

POSTED WORKERS: HOW TO ENSURE A FAIR MOBILITY?

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The labour ministers of the EU will meet in Luxembourg on 23 October for a landmark meeting on the European framework for posted workers. France is demanding tougher rules for this practice, which suffers in particular from a problem of circumvention of the existing legislation. This is the origin of the idea put forward by the Juncker Commission for a European Labour Authority, a new project for “Social Europe”.

In 2015, there were around 2 million work postings in the European Union (workers sent by their employer to another Member State with a view to providing a service on a temporary basis), which accounts for 0.9% of total employment in the EU-28. Despite the limited scope of this phenomenon, the posting of workers is one of the focal points in political debate on Europe in France. It is associated with unfair social competition between countries, which is harmful to Europe’s image. In addition, the divisions between EU Member States on this issue give the impression that Europe’s unity is waning. Defining rules designed to protect more effectively workers’ rights, combating more successfully the fraud and abuse related to posting – in particular through the creation of a European Labour Authority – and promoting genuine social and wage convergence within the EU are the winning formula for a more equitable mobility of posted workers within the EU.

Posted workers: “equal pay” but different social security contributions

The adoption of the directive on posted workers in 1996 aimed to facilitate the free movement of services within the single market, while guaranteeing a certain level of protection for workers. Twenty years on, as differences in labour costs between countries have been heightened following the successive enlargements of the EU, the priorities have been reversed. The challenge today is above all more effective protection for workers, while limiting obstacles to the free movement of services. It is for this purpose that the Commission proposed a revision of the 1996 directive in March 2016, with a view to guaranteeing compliance with the principle of “equal pay for equal work at the same place”. The directive in force only requires employers to comply with the minimum wage in the host country. The Commission proposed to replace the reference to “minimum rates of pay” in the directive with the broader notion of “remuneration” which includes “all the elements of remuneration rendered mandatory by national law, regulation or administrative provision,

collective agreements or arbitration awards which have been declared universally applicable”¹.

Some economists are sceptical about the usefulness of introducing the equal pay principle as the wages of two national workers doing the same type of job in the same industry may vary a lot, depending on many factors such as seniority, productivity and the profitability of the company². However, if provision for the same pay rules is not a sufficient condition to ensure that posted workers will enjoy equal pay, it is at least a necessary condition. The act of establishing that posted workers will be covered by universally applicable collective agreements can only have a positive impact on the reduction of the pay gap between posted workers and workers with a national employment contract.

If an equal pay is desired, (*souhaité et pas souhaitable*) the revision of European legislation does not call into question at this stage the basic principle of posting, according to which a posted worker retains the employment contract in his home country and is therefore covered by social security and labour laws – for example in terms of unemployment, pensions or work-related accidents – in his country of origin, where the worker’s social security contributions are paid. Due to the differences in social security contributions between countries, a posted worker could prove to be less expensive for an employer than hiring someone locally if the social security contributions of the country of origin are lower than those of the host country. However, this potential gain related to the social contribution gap is cancelled out in full or in part (for legal posting) by the additional cost of the posting for the employer, who is obliged to pay the worker an allowance – which is added to the salary – to cover the fees of posting (travel, accommodation, meals). In addition, for France, for the minimum wage, the rate

1. European Commission, *Proposal for a Directive of the European Parliament and of the Council amending directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.*

2. Zsolt Darvas, *Revision of the Posted Workers Directive misses the point*, Blogpost, Bruegel, 18 October 2017.

of employer social security contributions has been among the lowest in the EU since 2015 – with the exonerations provided by the tax credit for competitiveness and employment (CICE) – and is below the rates in Poland and Portugal, the two main countries sending posted workers to France³. The issue of social security contributions is not, however, covered by the directive on posted workers but by the regulation on the coordination of social security systems, which is also currently being revised⁴. Debate can therefore be opened on this issue in the near future, as Emmanuel Macron recently claimed that “the higher rate of social contributions [between the rate of the host country and that of the country of origin] should be paid, but to benefit the home country. This money would go into a solidarity fund for the less wealthy countries to support their convergence”⁵.

Revision of the directive on posted workers: is there scope for compromise?

Following an attempt to block the revision of the 1996 directive by the “yellow card” procedure triggered by the parliaments of 11 EU Member States⁶ and following a year of talks, EU labour ministers were about to adopt a joint approach to this issue last June. That was without reckoning with the hardening of France’s position following the election of Emmanuel Macron, in the name of a “Europe that protects”. France has presented new requirements and the challenge ever since has been to reconcile the positions of those who support the French position and those who oppose it. A compromise will inevitably imply concessions on both sides.

One of France’s main demands is to restrict the length of posting to 12 months, as against 24 months in the Commission’s initial proposal (upon the end of this period, the contract of the worker is then governed by labour legislation in the host country). This provision would clarify the temporary nature of posting. France has put forward the argument of the annual average length of posting – approximately 4 months in the EU, less than 2 months in France – to convince its partners to restrict the principle of posting to one year, which would have a strong positive impact on French public opinion. If France manages to rally its partners to its cause,

the members of the European Parliament will still need to be convinced, given that in its report, the European Parliament’s employment and consumers commission retained the Commission’s initial proposal of 24 months (this corresponds to what is already provided for in the Regulation on the coordination of social security systems). As for remuneration, France wishes to guarantee an explicit reference to travel, accommodation and meal allowances, with a view to preventing their assimilation as elements of remuneration. Today, all too often, these allowances are included in remuneration for the calculation of compliance with the minimum wage, given that these allowances are not subject to social security contributions. This demand from France would provide a necessary clarification and would have a real positive impact on the remuneration of posted workers.

The question of including road transport in the scope of this directive on posted workers (requested by France) or dealing with road transport in a specific law to be able to address the particular problems of this activity more effectively (as defended by the Commission, which presented its “Europe on the Move” legislative package last May, and the Parliament) is one of the key issues of the agreement to be found. It remains to be seen whether France can form a qualified majority of countries within the EU Council to support its position. Failing this, a concession by France on this issue will probably allow it to be successful, in the Council, as regards other provisions of the directive.

Ensuring compliance with legislation: reinforcing action against fraud and abuse

The revision of the rules provided in the directive is, however, merely a necessary step which remains insufficient for improving the situation of posted workers and ensuring fair competition between businesses. One of the main problems with the posting of workers today, as highlighted by many studies on this subject, is not cases of legal posting, but rather what is done to breach or circumvent European regulations. Multiple types of misuse and fraud have been confirmed to date. Some companies select a country of operation for its low social security contributions in order to benefit from the legislation on posting, but only have low, or even inexistent levels of business in this country (“letterbox” entities). Others do not comply with the regulations of the country of origin with regard to the payment of social security contributions (the distance between the social security administration and the workplace make it difficult to control the full and effective payment of contributions) or the labour law provisions

3. Marine Cheuvreux and Rémy Mathieu, “Social competition from posted workers in France: misconceptions and realities”, Trésor-Eco newsletter, No. 171, June 2016.

4. Proposal for a Regulation amending Regulation (EC) No. 883/2004 on the coordination of social security systems and Regulation (EC) No. 987/2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 (COM (2016) 815 final).

5. Initiative for Europe – Address by Emmanuel Macron for a sovereign, united and democratic Europe, 26 September 2017 at the Sorbonne.

6. The “yellow card” procedure is a subsidiary control mechanism which allows national parliaments in Member States to issue reasoned opinions if they believe that a draft legislative act does not comply with the principle of subsidiarity. The 11 Member States whose national parliaments issued this yellow card are: Bulgaria, Hungary, Croatia, Czech Republic, Poland, Estonia, Romania, Lithuania, Latvia, Slovakia and Denmark.

in the host country (for example, the number of paid hours is lower than those worked and/or overtime is not paid at an increased rate). In order to combat these inconsistencies more effectively, in 2014 EU Member States adopted an implementing directive⁷ which reinforces action against fraud and the protection of posted workers. This directive is used in particular to fight against “letterbox” entities by presenting a list of assessment criteria to ascertain whether the conditions related to the posting are met in terms of the company’s actual business in the country of origin. It also provides for a mechanism of joint liability of employers with regard to their direct subcontractors in the building industry.

Stepping up the fight against fraud and abuse must be a priority. If the new provisions of the directive are not complied with, they will clearly not help to improve the situation of posted workers in Europe. It is for this reason that it is crucial to improve the administrative cooperation between EU Member States. When conducting controls, the competent authorities in the host country require access to data held by authorities in the home country. Controls cannot be effective if there is a lack of communication. The revision of the regulation on the coordination of social security systems is an opportunity to improve this cooperation between national authorities, in particular by setting clear deadlines for data exchanges. It would also be useful to ensure that the declaration A1 (document which states that the worker pays social security contributions in another EU Member State) is submitted prior to the posting. In addition to cooperation between national authorities, strategies for misuse and fraud would be better countered if Member States were to establish sanctions that are sufficiently heavy to act as a deterrent to companies which circumvent the rules, if they adopt on-line platforms for posting declarations or if they create specialised units for posted workers within the labour and social security inspectorates, as is the case in Belgium.

Moving towards a “European Labour Authority”

National authorities are responsible for ensuring compliance with European legislation. This argument must not, however, absolve the Commission of its responsibility in this area. Only a few years ago, the supervision of Euro area banks was conducted by national supervisory bodies; today, this supervision is conducted by a European body. For cross-border mobility – because there are difficulties on a national level to ensure the

proper application of the legislation –, strengthening the EU’s role is essential. The Commission acknowledges this, with Jean-Claude Juncker recently proposing the creation of a European Labour Authority⁸, a proposal welcomed by the French president. This initiative would follow on from the launch in 2016 of the European Platform tackling undeclared work.

The terms of the future European Labour Authority are yet to be defined but it is already certain that it will not be a European body of labour inspectors which would replace national inspectors in the supervision of posting. The role of this authority would be rather to facilitate and coordinate exchanges between national authorities. It will be advantageous if it can mitigate liaison and data exchange difficulties between national authorities, have an arbitration role in the event of disputes (in particular concerning the validity of certificates), organise joint inspections by authorities of different countries and create a platform which links the IT systems of EU Member States’ social security systems for centralised access to certificates on posted workers. In 2013, the French National Assembly called for the creation of a “European Agency for the supervision of mobile work” in a resolution⁹, and proposed the creation of a secure e-card for European workers and the setting-up of a “black list of dishonest companies and service providers”, on which the names of companies found guilty of secondment fraud would be entered. These two proposals should be explored as part of the creation of the future European Labour Authority. Nevertheless, the Commission has already clarified that this authority will not focus solely on posted workers but will tackle all cross-border mobility issues, including undeclared work for example. The supervision of mobility will only be one of the two areas of expertise of this authority. The second area will be support for mobility (for example through a one-stop-shop for citizens and companies for issues regarding cross-border mobility), with the support of existing structures, such as the European Job Mobility Portal (EURES).

From social competition to social convergence

Some high-wage countries wish to strengthen the regulatory framework of posting in order to limit the risk of social competition related to this type of mobility. At the same time, low-wage countries typically highlight the need to tackle the primary cause of the high level of mobility of their workers, namely the major differences in labour costs between countries. They are calling for genuine social and wage convergence within the EU.

7. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

8. Jean-Claude Juncker, *Address on the State of the Union 2017*, 13 September 2017 at the European Parliament.

9. *European resolution of the French National Assembly No.185 (2012-2013)* dated 11 July 2013 on the draft directive on the implementation of the directive on the posting of workers (article 5).

This convergence must be an ambition, as the French president has stated, for all European nations. Will the posting of workers become obsolete if this process of convergence is successful? Absolutely not. Currently, around 35% of postings in the EU are from high-wage countries to other high-wage countries, a percentage which is slightly higher than that of postings from low-wage countries to high-wage countries¹⁰. In addition, one of the reasons for posting workers is to make up for labour shortages in EU countries. These labour shortages – which are set to increase – are already visible in some sectors/countries (in some professions of the building industry in France or personal services in Luxemburg for example).

Going beyond the issue of posted workers, the 28 Member States also have a major milestone coming up at the end of 2017 to strengthen the social dimension

of the European project. During the social summit of Gothenburg (Sweden) to be held on 17 November, there will be a joint proclamation by EU Heads of State or Government, the Commission and the Parliament of the “European Pillar of social rights”¹¹, presented by the Commission last April. It is the leading initiative of President Juncker to endow the EU with a “social triple A”. This key debate has been obscured by that of posted workers. An agreement on the 23 October between EU labour ministers for a common position on posting is necessary, not only to make progress on this issue but also to open up public debate ahead of the major milestone event in Gothenburg. The European Pillar of social rights is a tool which must be leveraged to achieve social convergence within the EU, and as such deserves to be better known.

10. See Uuriintuya Batsaikhan, “EU posted workers: separating fact and fiction”, Bruegel, 31 August 2017.

11. European Commission, *Recommendation establishing the European Pillar of social rights*, 26 April 2017.

BOX ► Figures on posted work

In 2015, there were roughly 2 million work postings within the EU, according to the number of A1 certificates issued. This only accounts for 0.9% of the total number of jobs in the EU. In addition, given the fact that the postings have an annual average length of around four months, the proportion of posting on the job as full-time equivalent is even lower at approximately 0.4%. This type of temporary mobility is actually therefore of limited scope, although it is expanding significantly. Between 2010 and 2015, the number of postings increased by 41.3 %. Despite its low impact on total employment, posting is highly concentrated in certain countries and certain business sectors.

In terms of economic activity, 41.6% of postings are concentrated in the building industry. The two other main business sectors for posted workers are the manufacturing industry (24.6%) and services related to education, health, social work and art (14.2%).

The main host country for posted workers is Germany (418,908 workers in 2015), followed by France (177,674) and Belgium (156,556). France and Germany are also among the three countries which post the most workers in Europe, just behind Poland (130,468, 218,006 and 251,107 respectively).

In France, the three main nationalities of posted workers are Polish, Portuguese and Spanish. While the total number of posted workers in the EU increased between 2014 and 2015, France hosted 7% fewer posted workers in 2015 than the previous year. Conversely, the number of French workers posted increased by 9% over the same period.

Source: European Commission, *Report on Posting of Workers - Report on A1 portable documents issued in 2015*, December 2016.

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