



MASARYK UNIVERSITY FACULTY OF LAW

Posting of Workers
Coordination in the Social Security
Systems
The law applicable to contractual
relations



Coordination of the Social Security

- The EU doesn't have competence for the harmonisation of the social security (social benefits, pensions, social security contributions, health care etc.).
- The EU law provides a coordination of the social security systems in order to protect social security rights when moving within Europe.
- The coordination doesn't replace national systems.
- Main principles:
 - Contributions are paid in just one country at a time.
 - Equal treatment.
 - When a person claims a benefit, previous periods of insurance, work or residence in other countries are taken into account.
 - A cash benefit from one state can be received even if a person lives in a different state.



Coordination of the Social Security

- Relevant legal acts:
 - Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.
 - Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.
- The regulation is relevant also for the EEA and for Switzerland.
- It also covers health care (European Health Insurance Card).



The law applicable to contractual relations

- If a citizen of one member state performs work in another state, the applicable law for this contractual relation must be found.
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- Art. 8.1:

An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.



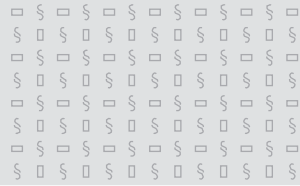
The law applicable to contractual relations

- Basic rules for finding the applicable law (Art. 8.2 and 3 of the Regulation):
 - The law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.
 - The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
 - If the abovementioned is not possible, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
 - If it appears from the circumstances that a contract is more closely connected with another country, the law of that other country shall apply.



Posting of workers

- Regulation in the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
- The basis for this Directive within the primary law is in the Art. 56 to 62 TFEU: freedom to provide services within EU.
- The goal of the directive is not a greater harmonization of labour law systems.



Posting of workers

- Main goals of the directive:
 - combat social dumping,
 - promotion of the transnational provision of services by strengthening competition and establishing measures guaranteeing respect for the rights of workers,
 - abolition of obstacles to the free movement of persons and services.
- There are some controversies about the directive's real effect. Some say that it creates an obstacle to the free movement of services rather than abolish it.



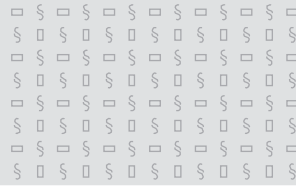
Scope of the Directive

- The directive applies to undertakings established in a Member State which, in the Framework of the transnational provision of services, post workers, to the territory of a different Member State.
- To „post a worker“ means to temporarily assign him to work for a different company (undertaking).
- This represents the main difference between the free movements of workers and posting of workers.



Definition of Posting

- Possible measures referred to as posting:
 - An undertaking posts a worker to another Member State on its account and under its direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, provided there is an employment relationship between the undertaking making the posting and the worker.
 - An undertaking posts a worker to another Member State to an establishment or to an undertaking owned by the group in the territory of a Member State under the same conditions as above.
 - Temporary employment undertaking hires out a worker to a user undertaking established in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking and the worker during the period of posting.
- The definition is important for the consideration whether the directive applies.



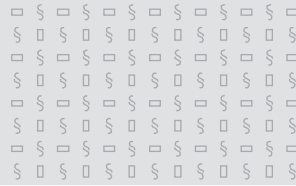
Definition of Posting

- Relevant case law:
 - Case C - 586/13 Martin Meat kft v Géza Simonfay and Ulrich Salburg
- Criteria for ‘hiring out workers’:
 - hiring-out of workers is a service provided for remuneration in respect of which the worker who has been hired-out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking,
 - the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services,
 - the employee carries out his tasks under the control and direction of the user undertaking.



Terms and conditions of employment

- Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down :
 - by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable.



Terms and conditions of employment

- A „hard core“ of terms and conditions covers:
 - maximum work periods and minimum rest periods,
 - minimum paid annual holidays,
 - the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes,
 - the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings,
 - health, safety and hygiene at work,
 - protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people,
 - equality of treatment between men and women and other provisions on non-discrimination.



Terms and conditions of employment

- For the purposes of the directive, the concept of minimum rates of pay is defined by the national law and/or practice of the Member State to whose territory the worker is posted.
- Relevant case law:
 - Case C - 341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet
 - Case C - 396/13 Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna



Case C - 396/13 Sähköalojen ammattiliitto

- The request has been made in proceedings between a Finnish trade union in the electricity sector, and Elektrobudowa Spółka Akcyjna (ESA), a Polish company, concerning pay claims arising out of employment relationships.
- ESA has a subsidiary in Finland. ESA posted 186 Polish workers to its subsidiary in Finland to carry out electrical installation work at the construction site for the nuclear power station.
- Workers claim that they are entitled to Finnish minimum wage under collective agreement.
- ESA argues that workers are entitled also to guaranteed piecework pay, holiday allowance, flat-rate daily allowance, compensation for daily travelling time, paid accommodation and meal vouchers and all this must be regarded as a part of minimum wage,
- Preliminary questions:



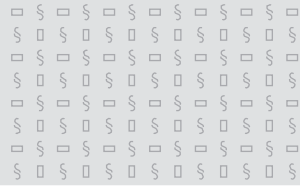
Case C - 396/13 Sähköalojen ammattiliitto

- Preliminary questions:
 - Is Article 3 of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, to be interpreted as meaning that the concept of minimum rates of pay covers basic hourly pay according to pay groups, guaranteed piecework pay, holiday allowance, flat-rate daily allowance and compensation for daily travelling time, as those employment and working conditions are defined in a collective agreement declared universally applicable and falling within the scope of the Annex to the directive?
 - Are accommodation paid for by an employer who is obliged under a collective agreement mentioned in Question 6 to do so and meal vouchers provided in accordance with a contract of employment by a service provider from another Member State to be regarded as compensation for expenses caused by being a posted worker or as part of the concept of minimum rates of pay within the meaning of Article 3(1)?



Case C - 396/13 Sähköalojen ammattiliitto

- A daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned.
- Compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify.
- Coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage.
- An allowance taking the form of meal vouchers provided to the posted workers is not to be regarded as part of the latter's minimum salary.



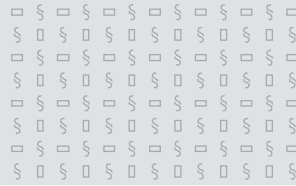
Cooperation and information

- For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.
- Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment generally available.
- The example for the Czech Republic:
<http://www.businessinfo.cz/en/psc/start-your-business/posting-of-workers.html>
(not 100 % up-to-dated)



Enforcement

- Member States shall take appropriate measures in the event of failure to comply with this Directive.
- They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.
- Relevant Case law:
 - Case C-60/03 Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix.



Directive on the enforcement

- The effectiveness of the directive is not very good.
- Many cases of abusing and circumvention of the applicable rules (e.g. so called letterbox companies).
- That was the reason for adopting 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.



Possible revision of the directive

- Very controversial topic.
- Some member states adopted much stricter regulation (e.g. German regulation of the Mindestlohngesetz - MiLoG).
- On the 8 of March 2016, the European Commission proposed a revision of the rules on posting of workers within the EU to ensure they remain fit for purpose.
- One of the key points is the remuneration of posted workers: remuneration would not only include the minimum rates of pay, but also other elements such as bonuses or allowances where applicable.
- Additional information can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1459423564906&uri=CELEX%3A52016PC0128>