

SMĚRNICE 96/71/ES O VYSÍLÁNÍ ZAMĚSTNANCŮ A PRAKTICKÉ PROBLÉMY JEJÍ APLIKACE

DIRECTIVE 96/71/EC CONCERNING THE POSTING OF WORKERS AND THE PROBLEMS OF ITS PRACTICAL APPLICATION

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Abstrakt

Součástí svobody poskytování služeb je i právo společnosti usazené v jednom členském státě vyslat dočasně pracovníky za účelem poskytování služeb do jiného státu EU. V roce 1996 přijala Evropská společenství směrnici o vysílání zaměstnanců, jejímž účelem je zajistit vysílaným zaměstnancům minimální pracovní podmínky, které se aplikují na zaměstnance ve státě vyslání. Příspěvek se zabývá praktickými problémy aplikace této směrnice, především minimálními pracovními podmínkami a způsobem, jak na tento požadavek členské státy reagovaly. Dále se věnuje kontrolním opatřením a jejich souladu se Smlouvou o založení ES a problematice spolupráce členských států při poskytování informací o pracovněprávních podmínkách.

Klíčová slova

Svoboda poskytování služeb, vysílání zaměstnanců, minimální pracovní podmínky, kontrolní opatření, spolupráce při poskytování informací

Abstract

According to the Article 49 of the EC Treaty (hereinafter known as 'EC') should Member States ensure the freedom to provide services within the Community. This fundamental freedom includes the right of a company established in a Member State to temporarily post workers to another Member State in order to provide a service. In 1996, the European Community has adopted a new Directive concerning the posting of workers in the framework

of the provision of services.¹ The paper deals with the practical problems of application of this directive, especially with the conditions of work, which has to be guaranteed to the posting workers, and the concrete way, how the member states have fulfilled this obligation. The next part of the paper deals with the problem of permissible and non permissible control measures. At the end, the issue of member states cooperation in the field of providing information on the terms and conditions of employment to foreign service providers and to workers is mentioned.

Key words

Freedom to provide services, posting of workers, conditions of work and employment, minimum protection of posted workers, control measures, cooperation in the field of providing information

Introduction

There are no precise figures of posted workers in the EU. However, the overall number of posted workers is estimated to be just under 1 million or about 0.4% of the EU working age population in 2005. The economic importance of posting is significant. It can play a crucial economic role in filling temporary shortfalls in the labor supply.² Furthermore, posting of workers enhances international trade in services with all the known advantages linked to the single market (higher competition, efficiency gains etc.).³

The European Union (hereinafter known as 'EU') wishes to remove the uncertainties and obstacles impeding the free provision of services by increasing legal certainty and making it easier to identify the working conditions which apply to posted workers. Therefore, on 16 December 1996 the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services was adopted.

The Directive aims to secure the exercise of companies' fundamental freedom to provide cross border services under Article 49 EC, on the one hand, with the appropriate protection of the

¹ 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

² Especially in certain professions or sectors (e.g. construction, transport).

³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers {SEC(2007) 747} /* COM/2007/0304 final. Brussels, 13.6.2007

rights of workers temporarily posted abroad, on the other. In order to do that it identifies the mandatory rules of general interest at Community level that must be applied to posted workers in the host country. The Directive establishes a hard core of clearly defined terms and conditions of work and employment for minimum protection of posted workers. The Directive also plays a key role in promoting the necessary climate of fair competition between all service providers (including those from other Member States).⁴ Furthermore, the ECJ has accepted that Member States have the power to verify compliance of the companies' praxis concerning the granting of the fundamental rights of the posted workers with national and Community provisions in respect of the provision of services. The application of such national rules of a Member State to service providers established in another Member State must be necessary to ensure attainment of the objective pursued and must not exceed what is necessary to attain the objective.

Since the Directive is a supranational legal instrument whose transposal in one Member State directly affects employers and workers in other countries, the manner in which it is actually implemented is particularly important for all Member States. The implementation as well as the practical application of the directive has to proceed at three levels:

- (i) Ensuring the work conditions and minimum protection of the posted workers
- (ii) Member states control measures for verifying the observance of the above mentioned conditions
- (iii) Cooperation in the field of providing information on the work conditions to foreign companies and to workers.

This paper should deal with the practical problems of the national application of the directive 96/71/EC. It will be divided in three parts according to the above mentioned levels.

I. Work conditions and minimum protection of the posted workers

The Directive applies to companies which post workers⁵ to the territory of another Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting:

⁴ See footnote 3.

⁵ For the purposes of the Directive, "posted worker" means a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works. The

- on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended;
- to an establishment or to an undertaking owned by the group;
- as a temporary employment undertaking, to a user undertaking.⁶

The situation of employees posted temporarily to another Member State has raised all sorts of legal questions. As these are transnational situations, questions often arise as to which law is applicable to the employment relationship. On this subject, the Rome Convention⁷ provides a general rules. The parties are free to choice the law applicable to the employment contract. In the absence of choice, the employment contract is governed, pursuant to Article 6(2), by the law of the country in which the employee habitually carries out his work, even if he is temporarily employed in another country. According to Article 6(1) of the Convention, the choice of law made by the parties must not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice. Article 7 provides that, under certain conditions, effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular those of the Member State within whose territory the worker is temporarily posted.

Whatever the law applicable to the employment relationship, the Directive seeks to guarantee that posted workers will enjoy the application of certain minimum protective provisions in force in the Member State to which they are posted. Therefore, Article 3(1) of the Directive lays down the mandatory rules to be observed by employers during the period of posting.⁸ These rules must be laid down by the legislations of the host country and/or by collective

definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

⁶ Posting of workers in the framework of the provision of services, available at:

<http://europa.eu/scadplus/leg/en/cha/c10508.htm>

⁷ Convention of Rome of 19 June 1980 on the law applicable to contractual obligations

⁸ (a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) 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;

(g) equality of treatment between men and women and other provisions on non-discrimination.

agreements or arbitration awards which have been declared universally acceptable.⁹ The member States must ensure that foreign companies will guarantee their posted workers this work conditions as they are laid down in the Member State¹⁰ in which the work is carried out.

Conditions of work and employment to be guaranteed are

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- 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.

Even before Directive 96/71/EC was adopted, several Member States had already established their own national legislation concerning the posting of workers. These include Germany, Austria and France. When the Directive was finally adopted, these States adapted their legislations to bring them into line with the requirements of the Community Directive.¹¹

Most Member States have defined, in their legislation, the posted worker situations covered by the Directive, and some have adopted the Directive's definitions word for word. Some legislations have also adopted the Directive's definition of "posted worker", while in other Member States the content of the concept of "posted worker" derives from the relevant legislation as a whole.

⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The implementation of Directive 96/71/EC in the Member States /* COM/2003/0458 final.

¹⁰ The concrete work conditions could be laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards which have been declared universally applicable.

¹¹ Deinert, O., Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals. In: THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS, Autumn 2000, p. 217-234.

In Ireland, no specific measure transposing the Directive has been adopted, but a provision contained in the Protection of Employees (Part-Time Work) Act, transposing another Community Directive, clarifies that certain provisions of Irish law apply to posted workers in Ireland.

In the United Kingdom, it was not deemed necessary to adopt a specific Act to transpose the Directive, since UK law applies to all employees regardless of their situation. The UK has simply amended certain more restrictive texts in order to extend their scope to posted workers.¹²

In the Czech Republic, a specific provision of Labor Code has been adopted in order to transpose the Directive and govern the aspects of working conditions of posted workers in the Czech Republic. The section 319 of Labor Code specifies which of its provisions should be applicable in this case.¹³

¹² Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The implementation of Directive 96/71/EC in the Member States /* COM/2003/0458 final.

¹³ Section 319 of Labor Code:

1. If an employee of an employer from another Member State is posted to perform (carry out) work within the framework of transnational provision of services in the territory of the Czech Republic, the regulation of the Czech republic shall apply to his/her work performance as regards:

- a) the maximum length of working time and the minimum length of rest periods;
- b) the minimum length of annual leave (paid leave per annum) or its proportionate part;
- c) the minimum wage, minimum wage rates and premium (bonus) payments for overtime work;
- d) occupational safety and health;
- e) the working conditions for pregnant employees, employees who are breastfeeding, and female employees until the end of the ninth month after childbirth and for adolescent employees;
- f) equal treatment for male and female employees and prohibition of discrimination.
- g) the conditions of work in the case of employment by an employment agency.

The first sentence (above mentioned part of the article) shall not apply if the rights ensuing from the statutory provisions of the Member State from which the employee concerned is posted to perform work within the framework of transnational provision of services are more advantageous for such employee. The advantageousness of each right arising from an employment relationship (employment) shall be considered separately.

2. The provisions of subsection (1)(b) and (c) shall not apply if the period of expatriation of an employee to perform work within the framework of transnational (supranational) provision of services in the Czech Republic shall not exceed 30 days (in total) per one calendar year.

This shall not be applicable if such employee is posted by an employment agency to perform work within the framework of transnational provision of services.”

More information to the work conditions applicable to the posted workers in the Czech Republic at: http://ec.europa.eu/employment_social/labour_law/docs/2007/posting/czech_republic_en.pdf

Difficulties with the practical application

Language barriers build the first and the main problem. In some Member States, the civil servants of the monitoring services are unable to read documents drafted in the national language of the posted workers.¹⁴

Another source of difficulties is the need to compare different countries' legislations to find out the rule (work condition) which is more advantageous for the posted worker. In order to compare legislations it is necessary not only to be familiar with the legislations of other Member States but also to be able to assess their equivalence to the domestic law.

Particular difficulties have been encountered in trying to compare paid leave schemes for workers in the building sector. It is usual that the employers in the building sector pay into the leave funds contributions in order to divide the financial burden between the employers concerned. Employers established abroad are obliged to participate in the paid leave funds scheme in the host country and pay contributions during the workers' period of posting. But if the paid leave funds scheme exists in both of the concerned countries, it is difficult to define the proportionate part of the contribution.¹⁵

II. Control measures

Posted workers are guaranteed during the period of posting certain protective rules of the Member State to which they are posted. The application of these rules should be observed and verified in order to prevent the abuses of the freedom to provide services, for example the use of workers from third countries on the labor market of the host Member State. European Court of Justice (hereinafter known as 'ECJ') has accepted that Member States have the power to verify compliance with national and Community provisions in respect of the provision of services. It has also accepted the justification for the inspection measures necessary to monitor the observance of obligations justified under the general interest.¹⁶

¹⁴ This has resulted in Member States requiring such documents to be drafted in the language of the country in which the services are provided.

¹⁵ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The implementation of Directive 96/71/EC in the Member States /* COM/2003/0458 final.

¹⁶ Guidance on the posting of workers in the framework of the provision of services {SEC(2006) 439} /* COM/2006/0159 final

The most important control measures implemented by certain Member States are:¹⁷

(a) The requirement **to have a representative** on the territory of the host Member State; it is explicitly made in 6 Member States (Germany, Greece, Luxemburg, Austria, Finland and Sweden), and implicitly in 3 others (Estonia, France and Latvia);

(b) The requirement **to obtain authorisation** from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation exists in two Member States (Malta and Luxembourg - the latter requires an authorization only for posting of third country nationals);

(c) The requirement to **make a declaration** exists in 16 Member States (Belgium, Germany, Greece, Spain, France, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Slovenia, Slovakia and Finland); whereas one Member State (Czech Republic) imposes such an obligation on the recipient of the service;

(d) The requirement **to keep and maintain social documents** on the territory of the host country and/or under the conditions which apply in its territory are imposed in 14 Member States in varying ways and concerning different types of documents (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Luxembourg, Malta, Austria, Portugal, Slovakia, Finland and Sweden).

a) As regards the first requirement, the ECJ described the requirement to have a subsidiary on the national territory as constituting "the very negation of the free provision of services".¹⁸ According to the ECJ opinion is the appointment of a person from among the posted workers, for example a foreman, sufficient to create the necessary link between the foreign company and the labor inspectorate.

b) According to the established case law of the ECJ constitutes the requirement to obtain an administrative authorization a restriction of the free provision of services within the meaning of Article 49 EC.¹⁹ Therefore, the host Member State is entitled to require prior authorization only for the performance of certain activities, whatever the posting situation, on condition that this can be justified by overriding reasons based on the general interest, is proportionate and is compatible with the relevant Article 49 EC.

¹⁷ See footnote 15.

¹⁸ Case C-279/00 (Commission v Republic of Italy), judgment of 7 February 2002

¹⁹ Case C-43/93 (Raymond Vander Elst v Office des migrations internationales), judgment of 9 August 1994

c) Almost half the Member States require service providers which post workers to their territory to submit a prior declaration to their authorities.²⁰ At this stage, the ECJ has not delivered any judgments relating specifically to the admissibility of an obligation to make such a declaration. Therefore, we can use only related judgments and indirectly try to find an answer. In the case *Commission v Luxembourg*²¹ and *Commission v Germany*²² the ECJ came to the conclusion, that the requirement to have a work permit in order to provide services is deemed to be a measure which is just as effective as but more restrictive than a prior declaration concerning the posting of workers, their number and another information. Anyway, the Member States must refrain from using declarations for purposes other than for providing information, such as for checking or registering companies which provide services, which would amount to a system of authorization.

d) As regards the last requirement, the ECJ accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that State, to the extent that this difference in treatment could be attributed to objective differences between those businesses and businesses established in the host Member State²³. However, it is not acceptable for the host Member State to demand that a second set of documents which comply with its own legislation be provided simply because the documents which comply with the legislation of the Member State of establishment exhibit certain differences in terms of form and content. Nor is it acceptable for the host Member State to require social security documents as they are the subject of a specific procedure in the country of origin, pursuant to Regulation (EEC) No 1408/71.

III. Cooperation in the field of providing information

In order to fulfill the obligations resulting from the directive, the member states have to provide access on the work conditions concerning the post workers at their territory and to cooperate to each other especially in the field of providing information and monitoring the observance of the directive provisions.

²⁰ The Member States in question are: Austria, Belgium, Germany, Spain, France, Greece, Luxembourg, Hungary, Latvia, Malta, Netherlands and Portugal. Slovenia and the Czech Republic impose a similar obligation on the recipients of the services

²¹ Case C-445/03, judgment of 21 October 2004

²² C-224/04, judgment of 19 January 2006

²³ Case Joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98 and 71/98 (*Finalarte Sociedade de Construção Civil Lda v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others*), judgment of 25 October 2001

a) Access to information

Article 4(3) of the Directive sets out a clear obligation for Member States to take the appropriate measures to provide generally access to the information on the terms and conditions of employment to foreign service providers and to workers. Most of the member states had used the national internet sites to provide at least basic information on labor law in general. However, there are still remaining problems in the practical applications of these obligations: Member States have to make clear which part of their national legislation has to be applied by foreign service providers, and avoid having only information on labor law in general. These informations should be made available in other languages than the national language(s) of the host country. Furthermore, liaison offices need to be equipped with appropriate staff and other resources to fulfill their information duties. Member States should indicate a contact person in charge of dealing with requests for information, as this works better than a large, anonymous structure.

b) Cooperation between Member States

Article 4(1) and (2) of the Directive imposes clear obligations as regards cooperation between national administrations. The Member States are responsible to create the necessary conditions for such cooperation. In order to fulfill their obligations, Member States are asked to take the necessary measures to ensure that their liaison offices and/or monitoring authorities have the necessary equipment and resources to respond effectively to requests for information and cross-border cooperation from the competent authorities of the other Member States.

Conclusion

The Directive 96/71/EC concerning the posting of workers has been successfully implemented in all member states and is wide used in the application praxis. Despite this fact, there are still some remaining problems which make its application difficult: Often it is not easy (or maybe impossible) to consider, which of the provisions in question are for the posted worker more advantageous (the provisions of the state where the worker is posted or the provisions of the law applicable to the employment contract). Another problem arises from the language plurality in the EU and the impossibility of the liaison offices and other civil servants to read texts in another (or in all) languages of the EU. At the first sight the admissibility of the control measures seems to be a problem as well, but in the light of the

latest case law of the ECJ it is quite clear which of the control measures are in conformity with the EC Treaty. With respect to the last topic, the Member states cooperation in the field of providing information, we should point out that there is some improvement during the last years, but although the member states are working on this issue, there is still enough to improve.

Literature:

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