ETUC Revision of the Posting of Workers Directive:
ETUC assessment for further consultation – Orientation paper

Endorsed at the Executive meeting of 13 April 2016

Key points

- The ETUC welcomes the proposed wording on remuneration in the targeted revision of the PWD as would cast in stone the ECJ current approach to equal pay. However, the proposed restrictive definition of the type of collective agreements recognised is not satisfactory: excluding most sectoral collective agreements, and all company level agreements.
- A 24 months duration for posting is a too long period, which does not correspond to the reality of posting today. In any case, the draft opens a door for circumvention to the time limit.
- The revision is very narrow and fails to include a number of elements to stop the exploitation of workers, including full respect for the fundamental right to collective bargaining and collective action in the host Member State and a mandatory joint and several liability mechanism in the subcontracting chain.
- Considerable work will have to be carried in the upcoming legislative process. All affiliates are asked to coordinate their activities on the basis of the agreed ETUC amendments.

Introduction

The Commission published a proposal for a "targeted" revision of the posting of workers Directive ('the PWD') on 8 March 2016[1]. This proposal addresses a small number of issues, essentially seeking to fulfil Juncker's promise to guarantee posted workers "equal pay for equal work". This orientation paper provides a first analysis and political assessment of the Commission's proposal, and proposes a roadmap for upcoming lobbying activities.

The proposed targeted revision – first analysis

1.1 Time limit

The proposal inserts a new provision clarifying that when the duration of posting exceeds 24 months, the host Member State is to be considered as the "habitual place of work". The notion of "habitual place of work" is used in Regulation 593/2000 on the law applicable to contractual obligations ('the Rome I Regulation'). This Regulation fixes the rules to determine which national law is applicable to an employment relationship and generally points at the law of the habitual place of work.

The 24 months duration corresponds to the rules laid down in the Regulation 988/2009 according to which a posted worker remains subject to the social security legislation of the Member State of origin for a period of a maximum 24 months, provided that the worker is not sent to replace another posted worker.

Already today, a situation of posting rarely exceeds 24months because of the existing restrictions on social security contributions. The proposed revision would clarify that upon expiry of the period of posting the worker becomes a host country worker. There should therefore no longer be room for a country of origin principle.

[1] *COM (2016) 128 final*

The proposed revision would also strengthen the idea that it is the task performed that has to be assessed, not the length of individual periods of posting. Mirroring the provisions of the social security regulation, the revision proposes indeed that the 24 months duration also covers cases of posted workers replacing other posted workers for the performance of the same task.

However, the text also proposes that the accumulated duration of posting can only be taken into account to the extent that each period of posting exceeds 6 months. A succession of posting contracts of 5 months would therefore not be subject to the 2 years restriction, even if posted workers replace each other to perform the same task.

It is unclear what justifies this restriction. The explanatory memorandum merely talks about respecting the principle of proportionality.

1.2 Equal pay for equal work?

The notion of remuneration

The proposed revision replaces the term “minimum rates of pay” by “remuneration”. The objective of this amendment is to enable host Member States to guarantee equal pay for posted and local workers alike. It should however be noted that according to recital 11, “in a competitive internal market, service providers compete not only on the basis of labour costs but also on factors such as productivity and efficiency, or the quality and innovation of their goods and services”.

In the case C-396/13 of 12 February 2015, the ECJ has already validated the principle of equal pay, ruling that the PWD cannot be used by employers who post employees “with the sole aim of offering lower labour costs than those of local workers”.

The Commission argues that the revision would improve the current legal situation because “remuneration” is a broader concept than “rates of pay”. According to the impact assessment, the following elements are currently not considered as elements of minimum rates of pay (but would be covered by the notion of remuneration): quality bonuses, bonuses for dirty, heavy or dangerous work and capital formation contribution. Directive 96/71 specifies that the concept of pay is defined by the national and/ or practice of the host Member State. The proposed revision deletes this paragraph, thereby raising some questions as to possible interference by the ECJ into what should or should not be considered as a constituent element of remuneration.

The proposed revision also requires Member States to publish the constituent elements of remuneration in the single official national website referred to in the enforcement Directive. The ETUC had opposed the creation of such websites, fearing that full disclosure on-line of pay classifications would prove difficult to achieve. It is unclear who would bear the responsibility of incomplete or outdated information on such websites (social partners?).

Collective agreements

Equal pay cannot be achieved without the respect of the collective agreement that is applicable at the workplace. The type of collective agreements that can be guaranteed by the host member State are laid down in Art 3.8 of the PWD. The proposed revision does not alter this provision, even strengthening it by repeating its formulation under the new concept of of remuneration.

According to Art 3.8, a host Member State can guarantee the respect of a collective agreement to the extent that it benefits from the erga omnes effect (‘universally applicable collective agreement’). In countries where such extension mechanisms do not exist, the Member State may rely on de facto collective agreements (‘generally applicable collective agreements’). Both mechanisms however are mutually exclusive.

If an extension mechanism is possible, even if theoretical, neither the host Member State nor trade unions in that Member State are allowed to take the necessary steps to guarantee the respect of de facto collective agreements.

Member States potentially affected by this restriction are as follows (list to be confirmed): Austria (only in sectors and professions that are not members of the Austrian Economic Chamber), Bulgaria, Croatia, Czech Republic, Estonia, Germany, Greece, Hungary, Italy (which has an indirect form of extension through labour court judgments), Ireland, Latvia, Lithuania, Poland, Slovakia, Slovenia, Switzerland, Portugal, Romania, Slovenia[2].

Finally, the respect of collective agreements applicable at company level cannot be guaranteed (with the exception of temporary agency workers. see section 1.4 below). This restriction concerns all Member States.

Subcontracting

A new paragraph deals with subcontracting chains. This provision allows host Member States to oblige undertakings to subcontract only to undertakings (national or foreign service providers) respecting the applicable conditions for remuneration.

It is settled jurisprudence, as recalled recently in the Regio post case C-115/14, that a Member State may impose in the context of public procurement the respect of applicable rates of pay to the tenderers and its subcontractors.

The proposed revision does not, however, overturn the Rüffert jurisprudence according to which a public authority in a Member State such as Germany cannot impose to foreign subcontractors the respect of generally applicable collective agreeements.

Temporary agency work

The revision specifies that that the conditions applicable to posted agency workers are those of Art 5 of the temporary work agency Directive, which is more advantageous to posted workers than the PWD. The temporary agency work Directive lays down the principle of non-discrimination between an agency worker and a comparable worker in the user undertaking regarding the essential conditions of work and of employment.

Contrary to other types of posted workers, it therefore seems possible to guarantee the respect of company level agreements to agency workers. The temporary work agency Directive is indeed less restrictive than the PWD on the type of collective agreements that can apply to workers.

Extension of the PWD to all sectors

The current PWD applies only to the construction sector, with the possibility for Member States to extend its principles to other sectors of their economy. The revision proposes to generalise the PWD to all sectors.

It should be clarified that the non application of the PWD does not mean that there can be no posted workers; this would probably run against the free provision of services principle. The absence of coordination rules such as those contained in the PWD creates a risk of having a whole category of workers covered only by a country of origin principle.

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[2] *Source: The role of extension for the strength and stability of collective bargaining in Europe*, Thorsten Schulten, Line Eldring and Reinhard Naumann, ETUI 2015

2. Political assessment

The ETUC has welcomed the proposed wording on remuneration. It is potentially broader than the notion of rates of pay and, most importantly, it would cast in stone the ECJ current approach to equal pay.

However, the proposed restrictive definition of the type of collective agreements recognised is not satisfactory: excluding most sectoral collective agreements, and all company level agreements. In practice, equal pay would not apply equally apply to all posted workers, leaving significant room for social dumping.

Concerning the time limit, the clarification that there can be no room for a country of origin principle is positive. However, 24 months is a too long period, which does not correspond to the reality of posting today. In any case, the draft opens a door for circumvention to the time limit.

Finally, whilst it is appreciated that the proposed revision does not seek to reopen the enforcement Directive, the revision is very narrow and fails to include a number of elements to stop the exploitation of workers, including full respect for the fundamental right to collective bargaining and collective action in the host Member State and a mandatory joint and several liability mechanism in the subcontracting chain.

Considerable work will therefore have to be carried in the upcoming legislative process. Together with the affiliates, the ETUC Secretariat will have to consider carefully the best strategy on possible priorities and redlines.

3. Some points for amendments

On social dumping. It has to be clarified that competition on labour costs can never be accepted.

On time limit. The maximum duration of posting should be determined by the host Member State, in consultation with the relevant social partners. The objective is to enable Member States to devise time limits that best fit the concrete realities in their region and sector.

On the notion of remuneration. Unconditional equal pay will constitute an absolute red line throughout the negotiations. In addition, it should be clarified that the host Member State is solely competent to determine the constituent elements of remuneration. There should be no obligation to publish on public websites the pay elements contained in collective agreements. Remuneration should be understood as “gross”,i.e. before tax deductions and social security contributions payable by wage-earners and retained by the employer.

On collective agreements. Sufficient flexibility should be introduced in Art 3.8 so as to enable the recognition of generally applicable collective agreements as well as company level collective agreements. Such collective agreements should be recognised as soon as they are negotiated by the social partners which are the most representative at national or sectoral level in the host Member State.

The general argument against generally applicable collective agreements is that the Directive cannot impose upon foreign service providers full respect of agreements which are not legally binding upon domestic workers. Careful argumentation will have to be developed, including for instance the acceptance of minimum coverage rates for generally applicable collective agreements (e.g: 50%).

On subcontracting. Introduction of a mandatory joint & several liability mechanism. Failing that, removal of any reference to domestic system already in place. The objective is to avoid the introduction of internal market test, assessing the necessity and proportionality of existing mechanisms.

On temporary agency work. Introducing a clear requirement of a previous period of employment in the country of origin. A temporary agency worker with no previous period of employment in the country of origin should be considered as being habitually employed in the host country. Furthermore, Art 3.9 of the current PWD should be reintroduced as it clarifies that a temporary agency worker should benefit from equal treatment with a comparable worker in the host Member State.

Additional demands. The proposal is subject to an ordinary revision procedure, which means that in the course of the procedure the co-legislators should normally be free to introduce additional topics for consideration. The following ETUC demands[3] are currently unaddressed:

Regardless of what Member States are authorised to do within the context of the PWD, trade unions must be expressly allowed to approach and **put pressure** equally on local and foreign companies to improve living and working conditions of workers and to demand equal treatment. This demand for a Monti clause would be a major improvement and help reconcile the PWD with ILO Conventions C98 and C87.

A broader legal basis, to include the social policy objectives contained in Art 153 TFEU. Sufficient provisions should be introduced to encourage the control of genuine self employment status, in accordance with host Member State standards.

Restoring the minimum character of the PWD, by inter alia giving more flexibility to the notion of public policy (Art 3.10). It should indeed be recalled that the Laval quartet judgments have established that the PWD is a maximum Directive with regard to the terms and employment conditions that can be guaranteed to posted workers. A Member State wishing to impose additional terms and conditions must have recourse to a public policy justification (Art 3.10 of the PWD). However, the ECJ is interpreting these justifications in such a narrow way that Art 3.1 must be considered as a virtually exhaustive list. In other words, a collective agreement cannot as a principle be imposed in its entirety.

4. Next steps

The Executive Committee mandates the ETUC Secretariat to draft amendments to the proposed revision of the PWD, on the basis of the lines listed in this document, as a background for further lobbying and negotiation with relevant institutions and stakeholders.

The Secretariat will consult the ETUC labour and internal market Committee, the Mobility, migration and inclusion Committee and will then report to the Executive Committee for further follow up.

All affiliates are asked to coordinate their activities on the basis of the agreed ETUC amendments.

[3] *https://www.etuc.org/documents/posting-workers-directive-proposals-revision#.VubAkPkrK70*