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The posting of workers saga: a potted version of the challenges engulfing social Europe

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Key points

- The new Directive revised in May 2018 on the posting of workers signals a genuine change of direction.
- This can be attributed to a change of preference demonstrated in some Central and Eastern European countries (CEECs) in the light of the failed convergence strategy underpinned by low wages.
- This conclusion also emerged from a substantive strategic collaboration between the ETUC and its Central and Eastern European members.
- The posting of workers saga highlights the increased diversity of national industrial relations systems while, at the same time, indicating that positive solutions can be found to the challenges of low-end social competition.

Introduction

In May 2018, the Council and the European Parliament adopted a new, definitive version of the Posting of Workers Directive. Even though some issues – not least the exclusion of the transport sector from the revision – have not been resolved, this new Directive marks a sea change to the previous approach. The Directive's history illustrates the uneasy development of a European social dimension as well as the difficulties in marrying different industrial relations and social protection systems. In this Policy Brief, we shall be elaborating on these points, leaving aside the highly technical detail to focus on the political pressures and the resulting lessons to be learned.¹

Postings within the EU were few and far between in the 1980s and early 1990s and involved only a limited number of undertakings. The purpose of this – at the time in essence technical – matter was to lay down the most appropriate arrangements for undertakings and their employees to conduct short-term work assignments outside the national territory on a temporary basis in another EU Member State. There were three separate dimensions to the arrangement: namely, labour law, the social security regime and taxation applicable to those workers.

Since 1971, social security matters had been regulated by the Regulation on social security coordination. Under the Regulation, workers were permitted to work for up to two years in another

EU country while still being covered by their own country's social protection scheme.

Taxation arrangements likewise incorporated relatively clear rules inasmuch as workers were covered by their country's own scheme provided that they worked for no more than 183 days in another country (this aspect will not be discussed here).

The issue of pay and of the employment law to be applied presented no major challenges because the wages and employment conditions of the original Six and subsequently of the Nine EU Member States did not differ to any significant degree. In accordance with the 1980 Rome Convention ratified by the Member States, in the absence of agreement between the parties, the law of the country of origin was, in principle, to be applied. Nonetheless, the mandatory rules (those from which there can be no derogation simply by contract) of the host country were to apply.

¹ Our sincere thanks go to Christophe Degryse for his valuable comments.

1. Initial disputes

An initial change came in the light of Spain and Portugal's accession to the EU in 1986. Both countries enjoyed a period of transition in terms of the free movement of workers until 1992. That said, no provision was made for the free movement of services. Nonetheless, Rush Portuguesa, a Portuguese company, carried out works on TGV Atlantique sites in France, using workers of Portuguese nationality which it posted to France. The French administration challenged this practice, while the company concerned maintained that it was applying the principle of the free movement of services. The dispute led in 1990 to a – now well-known – ruling by the Court of Justice on this matter (for a detailed analysis, see Rocca 2015). The judgment can be credited with providing some degree of clarification, although various grey areas remain (see below).

That ruling was delivered in the wake of the adoption in 1989 of the Community Charter of Fundamental Social Rights of Workers. In the drafting of the Charter, the status of temporary work in another country became an increasingly contentious issue. In the absence of consensus, this sticking point was, in the end, referred to the programme of action and to a subsequent proposal for a directive in this area (Jonckheer and Pochet 1990).

In the late 1980s and early 1990s, this issue had therefore taken on a predominantly legal and political dimension.

2. The 1996 Directive

The fall of the Berlin Wall in late 1989 and the transition by the Soviet Union's former satellite states to capitalism was another game-changer: on the one hand, there was increased competition in each country by companies using workers from the new Member States with significantly lower wage costs and, on the other hand, this was also happening on a greater scale.

Deciding how to handle this new form of competition was, as already mentioned, somewhat of a moot point, with one camp seeking full and immediate equality of national and posted workers, and the other seeking flexibility and trumpeting the positive effects of a competitive approach.

The construction sector lays at the heart of that conflict: like the unions, the industry's employers were keen to have rules enabling fair competition, not forgetting that they too felt the effects of the competition coming from companies that were using posted workers. One highly prominent and iconic example of this was the reconstruction in the 1990s of a unified Berlin and the extensive works carried out to that end, drawing on the labour of many foreign workers under their 'posted worker' status. These workers were paid less than their German counterparts because, at the time, Germany did not have a minimum wage universally applicable across the sector. Europe's sectoral social partners were the driving force behind the first European Directive on the posting of workers, adopted in 1996.

Under this Directive, Member States could guarantee a hard core of terms and conditions of employment for workers posted on their

territory. That hard core covered, in particular, minimum rates of pay, working time, the number of paid holidays and rules relating to health and safety. If those rules were to be imposed on all undertakings, regardless of their nationality, they would be required to demonstrate some form of legitimacy and therefore be laid down either by statute or by genuine collective agreement.

The Directive indicated a clear preference for *erga omnes* collective agreements, that is to say, agreements enjoying enforceability that is equivalent to statute. However, the nature of collective agreements varied enormously from one national tradition to another, and the 1996 Directive also acknowledged the possibility of guaranteeing the observance of collective agreements which are not-*erga omnes* collective agreements, but nonetheless respected through the ordinary interplay of industrial relations ('de facto' or 'generally applicable' collective agreements).

The minimum wage applied, therefore, if it was governed by law or if it was the result of an acknowledged agreement between employers and trade unions. The same reasoning applied *mutatis mutandis* in respect of wages negotiated by sector. This may well have been a social issue, but the legal base of the Directive was underpinned by the free movement of undertakings. At the time, the matter was, in the main, considered to have been settled.

Enlargement in 1995 to include Austria, Finland and Sweden and the subsequent enlargements of 2004 and 2007 added further breadth to the diversity of the industrial relations systems. In some countries, the minimum wage negotiated in the construction sector did not extend *erga omnes* to all undertakings and workers, and, consequently, its application to foreign service providers was more problematic. Employers therefore pressed for their posted workers to be paid the minimum wage or the wage approved by their country of origin. One seemingly straightforward solution involved making the minimum wage for the sector universally applicable by statute or by *erga omnes* agreement in the construction sector, a measure that would come to fruition in Germany in 1997. A more complex solution would have been to make it applicable to all sectors, which would ultimately also be achieved in Germany in 2016. However, this changed the nature of the industrial relations in which negotiations between social partners were autonomous and independent of the State.

This was also the point at which abusive practices became blatantly apparent, ranging from the failure to comply with working time requirements to the deduction of substantial costs from wages for the board and lodgings of posted workers. Progressing from a marginal and relatively well-regulated activity, posted work became more frequent, with some undertakings occasionally conducting operations that bordered on the illegal or were completely bogus (for instance, the setting up of 'letter box' companies; see Cremers 2014).

The accession in 2004 of 10 new Member States to the EU, bringing with them wage costs that were considerably lower than those of the Europe of the Fifteen, bolstered this trend. For example, in the case of France, the number of declared postings, which had been below 10,000 in 2000, shot up to 38,000 in 2005, 111,000 in 2010 and 210,000 in 2013, that is to say, a 21-fold increase in 13 years (Freyssinet 2016).

Posted work became a typical and almost caricatural illustration of the East/West split in social matters. In most Member States (apart from the United Kingdom), workers from the countries of Central and Eastern Europe (CEECs) were faced with a period of transition in which they were prohibited from settling in another country. Furthermore, East-West solidarity through the Structural Funds was more limited than during the previous enlargements. Against that background, the posting of workers (which, in itself, was permissible) really took off. It became a metaphor for social dumping (remember the Polish plumber?) for the EU's wealthiest countries but was regarded by the CEECs as a feature of competition. They argued that, when capitalist rules benefited them (such as when posting workers), the finger of blame was pointed squarely at them, but that when entire sections of their economy, the banking sector for example, were brought under foreign control, no one found any fault with that.

3. Role of the Court of Justice of the European Union

This increasingly tense situation became even more entrenched in 2008 when the Court of Justice delivered the judgments in *Viking*, *Laval*, *Luxembourg* and *Rüffert* respectively. We shall provide a brief recap of the circumstances of the latter three of these very well-known cases.

Laval: The Court noted that the legal basis was the free movement of companies and established a *de facto* hierarchy as between the economic freedoms relating to the internal market (free movement of undertakings) and the fundamental social rights. It held that action by trade unions should be proportionate, which led to uncertainty surrounding collective bargaining and its corollary, the right to strike. Ultimately, it held the Swedish system to be lacking in clarity, meaning that it could not be applied to undertakings using posted workers.

Luxembourg: The number of laws and agreements to be observed was found by the Court to be exaggerated. In the spirit of the Regulatory Fitness and Performance Programme (REFIT) (reducing legislation and the administrative burden), it held that only the most important aspects should be mandatory. The Directive was regarded as a ceiling rather than a lower limit. Following the *Luxembourg* ruling, it therefore became virtually impossible to impose terms and conditions of employment other than those expressly laid down by the Directive. In practice, the result was an unravelling of the collective agreements normally applying to national workers.

Rüffert: The Court held that, where there is even a highly theoretical possibility (as in German law at the time) of an extension *erga omnes*, any other form of collective agreement, even one broad in scope, cannot be imposed on foreign service providers.

This was a fundamental reversal of the approach agreed and adopted since the 1957 Treaty of Rome which levelled the playing field in the same territory (same rights for national and Community workers), but it also introduced the notion that the Posting of Workers Directive does not comprise a lower limit (which can be raised nationally) and instead introduces a ceiling the conditions of which must be strictly observed. Now competition regarding

labour costs in the same territory was deemed healthy and was to be rolled out with limited social guarantees.

This new situation provided a strong incentive for setting up more or less fictitious companies which would maximise, or 'optimise', the loopholes created by the judgments of the Court of Justice (McGauran 2016).

An easy solution would have been for the Swedish Government and, more generally, the European governments to make sectoral agreements *erga omnes* which, in turn, would become mandatory likewise for foreign undertakings. However, many trade unions were reluctant to adopt this approach: it would be specifically their model that would be subject to change, and they were opposed to the State's meddling in their joint collective agreements. Relying on a model that championed flexicurity and delivered results from both an economic and a social perspective, they were up against the Community's lowest-bidder approach which struck at the very core of the national models, namely the autonomy of the social partners.

One clear message to emerge from these arguments was that the statutory minimum wage was to be observed, rather than the salary paid to experienced or skilled workers, which, for its part, was negotiated through collective bargaining measures. This also highlighted the rather limited role of trade unions in securing equal treatment through industrial relations. Even with the safeguard of the minimum wage and traditional company practices, the gains made could be very high, especially as some companies also managed to minimise the social security cost by affiliating their workers to less costly systems (Portugal, Romania or Slovakia, to name just three examples). The Portuguese, Romanian and Slovak Governments each used a subtle trick by excluding from social security contributions the difference between the respective country's minimum wage and the salary paid in the country of posting. They treated this difference as a 'bonus' which was excluded from social security contributions (Trésor-Eco 2016).

From the political perspective, gridlock ensued as the new member countries enjoyed a blocking minority preventing any overhaul of the Directive. Under intense pressure to secure his appointment for a second term, Commission President Manuel Barroso initiated formal measures in 2009 to review the Directive. In the wake of lengthy and complex discussions, the Directive was, eventually, partially revised in 2014 not in terms of its substance but with a view to controlling abusive practices. Its subtlety lay in its nature as an enforcement directive, capable only of addressing issues connected with the application of the 1996 Directive and not of reviewing its fundamental principles. Nonetheless, seven countries rejected the compromise, namely the United Kingdom along with six new Member States (the Czech Republic, Estonia, Hungary, Latvia, Malta and Slovakia). The main change involved checking that companies were not letter box companies and improving cooperation between national administrations. The two most divisive aspects in this regard were control measures and subcontracting.

But these developments were insufficient to ease the tension, especially as the number of posted workers continued to rise at a rapid rate. According to European data, in 2015 there were 2.3 million workers posted in the EU. Their number skyrocketed

in the early years of the crisis and rose by 63% between 2010 and 2016, accounting for approximately 1% of total employment.

4. Reasons behind the successful revision of the Directive

When the Commission proposed a revision of the Directive, no fewer than 11 countries (Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) presented it with a 'yellow card' in May 2016.

Why then, after two years of negotiation, was a new directive now on the horizon? As we have already explained, this was essentially a legal and political discussion. From the legal perspective, the Court's judgment (in Case C396/13) of 2015 challenged the previous case law. As stated above, this Policy Brief does not dwell on the legal discussion, but it would appear that the Court, on the receiving end of much criticism from the political sphere but equally from its own quarters, acknowledged the limitations of its previous judgments. It noted in that judgment that minimum rates of pay could not be a matter of choice for an employer who posted workers with the sole aim of offering lower labour costs than those of local workers. In other words, the Court of Justice was ruling against competition on wages.

The second part of the explanation is political and stems from a gradual change of preference by some of the governments of the countries of Central and Eastern Europe with regard to their development model. The model selected thus far of competition based on very low wage costs and minimum wages entailed a significant outflow of workers from those countries because the prospects of a pay increase were poor, in particular for skilled workers remaining in the country.

Those particular workers emigrated in their hundreds of thousands. The governments, which were becoming increasingly nationalist, were therefore having to deal with an economic model which favoured emigration and thus the demographic weakening of those countries which were also affected by very low birth rates. In other words, the model selected had adverse effects and ultimately thwarted any chances of national development or improvement in the value-added chain.

These events went hand in hand with European trade union campaigns, involving all trade unions in the CEECs, promoting a process of convergence by increasing wages at national level. The trade unions of those countries did not endorse the low-cost model, symbolised *inter alia* in the posting of workers. The European Trade Union Confederation and, in particular, its General Secretary Luca Visentini organised a structured campaign for lobbying the employment ministers and the prime ministers of the CEECs in order to persuade them not to oppose the Directive.

The journey embarked upon to secure an agreement has been a complex one (Clauwaert 2018) but the outcome is impressive: the agreement reached between the Council and the European Parliament in trilogue in March 2018 ushered in a radical change of the rules.

5. Achievements of the new Directive

Without going into detail, here are the main changes: The legal basis remains unaltered inasmuch as it is still the internal market. However, under a new article, the right to strike and take collective action (the 'Monti clause') is to be unaffected by the Directive. It also provides that the sole objective of the Directive is to safeguard workers (not, as previously, to safeguard the freedom of undertakings to provide services). This is, therefore, a significant development.

The new text provides for postings of a maximum duration of one year, with an option to extend that period for a further six months. This clause per se in fact changes very little because the average duration of a posting is around four months, but it is of highly symbolic significance.

The wages issue carries greater significance. No longer restricted to the minimum wage, the issue now concerns 'remuneration'. The comparison is also made with gross earnings, which is essential for limiting competition between the social protection schemes, and this measure also makes it possible to clarify the status of various bonuses. Lastly, the rules governing board and lodging expenses are laid down in greater detail. These expenses will be required to be reimbursed, in addition to the remuneration. Bearing in mind that such expenditure can, in some regions, make up as much as 40% of the sum payable to workers, this is a major improvement. However, under the new Directive, the country of origin is responsible for establishing the arrangements for repayment, which might create problems for the practical implementation of this new law.

Secondly, the collective agreements extended *erga omnes* are no longer limited to the construction sector. And finally, and most importantly, guaranteeing the respect of generally applicable collective agreements (not necessarily those extending *erga omnes*) has become a real option. If a government decides to apply this option, the agreements concerned must be clearly identified and explained on a separate website setting out all the rules and obligations applying to companies using posted workers. Consequently, the Court's criticism of the Laval case (complexity and lack of clarity as to the rules to be applied) has been successfully tackled. There has therefore been a clear boost in both the number of agreements to be regarded as applicable and the salary levels agreed (exceeding the minimum wage) and other potentially mandatory measures.

For those workers posted via temporary work agencies, the principle of full equal treatment with the temporary workers used by local agencies prevails, thereby removing a further possibility for unfair competition. By contrast, the responsibility of main contractors in the subcontracting chains has not been addressed.

The period prescribed for transposing the new arrangements into national law is a maximum of two years, followed by an evaluation five years after transposition.

During the vote in the Council to approve the outcome of the trilogue, only Hungary and Poland voted against the text, with Croatia, the Czech Republic, Latvia, Lithuania and the United Kingdom abstaining (which is a far cry from the 11 governments

initially opposed to launching any form of discussion), while – with 456 votes for and only 147 against – the European Parliament voted resoundingly in favour of the new Directive.

The situation has therefore clearly been turned on its head, a phenomenon that few thought possible for a text that became far more ambitious than envisaged.

Conclusions

And so ends the saga of the Posting of Workers Directive ... well, in part at least, as the transport issue is still unresolved. After a 20-year peregrination, here we are again finally, looking to the basic principles on which the EU was originally founded. In the absence of European social harmonisation, the different Member States must be capable of developing, at national level, the safeguards they deem necessary, and not find themselves having to tackle unfair competition in their territory between workers covered by various safeguards and rights and workers employed by companies using every trick in the book to circumvent the principles of fair competition.

But the most interesting aspect to emerge from this is without doubt the lesson that can be drawn from the failure of a costs-led competition policy, such as that pursued by a number of CEECs. This has been a road to nowhere, demonstrated only too clearly by the outflowing of skilled workers from their country of origin seeking to take advantage of wages, employment conditions and pensions which meet their expectations. Such a policy at the same time denies business the opportunity to move up the value chain and therefore precludes any process of convergence.

This outcome also salutes the success of a single, coherent and coordinated strategy by the trade unions. The support provided by the trade unions of Central and Eastern Europe has been a crucial factor in this success.

In an increasingly deregulated world of work, this victory is significant.

All the same, we must point out that the Directive applies only to employed workers (unlike the Regulation on social security coordination which also covers self-employed workers). We now witness an increased use of bogus self-employed workers or workers of dubious status. One potential repercussion of the relaxation and widening, in many countries, of the scope of the legal arrangements

governing self-employed work is that these workers could be used to circumvent compliance with the core of mandatory rules. The discussions and proposals relating to the social pillar, and in particular the European Labour Authority, the Social Protection Recommendation and the Employment Contracts Directive, will be vital for regulating the growing risks of labour market fragmentation. But that is a chapter for another time.

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