The revision of the Posting of Workers Directive: protectionism or combatting social dumping?

Prof Herwig VERSCHUEREN
University of Antwerp, Belgium

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Overview

• Legal context
  • Origins and content of PWD
  • Loopholes and ambiguities
• Difficulties of implementation and enforcement
• Political background
• The Commission’s proposal
• Assessment
Legal context

- Initial (1990s) CJ’s case law on the labour law applicable to posted workers
  - Posted workers are not “migrant workers” under Article 45 TFEU (“since they do not gain access to the labour market of the host State”!?) and therefore, they cannot claim equal treatment with the workers in the host State
  - *Rush Portuguesa; Finalarte*
- Despite the “country of origin” principle in the internal market law: host Member State may apply (some parts of) their labour law to posted workers
  - *Rush Portuguesa; Vander Elst*
Legal context

- **Private International Law (PIL)**
    - In principle, posted workers remain subject to the labour law of the State where they “habitually work” (Article 8 Rome I Regulation)
    - However, the judiciary of the host State may apply its “overriding mandatory provisions” to posted workers (Article 9 Rome I Regulation)
Posting of Workers Directive 96/71 (PWD)

• Several objectives:
  • Promoting and facilitating the free provision of services
    • by creating legal certainty with regard to the applicable labour law
    • and by creating a level playing field between local and foreign competitors
  • Protecting posted workers
  • Instrument to prevent social dumping and unfair competition
PWD 1996

• Discussion on the legal basis:
  • Free movement of services (Articles 53 and 62 TFEU)
  • And not: freedom of movement for workers (Article 45 TFEU) or social policy (Article 153 TFEU)!!
  • Impacts on CJ’s case law
PWD 1996

- Instrument of coordination, not harmonization
  - Only determination of the applicable law
  - “hard core of mandatory provisions for minimum protection” the host State **must** apply
    - Most importantly: minimum wage, working hours, paid holidays, ... (Article 3(1))
  - Other matters: "**the law applicable to the employment contract**"
    - Which, in most cases, is the law of the sending State (see Rome I Regulation)
  - A number of possibilities for the receiving MSs to go beyond these minimum requirements (see further)
Case law on the PWD

- *Laval, Rüffert, Commission v. Lux.*
  - Very strict interpretation of the freedom of the host MSs to apply their labour law
  - Interpretation of Article 3(7): does not give any leeway to the receiving MS
  - Strict interpretation of possibilities to apply labour conditions laid down in not generally binding collective agreements (Article 3(8))
  - The concept of “public policy” (Article 3(10))
    - May only be used in highly exceptional cases
  - The “floor” *de facto* becomes the “ceiling”
Problems of interpretation: legal loopholes and ambiguities

- What is temporary (Article 2)?
  - If not temporary: “posted worker” becomes “migrant worker”

- What is “minimum wage”?  
  - To be defined by national law: variety of national concepts
  - Ambiguous case law of the CJ
  - But what about mobility-related costs, bonuses, holiday pay, seniority or other allowances, 13th month bonus,...?

- What is “establishment”?  
  - letter-box companies
Problems of interpretation: legal loopholes and ambiguities

- Distinction between workers and self-employed persons
- Structural differentiation of national wage rules applying to posted and local workers
  - PDW does not guarantee wages set by not generally applicable collective agreements
  - Sending companies tend to pay the rates applicable to the lowest pay group
  - Important real wage differences between local and posted workers: depending on countries and sectors
    - Gaps from 10% to 50%
Problems of interpretation: legal loopholes and ambiguities

- Inconsistencies with other parts of EU legislation
- Social security coordination (Reg. 883/2004)
  - First 24 months: posted workers remain fully subject to the social security legislation of the sending State
- Agency Work Directive 2008/104
  - Article 5: equal treatment between agency workers and the workers of the user firm for “basic working and employment conditions”
  - Goes further than the “minimum requirements” of the PWD
  - See possibility offered to the receiving State in Article 3(9) PWD
Abusive and fraudulent practices

- Insufficient cooperation between MSs
- Difficulties in obtaining information concerning applicable working conditions
- Letter-box companies and U-turn constructions
- Bogus self-employed persons
- Pyramids of subcontractors
Abusive and fraudulent practices

- Long-term postings
- Repeated replacement of posted workers
- Non-payment of minimum wages and/or social security contributions in home state
- Non-observation of the rest and work periods
- High sums to be paid by the workers for expenditure on travel, board and lodging
- Bad housing
- Poor access to legal remedies in practice
- ............
Enforcement Directive 2014/67

• Provision on the prevention of abuse and circumvention (Article 4)
  • Definition of “genuinely performing activities” by the employer in the home State (combatting “letter-box companies”)
  • Definition of “temporary”
  • Does it really create more legal clarity?
• Non-exhaustive list of control measures that can be adopted by the receiving MSs (Article 9)
• Provisions on subcontracting liability (joint and several liability of the main contractor(s)) (Article 12)
Enforcement Directive 2014/67

- Detailed arrangements and obligations of the MSs on:
  - Access to information
  - Administrative cooperation and mutual assistance between MSs
  - Inspections
  - Defence of rights
  - Facilitation of complaints
  - Back payments
  - Cross-border enforcement of administrative penalties and fines

- Had to be implemented in national law by 18 June 2016
- Did not amend the PWD and even confirmed its legal basis
  - Problems of interpretation remain
Political background:

“protectionism” v. “social dumping”

- PWD: compromise between the competing interests
  - the sending MSs and the receiving MSs
  - Employers making use of the possibilities offered by posting to reduce labour costs v. those who do not
  - Posted workers v. local workers
- Seen by sending MSs as an obstacle to fully participate in the internal market and to make use of their competitive advantage (low wages)
  - Also seen as limitation of the possibilities for workers from these MSs to increase the income that they normally have in their home country
  - “protectionism”
Political background:
“protectionism” vs “social dumping”

• Frustration about the strict interpretation of the CJ of the receiving MS’s possibilities, including the control measures, and about abuse of the PWD
  • “social dumping”; “unfair competition”; “labour market distortions”
  • Even political upheaval: see Brexit debate

• All this reinforced by the accession of new (low wage) MSs in 2004 and 2007 and the quickly growing number of posted workers
  • Partly due to the transitional measures on the free movement of workers
The Commission’s proposal

  • “create a level playing field ... through equal rules on wages”
  • “improve clarity of EU rules on posting and consistency between different pieces of EU legislation”

• Main issues:
  • Time limitation
  • ‘remuneration’ instead of ‘minimum rates of pay’
  • Subcontracting chains
  • Temporary agency workers
Posting exceeding 24 months: new Article 2a

• When the anticipated or effective duration of postings exceeds 24 months: “country in which his or her work is habitually carried out” is the receiving MS

• See Article 8 Rome I Regulation 593/2008
  • employment contract is subject to the labour law of the “country where the work is habitually carried out”
  • Relationship with Rome I Regulation remains unclear
    • Is this proposal an implicit amendment of the Rome I Regulation?
    • Is it still possible that the “habitual place of work” changes in the first 24 months?
Posting exceeding 24 months: new Article 2a

- In case of replacement of posted workers performing the same task at the same place: cumulative duration shall be taken into account
  - Only for workers posted for at least 6 months
  - Very few postings are expected to last longer than 24 months
  - Easy to circumvent??
  - Alignment to 24 months in the social security coordination Regulation 883/2004
“Remuneration” instead of “minimum rates of pay”: new Article 3(1)

- Same “remuneration” as local workers, including “overtime rates”
  - But not supplementary occupational retirement pension schemes

- “Remuneration means all the elements of remuneration rendered mandatory ....”
  - Condition that collective agreements should be universally applicable remains
“Remuneration” instead of “minimum rates of pay”: new Article 3(1)

- Employers will have to offer the same advantages, such as bonuses for dirty, heavy or dangerous work, allowances or pay increases according to seniority, 13/14th month bonuses, ... (see “Explanatory Memorandum”)
- What about sick pay, maternity pay, unfair dismissal compensation, redundancy pay, ... ????
“Remuneration” instead of “minimum rates of pay”: new Article 3(1)

• MS competence to set rules on remuneration
  • Obligation to publish the constituent element of remuneration on a website
  • Recital 12 “It is within Member States' competence to set rules on remuneration in accordance with their law and practice. However, national rules on remuneration applied to posted workers must be justified by the need to protect posted workers and must not disproportionately restrict the cross-border provision of services”
Subcontracting chains: new Article 3(1)a

- Option to oblige undertakings established in a MS to subcontract only to undertakings that guarantee certain terms and conditions of employment, including remuneration, when posting workers to that MS
  - If the same obligation is imposed on all national subcontractors (by law, regulation, administrative provision or collective agreement)
    - “on a non-discriminatory and proportionate basis”
  - Would include conditions resulting from not universally applicable collective agreements (see “Explanatory Memorandum”)

Equal treatment of posted temporary agency workers: new Article 3(1)b

- **Obligation** for the MS to guarantee posted workers the terms and conditions which apply to temporary workers hired-out by temporary agencies established in the MS where the work is carried out

- Reference to Article 5 of Directive 2008/104 on temporary agency work, which guaranteed equal treatment for “*basic working and employment conditions*”
  - Defined as “*pay, the duration of working time, overtime, breaks, rest period, night work, holidays and public holidays*”
  - Includes terms and conditions laid down in not universally applicable collective agreements

- Option in current Article 3(9) is made an obligation
  - Article 3(9) will be deleted accordingly
Transport sector

• Recital 10: “the forthcoming initiatives for the road transport sector should contribute to more clarity and better enforcement of the rules applicable to employment contracts in the transport sector and may address the specific challenges the application of the provisions of the Posting of Workers Directive raises in this specific sector”

• It remains unclear whether the PWD currently applies to highly mobile transport workers

• What is a “sending state” or a “receiving state” of a transport worker?
Reactions of Member States

- Yellow card procedure under Protocol No. 2
  - “On the application of the principles of subsidiarity and proportionality”
  - A national parliament may issue a reasoned opinion within 8 weeks “stating why it considers that the draft in question does not comply with the principle of subsidiarity”
  - no other reasons
- Compulsory review if a set threshold is exceeded:
  - Yellow card: one third of the MS
  - European Commission may decide to maintain, amend or withdraw the draft
Reactions of Member States:
yellow card procedure

• 11 national parliaments have issued such a reasoned opinion: BG, HR, CZ, DK, EE, HU, LT, LV, PL, RO and SL: threshold exceeded

• Reasons invoked:
  • Existing rules are sufficient and adequate
  • No need to force MSs to apply equal treatment in all sectors of industry
  • EU is not an adequate level to deal with these issues
    • In particular with regard to tackling the sub-contracting chain
  • Lack of express recognition of the MSs competences
    • In particular with regard to the definition of “remuneration”
  • Lack of justification
Reactions of Member States: yellow card procedure

• European Commission has decided to maintain its proposal
  • COM(2016)205 of 20 July 2016
  • Basically, the objectives of the proposed amendments can be better achieved at EU level, rather than by the MS individually
Other reactions

• European Economic and Social Committee
  • See critical opinion of 27 April 2016
• Groups of the European Parliament
  • Mixed reactions going from “good start”, “no real progress” to “more uncertainty and red tape for business”
• EP is co-decider
Reactions of stakeholders

- **Workers’ organizations:**
  - Welcome the proposal, but remain critical
    - “full equal treatment” is not guaranteed
    - Allowed duration (24 months) is too long
- **Employers’ organizations**
  - Some:
    - There is no need to revise the current PWD
    - Priority is to implement the Enforcement Directive
    - Proposal would undermine the competitive position of foreign service providers
  - Others: more critical
Assessment

• No substantial review of the PWD
• Very specific amendments addressing in particular the issue of equal treatment
  • Equal treatment for “remuneration”
  • Sub-contracting chains
  • Temporary agency workers
• Not sure that they will create more legal certainty and will close all the loopholes
Assessment

• Some national systems of industrial relations are not fully taken into account
  • Systems in which wages are set by sectoral collective agreements or company-level agreements
  • Growing trend towards decentralised wage setting

• Different rules applicable to different forms of posting
  • Sub-contracting; temporary agency workers; transport (?)...
Assessment

• Time limit (24 months) easy to circumvent or even irrelevant
• Must be seen as complementing the Enforcement Directive
  • But does not address its weaknesses
  • And its full and effective implementation is even more important to tackle abuse
• Difficult negotiations ahead, both in the Council and in the European Parliament
  • Risk of over-complicated compromise leading to new problems of interpretation and implementation
• Tension between the economic/single market perspective and the social/labour law perspective remains
Thank you for your attention
herwig.verschueren@uantwerpen.be