Posting of workers: enforcement problems and challenges

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General synthesis
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Introduction

This synthesis is the result of the common work led by 20 members of the steering committee and 98 workshop transnational participants of the project:

“Posting of workers: improving collaboration between the social partners and public authorities in Europe”

It will be available in French and English October 15, 2013 as a synthesis tool posted on the site EURODETACHEMENT http://www.eurodetachment-travail.eu/

The transnational workshops participants are all stakeholders involved in experiences in the field of posting of workers, and a mutual exchange of practice between public authorities and social partners has enabled to produce this synthesis.

This process has relied on concrete situations with a "pooled and sharable knowledge, a body of knowledge" gradually built by these interactions.

Designed as a directly operational tool, this synthesis is built upon fields of actions which are highlighted by an analysis of existing practices: “sensitizing, informing, supporting”, “monitoring, controlling”, “anticipating, preventing”, “acting at the transnational level”. A special chapter is dedicated to “the role of the social partners.”

For each field, an "analysis" part aims to formalize the result of these crossing points of views, collect and formalize, as a puzzle, knowledge and expertise held by each stakeholder (linked to his territory and his function).

Key issues, action-levers and “key actors” have been identified by the various participants.

The action sheets have been achieved by the participants themselves, on the basis of their experiences and to support analysis, with the support of the project team.

In order to facilitate a “network effect” and exchanges, action sheets incorporate contact information on the organizations involved.

The contents of this synthesis tool have been collected in this document in Word format which is an annex to the final technical report presented to the European Commission.
Expert's viewpoint
Expert's viewpoint

Posting of workers: enforcement problems and challenges - Jan Cremers, CLR-expert

Posting of workers as part of a provision of services is not new. A decision to subcontract other undertakings can be motivated by: the search for expertise and know-how not belonging to the own core activity; labour shortages, efficiency seeking; a traditionally evolved division of labour, with partners based on mutual trust, routine or historical reasons. In one of the first assessments dedicated to the implementation of the Posting Directive¹, a team of the European Institute for Construction Labour Research (CLR) undertook in 2003 an evaluation of both the legal context and the practical functioning of the PWD in the framework of the free provision of services.² The findings clustered around the key characteristics of posting:

1. **The existence of a direct labour contract in the home country and the maintenance of the employment relation.**

Not all Member States had implemented the notion ‘maintenance of an employment relation’ directly into national law, and a grey area of economically-dependent workers existed. The fact that under the rules applicable for the coordination of social security, the decisive authority as to whether a person is self-employed or employed is the sending state, whereas under the Posting Directive it is the receiving state, causes misunderstandings and a lack of clarity. The verification of whether labour regulations were really applied was and is an arduous path.

2. **The posting company should be a genuine undertaking that normally carries out activities in the home country (and that temporarily performs services abroad based on a commercial contract).**

Checking whether the undertaking in the home country was a genuine undertaking, pursuing economic operations on a stable basis turned out to be very difficult. Host countries had to rely entirely on information of the home country and the crucial cooperation and mutual exchange therefore were absent.

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3. **The posting is temporary and the posted worker stays subordinated to the posting company while performing work related to the commercial contract between the posting company and the user undertaking.**

Posting is temporary and workers do not seek permanent access. In practice, most Member States applied the posting periods which are used in the social security co-ordination Regulations. But, whether the posting was just workforce supply or in fact a service contract was not easy to control in the host country.

The CLR-research in 2003 found that the measures taken by Member States to ensure compliance with the posting rules were not very well developed. Both the liaison offices and responsible institutions in the Member States suffered from a lack of staff and were lacking information to give real content to the posting rules. Awareness campaigns, for instance by organising seminars where collaborators of the competent bodies meet and exchange experiences were recommended.

Based on this research the European, the social partners in construction (FIEC and EFBWW) formulated a joint statement and pinpointed several fundamental problems. The partners noted that the grey zone of economically-dependent work was (and remains) a growing problem in the sector. A good definition of ‘employees’ and ‘self-employed’ in national law can avoid problems with the application of the implementing legislation of the Directive. Furthermore it is important to be able to verify, legally and in practice, if a worker is correctly posted and falls under the scope of the Directive, and about liability in cases of fake self-employment and/or fake posting. Without these, whatever the apparent regulation of posted workers’ rights, these are unlikely to be enforceable in practice.

FIEC and EFBWW recommended implementing a provision to define who is deemed to be the real employer and thus can be held liable in such cases as fake posting by letterbox companies or fake self-employment. The social partners in construction also referred to the desirability of providing ‘transparent’ and ‘accessible’ necessary information on the applicable labour conditions for a good application of the Directive. For the construction industry a European portal website with links to national websites and/or databases was suggested (and in the meantime realised: www.posting-workers.eu). The social partners’ joint statement noted that much was needed to improve the Directive compliance, especially administrative co-ordination. While the notification of the provision of services is a useful instrument to enforce the Directive, labour and social inspectors needed to be fully authorised to check and investigate whether the labour conditions of the posted workers were respected. Fraudulent service providers – who abuse the posting to distort the construction market and create social
dumping – exploit the national borders of administrations in order to avoid being caught and sanctioned. A more effective execution of sanctions in cross-border situations should be ensured and national social and labour inspectors should step up their co-operation.

A team of CLR-experts, across twelve country cases, reinvestigated in 2010 the functioning of the principles formulated by the Posting Directive. The focus was on the social and economic disparities between the formal legislative or conventional rights and the real wages and remuneration, working time, paid leave, living conditions and health and safety. Two basic methods were exploited: fact finding based on available national sources, control related data and statistics and prominent cases, best practices and the use of an indicative list of research items on compliance, and experiences with monitoring, enforcement and sanctioning. The experts concentrated on compliance related evidence and succeeded in reporting the available facts in the field of control. A logical part of the national investigation was to use information from the liaison offices and authorities responsible for monitoring the terms and conditions of employment. The final report, an overview of actual posting in theory and practice, was built on three important pillars: the results of the preparatory work, a research synthesis and summaries of the national reports.

Compared to the assessment of the 2003 study, greater divergence in transposition and actual application was identified. As the Directive was concluded in the early 1990s it was not foreseeable what the consequences of the 2004 enlargement would be, with a high proportion of these states not offering commitment to collective bargaining as a means of labour standards regulation. A second development has been the extension and intensification of agency work, subcontracting and outsourcing in numerous labour market segments. Both developments have had a serious impact on how posting is actually organised in practice. Nowadays the use of the posting mechanism ranges from normal and decent long-established partnership between contracting partners to completely fake letterbox practices of labour-only recruitment. In the 2011 CLR-report, four applications of posting-related cross-border recruitment were distinguished.

1. Normal posting with specialised subcontractors providing temporary services in another EU Member State with well-paid skilled workers or qualified staff both belonging to the posting companies’ core workforce.

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2. **Legal posting** in the form of labour-only subcontracting where the calculation is made between engaging a domestic workforce or bringing in a workforce from abroad under the ‘free provision of services banner’. The reasoning followed is that a supplier providing workers from a country with low social security payments is cheaper than a domestic supplier. The legal character of the posting can be questioned if this is combined with long working hours and poor living and working conditions.

3. **Questionable practices of ‘legal’ posting** where the recruited workforce that is legally posted is confronted with deductions for administrative costs, for lodging and transport, tax deductions and the obligatory refunding (after the return back home) of (minimum) wage payments. These practices are clearly in breach of the PWD.

4. Finally, different types of ‘fake’ posting which varies from the copying and distribution over a whole work gang of falsified E 101/A1 forms; the recruitment of posted workers who were already in the host country, or workers turned into bogus self-employed; recruitment via letterbox companies and unverifiable invoices for the provision of services.

The use of posting in labour-intensive segments of the labour market does not necessarily lead to a deterioration of working conditions, but it has created an opening for new forms of recruitment not intended by the legislators. The problem arises as soon as cross-border labour-only subcontracting is presented as a provision of services. This is especially the case when companies transfer the recruitment of labour to small subcontractors, leading to the use of agencies, gang masters and other intermediaries. These agencies become the go-between for the worker and the user undertaking or the specialised subcontractor. Distortion of the labour market is potentially substantial as minimising labour costs may be very attractive by bringing in an undocumented element for part of the official work. The lower stratum of posting is then an illegal supply of cheap labour via agents or gang masters. Groups of workers are recruited via letter box companies, advertising and informal networking. Posting thus becomes one of the channels for the cross-border provision of cheap labour in the single market without reference to the free movement of workers and the rights that can be derived from the EU law related to genuine labour migration.

Based on the CLR-research it can be concluded that monitoring of posting rules is difficult and hampered by the ECJ limitations, enforcement lacks strong sanctioning, fines are weak in an extraterritorial context and in most countries there are no specific posting-related enforcement instruments. Examining the phenomenon in detail leads to the conclusion that a concentration of posted workers in the lower echelons of the labour markets and in specific regions, segments and sectors implies serious
risks (distortion of competition, erosion of workers’ rights and evasion of mandatory rules). Employment conditions, wages in particular, offered to posted workers, if not subject to proper monitoring and enforcement, may undercut the minimum conditions established by law or negotiated under generally applicable collective agreements.

There is some evidence that the ending of transition rules on labour market access for EU8 citizens has led to a significant substitution of letterbox postings, by individual direct temporary agency recruitment. Since they no longer need a work permit, workers are coming in through more direct forms of work, such as temporary or self-employed workers. Thus, next to the (ab)use of posting rules also cross-border agency work and the provision of services by (so-called) self-employed can function as methods to circumvent the rights based labour migration. In these cases the posting rules have been used as a transitional method and channel of recruiting temporary workers from EU8 countries by circumventing the applicable labour market restrictions with an invisible workforce on site that is settled through an invoice of the service supplier to the main contractor or the client. The EC has admitted that if such divergence takes place on a large scale, this might undermine the organisation and functioning of local labour markets.4

The project *Posting of workers – Improvement of collaboration between public bodies and both sides of industry*, organised in the period July 2012 to the summer of 2013, led to several new insights and to the confirmation of practical problems that were partly already identified in the referred CLR-literature.

The preparatory stage signalled the necessity of enhanced cooperation between all stakeholders (public and competent bodies, social partners) during the whole process: before the cross-border provision of services starts with posted workers and in the period of the workers’ stay in the host country (and in case of breaches, even after the service provision has ended). The project has led to the formulation of fields of action that fit (to a certain extent) in a chain of activities with shared partnership and cooperation models.

The EU treaties underpin the right to work, residence and labour rights, plus equal treatment for EU citizens. An although posted workers are supposed not to seek access to the labour market of the host country the posting principles enshrined in the EU Posting Directive can be seen as an effort to guarantee posted workers these rights enshrined in the EU treaties. The starting points in the field of the posting of workers for the legislator were the relationship that was kept upright with the basic social security in the home country and the respect by the employer, who delivers services by posting workers from their (normal) employment in one member state to another member state (temporarily),

of a large part of the labour standards applicable in the host country. This presumes the existence of reliable databases (to check compliance of the social security rules and to find the necessary information with regard to labour standards, just to mention two key areas) and the installation and adequate functioning of institutions that supply the information, prevent fraud and monitor the regularity.

The notion that fraudulent use of posting is often shaped as a circumvention of the national regulatory frame of pay, labour and working conditions and social security in the host state has been confirmed in the findings of the project. Forms of circumvention can be:

- Cross-border recruitment via (temporary) agencies.
- Sham self-employment in cases where differences between a commercial contract (for the provision of services) and a labour contract are blurred.
- Fake posting because control is inadequate or easily bypassed.
- Shift to other industries (regime shopping).
- Manipulation with free establishment (fictitious companies and arrangements) and country of residence.

Abuse of entitlements that are guaranteed by the posting rules (working time, minimum wage, pay scaling not in line with skill level, absurd deductions).

Control of the regularity of posting and the collection of evidence and supporting documents are hindered by poor registration and the lack of the necessary competence in the host country. It is relevant to memorise that participants in the project often had to conclude that an accumulation of breaches and circumvention was the rule rather than the exception once irregularities were detected. This, of course, raises not only the question how to find justice. Even more relevant is the question where the competence lies for the overall compliance control. As long as registration and notification in the host country are seen as an administrative burden and not as an essential tool to control compliance a proper solution will not be found.

The INTEFP-project has generated important findings related to the provision of information, at sectoral, national and European level. The strength and the weakness of the flow of information have been discussed (easy access, how to keep information reliable and updated, language problems and terminology). Given the fact that the information has to come from different relevant authorities and actors, more coordination in this area is a must. At European level very positive experiences have been gained with the website/database elaborated by the European social partners in construction. It is worthwhile considering how these experiences can be linked to and brought into an initiative with other stakeholders (public and competent bodies at national level, the legislator).
The aim of the European legislator has been to install a legislative frame for a genuine process of cross border service provision. In order to avoid social dumping and distortion of competition (for domestic service providers) and with the aim to establish a level-playing field for these service providers a policy of prevention of fraud and anticipation of undesirable practices is needed. However, such a policy is still in its infancy. In some countries a relationship has been established (or even a full integration) with the migration policy or with the fight against illegality. Given the strong link with labour recruitment in general this is not very logical. Posting of workers in the case of the cross-border provision of services is more and more (as also has been demonstrated in the CLR-studies) an alternative way to recruit labour. Therefore, prevention and anticipation has to come from instruments that are labour market oriented and are shaped with and borne by the institutions and bodies that have created the conventional and legislative frame for our industrial relations.

Monitoring the process of posting and controlling the regular character of the cross-border provision of services with posted workers has proven to be a problematic area. The INTEFP-project has confirmed the problems with compliance, the lack of cooperation notably in this area, the difficulties to trace circumvention in cross-border situations and the weakness of the existing sanctioning mechanism. One of the additional joint frustrations for the competent institutions, and in fact for all stakeholders, is the difficulty to bring cases of breaches to a righteous end. This imposes obligations to the (national and European) legislator. Implementation that is poor makes legislation a paper tiger, legislation that is powerless is worse than no legislation.