



Posted workers in the European Union

Executive summary

Introduction

This report looks at the phenomenon of posted workers in the EU Member States and Norway. It maps the available sources that can provide information about the occurrence of postings, and provides figures for those countries where data is available. The report also looks at the roles played both by European and national-level regulation in determining the employment and working conditions of posted workers. It also looks at the possible implications of a number of high-profile decisions recently taken by the European Court of Justice (ECJ) in cases of posting of workers. Lastly, it presents the positions and views of the social partners at national level.

Policy context

The Posting of Workers Directive (EU Directive 96/71/EC) adopted in 1996, refers to 'a nucleus of mandatory rules', which guarantee a minimum protection to posted workers in the 'host' country. Initially, many labour law experts saw the Directive as being of limited relevance for the transformation of European and national labour regulation. This assumption was based on the understanding that the Directive's main purpose was to allow the application of the host country's complete set of labour laws to posted workers.

A number of recent ECJ decisions have questioned the content and scope of national regulations of posted workers' employment conditions. These decisions have drawn the attention of the European Commission, the Member States and the social partners to the difficulties in implementing the Directive at national level.

The ensuing debate has not only revolved around the choice offered to Member States about the scope of the applicable rules, namely the question of 'full' versus 'minimum' protection, but has also raised other difficult issues. The manner in which regulation is implemented is one such issue, since Member States have a choice between legislation and collective bargaining in defining the employment conditions of posted workers. Another

difficulty lies in the characteristics of the collective agreement to be applied, since it has to be 'universally binding'.

Key findings

- In many countries, the issue of posted workers attracts – at most – limited attention in the public debate, even the social partners regarding it as a marginal question. The discussion tends to be focused rather on other categories of workers, such as foreign workers in general and on temporary-agency workers (often encompassing posted workers). However, recent ECJ rulings resulted in a mobilisation at European level, which has seen some involvement of the major trade union organisations in practically all Member States.
- There is a substantial lack of data regarding the overall number and characteristics of posted workers throughout the EU. Reporting and monitoring schemes on posted workers are rare. As a result, it is currently almost impossible to know how many workers are posted in Europe, as reliable data is missing for most countries, with the exception of the Czech Republic, Finland, Lithuania, Slovenia and – since 2008 – Denmark.
- The Directive presented Member States with two fundamental choices: implementing either minimum or full protection; and implementing protection either through legal instruments or through autonomous collective bargaining. In practice, most of the national laws implementing the Posting of Workers Directive mention both law and collective agreements as means for setting the protection levels for posted workers. Only three countries – Latvia, Poland and the UK – have assigned exclusively to the law the definition of the employment and working conditions of posted workers.

- In terms of protection levels, 16 countries implement only minimum protections, while 11 apply broader protections. The majority of the Member States that joined in 2004 and 2007 (countries that are mainly exporters of labour) have implemented the Directive by applying to workers posted in their own territories only the minimum requirements stated in the Directive. In contrast, the majority of EU15 Member States (and Slovenia) have implemented the Directive by trying to fully exploit the possibility of extending the application of national labour law to workers posted to their territories.
- Though often divided in their views on the Posting of Workers Directive and the ECJ rulings, the social partners, especially in sectors such as construction, have shared both concerns and initiatives aimed at combating low wages and irregular terms of employment. Some employer organisations have underlined the positive features of their national systems, such as the cooperation between the social partners and the capacity for ensuring social cohesion.
- The recent ECJ rulings have highlighted that the rules on posted workers do not belong to the domain of labour law but rather to that of commercial law. In the labour law domain, minimum protections and international standards can always be improved in favour of workers: they are a floor on which governments and social partners can build further guarantees. In commercial law, by contrast, the basic protections are the maximum limit in order to allow compatibility with the goal of fostering competition; any additions would be regarded as unjustified constraints on the provision of services and hence equivalent to non-tariff trade barriers.
- As a consequence of the different ECJ rulings, the room for manoeuvre by national trade unions trying to govern conditions and terms of employment practiced by posting companies has become very limited: trade unions cannot organise strikes or other forms of protest designed to push foreign companies into signing agreements or respecting minimum conditions set by national collective agreements.
- The ECJ's most recent rulings have made it extremely difficult to extend protections beyond those listed by Article 3.1 of the Directive (see

ECJ, Case 341/05, *Laval*, paragraph 108; Case C-438/05, *Viking Line* [2008] ECR I- 51, paragraph 81). According to this interpretation, when free movement of services clashes with the collective defence of rights practiced within national systems of industrial relations, the former will almost always prevail.

Policy pointers

- The availability of reliable data on posted workers is a precondition for a fruitful debate on their specificities and their needs for protection. Urgent action should include the creation of a common, EU-wide monitoring system, which would collect data on the numbers of posted workers and their employment and working conditions, integrating the sources already available (for instance, the social security systems involved in the issue of E101 forms or the various notification procedures already available) and filling existing gaps.
- Creating some scope for representation and collective bargaining in the host country could significantly contribute to limiting possible abuses and creating fair conditions of employment as well as of competition. Various means could be used to achieve that – for instance, extending information disclosure and consultation rights to the posting of workers in the 'receiving' company, allowing specific agreements covering posted workers and raising posted workers awareness, through information on their rights, via social partners' organisations or/and social security bodies.
- The cooperation between the social partners in the 'posting' and in the 'hosting' countries could provide a sound framework for collecting information and avoiding abuses. Trade unions and – sometimes – employers have already developed initiatives and guidelines to address the issue of posted workers, occasionally at cross-border level.
- Strengthening the role of the social partners at national and possibly also at European level, with a view to establishing a monitoring system and providing some scope for regulating the employment and working conditions of posted workers, would contribute to redressing a situation that at present appears to be dominated by economic considerations and European-level modes of regulation.

Further information

The full report, *Posted workers in the European Union*, is available at www.eurofound.europa.eu/eiro/studies/tn0908038s/index.htm

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