. 2014/67, despite being a labour law directive makes reference to the A 1 certificate. This is one side of the coin, the good one. But the flip side tells us another story. And it concerns the usage of the document. It is mainstream opinion of experts that a high number of A 1 forms are incorrect. Two reasons are stated usually as explanation of this incorrectness. The first reason is the fact that so far the competent Administrative Commission has not been in a position to offer a uniform blueprint of the document for general usage in the EU. In other words, up to now it is the Member States which define the contents of the form. As a consequence, the correctness of A 1 forms issued depends on to what extent the information required by the form is sufficient for a reliable decision which is in accordance with the posting regulation. The second reason lies in the handling of the issue of the document. It is normally the employer who makes the request after download of the form and filling in the information required. He or she sends the document filled in to the competent institution which typically decides on the basis of the written information. Since this task is normally a kind of mass business, there is no time for detailed control of the single case apart from cases in which the request presented is suspicious. The consequences of this detrimental state become even more evident if we think of the legal nature of this document. According to the case-law of the ECJ A 1 forms are binding on the institutions of the host Member State. Only through a very burdensome procedure developed by the Court and later on enshrined into Art. 5 of Reg. 987/2009 is it possible to delete the effects of false A 1 forms, a procedure in practice vary rarely used due to its cumbersomeness. In a recent judgment[14] the ECJ denied courts of Member States the competence to decide on the lawfulness of a A 1 document, stressing that the procedure under Art. 5 of Reg. 987/2009 prevails. In two further judgments the ECJ ruled that the A1 forms are also binding on national courts, but if the certificate is fraudulently obtained or relied on, a national court may disregard such a certificate[15].

VI. Reform prospects

In March 2016 the European Commission has presented a Proposal amending Dir. 96/71[16]. After long debates of this proposal on 28 June 2018 a new Dir. 2018/957 amending Dir. 96/71 was

[14] ECJ C-620/15 (A-Rosa Flussschiff GmbH), EU:C:2017:309 of 27 April 2017.
[15] See ECJ C-359/16 (Altun), EU:C:2018:63; C-527/16 (Alpenrind), EU:C:2018:669.
[16] COM (2016) 128 final.

adopted[17]. Two main changes were introduced. The first one is the principle of equal pay in favor of posted workers. From the beginning of their activities in the territory of the host Member State they can claim the same remuneration included overtime rates as the workers who fall under the labour law of this State. The second very important amendment is the application of the terms and conditions of the labour law of the host Member State if the duration of the posting exceeds 12 months. This is true also for posted workers who replace another posted worker. Member States have to implement this new Dir. at the latest by 20 July 2020.

[17] OJ L 173/16 0f 9 July 2018.