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Subject articles

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In search of cheap labour in Europe - Working and living conditions of posted workers¹

The cross border provision of services with posted workers is an integral part of the economic freedoms in the EU internal market. In the best case, this provision is a logical part of a genuine division of labour at European scale between contractors and specialised subcontractors. In the worst case, the cross border provision of services can be used falsely as a method to recruit cheap temporary labour.

The EU Posting of Workers Directive (Directive 96/71/EC), established in the mid 1990s, tried to settle posting rules that could guarantee the rights of posted workers within the territory where the work was pursued. The starting point was that a foreign employer, who temporarily delivers services, with workers posted, has to respect a large part of the applicable labour standards in the host country. The basic thinking behind the Directive was to formulate a 'hard core' of minimum provisions, combined with conditions of employment on matters other than those referred to, to be applied in a non-discriminatory manner, and based on mandatory rules (of labour law or generally applicable collective agreements).

Posting was first used in the field of the coordination of social security in Europe. The coordination rules are based on the principle of application of one legislation at a time. The rules aim to guarantee equal treatment and non-discrimination by the application of the *lex loci laboris* or the host country principle. This means that, as a general rule, the legislation is that applicable in the Member State in which the person pursues his/her activity as an employed or self-employed person. In the coordination framework as formulated, derogation from the general rules is made possible in specific situations that justify other criteria of applicability. Posting is one of these exceptions.

A team of CLR-experts has investigated the functioning of the principles formulated by the Posting of Workers Directive in practice on worksites. Our report, commissioned by the European Federation of Building and Woodworkers, with underlying research financed by the European Commission has been written on the basis of earlier research of the CLR network and recent additional surveys in 12 EU/EEA countries. In the resulting 12 country reports, information has been collected on national compliance with the posting rules, and on experiences with monitoring, enforcement and sanctioning.

The posting of workers in the framework of the provision of services can be defined in a relatively clear way. Based on article 1.3, it can be subdivided in several important elements:

- a. It presupposes the existence of an employment contract in the home country (or in the case of posted self-employed the continuation of the same economic activity). Posted workers are subject to a direct labour contract signed with the posting undertaking/employer in the home country.
- b. The posting undertaking/employer is a genuine company, registered and normally carrying out its activities in the home country. The posting undertaking/employer has signed a commercial contract for the temporary provision of services with a user/client in the host country. The provision of services is thus for a limited period.
- c. The posted worker is supposed to work on the request and under the control of the posting undertaking/employer. Posted workers perform paid work related to the services that are written down in the commercial contract between the posting undertaking/employer and the user/client.

The Posting of Workers Directive has in recent times been the subject of a series of court cases. The outcome of these cases has demonstrated that the European Court of Justice

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and the European Commission are working towards a narrow and restrictive interpretation of this Directive. According to the ECJ, the list of provisions regarding labour and working conditions is exhaustive. Additional mandatory rules are limited to rules, 'which, by their nature and objective, meet the imperative requirements of the public interest' (Observation 32 - Luxemburg case). According to the ECJ, it is not up to the Member States to determine the public policy that justifies additional mandatory rules beyond the minimum provisions listed in the Directive. This restriction of the ECJ means, in practical terms, that a higher level of protection than the minimum cannot be imposed on foreign undertakings with their posted workers. The ECJ judgements create a situation whereby foreign service providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore have to be respected by domestic service providers.

This interpretation contradicts the aim of the legislator as the Posting of Workers Directive was formulated and concluded: 'This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3.1 in the case of public policy provisions' (article 3.10 of the PWD). The ECJ has also seriously blocked the possibilities for Member States to control and enforce the posting rules.

One of the main conclusions of our practical evaluation is that 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 final report, four different features of posting-related cross-border recruitment are 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.

2. 'Perfectly legal' posting where the calculation is made between engaging a domestic workforce and bringing in a workforce from abroad under the banner of the free provision of services. Here, at first sight, nothing is wrong. But, the calculation is simple: a subcontractor that can provide a basic workforce from a country with low social security payments is cheaper than a domestic subcontractor. If this is combined with long working hours and poor living and working conditions, one can question the legal character of the posting.
3. Questionable practices of 'legal' posting where the recruited workforce 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 are practices that are in breach with the provisions of the Posting Directive.
4. Finally, different types of 'fake' posting, varying from: the copying and distribution over a whole gang of E 101/A1 forms; recruitment of posted workers who were already in the host country or workers turned into bogus self-employed; posting via letter-box companies and unverifiable invoices for the provision of services. Posting is the alibi in the case of control on site.

Posting has become one of the channels for the cross-border provision of (cheap) labour in the single market. Its use for the labour-intensive segments of our labour markets does not necessarily lead to a deterioration of working conditions, but it has certainly created an opening for new and unintended forms of recruitment.

Based on our research, we have to conclude that monitoring of posting rules is difficult and hampered by the ECJ limitations; enforcement lacks strong sanctioning, fines are weak in an extra-territorial context and - in most countries - there are no specific posting-related enforcement instruments.

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Posting is by most countries not seen as a problem or ignored, given the size of the phenomenon or the estimated impact. A condition for a properly-functioning and genuine provision of services is, however, that actors and competent authorities involved take contract compliance and posting rules seriously. Therefore, national and bilateral cooperation has to be improved, supervisory mechanisms have to be freed from the serious handicaps created by the European Court decisions and institutional coordination has to be guaranteed and strengthened. It is necessary to restore the aims and purposes of the Posting rules. There is an urgent need to repair this part of the Community Charter of Fundamental Rights of Workers. In the final report we have listed our conclusions and recommendations. I refer to CLR-Studies 6 and thank you for your attention.

1. Title of CLR-Studies 6, the new report on Posting of workers, ordered by the EFBWW, January 2011. The report with a synthesis of the research, short country reports and conclusions and recommendations is available in English: <http://www.antenna.nl/i-books>; extended syntheses in German and French on: www.clr-news.org