Transnational posting of workers

Reflections on a new European Path

edited by

Stefano Maria Corso and Maria Giovanna Greco

Giappichelli

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VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100

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Antonio Ojeda Avilés is Full Professor of Labour Law, University of Seville

Enrico Gragnoli is Full Professor of Labour Law, University of Parma

Daiva Petrylaitė is Full Professor of Labour Law, Vilnius University

Justinas Usonis is Associate Professor of Labour Law, Vilnius University

Victoria Rodríguez-Rico Roldán is Permanent Lecturer of Labour and Social Security Law, University of Granada

Stefano Maria Corso is Researcher in Labour Law, University of Milan

António C. da Frada de Sousa is Professor of Private International Law and European Union law, Catholic University of Portugal

Milena da Silva Rouxinol is Professor of Labour Law, Catholic University of Portugal

Manuel Velázquez is member of EU Labour Mobility Unit, National Anti-Fraud Office (ONLF), Labour and Social Security Inspectorate State Agency (OEITSS), Ministry of Labour and Social Economy

Desplazados: el sutil argumento de los requisitos menos atractivos

Antonio Ojeda Avilés [*]

1. *La extraña proporcionalidad de los desplazamientos atractivos*

En no pocas ocasiones el Tribunal de Justicia de la Unión Europea (TJUE) ha dictado sentencia en defensa de los derechos y libertades fundamentales y contra una conducta que ha venido considerada como contraria a alguna de las libertades y derechos fundamentales de la Unión, entre la que se encuentra la libre prestación de servicios y su vertiente del desplazamiento de trabajadores, una actividad que en los últimos años parece ir alcanzando cuantitativamente ala clásica emigración cuando de nacionales de otro Estado miembro se trata, aunque no tanto, o no tanto aún, si hablamos de inmigrantes extracomunitarios. Y entre los argumentos aducidos por el Tribunal, hay uno dotado de una extraña capacidad de convicción, a fuer de su aspecto casi frívolo dentro de una argumentación tan severa como la jurídica. En bastantes ocasiones, el TJUE rechaza una medida adoptada por un Estado miembro o por los propios órganos de la Unión bajo el – en apariencia – peregrino argumento de "hacer menos atractivo" o bien "menos interesante" el derecho que se propone a los nacionales de otros Estados miembros, como pueden ser el de libre circulación de trabajadores, o libre establecimiento de empresas, u otros en donde venga involucrado, a los efectos aquí contemplados, el desplazamiento de trabajadores de un país a otro.

En buena medida estos derechos y libertades fundamentales aparecen traducidos a otro derecho más venial, como por ejemplo, el derecho a que se ten-

[*] Catedrático de Derecho del Trabajo, Universidad de Sevilla.

ga en cuenta la experiencia adquirida en otro Estado miembro como mérito en un concurso, o el derecho a que no se exija la autorización administrativa para desplazarse a otro país, lo que a la larga ha venido a plantear además el interrogante de hasta qué punto semejante criterio puede valer para que el TJUE resuelva su opción en aspectos que muy poco, por no decir nada, tienen que ver con los derechos y libertades fundamentales del Derecho Originario. Pero no siempre hallamos la aplicación del criterio de la atracción enredada en aspectos veniales, sino que hay momentos en que el TJUE se lanza contra toda una determinada legislación de un país, en base, podríamos decir, exclusivamente a su escaso atractivo para declararla contraria a la legislación europea [1].

Veamos su alcance en una sentencia de rango intermedio en cuanto al asunto controvertido y que además aparece con frecuencia en materia de desplazamiento de trabajadores, el de los posibles requisitos para la entrada en el país de acogida y las autorizaciones administrativas. En la sentencia Maksimovic et al., de 12 de setiembre de 2019, asuntos acumulados C.64/18, C-140/18, C-146/18 y C-148/18, una deflagración en una fábrica austríaca de Zellstoff Pols AG, había obligado a la empresa a contratar a otra empresa austríaca, Andritz AG, para desmontar el utillaje destrozado y montar el nuevo, para lo cual ésta subcontrató a la croata Bilfinger d.o.o.; pero, no habiendo podido terminar el encargo, ambas empresas subcontrataron de nuevo a otra empresa croata, Brodmont d.o.o, su terminación, lo cual realizó en dos meses y medio con 217 obreros croatas, serbios y bosnios. Detectados por la policía financiera, hubo investigaciones que culminaron cuando la autoridad administrativa impuso sanciones a la austríaca Andritz y a la croata Brodmont. Así, al administrador de ésta impuso una multa de más de 3 millones de euros, y a los cuatro consejeros de la austríaca Andritz otras de alrededor de 2,5 millones de euros a cada uno, entendiendo que lo habido consistió realmente en una cesión

[1] En asunto relacionado con el transporte marítimo, y en base a propuestas erradas del propio tribunal, la sentencia TJUE de 11 de diciembre de 2014, Comisión contra Reino de España C-576/13, invalidó por contraria a la legislación europea a la normativa española sobre las Sociedades Anónimas de Gestión de Estiba Portuaria, SAGEPs, apuntando como alternativa la creación de empresas de trabajo de temporal o de sociedades anónimas de gestión de estiba portuaria (sic). La sentencia del TJUE se basa en la infracción de la libertad de establecimiento a pesar de que los requisitos para las empresas marítimas no españolas y la españolas eran idénticos, y no acudía al más accesible argumento de infracción de la libertad de competencia porque ya la Sentencia TJUE Becu y otros C-22/98 había resuelto la cuestión negativamente. Para mayores detalles véase mi libro *La reconversión del sector portuario. Los Reales Decretos Leyes 8/2017 y 9/2019*, Madrid 2019, 54 ss. En parecido sentido, la sentencia TJUE de 9 de marzo de 2017, caso Piringer C-342/15, aboga por suprimir cualquier restricción aunque se aplique también a los nacionales del país que la impone, si va a impedir, obstaculizar o hacer menos atractivas las actividades del prestador de servicios extranjero en un Estado miembro. Vid. CALVO CARAVACA y CARRASCOSA GONZALEZ, *El Tribunal de Justicia de la Unnión Europea y el Derec Internacional Privado*, Pamplona, 2021, nota 27.

de trabajadores por una empresa de trabajo temporal croata a una empresa usuaria austríaca, con incumplimiento de obligaciones legales. A mayor abundamiento, la legislación austríaca establecía unos límites mínimos en los importes sancionatorios, los cuales se acumulaban en función del número de obreros concernido, pero no establecía un límite máximo, se añadía una contribución por costas del procedimiento (el 20%) en caso de que el recurso interpuesto fuera desestimado, y las multas se convertían en penas privativas de libertad (prisión de casi cinco años y más de cuatro, según los casos) en supuesto de impago.

El TJUE corta en seco la actuación administrativa y recuerda la propia jurisprudencia de que deben considerarse restricciones a la libre prestación de servicios "todas las medidas que prohíban, obstaculicen o hagan menos interesante el ejercicio de esta libertad", por lo que exigir una autorización administrativa a los desplazamientos desde otro Estado miembro constituye una restricción a la libre prestación de servicios. Y que tales restricciones pueden hacer menos atractivo el ejercicio de dicha libertad [2]. Por todo lo cual concluye declarando la incompatibilidad entre la normativa nacional referida y el artículo 56 del Tratado de Funcionamiento (TFUE) por ir más allá de lo necesario para garantizar el cumplimiento de los objetivos perseguidos [3].

Vemos aquí cómo se vincula el criterio del menor atractivo con el de proporcionalidad. Lo cual nos confirma su pequeña capacidad argumentativa, basada en algo tan circunstancial y ligero como aquel brocardo aprendido en los primeros años de Facultad, el *fumus boni iuris*, pues en fin de cuentas se trata del antiguo criterio de la experiencia. Ahora bien: aun cuando hallamos en la jurisprudencia del TJUE sentencias como la acabada de ver en donde el argumento utilizado se reduce prácticamente éste, lo habitual viene a ser su uso como colofón, como argumento complementario, cuando el basamento principal no resulta decisivo porque ambas partes disponen de sólidos apoyos y los jueces del Tribunal se acogen a su experiencia y autoridad al apuntar a inicios mas o menos complementarios. Incluso en algunas ocasiones el argumento de la menor atracción sirve como aquella brizna que vence la báscula hacia uno de los lados tras haber oscilado ante el equilibrio de los platillos. Un poder fascinante que no se compadece con la envergadura o el peso de tan liviano criterio, sino con la autoridad de quien lo propone. Pero no es solo eso.

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[2] Cita las sentencias TJUE de 13 de noviembre de 2018, Cepelnik C-33/17; de 23 de noviembre de 1999, Arblade C-369/96 y C-376/96; y de 14 de noviembre de 2018, Danieli C-18/17. Vid. PEREZ GUERRERO, *Medidas de control y vigilancia de los Estados miembros en materia de desplazamientos temporales de trabajadores: la Inspección de Trabajo y la Autoridad Laboral europea en la lucha contra el fraude y la precariedad en el empleo*, en *Trabajo, Persona, Derecho y Mercado*, 13 de diciembre de 2020.

[3] Sentencia Maksimovic citada, § 48.

2. *El universo conceptual de pertenencia*

El criterio de lo atractivo no es un mero criterio estético al que se le da mayor importancia de la debida, en un ejercicio de frivolidad. Su impacto resolutivo no brilla en la alturas como decisivo colofón de unos argumentos oscuros y deslavazados que el tribunal ha desplegado casi por necesidad para dar mayor brillo al punto central, sino que vienen a resultar como la expresión sintética de cuanto se ha ido exponiendo en los argumentos previos, como parte mínima pero suficiente del argumentario completo: sin su pequeño peso vencido hacia uno de los lados, el peso de los anteriores argumentos respecto de los expuestos por la parte contraria no sería suficiente para despejar el resultado. Es el conjunto y no su parte más sobresaliente lo que vale.

Pues bien, ello es así porque en las sentencias donde aparece el argumento que nos ocupa se han ordenado las pruebas merced a un método concreto de solución de conflictos cuando las partes enfrentadas son dos derechos o libertades fundamentales, cada uno con enorme peso específico, de donde no resulta creíble negar completamente a uno para apoyar en su integridad al contrario. Nos hallamos ante el método de ponderación de los intereses contrapuestos (*Guterabwehgung*) a los cuales se aplica el test de proporcionalidad de manera que la victoria solo otorgue el espacio mínimo o necesario para la finalidad perseguida por la parte vencedora, y no más allá [4]. Una desproporción en los efectos dará lugar, por tanto, al rechazo del tribunal sobre lo pretendido por esa parte, o reconocido por los tribunales inferiores.

Ocurre que al hacer así estamos colocando el foco de atención, más que sobre el conflicto de ambos intereses, sobre los efectos que superan el punto de equilibrio, sobre los que el tribunal señala su adecuación comedida o su exceso. Se dirá que al hacer así ya ha formulado implícitamente su juicio respecto a cuál de los derechos o libertades fundamentales es prevalente en el caso enjuiciado, y así ocurre en efecto. Pero dicho juicio no resulta tan evidente en la gran mayoría de los casos, cuando lo que se contempla no es el desnudo conflicto entre dos pilares fundamentales, sino el áspero encon-

[4] Otro argumento reiterado en la multitud de sentencias sobre requisitos de entrada para trabajar en los países UE es el de no perturbar el mercado de trabajo del país de entrada, y solicitud de permiso de trabajo administrativo. Así, sentencias TJUE de 8 de julio de 2021, caso VAS Shipping C-71/20; o de 23 de noviembre de 1999, caso Arblade C.639(96 y C-376/96, que plantean el requisito del permiso administrativo como restricción excesiva que puede hacer menos atractiva la libre circulación de trabajadores. Sobre otros casos en donde se contrapone las cortapisas administrativas con la libre circulación de trabajadores, cfr. PEREZ GUERRERO., *Medidas de control y vigilancia de los Estados miembros en materia de desplazamientos temporales*, cit.

tronazo entre dos subproductos de ellos a un nivel claramente terrenal. En el caso con el que comenzábamos este análisis, la alegada libre prestación de servicios transnacional no queda enfrentada a otro derecho o libertad fundamental del elenco europeo, sino a algo mucho más difuso cual es la existencia de razones imperiosas de interés general para establecer límites como los establecidos por el gobierno austríaco al uso de personal desplazado de otros países comunitarios, límites que se concretan en los objetivos de protección social de los trabajadores, la lucha contra el fraude en el ámbito social y la prevención de abusos [5]. Tales razones imperiosas de interés general configuran ciertamente un límite externo a la propia libertad de prestación de servicios, pero no quedan vinculadas a otra libertad o derecho fundamental que se le contraponga, sino al orden público del país de acogida, aun cuando éste ni siquiera se recoja en cuanto tal. La sola mención de razones imperiosas de interés general bastaría para legitimar el predominio de las sanciones sobre la libre prestación de servicios, aunque hicieran menos atractivo el ejercicio de dicha libertad. Así pues, el TJUE contrapone en éste y otros casos a una libertad fundamental las razones de orden público o bien otros derechos y libertades que no gozan del rango máximo para cuyos conflictos se ha ideado el método de ponderación de intereses. Se dirá que nada obsta a aplicarlo en otros niveles inferiores si el resultado es plausible, a lo cual nada podemos objetar, pero el hecho de contraponer y tratar de equilibrar una libertad o derecho fundamental con un principio de orden público o, como en otros casos, un derecho subjetivo ordinario, parece desnivelado en sí mismo, en el mismo sentido que pudiéramos objetar cuando consideráramos la nulidad de una ley porque se contrapusiera a una orden ministerial. Lo cual no habría obstado a reconocer en todo derecho o libertad, incluso en los de mayor rango como el de libre prestación de servicios, unos límites *intrínsecos* basados en los límites marcados por una norma superior, en este caso el Tratado de Funcionamiento de la Unión Europea [6]. Una objeción también presente en otros contenciosos laborales, y no solo en el desplazamiento de trabajadores, como vemos en la sentencia TJUE de 21 de diciembre de 2016, caso Aget Iraklis C-220/15, sobre autorización administrativa para efectuar despidos colectivos en Grecia y libertad de establecimiento y de empresa, donde la li-

[5] TJUE, caso Maksimovic, § 36.

[6] Vid. MAGÁN PERALES, *Restricciones justificadas por razones imperiosas de interés general*, en GALLEGO CÓRCOLES (dir.), *Derecho Comunitario Europeo,* Lex Nova 2007, 424; BASTERRA HERNANDEZ, *El contrato de trabajo en el contexto internacional: ley aplicable, desplazamiento temporal y orden público*, en *Revista Española de Derecho de Trabajo,* 222, 2019, 173 ss.; GOÑI URRIZA, *El ámbito de aplicación de las libertades europeas que afectan al Derecho de Familia y las relaciones entre el orden público de la Unión Europea y de los estados miembros*, en *Cuadernos de Derecho Transnacional* 2, 2021, 233 ss.

bertad fundamental de establecimiento se une a otra, la de empresa del artículo 16 de la Carta Comunitaria de Derechos Fundamentales, la cual "es distinta a las demás libertades fundamentales del Título II de la Carta", y lleva a declarar que la autorización administrativa para despidos colectivos podría hacer menos atractivo a las otras empresas europeas el acceso al mercado griego [7]. O en la Sentencia TJUE de 28 de abril de 2022, caso Delia C-86/21, sobre el no reconocimiento de la experiencia profesional de una sanitaria portuguesa en un concurso para plaza hospitalaria española, en la que no se computaba la experiencia de siete años en un hospital lisboeta, medida que podía "obstaculizar o hacer menos atractivo el ejercicio de las libertades fundamentales".

A nuestros efectos lo importante consiste en la pertenencia del pretendido criterio del atractivo a un complejo hermenéutico de mayor fuste, cual es el de la ponderación de intereses en presencia, y cómo al cabo ese examen de proporcionalidad se concentra en uno de los polos del conflicto en sí mismo considerado. Lo que hasta cierto punto parecería lógico cuando una de las partes en presencia alegara el orden público nacional o algún otro aspecto difuso, el cual podría prestarse a excesos, pero ofrecería un peligro cierto de parcialidad cuando el conflicto se hubiera trabado entre dos libertades o derechos fundamentales de igual rango. Y, para desgracia del Derecho del Trabajo, casi podemos decir de entrada cuál va a ser el derecho o libertad fundamental objeto de examen cuando hay uno de ellos de carácter laboral [8].

El método de ponderación de bienes ha servido con profusión y acierto para resolver una multitud de conflictos entre derechos y libertades fundamentales: ha servido en ocasiones, como indica Pérez Luño, como cauce argumentativo para plantear y resolver la mayor parte de conflictos iusfundamentales [9]. Ahora bien, continúa, en determinadas ocasiones los tribunales que tienen ante si la necesidad de resolver un conflicto entre derechos fundamentales, optan por uno de ellos, sin pretender sopesar, medir o establecer un balanceo entre ellos.

Veamos un caso famoso y muy criticado por la doctrina laboralista desde

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[7] Véase el comentario de GARCIA-PERROTE ESCARTIN, *La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho Españo"*, en *Actualidad Jurídica Uría Menéndez*, 49, 2018, 169 ss.

[8] Reflexiones apriorísticas parecidas a las que hace MOLINA VERA., *Nuevos retos para el sindicalismo europeo. La jurisprudencia del Tribunal de Justicia de la Unión Europea relativa a desplazamiento de trabajadores en el marco de una prestación transnacional de servicios*, en *Quaderns de Ricerca (Bellaterra)*, 20, 2011-2012.

[9] PÉREZ LUÑO, *La Filosofía del Derecho como vocación, tarea y circunstancia*, Sevilla 2017, capítulo 3 sobre "El método dilemático en la resolución de conflictos entre derechos fundamentales".

diversos ángulos [10], el de la sentencia TJUE de 11 de diciembre de 2007, caso Viking Line ABP C-438/05, en donde la empresa finlandesa de transbordadores "desplaza" la bandera de su transbordador deficitario a su filial en Estonia para así negociar sin cortapisas con el sindicato del país unas condiciones laborales muy inferiores a los finlandeses. El sindicato de marinos finlandés convoca entonces medidas de conflicto contra la empresa, y el Sindicato Internacional de Marinos, con sede en Londres, declara un boicot internacional de negociación colectiva, que la empresa denunció ante los tribunales por ser transnacional (una huelga y un conflicto de un país contra un barco de otro) y finalmente llegó al TJUE. Y por más que el sindicato finlandés alegara que la *propiedad efectiva* correspondía a la casa matriz de Viking y no a la sucursal estonia, y que el cambio de bandera del barco viene a significar el cambio a una bandera de conveniencia, la sentencia del TJUE analiza hasta qué punta unas medidas conflictivas que son lícitas bajo el Derecho finlandés pueden actuar y son proporcionadas cuando se confronta a la libertad de establecimiento y, subsidiariamente, a la libre circulación de trabajadores y a la libre prestación de servicios [11]. Ciertamente que de tal forma responde a las preguntas formuladas por el tribunal británico, pero además sigue con ello la doctrina general expresada por sentencia anteriores del mismo Tribunal sobre el ejercicio de derechos fundamentales [12]; y en su favor ha de mencionarse el hecho de que reconociera

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[10] EWING y HENDY, *The New spectre haunting Europe: the ECJ, trade union rights and the British government*, en *Institute of Employment Rights*, Londres 2009, sobre las implicaciones de la sentencia en el conflicto entre el sindicato británico de pilotos BALTA y la aerolínea British Airways; KD EWING, *The Death of Social Europe*, en *King's Law Journal*, 1, 2015, 76-98. La sentencia tuvo una indirecta repercusión en las negociaciones para la aprobación del proyecto de Reglamento denominado Monti II sobre el derecho del huelga en la UE, que terminó archivado: EWING, *The Draft Monti II Regulation: An Inadequate Response to Viking and Laval*, en *Institute of Employment Rights*, Liverpool 2012.

[11] § 72: "en el presente asunto, por una parte, no puede negarse que una medida de conflicto colectivo como la proyectada por el FSU tiene como consecuencia hacer menos interesante, o incluso inútil, como destacó el tribunal remitente, el ejercicio por Viking de su derecho al libre establecimiento, porque impide que ésta y su filial Viking Eesti disfruten, en el Estado miembro de acogida, del mismo trato que reciben los demás operadores económicos establecidos en ese Estado". § 73: "Por otra parte, debe considerarse que una medida de conflicto colectivo adoptada para ejecutar la política de lucha contra los pabellones de conveniencia perseguida por la ITF (…) puede, cuando menos, restringir el ejercicio por Viking de su derecho al libre establecimiento". § 75: "De la jurisprudencia del Tribunal de Justicia se deriva que sólo puede admitirse una restricción a la libertad de establecimiento si ésta persigue un objetivo legítimo compatible con el Tratado y está justificada por razones imperiosas de interés general También es necesario, en tal caso, que sea adecuada para garantizar la realización del objetivo que persigue y que no vaya más allá de lo necesario para alcanzarlo".

[12] En sentencias TJUE de 12 de junio de 2003, caso Schmidberger C-112/00, y de 14 de octubre de 2004, caso Omega C-36/02, sobre libertades de expresión y reunión y respeto a la dignidad humana.

(en § 44) el derecho a adoptar medidas de conflicto colectivo como derecho fundamental en la UE. Pero en una sentencia lo importante es el fallo, y aquí el TJUE defiere indirectamente la respuesta sobre la proporcionalidad al tribunal que formula la cuestión [13]. Una proporcionalidad referida a las medidas de conflicto colectivo, sin entrar a considerar hasta qué punto con ello la libertad de establecimiento de la contraparte no queda plenamente confirmada con una táctica susceptible de dudas [14].

La doctrina especializada se ha planteado hasta qué punto cabría utilizar otro método distinto al de la ponderación de intereses cuando nos hallemos ante el conflicto de dos derechos o libertades fundamentales, y desde el campo del Derecho del Trabajo sus debate atraen nuestra atención al máximo por lo dicho respecto a cierta tendencia del TFUE a hacer prevalecer los análisis de proporcionalidad en torno y exclusivamente sobre los derechos laborales cuando confligen con las libertades económicas tan profundamente asentadas desde el principio en el alma de la Unión Europea.

3. *Otros métodos resolutivos en los conflictos sobre libertades y derechos fundamentales apropiados al desplazamiento de trabajadores*

a) *El método dilemático*

Partiendo de que los jueces, enfrentados a un conflicto, no tienen que sopesar la relevancia de cada derecho, sino indicar cuál de ellos prevalece con ar-

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[13] Fallo, nº. 3 in fine: "Estas restricciones pueden estar justificadas, en principio, por la protección de una razón imperiosa de interés general, como la protección de los trabajadores, siempre que se compruebe que son adecuadas para garantizar la realización del objetivo legítimo perseguido y que no van más allá de lo necesario para lograr este objetivo". § 87: "En relación con la cuestión de si la medida de conflicto colectivo controvertida en el asunto principal no va más allá de lo necesario para lograr el objetivo perseguido, corresponde al tribunal remitente examinar, en particular, por una parte, si, con arreglo a la legislación nacional y al Derecho derivado de los convenios colectivos aplicable a esta medida, el FSU no disponía de otros medios, menos restrictivos de la libertad de establecimiento, para conseguir el éxito de la negociación colectiva desarrollada con Viking y, por otra parte, si este sindicato había agotado estos medios antes de emprender dicha medida".

[14] Son relevantes a tales efectos varios párrafos de la Sentencia Viking, de los que entresaco dos. § 8: "La ITF considera que un buque está registrado con un pabellón de conveniencia cuando la propiedad efectiva y el control del buque se encuentran en un Estado distinto del Estado bajo cuyo pabellón está matriculado". Y § 9: "Viking proyectó, durante el mes de octubre del año 2003, cambiar su pabellón registrándolo en Estonia o en Noruega, con el fin de poder celebrar un nuevo convenio colectivo con un sindicato establecido en uno de esos Estados".

gumentos de peso, el método dilemático considera que los jueces se hallan ante una oposición entre dos tesis enfrentadas, de tal modo que la verdad o corrección de una implica la falsedad o incorrección de la otra[15]. El dilema entre a o b viene expresado en el mundo actual con el dilema del prisionero – confesar el delito o no hacerlo – en la teoría de los juegos, a cuya virtud no pocos juristas y filósofos han elaborado teorías respecto a los conflictos sustanciales [16].

Ciertamente en la resolución de conflictos entre derechos y libertades fundamentales los tribunales no tienen por objetivo decidir la primacía o jerarquía definitiva de uno de ellos sobre otro [17], sino establecer cuál de ellos prevalece en determinada situación, por lo cual les bastaría con determinar, como propugna el método dilemático, cuál prevalece en el caso planteado y por qué motivos jurídicos. Los derechos, como las libertades, adoptan muchos perfiles, y en el caso de los fundamentales ocurre igual, por lo que todos tienen sus límites, como bien sabemos, y tales límites deben ser reconocidos cuando llega el caso.

Ahora bien, la desviación del método ponderativo en el sentido más arriba apuntado, de abandonar cualquier análisis de los equilibrios y centrarse en uno de los derechos en liza para declararlo ponderado o no, va en esa misma línea dilemática, de a o b, por lo cual el posible avance es puramente metodológico – partir del resultado para luego aportar los motivos –, al menos en esa variante evolucionada de la ponderación.

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[15] PEREZ LUÑO, *op. et loc. cit.*

[16] Así por ejemplo, G. TEUBNER, *The Transformation of Law in the Welfare State*, en TEUBNER (dir.), *Dilemmas of Law in the Welfare State*, New York, 1986, 3 ss., analiza las relaciones entre los tres sistemas autónomos de lo que denomina el trilema regulativo: el jurídico, el político y el social, en parecido modo a como en el dilema del prisionero la policía ofrece varias opciones de condena a dos presos incomunicados entre sí, idénticas (si ambos confiesan o si ninguno confiesa) o diferentes (si uno confiesa y el otro niega).

[17] No obstante, FERRAJOLI, *Diritti fondamentali*, en VITALE (coord.), *L. Ferrajoli, Diritti fondamentali. Un dibattito teorico*, Roma-Bari, 2001, 5, afirma que existe una jerarquía constitucional de derechos fundamentales en donde los tipos de derecho ocupan lugares distintos, ofreciendo a los jueces prácticamente la solución de sus cuitas. Según él, el "escalafón de derechos fundamentales sería en la Constitución del siguiente tenor: 1, derechos de inmunidad; 2, derechos de libertad; 3, derechos sociales; 4, derechos económicos. Los problemas radican en que, primero, esos derechos o libertades no se expresan muchas veces como no sea a través de sus manifestaciones, que pueden ser a su vez de muy distinta relevancia, y, segundo, que a todas luces la clasificación recibe una inspiración histórica – o al menos una cierta influencia – del nacimiento de tales derechos en los dos Pactos Internacionales de la ONU de 1966, sobre derechos civiles y políticos, y sobre derechos económicos, sociales y culturales. El primero de ellos, por cierto, tiene siete ratificaciones más, una de ellas de Estados Unidos, respecto de las obtenidas por el PIDESC. Vid. PINO, *Conflictos entre derechos fundamentales. Una crítica a Luigi Ferrajoli*, en *Doxa. Cuadernos de Filosofía del Derecho,* 12, 2009. 647 ss.

a) *La garantía del contenido esencial de los derechos fundamentales (Wensensgehalts Garantie)*

Tras algunos decenios en que este antiguo "límite de los límites" había quedado oscurecido por el uso y abuso del método ponderado, el respeto al contenido esencial ha vuelto por sus fueros, a la vista de críticas de la ponderación unilateral, y con apoyo de títulos de llamativo enfoque [18]. La Carta de Niza sobre Derechos Fundamentales en la Unión Europea lo recoge además en su artículo 52, apartado 1 [19], por lo cual parece orientar a la jurisprudencia en tal sentido. Y en verdad que, como indica Lenaerts, nuestros valores esenciales europeos son absolutos, por lo cual no pueden trocearse, y como señala la sentencia TJUE de 16 de julio de 2020 en el caso Schrems C-311/18, un límite a un derecho fundamental tan intenso que ponga en cuestión el propio derecho en cuanto tal es incompatible con la Carta.

Ahora bien, no hablamos de un límite absoluto, como alguno de los autores ha sostenido, sino de un límite al ataque del contenido esencial, que es distinto. La propia Carta determina que se podrán introducir limitaciones cuando sean necesarias y respondan a objetivos de interés general o a la protección de los derechos y ibertades de los demás, respetando el principio de proporcionalidad. Y el propio Lenaerts, tras hablar de dicho criterio como "el límite de los límites", entiende como necesario un ejercicio de equilibrio ("balancing") de los intereses en competencia, pues si afecta a la esencia del derecho es desproporcionado. Utiliza un lenguaje conocido, cual es el utilizado por el método de

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[18] LENAERTS, *Limits on Limitations: the Essence of Fundamental Rights in the EU*, Cambridge University Press, 4 de setiembre de 2019; el mismo artículo, en *German Law Journal, numero especial sobre Interrogating the Essence on European Union Fundamental Rights*, setiembre de 2019, 779 ss.; MESSINEO, *Garanzia del contenuto essenziale e tutela multilivello dei diritti* fondamentali, Macerata, 2010; CASTELLI, *Alla ricerca del 'limite dei limiti': il 'contenuto essenziale' dei diritti fondamentali nel dialogo fra le corti*, en *Rivista AIC,* 2021, 1 con interesantes dilemas en apartado 4.1, sobre el contenido esencial entre inviolabilidad y contrólimites; MARTIN HUERTAS, *El contenido esencial de los derechos fundamentales*, en *Revista de las Cortes* Generales, 2019, 105 ss.; DREWS, *Die Wesensgehaltsgarantie des Art. 19 Abs 2 GG,* Baden-Baden 2005; GENNUSA, *La tutela dei diritti fondamentali nell'Unione Europea: tratti di continuità e discontinuità nella Giurisprudenza comunitaria*, en *Il Politico* (universidad de Pavia), 2, 2006, 25-73. Anteriormente, y a partir de la Grundgesetz alemana donde se contempló por primera vez, numerosas Constituciones de otros países, entre otras la española (art. 53.1), la integraron en su texto. Vid. HÄBERLE, *Die Wessensgehatsgarantie des Art. 19 Abs. 2 GG,* CF Muller, 3ª edición, Heidelberg 1983.

[19] "1. Cualquier limitación del ejercicio de los derechos y libertades reconocidos por la presente Carta deberá ser establecida por la ley y respetar el contenido esencial de dichos derechos y libertades. Sólo se podrán introducir limitaciones, respetando el principio de proporcionalidad, cuando sean necesarias y respondan efectivamente a objetivos de interés general reconocidos por la Unión o a la necesidad de protección de los derechos y libertades de los demás".

la ponderación de intereses, de manera que aproxima a ambos, siquiera sea en la terminología. Lo cual quiere decir que en ocasiones podrá apartarse íntegramente un derecho fundamental – ejemplo, el derecho a la libertad de expresión, el derecho a la propia imagen, o el derecho a la libre circulación de trabajadores – en casos determinados, siempre que no afecte al núcleo del derecho. La propuesta de efectuar, junto a la ponderación de intereses, un "test de respeto a la esencia" que hallamos en el provocativo artículo de Lenaerts, nos conduce a la afirmación de Leal Espinosa y López Sánchez, de que ambos criterios se complementan [20].

Dicho en otros términos, nos hallamos antes los dos principales métodos de interpretación de los conflictos entre derechos y libertades fundamentales [21], los cuales además tienen elementos y métodos coincidentes, no ya solo cuando la esencia de un derecho fundamental no queda afectada, sino incluso allí donde el núcleo entra en conflicto.

Aplicado el debate al desplazamiento y la libre circulación de trabajadores, enfrentados con cierta frecuencia a las libertades económicas, cuando no a los aspectos de orden público de cada país, hay aspectos en donde cabe preguntarse si algunas materias entran dentro del contenido esencial, más allá del propio conflicto entre derechos y libertades fundamentales. En tal dirección habría de tenerse en cuenta la afectación a los contenidos de seguridad y salud en el trabajo, recientemente convertidos en derecho fundamental por la OIT [22], o las pensiones mínimas en algunas prestaciones de la Seguridad Social.

Pero seguramente el argumento del mayor o menor atractivo de la medida limitativa continuará ondeando en la cúspide de la solución adoptada.

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[20] LEAL ESPINOSA y LOPEZ SÄNCHEZ, *Contenido esencial de derechos fundamentales desde el método discursivo y principialista de Robert Alexi*, en *Oñati Socio-Legal Series*, 6, 2018, 1026.

[21] Como Los Modelos Más Relevantes En Argumentación Constitucional Lo Consideran LEAL ESPINOSA y LÓPEZ SÁNCHEZ, *Contenido esencial de derechos fundamentales*, cit., 1026. Vide también STELZER, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismässigkeit*, Viena 1991.

[22] La Conferencia Internacional del Trabajo ceebrada enjunio de 2022 ha incorporado la seguridad y salud al grupo de Principios y Derechos Fundamentales del Trabajo, para lo cual ha añadido al grupo de Convenios que se definen como esenciales en su cuerpo normativo los nn. 155 (1981) y 187 (2006).

Cross-border posting and smart working

Enrico Gragnoli[*]

1. *The epidemic and the peculiar fate of the research project*

In the conflict between economic freedoms[1] and workers' protection,[2] with regard to intra-EU posting, a recent judgement[3] is of considerable value, according to which "the coordination measures adopted by the EU legislature (...) must not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring (...) the protection of other fundamental interests that may be affected by that freedom". If we are to attempt once again to reconcile opposing purposes, the legislation must ensure "the freedom to provide services on a fair basis, that is, within a framework of rules guaranteeing competition" that would not be "based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on" whether or not "the employer is (...) established in that Member State".[4] Even assuming it has been imple-

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[*] Full Professor of Labor Law, University of Parma.

[1] CORTI, *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta*, in *Giorn. dir. lav. rel. ind*., 2016, 512 ss.

[2] TURSI, *La giurisprudenza uni-europea sul rapporto tra libertà economiche e diritto del lavoro:* discerni oportet, in *Dir. rel. ind.*, 2018, 835 ss.

[3] Court of Justice, Grand Chamber, 8 December 2020, C-626/2018, *Republic of Poland* vs. *the European Parliament*, in *www.dirittolavorovariazioni.com*.

[4] Court of Justice, Grand Chamber, 8 December 2020, C-626/2018, *Republic of Poland* vs. *the European Parliament*, cit.

mented with little sympathy for our trade union system, at least the overall direction reflects a set orientation and the decision rests on the transformations made to the original setting of the directive and their meaning,[5] versus the original idea of the EU regulation.[6]

Similar concepts are expressed in a contemporary judgement,[7] which states that the EU legislation on posting "is such as to develop the freedom to provide services on a fair basis", which would be "the main objective pursued by that directive, since it ensures that the terms and conditions of employment of posted workers are as close as possible to those of workers employed by undertakings established in the host Member State, by providing that those posted workers have the benefit of terms and conditions of employment in that Member State that offer greater protection than those provided for" by the original setting of the 1996 Directive. This statement is questionable, as it assumes the rationality of the present EU legislation structure, taking for granted both its consistency with the treaties' principles and its compliance with substantive justice, which, conversely, are to be proved.[8] Indeed, the achievement of the best possible balance between competition promotion and workers' protection can in no way be deemed evident, also accepting the fact that it is the inevitable purpose of the EU law, and that enterprise initiative needed such enhancement.[9]

This project intended to study, above all, engineering companies, since, at least in Italy, borderline illegal (and often completely illegal) postings are common in this industry, particularly with workers from Portugal and Romania. Since the project involves inspection services, in Italy it would be legiti-

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[5] ORLANDINI, *Salari e contrattazione alla prova dei vincoli del mercato interno*, in *Lav. dir.*, 2020, 285 ss.

[6] ORLANDINI, *Considerazioni sulla disciplina del distacco dei lavoratori in Italia*, in *Riv. it. dir. lav.*, 2008, 1, 70 ss.

[7] Court of Justice, Grand Chamber, 8 December 2020, C-620/2018, *Hungary vs. European Parliament*, in *www.dirittolavorovariazioni.com*.

[8] European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014*, 11 ff.

[9] Court of Justice, Grand Chamber, 8 December 2020, C-620/2018, *Hungary vs. European Parliament*, cit., which states "the EU legislature endeavoured, when adopting the contested directive, to ensure the freedom to provide services on a fair basis, that is, within a framework of rules guaranteeing competition that would not be based on the application, in one and the same Member State, of terms and conditions of employment at a level that is substantially different depending on" whether or not "the employer is (...) established in that Member State, while offering greater protection to posted workers, that protection constituting, moreover, (...) a means to safeguard the freedom to provide services on a fair basis".

mate to expect a certain coldness from employers' associations, as was confirmed to be the case when collecting the information, as well as with the completion of the statistical samples involved in the research. The fundamental objective presumed close coordination with the information gathered by the national authorities active in the field of inspection, since we would have to identify the mechanisms of fruitful cross-border collaboration between the various public bodies, in order to ensure the maximum possible effectiveness of the EU regulations, in relation to the prior identification of feasible offences. This was expected to result in a model (under the auspices generally applicable in relations with any European State) of fruitful cross-border connections, including with regard to the aspect of training, in order to ensure simple, linear cooperation in administrative procedures, in line with the achievement of the overall effectiveness listed among the purposes of Directive 2018/957/EU.

Originally scheduled to last 24 months, later extended to 30 due to the pandemic, the project was clearly and inevitably influenced by the unexpected situation that occurred in 2020, particularly in Italy, a heavily industrial area, and especially in Emilia-Romagna, where the restrictions imposed by the Government (in place from March 2020 to January 2021) resulted in a severe fall in production and, therefore, in the turnover of a large proportion of companies. The main consequences included an unsurprising reduction in the presence of workers from other countries, whether as employees or in the context of cross-border postings or sub-contracts aimed at concealing them and avoiding having to apply the relevant regulations on workers' protection, with a considerable reduction in the quantity of such arrangements, at least among engineering companies. It is possible that the same thing did not happen in other industries, such as logistics, though that sector was never under a great deal of pressure due to social distancing and the related need to transport goods to those reluctant to go out.

As was inevitable (and completely unpredictable prior to March 2020), the substantial fall in industrial production was, in many contexts, including that of the engineering industry, unfavourable to the development and confirmation of postings of various individuals, particularly those from countries with a less well-developed entrepreneurial spirit, with an indirect but perceptible reduction in illegal phenomena, which were discouraged by the presence of suspended employees and, more generally, the climate generated by social distancing. In part, this situation is noticeable in light of the information pertaining to the samples selected and subjected to verification, i.e. businesses, trade unions and workers, since attention was paid to events considered to be concluded.

More generally, with regard to posting, the situation after March 2020 can be viewed in different ways; faced with such a worrying scenario from a

health perspective and a rapid worsening of the economic conditions of the entire country and the European Union, the fact that the fall in production in many sectors coincided with a slowdown in illegal conduct is scant consolation. Nevertheless, in the throes of more dramatic problems and the issue of protecting public safety, the public authorities saw a clear, inevitable contraction in cross-border mobility, with a sort of truce in terms of unlawful postings.

2. *The use of smart working and its impact on cross-border posting*

Conceived to verify the flows of workers involved in cross-border postings in the engineering industry and to understand the prospects for improvement in such contexts of the safeguarding system designed under EU law, the project ... did not find workers, who had returned to their homeland, and the relevant assessments were carried out based on previous experience and associated disputes. On the contrary, a new issue emerged as a result of the epidemic, which was particularly significant in the European context: the presence of postings carried out remotely, with activities performed using so-called smart working. It is useful to reconstruct the Italian situation of March 2020, at the beginning of the project.

With regard to labour relations, when many activities considered non-essential were forbidden, as of 7 March 2020, this was accompanied by the constant and somewhat distasteful call for smart working, which was misunderstood by the political system and confused with the simple performance of work in the absence of physical contact and, as far as possible, carried out from home, in complete isolation.[10] As is often the case in Italian tradition, the response of employers and workers was less disastrous than the institutional one and, in the spirit of spontaneous rationality and the capacity for improvisation that have characterised our people since time immemorial, without any planning whatsoever, public authorities, companies and freelancers survived, albeit with a drastic reduction in gross domestic product.

In all the cases in which it turned out to be practicable (and there were many such cases), work was performed using electronic resources[11] that were already available but, for the most part, were used for the first time in such an intense and widespread way, out of necessity. As is still happening now, busi-

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[10] M. MISCIONE, *Il diritto del lavoro ai tempi orribili del* coronavirus, in *Lav. giur.*, 2020, 321 ss.

[11] FILÌ, *Diritto del lavoro e dell'emergenza epidemiologica da Covid-19 e nuova "questione sociale"*, in *Lav. giur*., 2020, 332 ss.

nesses and institutions discovered that they were able to put in place electronic tools that guaranteed and can permanently ensure their survival, with employees working from home.[12] For companies, it remains to be seen whether these methods can facilitate reasonable levels of profitability and ensure not just the continuity, but the efficiency of their traditional functions, above all without intruding too much in workers' private lives[13] and in their[14] work-life balance.[15] In any case, however dramatic it may have been, the pandemic brought about an unexpected technological turning point and faced all elements of the labour market with a common question: is it necessary or even simply convenient to transform their way of working, with the partial or total liberation of workers from the obligation to be present?[16]

On the social side, the questions are significant[17] and had been asked several years ago,[18] such that their importance and urgency have only grown. This involves a qualitative transformation, since, while evolution has been presented as gradual and guided by the logic of progressive experimentation,[19] the events of 2020 have brought about rapid changes, with improvisation and without much reflection. From the legal perspective, the provisions of Law no. 81 of 2017 were conceived for a gradual process of possible (and not even necessarily expected) modernisation[20] of authorities and businesses,[21] and were wrong-footed by the urgency of preventing the spread of contagion. We

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[12] D. GAROFALO, *La dottrina giuslavorista alla prova del Covid-19: la nuova questione sociale*, in *Lav. giur.*, 2020, 429 ss.

[13] TINTI, *Il lavoro agile e gli equivoci della conciliazione virtuale*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 2020, 420, 7 ss.

[14] MALZANI, *Il lavoro tra opportunità e rischi per il lavoratore*, in *Dir. merc. lav.*, 2018, 17 ss.

[15] R. PESSI, FABOZZI, *Gli obblighi del datore di lavoro in materia di salute e sicurezza*, in FIORILLO, PERULLI (a cura di), *Il* Jobs act *del lavoro autonomo e del lavoro agile*, Torino, 2018, 227 ss.

[16] Before the epidemic and regardless of its drastic impact, see VERZARO, *Fattispecie della prestazione agile e limite dell'autonomia individuale*, in *Riv. it. dir. lav.*, 2019, 1, 254 ss.

[17] TREU, *Rimedi, tutele e fattispecie, riflessioni a partire dai lavori della* gig economy, in *Lav. dir.*, 2017, 393 ss.

[18] PROIA, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile*, in FIORILLO, PERULLI (a cura di), cit., 179 ss.

[19] DONINI, *Nuova flessibilità spazio temporale e tecnologie: l'idea di lavoro agile*, in TULLINI (a cura di), Web *e lavoro. Profili evolutivi e di tutela*, Torino, 2017, 87 ss.

[20] TIRABOSCHI, *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, in *Dir. rel. ind.*, 2017, 962 ss.

[21] FRANZA, *Lavoro agile: profili sistematici e disciplina del recesso*, in *Variaz. temi dir. lav.*, 2018, 773 ss.

need to ask ourselves whether "smart" working, as imposed by the general situation of spring 2020, is a variant of what we know or represents an alternative.

The project identified various posted workers (with the drawing up of the relevant documents, in accordance with European regulations, where applicable) who found themselves placed within Italian companies on behalf of foreign parties or within foreign businesses on behalf of Italian employers, but called (for the most part and on an ongoing basis) to carry out their activities remotely, without leaving their residence. If this applied to a large percentage of Italian employees and managers, the same thing happened to a proportion of posted individuals, based on the measures adopted in 2020 and then implemented subsequently. The interviews conducted brought to light certain significant cases that revealed a much wider phenomenon. Just like the regulations of both our country and Europe, this way of working was legitimate prior to 2020 and has been even more so afterwards, in the last two years, during which similar phenomena have been encouraged in every way possible. Thus, "smart" posting is a solution that is consistent with both Italian and European regulations. This statement raises a new question: should we be applying the idea of parity of treatment, particularly in terms of pay, for smart posted workers?

3. *The emergence of the more general problem of cross-border smart working*

As rightly observed, posting "is a particular form of mobility or circulation of manpower, but it actually operates as a carrier of national labour mobility with important (...) outcomes for State systems as it is a scheme (...) to be included in the scope of free circulation of services";[22] this understanding of posting views directives and amendments thereto[23] as having been extremely significant to the European debate, since the very beginning.[24] The defence of competition has brought conciliation of different objectives back to the forefront and especially it has questioned the State concept of the workers' protec-

[22] BANO, *Il distacco nella recente normativa europea: fra cooperazione e competizione*, in *Variaz. temi dir. lav*., 2021.

[23] ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, Milano, 2013, 13 ss.

[24] Court of Justice 17 March 1990, C-113/1989, *Rush portuguesa Lda.* See CORTI, *Il distacco transnazionale dei lavoratori nell'Unione europea: dal* dumping *sociale alle nuove prospettive del diritto del lavoro europeo*, in *Variaz. temi dir. lav.*, 2021.

tion system,[25] if the EU legislation is seen as a mechanism to define the applicable law,[26] with an intuition that is correct, albeit somewhat excessive. Indeed, this is not all that Directive 96/71/EC does,[27] as it has introduced a specific safeguard, albeit relating to arbitration and to the consideration of competition, which should be "fair".[28]

Referred to several times in the case law,[29] the adjective "fair" is tautological, as it does not refer to any axiological or legal parameters determined by others,[30] but rather to the equilibrium point as set by the regulation, with strenuous defence of its adversarial structure. What results from this in terms of employers' protection[31] and in terms of employees' protection is the definition of "fair" competition, so that the adjective specifies only the reconciliation of the two values, referring to the policy choices made by the Union and to their transformation over time; from this perspective, it is not by chance that social security profiles have been developed,[32] because if "fair" competition is such insofar as it involves arbitration,[33] then the safeguarding of employees is partial or, if you prefer, selective, thus relying on choices that are discretionary,[34] rather than aimed at the entire range of their needs.[35] Throughout its evolution, Directive 96/71/EC has brought about a substantial regulation "lay-

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[25] BANO, *La territorialità del diritto. Distacco transnazionale di manodopera a basso costo*, in *Lav. dir*., 2015, 583 ss.

[26] BANO, *Il distacco nella recente normativa europea: fra cooperazione e competizione*, cit.

[27] VAN HOEK, HOUWERZIJL, *Where do EU mobile workers belong, according to Rome I and the (E)PWD?*, in AA.VV., *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Cambridge, 2016, 215 ff.

[28] Court of Justice, Grand Chamber, 8 December 2020, C-626/2018, cit.

[29] Court of Justice, Grand Chamber, 8 December 2020, C-620/2018, *Hungary* vs. *European Parliament*, cit. See Court of Justice, Third Division, 14 November 2018, C-18/2017, *Spa Danieli & C. Officine meccaniche e altri* c. *Regionale Geschäftsstelle Leoben des Arbeitsmarktservice.*

[30] BORELLI, ORLANDINI, *Appunti sulla nuova legislazione sociale europea. La direttiva sul distacco transnazionale e la direttiva sulla trasparenza*, in *Quest. giust*., 2019, 4, 134 ss.

[31] Court of Justice, Third Division, 14 November 2018, C-18/2017, *Spa Danieli & C. Officine meccaniche e altri* c. *Regionale Geschäftsstelle Leoben des Arbeitsmarktservice.*

[32] SGROI, *Profili previdenziali del distacco nell'Unione europea*, in *Arg. dir. lav.*, 2019, 67 ss.

[33] CORTI, *Il distacco transnazionale dei lavoratori nell'Unione europea: dal* dumping *sociale alle nuove prospettive del diritto del lavoro europeo*, cit., with a more optimistic position.

[34] Court of Justice, Grand Chamber, 8 December 2020, C-626/2018, *Republic of Poland* vs. *the European Parliament*, cit.

[35] With less pessimism, see CORTI, *Il distacco transnazionale dei lavoratori nell'Unione europea: dal* dumping *sociale alle nuove prospettive del diritto del lavoro europeo*, cit.

ing down a true right to equal pay for posted workers and (...) national workers, which extends, among other things, to all economic sectors, rather than to the construction sector alone, as conversely provided for by the 1996 Directive".[36] What is "fair" in smart cross-border posting? As the pandemic revealed, this question is a general one.

It does not concern only cases of posting, but all cases of so-called smart working, regardless of the configuration thereof within the national regulations. For certain professional vocations, it has been possible for some time now to carry out work abroad, and the epidemic has caused this issue to arise to an unexpected degree. Without any particular technical difficulties, workers located in other States can carry out their activities as employees, to the complete satisfaction of businesses, which sometimes do not even know and are not interested in knowing where the worker is and whether they live in the same country where the company's headquarters is located. Partly because of the pandemic, cross-border smart working has become a significant phenomenon from an organisational perspective.

If smart working has prompted discussion about employment in general and has raised theoretical questions that have no easy solution and, to tell the truth, have not yet been fully framed,[37] if only due to minimal practical experience, at the same time it has brought about, if there was a need to, a significant social innovation and has blurred the boundaries between time spent on personal needs and time dedicated to professional activities.[38] This has given rise to the stipulation of the right to disconnect,[39] understood as completely switching off from all electronic communications, in order to facilitate moments of privacy and time dedicated exclusively to family and emotional relations, without the risk of an oppressive influx of information and requests related to the interests of companies or public authorities.

The disruption of businesses and institutions as places of work appears to have already been inescapable in Italy since the end of 2019, regardless of the onset of the pandemic, which, in the space of a few weeks, raised brutal questions about matters of organisation and the protection of public health and safety. In fact, in these last few years the contrast between white-collar and blue-collar jobs has been exacerbated, with the former being performed in locations chosen in part by the worker, while the latter are confined to predeter-

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[36] BANO, *Il distacco nella recente normativa europea: fra cooperazione e competizione*, cit.

[37] CARUSO, *Il lavoro digitale e tramite piattaforma: profili giuridici e di relazioni industriali. I lavoratori digitali nella prospettiva del Pilastro sociale europeo: tutele rimediali, giurisprudenziali e contrattuali*, in *Dir. rel. ind.*, 2019, 1005 ss.

[38] SIGNORINI, *Il diritto del lavoro nell'economia digitale*, Torino, 2018, 15 ss.

[39] SPINELLI, *Tecnologie digitali e lavoro agile*, Bari, 2018, 137 ss.

mined spaces, characterised by rigid hours and often perceived as low quality, partly for this reason. In terms of intellectual activity, the physical breakdown of the company has coincided with the gradual decline in the feeling of collective participation among workers and in their trade union membership, despite such associations' attempts to limit these developments by making use of direct electronic communications,[40] thereby boosting contact between members and their representatives.[41]

Even without the pandemic, smart working and its success would perhaps have left our workers freer (or, at least, believing they were so), but undoubtedly more lonely, deprived of the human experience associated with their professional activities within the company and immersed in electronic communications that, at least to reactionaries like me, seem a bit depressing, in a flood of emails, data and news summaries in which it can be hard to follow the thread and find any profound meaning. If we accept these assessments, which cannot be proven and contradict the favourable reception of Italian doctrine,[42] smart working was in any case destined to reduce cohesion, culture and the capacity for personal interpretation of the actions of companies and public authorities, and to promote the phenomena of isolation and subjection to the perspective imposed by the employer, to the detriment of freedom, at least within the business.

4. *What does the search for a "fair" solution mean?*

Apart from businesses dedicated to activities considered essential for day-to-day life, not only in terms of public services (e. g. food and large retail businesses), the others were forced to cease activities between March and May 2020 (except for a complex system of exemptions), with the obligation to make use of smart working where possible and with certain adaptations effectively imposed, in the name of reducing social contact. Though put to the test at a dramatic moment, the technological resources proved more adequate than expected and allowed for a reasonable level of activity, not so much in terms of acceleration, but in terms of maintaining habitual functions and reducing preconceived notions. Neither businesses nor private employees have

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[40] MARAZZA, Social, *relazioni industriali e (nuovi percorsi di) formazione della volontà collettiva*, in *Riv. it. dir. lav.*, 2019, 1, 57 ss.

[41] OCCHINO, *Nuove soggettività e nuove rappresentanze del lavoro nell'economia digitale*, in *Labor*, 2019, 5 ss.

[42] TIMELLINI, *In che modo oggi il lavoro è* smart? *Sulla definizione di lavora agile?*, in *Lav. giur.*, 2018, 230 ss.

ever thought that such a model could become permanent and, to date, it has been considered a variant of smart working,[43] based on the urgent, transitory measures introduced in spring 2020.[44]

In legal terms, the phenomenon has two opposing characteristics. On the one hand, the encouragement to work remotely is a temporary situation rather than being a permanent shake-up of the system, which has been developing since May 2020 and is still constantly evolving,[45] with the resumption of more traditional methods and the partial but significant return of staff to the office, in the hopes that such situations will not have to be repeated. On the other hand, the lack of clarity over the obligations of workers confined to their residence has not been seen as an exemption carried out pursuant to the sophisticated structure of Law no. 81 of 2017,[46] but as an adaptation based on the emergency situation and the impossibility of carrying out more complete negotiations and agreements. Therefore, the "simplified" and quasi-compulsory smart working of spring 2020 has been a footnote in the evolution of the experience of Law no. 81 of 2017 and this should resume its course, with more careful planning of the coordination between the individual contribution and the corporate structure[47] and with a detailed definition of rights, starting with the right to disconnect.[48]

If the European regulations cite "fairness" with regard to the breakdown of the interests of posted workers and those relating to the promotion of competition, we may ask how this should be viewed with regard to smart-working cases; the reasoning considers all work activities carried out remotely in a cross-border context. The collective industry agreement was founded partly on the national aspect, with the structural limitation of competition and with the implicit prohibition applicable to businesses on competing to the detriment of workers and on lowering the cost of labour below that provided for in the mandatory clauses, in light of Article 36 of the Italian Constitution.[49] Nevertheless, the agreement remains a national one, either because such is the geo-

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[43] BROLLO, *Verso il lavoro* "anytime anywhere"*?*, in AA.VV., *Giuseppe Santoro Passarelli. Giurista della contemporaneità*, Liber amicorum, Vol. II, Torino, 2018, 924 ss.

[44] M. MISCIONE, *Il diritto del lavoro ai tempi orribili del coronavirus*, cit., 321 ss.

[45] This contribution was written in August 2020.

[46] PINTO, *La flessibilità funzionale e i poteri del datore di lavoro. Prime considerazioni sui decreti attuativi del "*Jobs Act*" e sul lavoro agile*, in *Riv. giur. lav.*, 2016, I, 367 ss.

[47] DONINI, *Lavoro agile e su piattaforma digitale tra autonomia subordinazione*, in *Variaz. temi dir. lav.*, 2018, 3, 823 ss.

[48] ALESSI, VALLAURI, *Il lavoro agile alla prova del Covid-19*, in BONARDI, CARABELLI, D'ONGHIA, L. ZOPPOLI (a cura di), *Covid-19 e diritti dei lavoratori*, Roma, 2020, 131 ss.

[49] See Italian Court of Cassation, 14 December 2005, n. 27591, in *Riv. crit. dir. lav*., 2006, 556.

graphical area in which it applies, or because it identifies standardised conditions for all companies in the same product sector, with regard to the entire country. On the contrary, cross-border remote working (with or without reference to cases of posting) gives rise to a dialectical connection between the life needs of a worker that are rooted in one State and the performance of that worker's activity for the benefit of a foreign company. How should pay be determined?

For the moment, at least in our system, this matter is for the business to determine, with the application of the same collective agreement to all workers, regardless of their methods of working and, therefore, even if they do smart working. This may allocate additional and unexpected resources to those living in EU Member States with lower average income levels, and this phenomenon, as observed by the project, has been significant during the pandemic; the return of workers to their State of origin and the use of electronic resources to perform activities remotely enable them to enjoy Italian levels of pay in a social context characterised by a lower standard of living. On the contrary, if workers operating from other countries were paid based on their territorial context, they would represent fierce competition for Italian workers and could throw such workers' job prospects into crisis, particularly with regard to professional vocations that do not require complete mastery of the language or of aspects of national culture, such as knowledge of the law.

Should workers operating remotely for foreign businesses be paid based on the country in which they live or the country in which the business is based? Adopted in order to regulate competition between workers, collective agreements, and Italian ones in particular, have never been designed to protect foreigners, and labour law has always had a national vocation, at least with regard to determining wages. Such agreements are limited to the Italian context, if they ever manage to oversee it with sufficient credibility. In fact, supranational contractual agreements have rarely enjoyed much prominence and, with regard to our country, European corporate committees have never played a significant role.

The foundation of collective agreements in national law is currently a key point, and their consideration by EU case law has always been based on the regulations of the State in question, even in a scenario influenced by EU regulations. This is one of the main reasons for the crisis affecting trade unions, which, albeit with growing openness to cross-border issues, are organised at industry level, when conditions are changing due to the global nature of the economic struggle. Basic shared interests are disappearing because companies are too different. The resources made available for national negotiations, in which minimum pay rises are discussed, are currently decreasing, and this is not expected to change in the short term, due to the disruption to companies' prospects and the decline in the governance of competition. There are not ma-

ny alternatives and, faced with large sectors of production characterised by proto-capitalist organisational mechanisms that do not value "know-how", national agreements are simultaneously in existential crisis and the only form of solidarity-based protection for workers.

However, if the work is performed remotely, this throws into crisis the principle of a national collective agreement and of determining pay on that basis, since pay is traditionally linked to overall living standards, and it is no coincidence that parity of treatment with regard to cross-border posting is stipulated on the assumption of the physical transfer of the worker in question. If he operates from home, does it make sense for his salary to be determined according to which country the company is based in? This may go against the desires of the worker, who may be interested in bringing about more effective competition for the employees of the company, with the offer of pay that is lower than theirs, but equal to or higher than what the former would earn in his traditional labour market. This question, which came to prominence in Italy during the pandemic, is of a structural nature due to the rapid spread of forms of remote working and the current enormous increase in cases of videoconferencing and electronic collaboration.

5. *The need for the European Union to reflect and the current, habitual use of questionable self-employment relationships*

For the moment, there is no realistic prospect of cross-border trade union agreements, still less such agreements at EU level. Neither are there even the most timid indications from the EU of the need for regulations on cross-border smart working. The resolution of the European Parliament of 21 January 2021 concerns the different matter of disconnection and acknowledges the importance of remote working, but does not address the issue of pay, let alone in a cross-border context. In regulatory terms, the absence of an EU initiative leaves the parties free to act and, in particular, businesses operate according to diffuse posting systems, with structures in various countries, entering into contracts in one or the other depending on pay-related issues and often with the use of services provided on a group basis, to the benefit of companies other than the one that entered into the original agreement. This model, typical of multinational organisations, is also imitated by smaller entities, specifically through the use of contributions acquired from different companies and made available to the end beneficiary, with debatable contracts, as is the case for some foreign companies that offer commercial activities via telephone, with recruitment *in loco* and the creation of permanent forms of cooperation with Italian businesses.

The spread of smart work, according to different national arrangements and with related pay prospects, means taking a decision about what is in the social interest, since the risk of competition between workers from different States is increasing and creating a framework that is not currently regulated. Above all, some objectives need to be defined: whether to allow businesses to operate with the lowest costs possible, whether to allow workers from less wealthy States to make the most of their opportunities by effectively competing against other workers, or whether to protect such other workers and their prospects with the companies based in their home country. It is hard to imagine a balance between such different expectations, because they cannot be reduced to a compromise, and the EU must choose, sooner or later.

In the medium term, the EU's intervention is inevitable and, first and foremost, not only in the context of posting, but, also with regard to cross-border remote working, it must establish which interests deserve to be protected as a priority (although this is not easy), both strategically and in terms of comparison between different expectations. In fact, the opportunity to work across different countries is a reality that, though perhaps inevitable, was accentuated by the pandemic. If we are not mistaken, at the moment there is a rush towards self-employment, whereas many working relationships can be described as employment relationships, at least with regard to our regulations, based on Law no. 81 of 2017.

The Italian system is familiar with and has experimented somewhat successfully with "smart working",[50] characterised by the performance of work in a location chosen by the worker and outside of the physical control of the business or public authority, which differs from "remote working",[51] which is carried out from the worker's residence, but with the use of a predetermined work station and according to the employer's working hours, and therefore subject to monitoring, albeit from a distance.[52] The success achieved by "smart working" in the five years since Law no. 81 of 2017 came into force demonstrates not only the technological transformation of companies and institutions prepared to accept innovation, but also workers' willingness to adopt smart working, for various reasons.[53] On the one hand, there is an enthusiasm for electronic resources, with workers' belief that they enjoy greater freedom by being out of the office at least for a few days, while on the other, workers

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[50] PERULLI, *La "soggettivazione regolativa" nel diritto del lavoro*, in *Dir. rel. ind.*, 2019, 111 ss.

[51] See GAETA, PASCUCCI, *Telelavoro e diritto*, Torino, 1998.

[52] G. SANTORO PASSARELLI, *Lavoro etero organizzato, coordinato, agile e telelavoro: un* puzzle *non facile da comporre in una impresa in via di trasformazione*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 2017, 327, 15 ss.

[53] CASILLO, *La subordinazione "agile"*, in *Dir. merc. lav.*, 2017, 545 ss.

have become accustomed to using IT tools, with their key role in working arrangements and the consequent partial irrelevance of the location in which work is performed.

Employers' enthusiasm has been changeable, but not so much as to discourage smart working, with the application of regulations that are not even comparable to those of the more rigid "remote working", which has been known since the end of the '90s and has never been particularly successful, other than within public authorities, which have detailed regulations[54] that are lacking in the private sector. Indeed, Law no. 81 of 2017 did not cover just one feature of the current set-up (i.e. attention to the outcome of the worker's activities),[55] but also sought to better reconcile the worker's personal needs with their professional commitments. The allocation of many activities provided electronically to employed work is an important starting point for Law no. 81 of 2017; however, this gain may be jeopardised by the performance of cross-border activities, because the option for self-employment contracts may avoid any problem for the business with regard to parity of treatment. The risk is real, but it can be overcome. In order to do so, first and foremost, we need to ask ourselves what fair pay for cross-border smart posting is.

[54] M. MISCIONE, *Diverse tipologie contrattuali:* remote working, *telelavoro* e digital workplace, in *Lav. giur.*, 2009, 663 ss.

[55] ANDREONI, *Il lavoro agile nel collegamento negoziale*, in *Riv. giur. lav.*, 2018, 1, 106 ss.

Implementation Issues of the Posting Directives in Lithuanian Labour Law – Transport Sector Specifics

Daiva Petrylaitė and *Justinas Usonis*[*]

1. *Introduction*

In the context of the posting of workers in the European Union, Lithuania is considered the so-called "sending (posting) country" with low numbers of EU workers posted to Lithuania and a quite significant number of workers posted from Lithuania from other EU Member States.[1] This trend is in particular distinct in road transport operations. After 1990, the road transport sector of Lithuania kept growing strongly due to Lithuania's favourable geographical position. Lithuanian carriers were active in providing transportation services between Eastern and Western businesses using the TIR system,[2] and the vehicle fleet has been growing steadily. After joining the European Union, Lithuanian carriers promptly shifted towards the provision of services in the EU, and after the economic crisis of 2008, quickly proved to Western customers that they are capable of providing quality transport services.

The growth in transportation services has been, presumably, driven more by the export of transportation services than by the export of Lithuanian

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[*] Full Professor of Labour Law at Vilnius University, Law Faculty and Associate Professor of Labour Law at Vilnius University, Law Faculty.

[1] D. PETRYLAITĖ, V. PETRYLAITĖ, *The Legal System of Posting of Workers in Lithuania*, in *Variaz. temi dir. lav.*, 2021, 1, 123-136.

[2] Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), Geneva, 14 November 1975 (reg. 20 March 1978, No. 16510).

goods. Drivers mostly provide services in Western countries without even returning to Lithuania. The demand for drivers in Europe is enormous, therefore, the mobility of workers in this sector is high. According to the International Road Transport Union (IRU), the shortage of drivers in Europe between 2019 and 2021 was about 17-21%. The shortfall in both sectors is forecast to reach 40% soon.[3] According to the data of the Employment Service of Lithuania, the demand for drivers was five times higher than their supply in 2020-2021. Lithuanian statistics show that drivers of Lithuanian transport companies spent most of their working time working in foreign countries in 2020, as international transport between other countries and cabotage was more than 10 times higher than international transport and cargo transport in/from Lithuania. The statistics indicate a clear upward trend in services in foreign countries over the last decade. The statistical data also show that, in 2015, Lithuanian drivers carried out twice as many cargo and passenger transport operations between foreign countries (without returning to Lithuania as the employer's home country) than local transport operations in Lithuania. Five years later, i.e. in 2020, such international transport operations have already exceeded national transport volumes 10 times. Such nature of work has given rise to a new distinctive form of work, known in practice as "weeks on/weeks off" – a driver is posted for several months (usually between 2 and 3 months) to foreign countries to provide services and actually lives in the vehicle. After the weeks on, the driver rests at home (in Lithuania or in another country of his/her residence) for several weeks.

This type of work when services are provided abroad creates non-standard situations in the application of employment law: firstly, problems relating to the quality of rest and life of drivers; secondly, legal and procedural uncertainties in proper documentation of the periods when drivers return to their place of residence after "weeks on" driving; thirdly, a large number of legal problems in order to pay for work in a proper manner; and, fourthly, many uncertainties in the application of social security insurance periods and related social security benefits.

In order to address these problems and other related aspects, European Union legislation started gradually introducing additional rules and benefits for drivers. The new legal regulation, however, brings along a number of current issues both in legal doctrine and in practice in the effort to ensure all employment and social benefits to posted workers (drivers in this case).

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[3] The International Road Transport Union (IRU), *A Fifth of Driver Positions Unfilled in the European Road Transport Sector*, *Report, 20 March 2019* available at *https://www.iru.org/resources/newsroom/fifth-driver-positions-unfilled-european-road-transport-sector-:~:text=Polling%20of%20IRU%20members%20and,as%20demand%20grows%20in%202019*; *https://www.iru.org/news-resources/newsroom/fifth-driver-positions-unfilled-european-road-transport-sector*.

Therefore, this article aims at presenting the regulation specifics of the working conditions of mobile road transport workers, analysing the problems in the application of employment law and offering conclusions and *de lege ferenda* proposals.

2. *Drivers – posted workers: weeks on / weeks off*

The first question to answer in the analysis of the nature of work when drivers have "weeks on and weeks off" is at whose initiative and for the benefit of which party to the employment relationship is work organised in this form? Otherwise stated, does this form of work exist at the initiative of the employer or the employee (the driver)? At first sight, it would seem that the work of a driver always involves travelling and it is therefore natural that, in choosing the profession of a driver, workers also take on the risk of a particular regime of work and rest time (including inability to return home and to their residence areas every day). In those cases when drivers transport goods on bilateral basis (e.g. from Lithuania to Germany and back), they have an opportunity to rest at home 1-3 times a week (depending on travelling duration). However, if drivers regularly transport cargo between different countries or carry out cabotage transportation, they are limited in both theory and practice in terms of their ability to return home regularly and frequently for rest periods. For example, the current legal regulation applicable in Lithuania allows the employer to post a worker–driver to work for a maximum of 183 consecutive days abroad.[4]

Such working conditions of drivers have led the European Union to regulate the posting periods of drivers. The Recitals of Regulation (EU) 2020/1054[5] (Mobility Package 1) (hereinafter – Regulation 2020/1054) state that "drivers engaged in long-distance international transport of goods spend long periods away from their homes. The current requirements on the regular weekly rest may prolong those periods unnecessarily. It is thus desirable to adapt the provisions on the regular weekly rest periods in such a way that it is easier for drivers to carry out international transport operations in compliance with the

[4] Article 21(2) of the Law on Corporate Income Tax of the Republic of Lithuania, No. IX-675, 20 December 2001.

[5] Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs, OJ L 249, 31.7.2020, 1-16.

rules and to reach their home for their regular weekly rest period, and be fully compensated for all reduced weekly rest periods". Article 8a of Regulation (EC) 561/2006 as amended by Regulation 2020/1054 (hereinafter – Regulation 561/2006) states that transport undertakings shall organise the work of drivers in such a way that the drivers are able to return to the employer's operational centre where the driver is normally based and where the driver's weekly rest period begins, in the Member State of the employer's establishment, or to return to the drivers' place of residence, within each period of four consecutive weeks, in order to spend at least one regular weekly rest period or a weekly rest period of more than 45 hours taken in compensation for reduced weekly rest period.[6] In implementing this provision, from autumn 2020, employers operating in the EU must make it possible for posted drivers to return home, however, there is no imperative obligation to return the worker home if the worker does not want to. Such imperative could not even be laid down in the Regulation as workers use their time off at their own discretion and, if they wish to stay abroad, the Regulation may not restrict their right to choose to exercise the right of free movement. Such position is also expressed by the European Commission in its published Questions and Answers[7] on Mobility Package I. It should be noted that although posted workers-drivers have a right to return home as set out in the Regulation, in practice they more often choose to work the "term" of 8 to 12 weeks than to waste time travelling home and back every 4 weeks. It should also be noted that the employer has the right to terminate posting earlier than required by the Regulation either at the worker's request or on his/her own initiative. However, in any case, the employer remains obliged to pay for the employee's return to the company's home country or the worker's country of residence. If a worker prefers to use the rest time at his/her own discretion, he/she must make a clear request in writing by customary IT means (e-mail, mobile devices, etc.), provided that the content of the information, the person who provided such information, the fact and time of its provision can be identified and it is reasonably possible to preserve it. In practice, it is recommended to provide information by e-mail, which is the easiest way to provide evidence in case of a dispute.

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[6] Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, OJ L 102, 11.4.2006, 1-14.

[7] European Commission, *Mobility Package: Questions and Answers*, 25 November 2020 available at *https://www.iru.org/resources/newsroom/fifth-driver-positions-unfilled-european-road-transport-sector-:~:text=Polling%20of%20IRU%20members%20and,as%20demand%20grows%20in%202019*, *https://transport.ec.europa.eu/transport-modes/road/mobility-package-i/driving-rest-times_en.*

On the other hand, the provision in the Regulation that allows a driver not to return home for rest does not allow employers to require drivers to write bogus requests and state that they are unwilling to be returned home for rest. It can clearly be stated that such "requests" by workers would be viewed with criticism in practice as far as their lawfulness and genuine intent is concerned. The cases where workers massively "request" working conditions, which are manifestly less favourable than set out by law, would be considered contrary to the true will of workers and treated as abuse by the employer. In other words, if it is proven that an employer encouraged a worker to write a request refusing to be returned home for rest time, which was, in principle, unfavourable to him/her, that would be considered a violation of the requirement of Regulation 561/2006.

A practical issue relevant, in particular, for the EU Member States (such as Lithuania) where the posting of third-country workers prevails is whether such workers-drivers should also be returned to the country of their domicile at the employer's expense or whether it is sufficient to return such workers only to the employer's home country. Regulation 561/2006 does not detail the term "place of his/her residence". The explanatory comment to Regulation 561/2006 by the European Commission gives the following example:

"A Polish driver residing in Slovakia and employed by a company established in Poland carries out transport operations between France and Spain. The employer must offer the choice to this driver, and organise the work accordingly, so as to enable the driver to return either to the place of residence (Slovakia) or the operational centre of the company (Poland) on regular basis. The driver may however inform the employer of his/her decision to take the opportunity of a break to go to another place, e.g. south of Italy for holiday. After the break, the driver will go directly from the place where he took his rest in Italy to the place where he/she will restart work (Spain or France)". (...) "When a driver decides not to benefit from the employer's offer to return to the driver's place of residence or to the operational centre of the employer and decides to spend his/her rest period in another place, then any travelling costs to and from this place should be covered by the driver. The same principles apply to drivers having a place of residence in a third country and being employed by the company established in the EU".[8]

The examples provided by the European Commission suggest that if a driver's place of residence is in an EU Member State, the driver must be re-

[8] EUROPEAN COMMISSION, *Mobility Package: Questions and Answers*, 25 November 2020 available at *https://www.iru.org/resources/newsroom/fifth-driver-positions-unfilled-european-road-transport-sector-:~:text=Polling%20of%20IRU%20members%20and,as%20demand%20grows%20in%202019*, *https://transport.ec.europa.eu/transport-modes/road/mobility-package-i/driving-rest-times_en.*

turned to that Member State at the employer's expense, while if the driver's place of residence is in a third country (e.g. Ukraine or Belarus), the worker will have to return home at his/her own cost. Such interpretation of the provisions of Regulation 561/2006 is logical and rational – if employers were to be obliged to return drivers-employees to the third country at their own expense, the employers would simply refuse to employ employees living far from the country of establishment (e.g. Lithuania), as returning them to their home country would be hardly cost-efficient for the company.

It is important to note that, in any case, the parties to an employment contract may discuss the issues of mandatory return of the worker to the employer's country of establishment or to the country of the worker's habitual residence in the employment contract, without deviating from the imperative requirements of law.

3. *Relationship between the concepts "posting" and "mobile work"*

It has been assumed in Lithuania for decades that the legislation allows employers to choose between two options of compensation for work in travel: (i) under the mobile work provisions (as most common for compensating drivers working in passenger transport) or (ii) under the posting provisions (as drivers working in long-distance freight transport are compensated). However, the possibility of such choice was limited in 2019 by the Supreme Court of Lithuania in its decision on work remuneration and other monetary compensations for long-distance drivers.[9] The Court held that, in the situation at issue, "the amount of the daily allowance paid was up to three times the salary paid to the employee". The Court therefore ruled that this circumstance raised reasonable doubts whether it was correct to treat the worker's performance of work functions in a place other than his permanent workplace as posting and whether the daily allowance estimated for him was compensatory. Otherwise stated, the Court started developing the approach that the work of long-distance drivers should be treated as "mobile work" rather than posting. Classifying a driver's work as mobile work rather than posting would lead to higher expenses of the employer for social security and other taxes. The doctrine of employment law supports this logic of the court.[10] It should be noted, however, that a driver is considered to be posted to the territory of

[9] The Supreme Court of Lithuania, Ruling of 16 October 2019 in the civil case No. 3K-3-299-313/2019.

[10] USONIS, *Legal Aspects of Nature of Work of Mobile Road Transport Workers*, in *Jurisprudencija*, 2007, Vol. 3(93), 21-28 [in Lithuanian].

another Member State under Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (hereinafter – Directive 96/71/EC).[11] Hence, it can be asked whether it could be stated that, under the above-mentioned case law of the Supreme Court of Lithuania, a driver would not be considered posted even within the meaning of the Directive. Legal provisions may not be interpreted in a restrictive sense and such a worker is considered to be a posted worker, since, in accordance with the concept of a posted worker as set out Article 2 of Directive 96/71/EC, a posted worker is a worker who, for a limited time, carries out his/her work in the territory of a Member State other than the State in which he/she normally works. This is irrespective of the fact that, within the meaning of national employment law, a driver's work is considered mobile work rather than posting in Lithuania and national law provisions on taxes, compensation, etc. apply accordingly. In the context of provisions of Directive 96/71/EC, however, such workers-drivers are considered posted workers and must be guaranteed all the working conditions laid down in the Directive.

4. *Restrictions on rest taken in vehicle*

Recitals 13 of Regulation 2020/1054 state that, in order to promote social progress, it is appropriate to specify where the weekly rest periods may be taken, ensuring that drivers enjoy adequate rest conditions. The quality of accommodation is particularly important during the regular weekly rest periods, which the driver should spend away from the vehicle's cabin in a suitable accommodation, at the cost of the employer. In order to ensure good working conditions and the safety of drivers, it is appropriate to clarify the requirement for drivers to be provided with quality and gender-friendly accommodation for their regular weekly rest periods if they are taken away from home.

Recitals 15 of Regulation 2020/1054 state that (...) while regular weekly rest periods and longer rest periods cannot be taken in the vehicle or in a parking area, but only in suitable accommodation, which may be adjacent to a parking area, it is of utmost importance to enable drivers to locate safe and secure parking areas that provide appropriate levels of security and appropriate facilities. The Commission should therefore develop standards for safe and secure parking areas (...).

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[11] 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, OJ L 18, 21.1.1997, 1-6.

However, it is common knowledge that there is still a shortage of suitable parking facilities and hotels in Europe,[12] and the Covid-19 virus has exacerbated this problem. Drivers cannot find suitable places to rest and are fined for that. This situation prompts the question who is responsible for such violations of the drivers' rest regime.

Recitals 23 of Regulation 2020/1054 state that Member States should take all measures necessary to ensure that national rules on penalties applicable to infringements of Regulation 561/2006 and Regulation 165/2014[13] are implemented in an effective, proportionate and dissuasive manner. It is important to ensure easy access by professionals to information on the penalties that apply in each Member State. Access to this information is facilitated by a single European website[14] administered by the European Labour Authority established by Regulation (EU) 2019/1149 of the European Parliament and of the Council.[15] These measures enable employers and posted workers-drivers get information about the penalties imposed by Member States for infringements of the requirement of Article 8(8) of Regulation 561/2006 prohibiting to remain in the vehicle during regular weekly rest periods. As already mentioned, the regular weekly rest period and any period of weekly rest of at least 45 hours to compensate for previous reduced weekly rest periods must be spent in gender-friendly accommodation with adequate sleeping and sanitary facilities, and all the costs of such accommodation must be covered by the employer. It is the employer's responsibility to organise and pay all the costs associated with the posting, therefore, the driver could only be held liable for non-compliance with the above requirements if he/she has the rest conditions created by the employer and fails to comply with the set requirements of rest time and conditions through his/her own fault.

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[12] EUROPEAN COMMISSION, *Study on Safe and Secure Parking Places for Trucks*, 2019, available at *https://ec.europa.eu/transport/sites/transport/files/2019-study-on-safe-and-secure-parking-places-for-trucks.pdf.*

[13] Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport Text with EEA relevance, OJ L 60, 28.2.2014, 1-33.

[14] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland), OJ L 186, 11.7.2019, 21-56.

[15] This website operates as a single portal created by Regulation (EU) 2018/1724 of the European Parliament and of the Council to provide access to information sources and services at Union and national level in all official languages of the Union.

5. *Work remuneration for drivers*

The mobile nature of drivers' work raises a number of issues regarding the application of posting legislation. Article 3 of Directive 96/71/EC states that posted workers shall be guaranteed the work remuneration applicable in the hosting state, including the overtime rates set out by (a) law and other legal acts, and/or (b) collective agreements or arbitration awards. The concept of work remuneration is defined according to the national law and/or practice of the Member State to whose territory the worker is posted and includes all the components of pay, which are obligatory under national laws and legal acts, collective agreements or arbitration awards in the Member State where they have been declared as universally applicable or otherwise applied under Article 3(8) of Directive 96/71/EC. It follows that in case the Member State to whose territory the worker is posted does not define the amount of work remuneration by law or collective agreement (arbitration award), the minimum work remuneration (if any) of that state will apply.

Member States must publish information about the terms and conditions of employment contracts, including work remuneration components, on the official national website and ensure that this information is accurate and up-to-date. The Commission publishes the addresses of the common official national websites on its website.[16]

The requirement to pay the work remuneration of the state where work is carried out does not apply when drivers carry out bilateral transportation operations (e.g. when cargo is transported from the employer's home country to another EU Member State and another cargo is transported from the EU Member State directly to the country of registration of the driver's employer). In this case, the posted driver does not provide services to an undertaking located in another Member State and this situation does not fall within the definition of Article 1(3) of Directive 96/71, which states that the Directive applies when the posted worker provides services under a contract concluded between the undertaking making the posting and the party operating in that Member State.

Transportation contracts vary widely and it can be that the employer of the posted worker does not have any contractual relationship with the consignee. Therefore, Article 1(3) of *lex specialis* Directive (EU) 2020/1057 also provides that, notwithstanding Article 2(1) of Directive 96/71/EC, a driver shall not be considered to be posted for the purpose of Directive 96/71/EC when

[16] National websites on posting, available at *https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites*

performing bilateral transport operations[17] in respect of goods as well as bilateral transport operations in respect of passengers.

Another case where Directive 96/71/EC does not apply is transit transport, i.e. a journey through the territory of another Member State without unloading or loading. In this case, a driver does not provide a service within the meaning of Directive 96/71/EC, as he/she has no service connection with the State he/she is transiting. Therefore, Article 1(5) of *lex specialis* Directive (EU) 2020/1057 provides that, notwithstanding Article 2(1) of Directive 96/71/EC, a driver shall not be considered to be posted when he/she transits through the territory of a Member State without loading or unloading freight and without picking up or setting down passengers. The question in this case is what remuneration must be paid by employer to the driver – that of the State of establishment (posting State) or of the State of destination. In the case of such transit, the applicable law is presumably that agreed in the employment contract with the employer.

Likewise, a driver is not considered to be posted within the meaning of Directive 96/71/EC when performing the initial or final road leg of a combined transport operation as defined in Council Directive 92/106/EEC, if the road leg on its own consists of bilateral transport operations.

The question to be addressed is how to apply the provision of Article 3(1)(i) of Directive 96/71/EC, which obliges to apply to a driver the rules of the State to which the driver has been posted governing the allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. This point applies only to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work. We believe that this provision should apply to drivers carrying out cabotage operations because Article 1(7) of *lex specialis* Directive (EU) 2020/1057 states that a driver performing cabotage operations as defined in Regulations (EC) No 1072/2009 and (EC) No 1073/2009 shall be considered to be posted under Directive 96/71/EC.

It should be noted that labour disputes between drivers and employers often raise the question of whether the parties have properly complied with the regulatory framework applicable in the foreign state. In such cases, the body deal-

[17] Directive (EU) 2020/1057 defines a bilateral transport operation in respect of goods as the movement of goods, based on a transport contract, from the Member State of establishment, as defined in Article 2(8) of Regulation (EC) No 1071/2009, to another Member State or to a third country, or from another Member State or a third country to the Member State of establishment.

ing with the dispute needs to know the content and application of the relevant foreign provision in accordance with the requirements of Directive 96/71/EC. In this context, it is important to note the case law developed by the Supreme Court of Lithuania[18] that the content of foreign law is a matter of law and not of fact, and the duty to clarify it, in accordance with the principle of *iure novit curia* (the court knows the law), is incumbent upon the court hearing the case. It means it is for the court and not for the litigants to collect information on the requirements of foreign regulatory legislation and that could be done using the possibilities provided for in Regulation (EU) 2019/1149 and Regulation (EU) 2018/1724.

Interestingly, Article 1(11) of *lex specialis* Directive (EU) 2020/1057 sets out an exhaustive list of administrative requirements that Member States may impose on employers in relation to the posting of drivers:

– firstly, an obligation for the operator established in another Member State to submit a posting declaration to the national competent authorities of a Member State to which the driver is posted at the latest at the commencement of the posting, using a multilingual standard form of the public interface connected to the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012;

– secondly, an obligation for the operator to ensure that the driver has at his/her disposal in paper or electronic form data about the transport operations he/she carries out and an obligation for the driver to keep and make them available when requested at the roadside;

– thirdly, an obligation for the operator to send via the public interface connected to IMI, after the period of posting, at the direct request of the competent authorities of the Member States where the posting took place, copies of documents referred to in point (b), as well as documentation relating to the remuneration of the driver in respect of the period of posting, the employment contract or an equivalent document, time-sheets relating to the driver's work, and proof of payments.

The employer/operator must send the documents via the IMI public interface no later than eight weeks from the date of the request. If the operator fails to provide the requested documents within the set time limit, the competent authorities of the Member State where the posting took place may, through IMI, request the assistance of the competent authorities of the Member State of establishment in accordance with Articles 6 and 7 of Directive 2014/67/EU. Where such a request for mutual assistance is made, the competent authorities of the Member State of establishment of the operator shall have access to the

[18] The Supreme Court of Lithuania, Ruling of 27 February 2019 in the civil case No. e3K-3-73-248/2019.

posting declaration and other relevant information submitted by the operator through the public interface connected to IMI.

Hence, it can be stated that there is already a specific mechanism at EU level to ensure the implementation of the working conditions of posted drivers as specified in Directive 96/71/EC. However, employers (transport companies) note that it is difficult to find out about the employment conditions applicable abroad and it is not known whether all the information necessary is available on official national websites. Moreover, it is not always easy to understand legislation in a foreign language and to interpret their context and application specifics in a proper manner. It is considered that, in order to apply the provisions of Directive 96/71/EC correctly, an employer posting a worker must cooperate with the business partners and trade unions in the host country.

6. *Annual leave and unpaid leave*

Employers need clarification how and in what proportion to calculate the annual leave of a posted worker in accordance with the provision of Article 3(1)(b) of Directive 96/71/EC, which obliges them to apply to the driver the provisions of the law or collective agreement governing the minimum duration of paid annual leave in the country to which he/she has been posted. If more annual leave days are granted in the hosting Member State than under the worker's employment contract, it is necessary to devise a methodology to calculate how many more annual leave days should be granted pro rata for the days spent abroad, as posted workers have short stays in host countries, sometimes only a few days per month.

As quite a large number of Lithuanian citizens move to other EU Member States to work and the demand for drivers keeps increasing, vacancies in Lithuania are filled by workers from third countries, mainly from Belarus and Ukraine. For these workers, it is not convenient to return to the employer's country of registration (Lithuania), therefore, such drivers do not exercise their right to return for rest in practice. The aim of both third-country and Lithuanian workers is to earn money in a country where work is more expensive and spend it at home, where the standard of living is lower and the purchasing power of the money earned is higher. This is why drivers often prefer to work for 2-3 months in the West and then have 2-3 weeks off at home (working in the above-discussed mode of "weeks on/weeks off"). The question therefore is how to treat the period of 2-3 weeks of rest after the "weeks on". Is it unpaid leave or downtime, or the time off granted by the employer?

Article 137 of the Lithuanian Labour Code regulates the granting of unpaid

leave and unpaid time off and prohibits an employer from granting unpaid leave to an employee without the worker's consent. The worker has the right to request unpaid leave (Article 137(1) of the Labour Code) or the employer may grant it by agreement between the parties (Article 137(2) of the Labour Code). In such a case, a clear expression of the worker's will must be provided in the form of a signed or electronic request specifying the period of unpaid leave. Without evidence of the worker's true intentions, the employer who grants unpaid leave to such a worker runs the risk in terms of lawfulness and may be subject to legal action for the initiation of an employment dispute. It should be noted that the burden of proof in the event of such employment dispute lies with the employer. If the worker claims during the dispute that the employer encouraged (or even forced) the request for unpaid leave, it is likely that it will be held that the unpaid leave has been granted unlawfully, without the worker's will.

This situation indicates the issues of implementation of the mechanism for compensating working and rest time under Regulation 561/2006. The problem arises when the rest time that must be remuneration is taken during a non-insured period, i.e. unpaid leave. Although Regulation 561/2006 does not detail the period of rest during which rest time that was unavailable must be compensated, it is recommended that unpaid leave should not be granted during the period of compensatory rest in order to avoid disputes with employees, i.e. unpaid leave should not include the period of mandatory rest.

7. *Conclusions*

1. Drivers from countries like Lithuania spend most of their working time abroad without returning to their employer's country of establishment. This pattern of work is known in practice as "weeks on/weeks off". That has negative consequences for the quality of workers' work and rest time, as well as for their personal and family life. In order to improve working conditions for drivers, the EU has adopted the so-called "Mobility Package", which *inter alia* obliges employers (transport companies) to make it possible for drivers to return regularly to place of their residence or to the centre of the employer's operations in the Member State of establishment. However, the implementation of this requirement in practice poses a number of legal and organisational challenges:

– firstly, drivers are free to decide on their daily working and rest time arrangements, but employers are nevertheless obliged to plan drivers' work (delivery schedules) in such a way that drivers do not have to violate the working and rest regime requirements due to organisational circumstances;

– secondly, drivers are not allowed to spend their regular weekly rest periods and any weekly rest period of more than 45 hours, which compensates for the previous periods of reduced weekly rest, in the vehicle cabin. During rest, they must stay in gender-friendly accommodation with adequate sleeping and sanitary facilities. Employers must ensure compliance with this requirement and reimburse any costs involved.

2. Drivers are subject to the provisions of Posting Directive 96/71/EC, i.e. they are considered as posted workers during their work abroad. Drivers are, therefore, covered by all the working conditions and benefits provided in the Directive for posted workers. For example, the work remuneration of drivers is calculated and paid with reference to the information about the terms and conditions of the employment contract, including work remuneration components, published on the official national website of the Member State to which the worker is posted. It is interesting to note that, according to case law of Lithuanian courts, the content of foreign law is a matter of law and not of fact, and it is the obligation of the court hearing the case to collect and interpret this information.

3. According to the case law of courts in Lithuania, the work of long-distance drivers is considered to be "mobile work" rather than posting. This legal construct applies and predetermined the specifics of application of national law, such as provisions on taxes, compensations, etc. In the context of provisions of Directive 96/71/EC, however, such workers–drivers are considered posted workers and must be guaranteed all the working conditions laid down in the Directive.

Posting of workers in the framework of an ongoing process of reform

Victoria Rodríguez-Rico Roldán[*]

1. *Preliminary remarks on the topic*

In a context characterized by the globalization of economic activities, the displacement of production factors beyond national borders and, with them, labour mobility, has long been conceived as one of the main strategic factors of competitiveness. Specifically, the temporary posting of workers within the framework of transnational provision of services constitutes one of the most common manifestations of transnational labour mobility, although it differs from traditional migratory movements in its shorter duration and in its greater specialization. Faced with the traditional migratory phenomena linked to the search for work and, therefore, with *mobility for employment*, in transnational services, workers are the protagonists of *mobility in employment*, at the request and under the direction of the employer.[1]

Although at a moderate rate, growth is constant year after year in the temporary posting of workers within the European Union. Notwithstanding the difficulty of measuring the volume of postings, given the scarcity of statistical sources that address this phenomenon as a specific work modali-

[*] Permanent Lecturer of Labour and Social Security Law, University of Granada.

[1] A. GUAMÁN HERNÁNDEZ, *De nuevo sobre la ley aplicable en los supuestos de desplazamiento temporal de trabajadores: el caso Laval*, in *Revista Relaciones Laborales*, 2008, 15.

ty,[2] it has been estimated that the number of posted workers reached 1.9 million in 2018, while in 2019 the figure increased to 3.06 million.[3]

When companies choose to post workers in order to provide services in countries other than their own establishment, they take advantage, through the exercise of freedom to provide services, of the differences between the social standards established in the Member States of the Union. The phenomenon entails the danger of the so-called social dumping, since the level of applicable labour conditions differs among the different national systems. And it should not be forgotten that each labour market has its own specificities, which generates a dispersion of the regulatory frameworks of the employment contract due to differentials in activity, employment and unemployment rates between markets,[4] to which the divergences regulations in terms of working conditions (notably the minimum wage) are added and, with it, labour costs that vary from one country to another. These divergences can lead to unfair competition practices between companies and, at the same time, generate situations of discrimination between local workers and those who are posted. Likewise, the heterogeneity is notorious (intensified in turn with the enlargement of the Union to the Eastern countries in 2004) in terms of labour taxation and social contributions.[5] Certain companies thus make use of the existing imbalances among the labour costs of the different States, seeking precisely to reduce those they must face.

In the context of this type of transnational posting, the worker provides services in a State other than the one in which the company to which the worker is contractually bound is established. The introduction of this international element in the employment contract incorporates the problem of determining whether the posted worker is subject to the labour regulations of the State of origin, that of the host State, or a combination of both. Article 8 of Regulation 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I Regulation) establishes that the individual employment contract is governed by the law chosen by the parties and, in the absence of choice, by the law of the

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[2] Riesco Sanz, García López, Maira Vidal, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, Albacete, 2018, 27 ff.

[3] Fries-Tersch, Jones, Siöland, *Annual Report on Intra-EU Labour Mobility 2020*, Luxembourg, 2021, 20 ff.

[4] J.M. Gómez Muñoz, *La libre circulación de trabajadores: retrospectiva y evoluciones en el contexto europeo actual*, in J. Gorelli Hernández (coord.), *Libre circulación de trabajadores en la Unión Europea. Treinta años en la Unión*, Sevilla, 2017, 24 ff.

[5] Riesco Sanz, García López, Maira Vidal, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, cit., 50 ff.

country in which the worker habitually performs his work, without the rule considering that the country of habitual performance of the work changes when the worker temporarily performs the work in another country. Therefore, the change of applicable law due to a change in the usual place of work only occurs if the posting is permanent. In cases where the applicable law cannot be determined, the contract must be governed by the law of the country where the establishment through which the worker was hired is located. All this unless, from the set of circumstances, it appears that the contract has closer ties with a different country, in which case the law of that other country will apply.

The application of the rules of the country of origin of the service provider favours the relocation of the corporate headquarters of companies in countries with lower social standards of protection, regardless of where the services are provided, while it leads to worse treatment of national service providers if they are subject to requirements that non-nationals escape.[6] And it is that, if the legislation of the State in which the company that posts the workers is established is applied, there is a risk of generating a comparative grievance in relation to the most beneficial conditions applicable to local workers of the host State, implying unfair competition between companies as the original company benefits from existing labour differences. Hence, the European regulatory framework has long opted for modulating the criterion established in the Rome I Regulation, as will be seen later.

2. *The posting of workers and the freedom to provide services in the European Union*

Within the scope of the EU, a whole common regulatory heritage has been developed aimed at guaranteeing both fair conditions of competition for companies and due respect for the rights of workers. The application of such rules presupposes the existence of a temporary posting of workers in the framework of a transnational provision of services. There are three essential constituent elements of said object of regulation: the maintenance of the labour legal relationship between the posting employer and the posted worker throughout the time of the posting, the temporary limited nature of the posting, as well as the close link between the work of the posted worker and the industrial, commer-

[6] A. ESTEVE SEGARRA, *Un balance de la jurisprudencia del Tribunal de Justicia de la Unión Europea en materia de libertad de prestación de servicios y dumping social*, in *Revista de Información Laboral*, 2015, 6.

cial or professional services that the employer of the Member State of origin provides to the recipient located in the State of posting.[7] The Judgment of the CJEU of 1 December 2020, *Federatie Nederlandse Vakbeweging*, C-815/18, insists precisely on the requirement of "sufficient connection" of the performance of the work with the territory of the Member State.

The employment relationship between the company of the State of establishment, provider of the service, and the worker must be maintained during the posting period. Otherwise, that is, if the worker were to depend on another company in the host State, the legal basis for mobility would be identified with the free movement of workers and not with the free provision of services. However, European regulations do not establish whether the contractual relationship must have a specific prior duration or specific characteristics. In the absence of precision in this regard, it is understood to include both those labour contracts prior to the posting and those made *ex novo* with the purpose of posting the worker to carry out the transnational provision of services.[8] What is relevant, for these purposes, in relation to the time and place of execution is that the employment contract is prior to the posting and that it has been concluded in a State other than that of the recipient of the benefit.

On the other hand, displacement in the legal sense cannot do without physical mobility. Hence, those transnational provisions of services that are not accompanied by mobility of workers are outside the scope of application of the European regulation on the matter.[9] Such would be the case, more and more frequent, in which the provision of services is undertaken through new technologies. Teleworking would be a paradigmatic example in this regard, since it allows the development of transnational provision of services, although since it involves no real geographical mobility, it falls outside the scope of application of European regulations.

Regarding the temporary nature of the posting, article 2.1 of Directive 96/71/EC defines "posted worker" as one who, for a *limited period*, carries out his work in the territory of a Member State other than the one in whose territory the worker usually works. Transposing said precept, the Act 45/1999, of 29 November, on the posting of workers in the framework of a transnational pro-

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[7] F.J. Gómez Abelleira, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, in *Cuadernos de Derecho Transnacional*, vol. 10, iss. 1, 2018, 215 ff.

[8] The Judgment of the Court of Justice of the European Union, 21 October 2004, C-445/03, *Commission v Luxembourg*, concluded that requiring the workers to have been, for at least six months prior to the deployment, in a relationship with their undertaking of origin through a contract of employment is incompatible with European Union Law.

[9] Court of Justice of the European Union, 18 September 2014, C-549/13, *Bundesdruckerei*.

vision of services, understands by posting that made to Spain by the companies included in the scope of application of this Law for a limited period of time (article 2.1.1º). The temporality of the displacement (which coincides with that of the provision of services) is configured, thus, as an essential case of the application of the European regulatory framework. However, no time criterion is introduced (as the "Coordination Regulation" does[10]). In fact, the same adjective temporary is conspicuous by its absence when referring to posting, without prejudice to references in the recitals of the Directive. Like this, the Spanish transposition rule refrains from completing the definition by incorporating a specific time reference that would help to specify what is meant by "limited period of time". The European system rules out, that is clear, definitive postings as the object of application of the corresponding regulation (not in vain, in the declaration prior to the posting, the foreseeable duration must be stated, with the estimated dates of the start and end of the posting according to article 1.a.iv. of Directive 2014/67/EU), but without specifying the time limits of mobility.

The key to the issue lies, therefore, in considering the provision of services in another Member State as a causal element for the posting of the worker and his return to the State of establishment to continue with his work activity. As the Court of Justice of the European Union has pointed out, in the framework of a provision of services by their company, "such workers return to their country of origin after the completion of their work".[11] This in turn connects with the temporality criterion handled in the Rome I Regulation, according to which, "as regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad" (Whereas 36).

In the same sense, Directive 2014/67/EU includes, among the elements to consider when determining whether a posted worker temporarily carries out the work in a Member State other than the one in which the worker normally works, the return of the posted worker or the forecast that the worker will return to work in the Member State from which the worker is posted, once the work has been completed or the services for which the worker was posted have been provided (article 4.3.d.). Therefore, what is relevant is not that the worker returns in order to continue providing services for the same employer

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[10] Article 12.1 of Regulation (EC) n. 883/2004 of the European Parliament and of the Council of 29 April 2004, on the coordination of social security systems, refers to a maximum duration of 24 months.

[11] Court of Justice of the European Union, 27 March 1990, C-113/89, *Rush Portuguesa v Office national d'immigration*.

that has posted him, but that he returns to continue working as part of the labour market of the country of origin. And it is that the Directive does not contemplate posting as an episode of a broader employment relationship, but rather treats the worker as temporarily posted from their usual labour market.[12]

3. *The regulation of the temporary posting of workers in Directive 96/71/EC*

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, was the first European standard to address the phenomenon in question. Its objective was none other than to preserve "a climate of fair competition and measures guaranteeing respect for the rights of workers", to express it in the terms used by the Directive itself (Recital 5). It is applicable to companies established in a Member State that, within the framework of a transnational provision of services, post workers to the territory of another Member State through any of the following transnational measures:

– companies that post a worker on their own account and under their direction, within the framework of a contract concluded between the company of origin and the recipient of the provision of services that operates in said Member State, to the territory of a Member State;

– companies that post a worker to the territory of a Member State, in an establishment or in a company that belongs to the group;

– companies that, in their capacity as temporary employment agencies or placement agencies, post a worker to a user company that is established or carries out its activity in the territory of a Member State.

Spain, within the framework of a minimum transposition, limits itself to reproducing those cases in Act 45/1999, of 29 November, on the posting of workers in the framework of a transnational provision of services. Given the absence of a common concept of employee, the definition is at the expense of the internal regulations of the State in which the worker is posted. This follows from article 2 of Directive 96/71/EC which, after stating that "posted worker" shall mean any worker who, for a limited period, carries out his work in the territory of a Member State other than the one in whose territory he ha-

[12] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 225-226.

bitually works, maintains that the concept of worker is that which is applicable under the law of the Member State in whose territory the worker is posted. Nor does Directive 2014/67/EU add anything relevant in this regard, which limits itself to recalling that the Member States must be guided, among other elements, by the facts related to the performance of the work, the subordination and the remuneration of the worker, regardless of how the relationship is characterized in the agreements, contractual or otherwise, that the parties have agreed to (article 4.5). The reference to the national legislation that undertakes the European norm does not stop posing problems, rather than solving the main one for these purposes: the issue of false self-employment. And it is enough that an employee, who carries out an activity in a certain Member State, is converted by his employer into a self-employed worker in said country so that the employer is exempted from the obligations incumbent on him in application of the Directive in the Member State to which the worker has been posted.[13]

One of the main virtues that Directive 96/71/EC incorporated consisted in the application of what has been called a hard core of mandatory minimum protection provisions, that is, the obligation to guarantee the working conditions in force in the host State for posted workers, regardless of the legislation applicable to the employment relationship. Specifically, the conditions to be respected in the first version of the Directive concerned the following matters: a) maximum work periods as well as minimum rest periods; b) the minimum length of paid annual leave; c) the amounts of the minimum wage, including those increased by overtime; d) labour supply conditions, in particular by temporary employment agencies; e) health, safety and hygiene at work; f) protective measures applicable to the working and employment conditions of pregnant women or women who have recently given birth, as well as children and young people; g) equal treatment between men and women and other provisions on non-discrimination.

The objective is to achieve, based on the application of part of the *lex loci labouris*, a certain standardization of the working conditions applicable to local and posted workers who provide services in the same State and to avoid situations of unfair competition between this and the establishment State.

The Directive does not harmonize the material content of these mandatory minimum protection standards, although it is true that it provides certain information in this regard.[14] Therefore, a considerable margin of decision is

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[13] J.M. Serrano García, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, in *Revista Española de Derecho del Trabajo*, 2016, 190.

[14] Court of Justice of the European Union, 2 February 2015, C-396/13, *Sähköalojen ammattiliitto*.

preserved for the Member States when defining them. The rule does expressly clarify that the notion of minimum wage amounts will be defined by the legislation and/or the national use of the Member State in whose territory the worker is posted,[15] specifying that the supplements corresponding to the posting form part of the minimum wage to the extent that they are not paid as reimbursement for the expenses actually incurred as a result of the displacement, such as travel, accommodation or maintenance expenses (article 3.7). The fact that the definition of the constituent elements of the minimum wage (as well as the method of calculation and the criteria selected for it) depends on the corresponding national law, provided that said definition does not impede the freedom to provide services among Member States,[16] explains the important work that the CJEU was forced to undertake in this regard.

The Directive articulated an exceptional regime insofar as it prevents the normal operation of the Rome I Regulation, because if the posting is covered by it, the applicable law turns out to be that of the country of origin (without the provisions of article 8 of the Regulation being applicable), limiting the State of destination to requiring the application of a few minimum imperatives of article 3 of Directive.[17] The European standard thus equates the posted worker with the local worker in terms of these minimum working conditions in force in the country of destination, breaking the rule of the country of origin of the service provider. The recognition of such minimum protection has as a consequence, when the level of protection derived from the working conditions granted to posted workers in the Member State of origin, in relation to the matters covered by Directive 96/71/EC, is lower than the minimum level of protection recognized in the host Member State, that these workers can enjoy better working conditions in the latter State. In any case, it should be borne in mind that, in accordance with the Directive, its provisions "shall not prevent application of terms and conditions of employment which are more favourable to workers" (article 3.7). Then, by comparing the conditions applicable in the Member State of origin and those in force in the host

[15] Spain incorporated the broadest version of the salary allowed in the framework of the Directive through article 4 of Law 45/1999, of 29 November, on the posting of workers within the framework of a transnational provision of services. As specified in the precept, the minimum amount of salary is understood to be that constituted, in annual computation and without discounting taxes, payments on account and Social Security contributions payable by the worker, for the base salary and supplements, salaries, extraordinary bonuses and, where appropriate, the remuneration corresponding to overtime and complementary hours and night work.

[16] Court of Justice of the European Union, 7 November 2013, C-522/12, *Isbir*.

[17] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 230 ff.

Member State, those of the latter must be taken into account and respected when they are more favourable.

Despite this provision, in addition to the non-exhaustive nature of the list contained in article 3.1 of the Directive, Community jurisprudence closed the door to any claim to reinforce or expand the matters included in that hard core of (paradoxically) "minimum" protection provisions. In a defence of the freedom to provide services stronger than of the promotion of social rights, the CJEU ruled out in different pronouncements that the host States could make the provision of services in their territory subject to the fulfilment of working conditions that were more beyond the terms of the Directive. Thus, the CJEU ended up converting into a maximum rule what should be interpreted as a minimum rule. So, when article 3.7 of the Directive declares not to prevent the application of more favourable working conditions for workers, it must be understood that essentially they will have to come from the legislation of the State of origin or from decisions of the employers themselves, but that they cannot normally be imposed by the host State.[18] The underlying problem is that, despite the fact that the European Commission has always focused on the adoption of the different regulations on the posting of workers within the framework of the social dimension of the European Union, in Directive 96/71/EC the economic aspect prevails over the social, since it is based on the norms of the treaties on the free provision of services and not on those on the protection of workers.[19]

4. *Enforcement and implementation of European Union Law*

Although Directive 96/71/EC represented a first step forward of great importance in the construction of a regulatory framework specifically dedicated to the posting of workers, it did not resolve all the problems. Moreover, it would not be long before the need to complete the shortcomings and gaps in the European standard was detected in order to work more insistently in the fight against fraud that manifested itself in very different versions. In addition, the restriction that, in the field of interpretation, the CJEU had implemented in its various rulings, fundamentally in relation to the control capacity of the host States regarding the conditions in which the posted workers

[18] C.L. ALFONSO MELLADO, *Desplazamientos de trabajadores en el ámbito europeo y garantías salariales (a propósito de la STJUE de 12 de febrero de 2015)*, in *Trabajo y Derecho*, 2015, 5.

[19] J.F. LOUSADA AROCHENA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: el estado de la cuestión*, in *Ciudad del Trabajo*, 2018, 2, 87 ff.

provided services in their territory. Likewise, the European Commission itself would be more attentive to preserving the economic freedom of companies and combating the administrative overload that the imposition of notification requirements, registration of movements and other control measures could entail for them.[20]

It was therefore necessary to *reinforce* the application of Directive 96/71/EC in order to improve the control, information, administrative cooperation between Member States and the cross-border enforcement of penalties and fines imposed. The *Monti Report* pointed out this need,[21] as was the Resolution of the European Parliament, of 22 October 2008, on the challenges for collective agreements in the European Union, which also highlighted the convenience of a review, although appealing the achievement of the necessary balance between the freedom to provide services (as the cornerstone of the European project) and the fundamental rights and social objectives established in the Treaties, as well as the right available to public and trade union partners to guarantee non-discrimination, equal treatment and improvement of living and working conditions.

Finally opting for a new guarantee Directive and not for the modification of the provisions of the existing one, Directive 2014/67/EU of the European Parliament and of the Council, of May 2014, regarding the guarantee of compliance was approved of Directive 96/71/EC, on the posting of workers carried out in the framework of a provision of services, and which modifies Regulation (EU) n. 1024/2012 regarding administrative cooperation through the Internal Market Information System ("IMI Regulation"). The rule thus responded to the need to consolidate effective instruments to combat fraudulent situations that continued to be detected.

In this sense, one of the main contributions of the Directive concerned the global evaluation of the factual elements considered necessary to verify whether a person falls within the definition of worker or whether there is a real posting. And it is that one of the key problems that the displacements affected by Directive 96/71/EC have always raised is that related to the "reality" of the same.[22] In order to determine whether a company actually carries out substantive activities that are not purely administrative or internal management, i.e. that there is a clear connection between the posting of the worker and the transnational provision of services, the competent authorities

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[20] RIESCO SANZ, GARCÍA LÓPEZ, MAIRA VIDAL, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, cit., 42 ff.

[21] REPORT TO THE PRESIDENT OF THE EUROPEAN COMMISSION, *A new Strategy for the single market. At the service of Europe's economy and society,* 9 May 2010.

[22] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 214 ff.

have to assess the elements characterizing the activities carried out by the company in the Member State of establishment and, where necessary, in the host Member State.

Thinking particularly about the fight against letterbox companies, the European standard tries to facilitate the task of verifying if the company posting workers responds to a real activity or, on the contrary, constitutes a fictitious company in order to post workers to other States where labour costs are higher; if it participates, in short, in transnational labour force recruitment mechanisms at a lower cost. The elements proposed for such valuation may include, in particular, the following: a) the place where the company has its registered office and administrative headquarters, occupies office space, pays its taxes and Social Security contributions and, if applicable, holds a professional license or is registered with the relevant chambers of commerce or professional associations in accordance with national regulations; b) the place where posted workers are hired and the place from which they are posted; c) the Law applicable to the contracts entered into by the company with its workers, on the one hand, and with its clients, on the other; d) the place where the company carries out its fundamental business activity and where it employs administrative personnel; e) the number of contracts entered into or the volume of business obtained in the Member State of establishment, taking into account the specific situation of newly created companies (without introducing any criteria to limit this number or volume).

On the other hand, Directive 2014/67/EU incorporates a list (equally non-exhaustive) with the characteristic elements of the work and the situation of the worker that can be examined when determining whether the worker temporarily provides services in a Member State other than the one in which you normally work: a) if the work is carried out for a limited period in another Member State; b) the start date of the posting; c) if the posting is made to a Member State other than the one in which or from which the posted worker usually carries out his work, in accordance with the Rome I Regulation or the Rome Convention; d) if the posted worker returns or is expected to return to work in the Member State from which he is posted, after the work or services for which he was posted have been completed; e) the nature of the activities; f) whether the employer provides or reimburses the travel, board or lodging of the displaced worker and, if so, in what form it is provided or the method of reimbursement; g) the previous periods in which the post has been held by the same or by another posted worker.

The aforementioned budgets, endowed with greater or lesser effectiveness, are incorporated without alterations in the Spanish internal regulations, including the non-exhaustive nature of the list in which they are collected. In any case, such elements cannot be considered in isolation in the corresponding global evaluation, without requiring that all the elements concur in each case

of displacement. Then, if one or more of them do not occur, the possibility of the situation being considered displacement cannot be automatically excluded. In this sense, the assessment of the factual elements in question must be adapted to each particular case and take into account the peculiarities of the situation. In the event of a fraudulent situation in which, despite the simulation, there is no "real" displacement, the regulations of the place of execution of the work shall be applied.

Improving access to information was another of the strengths of Directive 2014/67/EU, in order to complement the brief regulation contained in Directive 96/71/EC. For obvious reasons, access to correct information is essential for the legal certainty of companies and the effectiveness of the protection of the rights of posted workers. They need to know the applicable conditions in order to be able to detect possible irregularities. At the same time, only through effective access for employers to information on their rights and obligations in the fields of labour mobility and the freedom to provide services, will they be able to benefit from the full potential of the internal market.

The objective is none other than to provide information on the working conditions referred to in article 3 of Directive 96/71/EC, and applicable by service providers, of clarity, transparency, intelligibility and accessibility, while providing contact centres or other competent national authorities (article 4 of Directive 96/71/EC) the effective development of its activities. Hence, the European standard mandates the adoption of appropriate measures to ensure that such information is disclosed free of charge and publicly, remotely and by electronic means. Member States should clearly indicate, on a single official website at national level and by other appropriate means, in a detailed and accessible format, which conditions of employment or which provisions of national law apply to workers displaced persons in its territory (without the Spanish transposition regulations detailing characteristics regarding the information that must be provided on the web portal).

The official Spanish website not only offers the corresponding information in our official language, but also in English, French, German, Portuguese, Italian, Romanian, Polish and Bulgarian, reproducing the most relevant provisions on the matter, as well as a link to search engines for collective agreements. As an additional guarantee, the links to the portals of the different social partners are indicated.[23]

Likewise, the express reference introduced by Directive 2014/67/EU to subcontracting chains is relevant. Despite its optional character (article 12

[23] Available in *https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm.*

states that the Member States "may" adopt national measures in this regard) confirmed in Whereas 36, which refers to an "introduction on a voluntary basis", and the fact that the Spanish legal system already had the provisions incorporated in Directive 2014/67/EU (article 42 of the Workers' Statute), the regulation that it includes in this regard is no less an advance. Specifically, the Directive establishes the responsibility of the contractor with respect to any pending net remuneration corresponding to the amounts of the minimum wage or the contributions owed to common funds or institutions of the social partners. The flexibility of the provision extends to the very modality of liability, which can be articulated as subsidiary or joint and several (it indicates that the contractor may be held liable "in addition to or in place of the employer"). As a reminder, Directive 2018/957 provides that Member States must take appropriate measures, in accordance with article 12 of Directive 2014/67/EU, to guarantee responsibility in matters of subcontracting (Whereas 25).

In any case, it is remarkable that the European standard renounces limiting the subcontracting chain and, however, does impose limits on the responsibilities themselves.[24] And it is that Directive 2014/67/EU refers to measures aimed at making the contractor responsible for which the employer is a "direct subcontractor", without therefore extending said responsibility to the other levels of the chain. It also limits this liability to the rights of workers acquired within the framework of the contractual relationship between the contractor and the subcontractor, without prejudice to the Member States being able to establish stricter rules on the scope and extent of liability in subcontracting and, therefore, extend the period of responsibility.

The reinforcement of administrative cooperation between the Member States constitutes another of the workhorses of the field of posting of workers, in the search for the maximum possible guarantee in compliance with European regulations. Directive 2014/67/EU articulates this cooperation through the sending of reasoned requests for information from the competent authorities through the Internal Market Information System, as well as the response to them and the verification and inspection related to the displacements. It also includes the possible investigation of non-compliance or abuse of the applicable regulations on the posting of workers, the sending and notification of documents and the notification of decisions that impose sanctions and fines.

The truth is that factors such as language, ignorance of the national regulations of the country of destination, the problem of letter-box companies or un-

[24] J.M. SERRANO GARCÍA, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, cit.

declared work, add great complexity to the control of these movements and the follow-up of the compliance with European regulations. This was not resolved by Directive 96/71/EC, which remains silent and therefore refrains from introducing provisions in this regard. Not surprisingly, the judgments of the CJEU of 7 October 2010, *Dos Santos Palhota and others*, C-515/08, and of 3 December 2014, *De Clercq and others*, C-315/13, reflected the problem well which implies the wide margin of decision that was left to the Member States, always within the framework of respect for the Treaties of the European Union. Specifically, the CJEU recalls in both judgments that Directive 96/71/EC seeks to coordinate the material national provisions relating to the working and employment conditions of posted workers, regardless of the ancillary administrative regulations intended to allow the verification of the observance of said conditions, on which it does not include specific measures. Therefore, it concludes that the Member States are free to define those control measures, while respecting the Treaty and the general principles of Union law.[25]

With the purpose of amending these regulatory deficiencies, Directive 2014/67/EU provides that the Member States may only impose the administrative requirements and control measures that are necessary to guarantee the effective supervision of compliance with the obligations contemplated in this Directive and Directive 96/71/EC (article 9.1). Although the list of possible measures contained in the European standard is not exhaustive, it should be borne in mind that the incorporation of other administrative requirements and control mechanisms is subject to the condition that they are justified and proportionate and, in any case, to the appearance of situations or new elements that allow us to suppose the insufficiency or inefficiency of the requirements stipulated in the Directive. In particular, it proposes various measures that can be imposed by the Member States.

The European standard refers to the obligation of the service provider established in another Member State to present a simple declaration to the responsible competent national authorities, at the latest when the provision of services begins,[26] in the language or one of the official languages of the host

[25] Court of Justice of the European Union, 12 September 2019, C-64/18. *Maksimovic*.

[26] The Spanish transposition Act requires the communication of the posting "before it begins" (article 5.1 of Act 45/1999). Thus, the requirement that the declaration shall be made within a certain period (for example, a few hours or a few days) before the posting goes beyond what is expressly authorized under the Directive. See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of 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 and amending Regulation (EU)

Member State, or in one or more other languages accepted by it, containing the relevant information necessary to enable physical checks at the workplace. Specifically, this information includes: the identity of the service provider, the anticipated number of clearly identifiable posted workers, the person who liaises with the competent authorities of the host Member State and the person who acts as a representative, the foreseeable duration and the expected dates of the start and end of the posting, the address of the place of work and the nature of the services that justify the posting.

This declaration makes it possible to specify the terms of the posting, which helps to facilitate the supervision of applicable working conditions and the detection of possible fraudulent conduct, as well as to guarantee better monitoring and control according to the sector or type of company. Act 45/1999 dispenses with specifying a procedure or deadlines if the case, not necessarily implausible, of changes in the information presented in the prior declaration arises. However, it does decide to extend the regulation of the Directive and impose another requirement in the event that the company posting workers to Spain is a temporary employment company. In such a case, the notification of posting must also include both the accreditation that meets the requirements demanded by the legislation of its State of establishment to place workers at the disposal of another user company, as well as the indication of the temporary needs of the user company that they try to satisfy with the contract for making available.

Among the control measures that the Directive allows the Member States to impose, it is also worth mentioning the obligation to keep, make available or keep copies in paper or electronic format of the employment contract, the pay slips, the files with the schedules that indicate the beginning, end and duration of daily work and proof of payment of wages, or copies of equivalent documents, during the posting period, in an accessible and clearly identified place in its territory, such as the place of work, at the construction site or, in the case of mobile workers in the transport sector, the base of operations or the vehicle in which the service is provided. The Spanish transposition regulations add to this documentation the corresponding accreditation of the authorization to work of third-country nationals in accordance with the legislation of the State of establishment (article 6.2.d. of Act 45/1999). Once the posting is completed, said Act requires employers to deliver the aforementioned documents when they are required by the Labour and Social Security Inspectorate, materializing the possibility that the Directive opened in letter c) of article 9.1, although it does not specify a specific period. Likewise, written notification is provided for by employers to the Labour Author-

1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation").

ity in relation to damage to the health of displaced workers that may have occurred on the occasion of or as a consequence of the work carried out in Spain. Also following the provisions of letter d) of the precept, the Spanish standard requires the translation of the documentation. Specifically, it must be submitted translated into Spanish or in a co-official language of the territory where the services are to be provided.

Directive 2014/67/EU completes the list of possible measures to be imposed by the Member States by referring to the obligation to designate a person to serve as liaison with the competent authorities of the host Member State in which the services are provided and to send and receive documents or notifications, if necessary; as well as the obligation to appoint a contact person to act as a representative through whom the relevant social partners can seek to engage the service provider in collective bargaining in the host Member State during the period in which the services are provided. This person does not have to be present in the host Member State, but must be available upon reasonable and justified request.

5. *The latest reform on the matter: an assessment of the strengths and weaknesses*

Good proof that Directive 2014/67/EU did not provide the solution to all the shortcomings that were attributed to the 1996 standard is that, even before its entry into force, the need to carry out not so much a reinforcement of the movement control mechanisms, but a reform of some of the essential contents of Directive 96/71/EC.[27] Thus, just one year after its approval, the European Commission launched an initiative aimed at assessing the virtues of a reform of the 1996 Directive in order to address the problems that the later Directive was not capable of solving or had left slopes. We could consider some of these problems to be endemic, in the sense that they have always existed and have not been fully resolved, while others would have arisen as a result of new realities brought about by the passage of more than twenty years between the first Directive and the most recent to date.

The objective of the latter is not far from that of Directive 96/71/EC, insofar as it continues to strike a balance between the need to promote the free provision of services and guarantee fair conditions of competition, on the one hand, and the protection of the rights of posted workers, on the other. Alt-

[27] M.P. VELÁZQUEZ FERNÁNDEZ, *Los desplazamientos transnacionales de las personas trabajadoras: novedades y desafíos de la transposición de la Directiva 2018/957/UE al ordenamiento jurídico español*, in *Revista de Trabajo y Seguridad Social. CEF*, 2021, 461-462, 76-77.

hough Directive 2018/957 addresses this task through more ambitious provisions and more incisive techniques aimed at making elements that were once ambiguous or vitiated by legal loopholes effective.

A good part of its content had already been anticipated in our legal system, since Act 45/1999 contemplated the application to posted workers of all the constitutive elements of remuneration and of the basic working conditions provided for in the agreements sectorial groups of the host State in all branches of activity (and not only in the construction sector), or the application of the principle of equal remuneration and other essential working conditions among workers assigned by temporary employment agencies of another Member State and the workers of the Spanish user companies. Perhaps that is why Spain took time to transpose the European standard to the internal legal system (as it already did with respect to Directive 2014/67/EU), finally through Royal Decree-Law 7/2021, of 27 April, of Transposition of European Union Directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, posting of workers in the provision of transnational services and defence of consumers (articles 11-14). The rule introduces modifications in Act 14/1994, of 1 June, by which temporary employment agencies are regulated; Act 23/2015, of 21 July, Organizing the Labour and Social Security Inspection System; and Royal Legislative Decree 5/2000, of 4 August, on Infractions and Sanctions in the Social Order.

Directive 2018/957 considerably increases the degree of protection for posted workers. And it does so by expanding, through a non-aseptic mention ("on the basis of equality of treatment"), the catalogue of working conditions that apply to posted workers in accordance with the legislation of the State of provision of services. Specifically, the list of matters that contained the "hard core" of minimum protection provisions includes both the housing conditions of workers, when the employer provides them to workers who are outside their usual place of work, as well as supplements or reimbursements for travel, accommodation and subsistence expenses incurred by posted workers, when they must travel to and from their usual place of work in the host Member State or when they are temporarily sent by their employer from that Member State usual place of work to another.

Likewise, addressing an issue that had been neglected in Directive 2014/67 /EU (despite the judicial pronouncements in this regard[28]), the 2018 Directive modifies the provisions related to salary and does so by dispensing with this term to use the term "remuneration". If prior to the reform, article 3 of Directive 96/71/EC alluded to the amounts of the minimum wage among the working

[28] Court of Justice of the European Union, 14 April 2005, C-341/02, *Commission v Germany*; 7 November 2013, C-522/12, *Isbir*; 2 February 2015, C-396/13, *Sähköalojen ammattiliitto.*

conditions to be equated, the precept now refers to remuneration, also including, as it did before, the corresponding increase for overtime. For the purposes of the European standard, the concept of remuneration is determined by the national legislation or practices of the Member State in whose territory the worker is posted and includes all the constituent elements of remuneration that are mandatory by virtue of legal, regulatory or administrative provisions, or of the collective agreements or arbitration awards that, in that Member State, have been declared universally applicable or in any other way of application.

Specific supplements for displacement must be considered part of the remuneration to the extent that they are not paid as a reimbursement of the expenses actually incurred as a result of the displacement, such as travel, accommodation or maintenance expenses. In the event that the working conditions applicable to the employment relationship do not indicate whether the elements of the supplement for displacement are paid as reimbursement for expenses actually incurred as a result of the displacement or as part of the remuneration and, where appropriate, what those items are, the entire add-on is considered to be paid as expense reimbursement.

But the extension that the 2018 reform stars is not only material but also formal, since the limitations that Directive 96/71/EC articulated in terms of the legal instruments in which working conditions were recognized are also overcome. The previous version of the 1996 Directive referred to the working and employment conditions established in the legal, regulatory or administrative provisions, as well as in the collective agreements or arbitration awards declared of general application in force in the host State (provided that they refer to the activities in the field of construction mentioned in the Annex to the standard). Directive 2018/957, in its vocation to extend the degree of protection, adds to the latter the collective agreements or awards that "otherwise apply" and without circumscribing them to the construction sector. For clarification purposes, the European standard clarifies that, "in the absence of or in addition to" a declaration system of universal application of collective agreements or arbitration awards, the Member States may rely on those that are universally applicable in all similar companies belonging to the profession or sector in question and corresponding to their territorial scope of application, or in the collective agreements concluded by the most representative organizations of the social partners at national level and that are widely applied throughout the national territory.

The 2018 rule thus enters into an issue on which Directive 2014/67/EU had not ruled and which continued to pose problems,[29] especially in the field of

[29] This issue was already evident on the subject of the Judgment of the Court of Justice of the European Union, 3 April 2008 C-346/06, *Rüffert*.

remuneration, given that there are countries where the minimum wage is not regulated by a heteronomous norm, but it is necessary to comply with the provisions of the collective agreements, which are not always considered *erga omnes* and, therefore, were not covered by the previous regime.[30] Therefore, this regulatory change allows the application of working conditions established in existing collective agreements in the country of provision of services, regardless of whether or not it has a universal declaration system. In any case, it is worth pointing out that the reform could have been more complete if, as Directive 96/71/EC did, which specified what should be understood by collective agreements or arbitration awards declared to be of general application, even to lack of a system of declaration of general application of collective agreements or arbitration awards (article 3.8), it would have done the same with the new category that it incorporates.

In the Spanish case, the application priority of the company agreement contemplated in the Workers' Statute may cause problems when determining the instrument applicable to posted workers. And it is that, taking into account that article 3.4 of Act 45/1999 provides for the application of the working conditions provided for in the sectorial collective agreements, it could be the case that, in the same company, the local workers were subject to the conditions provided for in the company agreement and the posted to those regulated by the sectorial agreement. With which, the principle of equal treatment so often extolled in Directive 2018/957 would be called into question, by applying different conditions to workers who provide services in the same company. At the same time, there would be reasons to question whether this differentiation in the applicable instrument could imply a restriction on the free provision of services by companies that post workers to our country. At least, the CJEU reached this conclusion when it asserted that the fact that a national employer may, through the conclusion of a company collective agreement, pay a lower minimum wage than that established in a collective agreement, declared of general application, while an employer established in another Member State cannot do the same, it constitutes an unjustified restriction on the freedom to provide services.[31]

The temporal aspect in the concept of posting is another of the extremes addressed in the reform of the 1996 Directive. It is true that Directive 2014/67/EU had tried to define temporality more precisely, assuming that it constitutes a determining element for the application of the legal regime provided for in the European regulatory framework. But the efforts were not en-

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[30] J.M. SERRANO GARCÍA, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, cit.

[31] Court of Justice of the European Union, 24 January 2002, C-164/99, *Portugaia Construções.*

tirely successful and Directive 2018/957 delves into this issue. Bearing in mind that, in a good part of the cases, postings have a long duration, the regulation introduces the long-term posting worker as a new legal category.[32] It is a matter of alleviating one of the main deficiencies that the legal regime of the transnational posting of workers dragged on since Directive 96/71/EC refrained from introducing both minimum or maximum references in the temporality of the posting, as well as control mechanisms in the extensions of the same. Thus, abusive situations were witnessed that escaped the application of the most guaranteeing rules of the host State.

Since the last reform on the matter, when the effective period of posting exceeds twelve months (susceptible of being extended for another six if there is a reasoned notification),[33] all the working conditions that are established apply to posted workers in the host Member State. The implementation of the concept of long-term posting implies, through a specific legal regime, practically complete equality in terms of working conditions between local workers in the host State and those posted there. Excepted from this comparison, in any case, are the procedures, formalities and conditions for entering into and terminating the employment contract, including non-competition clauses, as well as supplementary retirement schemes.

However, if a company replaces a posted worker with another posted worker who performs the same job in the same place, it is understood that the posting has the cumulative duration of the posting periods of each of the posted workers. The concept of "the same task at the same place" is determined taking into account, among other things, the nature of the service provided, the work performed and the address or addresses of the place of work. Directive 2014/67/EU already alluded to the substitution of posted workers precisely in the enumeration of the elements to be taken into consideration to determine the temporary nature of the work provided in a Member State other than that of establishment. Specifically, the European rule calls for taking into account the previous periods in which the position has been held by the same or by another (posted) worker, although the absence of provision on the limit to the duration of the posting clouded the effectiveness of this forecast.

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[32] N. MARCHAL ESCALONA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado*, in *Revista de Derecho Comunitario Europeo*, 2019, 62, 96-98.

[33] The Spanish transposition introduces a transitory rule in relation to the temporary posting limit, so that said limit is applicable to workers who are posted to Spain after the entry into force of Royal Decree-Law 7/2021, as of 29 April 2021. For workers who were already posted in Spain at the time of its entry into force, this maximum term would apply once six months have elapsed since it.

On the other hand, protection is extended in relation to workers posted by temporary employment agencies. The Directive urges them to guarantee the working conditions that apply, in accordance with article 5 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008, regarding work through temporary employment agencies, to workers assigned by said temporary employment agencies established in the Member State where they are located. Then Directive 2018/957 makes the option articulated in the 2008 Directive a mandate to be imposed in all Member States.[34]

Likewise, the 2018 reform introduced a specific regulation of the cases of "chain posting" of temporary agency workers, that is, those cases in which the workers who have been made available to a user company by a temporary employment company are sent to the territory of another Member State in the framework of a transnational provision of services. In order to guarantee the effective protection of these workers, the current version of Directive 96/71/EC provides that the user company must inform the temporary work agency about posted workers temporarily working in the territory of a different Member State from the one in which they usually work for the temporary work agency or for the user company, in order to allow the employer to apply the working conditions that are most favourable to the posted worker.

Transposing these provisions, Act 14/1994, after the reform carried out by Royal Decree-Law 7/2021, urges Spanish user companies that temporarily send workers assigned to them by Spanish temporary employment companies to another State member, to indicate in the provision contract the estimated start and end dates of the posting, either at the time of signing it or through an addendum to it in the event of a sudden need to make the shipment, as well as to report on the start of the assignment to the temporary work agency with enough time before it so that it can communicate the posting to the other State to which the worker is sent. In the same way, the user companies established in other States of the Union that temporarily send the workers assigned by the temporary employment agencies to Spain to carry out a job within the framework of a transnational provision of services, must inform the temporary employment agency about the start of the posting with enough time for said company to communicate the displacement to the Spanish authorities. These cases of chain postings also have their impact in the field of the previous posting declaration. And it is that, in such cases, the

[34] N. MARCHAL ESCALONA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado*, cit., 100 ff.

communication must also include the identification of the foreign user company that sends the worker to Spain, as well as the determination of the provision of services that he is going to develop.

The control measures are also reinforced with the 2018 reform. If in its previous version, Directive 96/71/EC simply alluded to the adoption of appropriate measures by the Member States in the event of non-compliance with the standard European Union, who were entrusted in particular to ensure that workers or their representatives had adequate procedures to comply with the obligations established in the Directive, the current wording of article 5 of Directive 96/71/EC affects the joint responsibility of the States involved in the posting of the worker. Specifically, both the State of origin and the host State are responsible for monitoring and executing the obligations contemplated in said Directive and in Directive 2014/67/EU, as well as adopting the appropriate measures in the event of non-compliance. In addition, when after an overall assessment carried out by a Member State it is found that a company is creating, unduly or fraudulently, the impression that a worker's situation falls within the scope of Directive 96/71/EC, that Member State is called upon to ensure that the worker benefits from the applicable legislation and practices.

6. *Conclusions*

The need for regulation and effective collaboration between the Member States is explained by the constant growth (although at a slight rate, as indicated) of this type of labour mobility. But it is not only a quantitative question, or it should not only be. The persistence of dysfunctions in the framework of the posting of workers, motivated by the very insecurity that permeates the scenario in which the companies operate, generally without equal conditions of competition, as well as by the vulnerability of the posted workers, who are frequently exposed to situations of abuse or fraud, justifies the convenience of continuing to consolidate and advance in the articulation of an effective regulatory and cooperative framework.

The permanent normative review shows that the trans-nationalization of labour relations does not stop giving rise to conflicts, whether in terms of interpretation or application. Also the very context in which EU legislation is called to govern has changed considerably over the years. Notably, the successive enlargements of the European Union and the incorporation of countries with different standards (generally lower) than the other Member States highlighted the need to update the regulation of those that have been traditional workhorses in the field of movement of workers: working condi-

tions, control instruments and administrative cooperation between the Member States involved. In any case, the gestation of the 2018 Directive materializes the confrontation between those countries traditionally of origin of posted workers and those other recipients of such displacements. The former understand that the application of the principle of "equal pay for equal work" violates the free provision of services as the basis of the single European market, given that salary differences can represent a competitive advantage for service providers. The appeals filed by Hungary and Poland against the European standard would well illustrate the aforementioned confrontation.

The suspicion that it is an unfinished regulation (perhaps endless), in the sense that it is exposed to continuous revisions and proposals for improvement, is confirmed in Directive 2018/957 itself. This urges the Commission to examine the application and compliance with the standard and to propose, where appropriate, the necessary modifications. Likewise, the Directive entrusts the EU institution with assessing the adoption of new measures to guarantee fair conditions of competition and protect workers in the event of subcontracting or road transport activity.

The Spanish transposition of the most recent Directive has not been ambitious, which is hardly reprehensible if one takes into account that our legal system already had incorporated a large part of the provisions set forth in Directive 2018/957. Specifically, issues such as the application of the principle of equal pay and other working conditions between workers assigned by temporary employment agencies from another Member State and workers from Spanish user companies, or the application of all the constituent elements of the mandatory remuneration and working conditions provided for in the sectorial collective agreements for posted workers who provide services in any branch of activity, and not only in the construction sector, were already contemplated in our domestic law.

However, the regulatory development required by Act 45/1999 since its reform in 2017 in various aspects related to the posting of workers is still pending. Thus, issues such as posting declarations and the creation of a central registry of such declarations (article 5 and sixth additional provision),[35] the notification of employers to the Labour Authority regarding damages to the health of posted workers that occur on the occasion of or as a consequence of the work carried out in Spain (article 6.4), as well as mutual recognition and assis-

[35] Spain does not have a centralized database of posting declarations. See M.P. VELÁZQUEZ FERNÁNDEZ, *Los desplazamientos transnacionales de las personas trabajadoras: novedades y desafíos de la transposición de la Directiva 2018/957/UE al ordenamiento jurídico español*, cit., 93 ff.

tance in the notification and cross-border execution of administrative sanctions derived from non-compliance with the regulations on the posting of workers (seventh additional provision) remain to be specified. This delay in the regulatory development, while hindering the effectiveness of control in compliance with the regulations in this regard, is one of the causes to which the absence of centralized information on the temporary posting of workers is attributed.

On the other hand, it should be pointed out that many of the problems associated with the phenomenon of temporary posting of workers frequently have their origin, not so much in the transnational nature of the provision of services, but in their abusive or fraudulent use. In fact, no minor challenges are still pending that defy the useful effect of the regulatory framework articulated in this regard, which does not seem to finish facing them effectively. One such challenge is represented by the so-called mailbox companies. These, far from developing real and effective activities in the country of establishment, are created with no other objective than that of formally hiring workers there. Taking into account that it is usually the State where the least social contributions are paid and where wages are lowest, the use of these companies tries to avoid the full application of the working conditions of the host State. Along with letterbox companies, the persistence of fraudulent situations continues to pose challenges, such as the false self-employed workers, who try to avoid the application of Directive 96/71/EC and, with it, the working conditions in accordance with the *lex loci laboris* principle;[36] as well as other abuses that take advantage of the very complexity of triangular labour relations in an international context.

The concern for these situations of regulatory transgression and fraud has not ceased to be present in the European legislator despite the fact that, as has just been pointed out, the efforts for the moment have not been as fruitful as would have been desirable. Not surprisingly, Directive 2018/957 expressly mentions the transnational cases of undeclared work and fictitious self-employment related to the posting of workers among the matters subject to cooperation and assistance between the authorities of the different Member States. Likewise, it should not be forgotten that supporting the Member States in the fight against undeclared work is precisely one of the functions of the European Labour Authority and that, internally, Spain has a Special Coordination Unit for the Fight against Transnational Labour Fraud, integrated into the Labour and Social Security Inspection through its affiliation to the National Office for the Fight against Fraud. This Unit allows for better

[36] J.F. LOUSADA AROCHENA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: el estado de la cuestión*, cit., 89 ff.

coordination of all the actions of this body within the scope of the European Labour Authority and cooperation actions with other bodies within the same scope.

Finally, the discrepancy between the labour approach and that of Social Security itself also presents problems in the treatment of this issue. Posted workers remain subject to the Social Security legislation of the country of origin during the posting, provided that the foreseeable duration of the posting does not exceed twenty-four months and that they have not been sent to the country of provision of services to replace other displaced workers (article 12.1 of Regulation 883/2004), even when said workers have not been sent by the same employer.[37] For this purpose, the institution of the State of origin must issue the A1 certificate, which certifies the maintenance of the insurance relationship with the Social Security of that State. This form is binding for the Social Security institutions and jurisdictional bodies of the other Member States, as long as it is not withdrawn or invalidated by the issuing State. The application of the legislation of the State of origin contrasts with the one that corresponds to apply from the labour point of view. In accordance with article 3 of the 1996 Directive, posted workers are subject to the working conditions mentioned in the precept in accordance with the provisions of the legislation of the host State. This divergence in the determination of the applicable Law according to one matter or another ends up further complicating the solution of those situations in which the application of labour and Social Security legislation must converge.

[37] Court of Justice of the European Union, 6 September 2018, C-527/16, *Alpenrind and Others*.

Est modus in rebus: the dosimetry of sanctions in the transnational posting of workers between european legislation and national application

Stefano Maria Corso[*]

1. *The regulation on the posting of workers as a test case for European case-law*

In an attempt to ensure both equal business opportunities and equal working conditions,[1] the EU legislator has intervened on several occasions in the field of transnational posting of workers, drafting new (general and sector-specific) regulations in order to address different treatments (opportunistic or

[*] Researcher in Labour Law, University of Milan.

[1] ORLANDINI, *Considerazioni sulla disciplina del distacco dei lavoratori stranieri in Italia*, in *Riv. it. dir. lav*., 2008, 68 ss.; GIUBBONI, *Norme imperative applicabili al rapporto di lavoro, disciplina del distacco e di esercizio di libertà comunitarie*, in *Dir. lav. merc*., 2008, 569 ss.; DE MOZZI, *La tutela dei lavoratori nell'appalto transnazionale*, in M.T. CARINCI, CESTER, MATTAROLO, SCARPELLI, *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, Torino, 2011, 54 ss.; SCIARRA, *L'Europa e il lavoro*, Bari, 2013, 67 ss.; BELLOCCHI, *Concorrenza e dumping sociale nell'Unione Europea: le nuove regole sul distacco transnazionale dei lavoratori*, in *Studi sull'integrazione europea*, 2019, 3, 593 ss.; DELFINO, *Ultima direttiva sul distacco transnazionale dei lavoratori e trasposizione in Italia nel prisma del bilanciamento degli interessi*, in *Dir. lav. merc*., 2021, 2, 271 ss.; GRAGNOLI, *Cross-border posting, the spirit and scope of the EU legislation*, in *Variaz. temi dir. lav*., 2021, 1, 84 ss.

sometimes fraudulent) based on nationality, residence and origin (from an EU country or, in part, extra-EU).[2]

Concurrently, control procedures have been implemented in compliance with the principle of proportionality and non-discrimination and the applicable "penalties" have been enforced (especially through the "enforcement" directive),[3] so as to increase the margins of "legal certainty" in the correct "application of the law" by companies, workers and supervisory and monitoring bodies in the individual national legal systems.

To better clarify this perspective – especially in view of the scarce Italian case-law available on the matter, as evidenced below – it is useful to mention the recent ruling of the Court of Justice concerning, in particular, the compatibility of the Austrian legislation imposing penalties for several infringements of provisions concerning transnational posting of workers in the context of the provision of services in implementation of the Community input in favor of the adoption of "effective, proportionate and dissuasive" penalties (Article 20 Directive 2014/67/EU).[4]

The European legislation on the transnational posting of workers is the leading case that led to the CJEU (Grand Chamber) ruling,[5] but the problem (and the solution) has a much broader scope – in fact, almost general – because both the directives and the regulations consistently include the request that each Member State adopt a penalty system that is effective, proportionate and dissuasive.[6]

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[2] GIUBBONI, *Diritti sociali e mercato*, Bologna, 2003, 116-117; CARABELLI, *Europa dei mercati e conflitto sociale*, Bari, 2009, 125 ss.; CORSO, *Le scelte "discrezionali" del legislatore dell'Unione e i limiti del controllo della Corte di giustizia: a proposito del ricorso per l'annullamento della Direttiva (UE) 2018/957 relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi*, in *Arg. dir. lav.*, 2021, 5, 1216 ss.

[3] See Italian National Labour Inspectorate (note), 10 June 2019, n. 5398.

[4] Before this Directive, see BANO, *Diritto del lavoro e libera prestazione di servizi nell'Unione Europea*, Bologna, 2008, 211 ss.; ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, Milano, 2013, 111 ss. For a more in-depth analysis of the Directive see BANO, *La territorialità del diritto. Distacco transnazionale di manodopera a basso costo*, in *Lav. dir.*, 2015, 4, 593 ss.; ROCCA, *Posting of workers and collective labour law: there and back again*, Cambridge, 2015, 327 ff.; MATTEI, *La direttiva enforcement n. 2014/67/UE e il recepimento nell'ordinamento italiano*, in *Riv. giur. lav.*, 2017, 1, 149 ss.

[5] Court of Justice, Grand chambre, 8 March 2022, C-205/20. The controversy, involving the Austrian government, saw the intervention of the Czech government and the Polish government through "observations". For a first comment, from a criminal law perspective, VIGANÒ, *La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea: sull'effetto diretto dell'art. 49, paragrafo 3, della Corte alla luce di una recentissima sentenza della Corte di Giustizia*, in *Sistema penale*, 2022.

[6] CORTI, *Il distacco transnazionale dei lavoratori nell'UE: dal dumping sociale alle nuo-*

These three features must be included in the sanction, regardless of the type of penalty (administrative or criminal), connotating a profile in relation to which the EU legislator generally refrains from interfering in the decisions of the national legislator.

Recital 23 of the Directive is explicit in requesting that "member states shall apply appropriate measures for cases of non-compliance with the Directive": in particular, the need for a control system and a penalty system with the characteristics described above.

The control and the penalties are based on the assumption of a guaranteed judicial recourse, through the provision of "appropriate procedures for the purpose of satisfying the obligations provided for by this Directive" (Article 5 par. 2).[7]

The judicial guarantee – as obvious as it may seem – is an "objective" guarantee, meaning that the worker or his representatives can directly ask the court to investigate and terminate the employer's conduct if it is found to be in conflict with the Directive. However, this judicial intervention can also be initiated by the employer, who – whether or not responsible for the infringement of national legislation concerning the posting of workers – complains about an omitted or inadequate execution of the obligations under the Directive.

Which is exactly what happened in the specific case submitted to the CJEU, where an employer, having received an administrative sentence for infringement of the Austrian legislation on the transnational posting of workers in the provision of services, complained about the amount of the penalties applied, including an objection not contesting the decision of the national court (which remained within the limits of the sentences set by the ordinary legislator), but – instead – the decision by the national legislator to impose penalties for the violations in question that were deemed disproportionate to the gravity of the illegal acts they were intended to contrast.

Hence the request for a preliminary ruling, concerning the interpretation of Article 20 of Directive 2014/67/EU of the European Parliament and of the Council and, in particular, the concept of "proportionality" applied to the penalties imposed by the national legislator.

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ve prospettive del diritto del lavoro, in *Variaz. temi dir. lav*., 2021, 1, 60 ss.; PALLINI, *La nuova disciplina del distacco transnazionale dei lavoratori tra diritto europeo e nazionale*, *ivi*, 120.

[7] CASSAR, *Il distacco transnazionale intracomunitario*, in *Mass. giur. lav*., 2019, 2, par. 4.

2. *The features of the penalty according to EU legislation*

In EU legislation, it is a recurring notion that the activity of combating illegal acts must be conducted by applying "effective, proportionate and dissuasive" penalties (regardless of the type of penalty envisaged by the Member State).

This is nothing new, because Cesare Beccaria already underlined that "the certainty of a punishment, even if moderate, will always make a greater impression than the fear of a more terrible one, combined with the hope of impunity; because evils, even minimal ones, always frighten human souls when they are certain".[8]

With regard to the penalty requirements, Beccaria again indicated its purpose in "preventing the offender from doing new damage to the citizenry and preventing others from doing the same" (dissuasive effect) and hoped for a "method of imposition" that "while maintaining the proportion, would make a more effective and more lasting impression on people's minds while tormenting the offender less".[9]

Getting back to European legislation, the three requirements must coexist: a very severe penalty (essentially inapplicable) will turn into a pointless "cry",[10] losing in terms of efficacy; a penalty that is excessive compared to the severity of the illegal act (defined as "exemplary") would (probably) be dissuasive, but certainly disproportionate and – consequently – fail to satisfy the second requirement, which envisages a penalty that metes out justice without being the expression of revenge;[11] a penalty (proportionate or not) that ends there would be devoid of any general and special preventive quality and, therefore, not dissuasive.

Obviously – and conversely – a disproportionate and implacably applied excessive penalty would meet two of the three requirements, yet would obviate the demand for justice and the role of the judge in adapting it to the severity of the real case (think of the intervention of the labour judge in verifying the legitimacy and adequacy of the penalty applied by the employer in the case of employee's infringement).

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[8] BECCARIA, *Dei delitti e delle pene*, Livorno, 1764, par. XXVII.

[9] BECCARIA, *Dei delitti e delle pene*, cit., par. XII.

[10] The reference is to the so-called "grida" and to the famous Italian writer Alessandro Manzoni.

[11] To cite the Constitutional Court, 9 March-14 April 2022, n. 95, "this disparity in the imposition of penalties cannot but generate a feeling of having suffered an injustice in those affected by such a severe penalty. That feeling has its roots in the *vulnus* perceived in that 'essential worth of the legal system of a civilized country' protected by Article 3 of the Constitution and represented by the 'consistency between its component parts' (Judgment n. 204 of 1982)".

The strong reference made by the EU directive to the principle of proportionality is in line with a profound rethinking, also at the EU level, of the need for calibrated penalties and, consequently, the unconstitutionality of a fixed penalty system that does not take into account gradations, but is applied equally to heterogeneous conducts that express a different disvalue. This reasoning, originally applied to criminal sentences, was progressively extended to punitive administrative law, given that the principle of proportionality has now been legally affirmed and, therefore, extended to every field of law,[12] including labour law and its varied systems of sanctions that reject automated mechanisms.[13]

As pointed out by the Constitutional Court long ago, it is difficult to assume that a fixed penalty be reasonably "proportionate" for an entire range of conducts attributable to the infringement.[14] Hence, judicial power steps in where the legislator, through the imposition of penalties with a minimum and a maximum cap, allows for reasonable and calibrated decisions to be made.

In this specific case, the issue of proportionality does not concern the notion of a "fixed" penalty and, consequently, a penalty treatment that fails to consider the different gravity levels of the individual offences subjected to the imposition of a one-size-fits-all penalty, but a legislative intervention that is "unreasonable", because the judge can only avail himself of a series of penalties that are all theoretically excessively disproportionate compared to the actual gravity of the infringement of labour law regulation.

The judge who recognizes a violation of the national legislation concerning the transnational posting of workers would have to choose between the application of a penalty (that he considers) disproportionate and overriding the illegal act (which he recognizes) without the imposition of any penalty, as any penalty recognized by the system would be inappropriate for the specific case. These solutions would have the effect of maintaining the *status quo*.

Or – based on the EU jurisprudence in question – it should affect the response to the penalty according to the relevant legal system of reference, so as to remove disproportion.

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[12] See, by way of example, ALFANO-TRAVERSA, *Sanzioni amministrative tributarie e tutela del contribuente nei principi e nella giurisprudenza della Corte di giustizia*, in *Dir. prat. trib. internazionale*, 2020, 884 ss.

[13] According to most recent case law of the Constitutional Court, the principle of penalty proportionality in relation to the level of gravity of the offence is also applicable outside the borders of criminal law, and, in particular, in relation to the matter of administrative penalties of a punitive nature, the foundation of which lies in Article 3 of the Constitution, in conjunction with the constitutional regulations that protect the rights from time to time affected by the penalty (Constitutional Court, 6 March-10 May 2019, n. 112). See also, *ex multis*, Constitutional Court, 24 January, n. 22; 17 April 2019, n. 88; 23 September 2021, n. 185; 3 July 2019, n. 212; 14 April 2022, n. 95.

[14] See also Constitutional Court, 14 April 1980, n. 50, in *Foro it.*, 1980, 1260.

The constitutional substratum of the *ius puniendi* requires (also in the light of EU recognition) that the principle of proportionality must govern any relationship between the offence committed and the magnitude of the penalty to be applied.

Another problem – still unsolved – is the need to identify an objective parameter that will determine, not *ad libitum*, what severity of penalty can be considered proportionate (and, therefore, not inadequate by excess or defect, in relation to the seriousness of the offence).[15]

This is a recurring requisite, which the EU legislation has thus far been unable to quantify precisely, delegating the decision to the national legislator and the "mediation" of the judicial authority. For the sake of clarity, it suffices to recall the right that a legal suit be examined (and settled) "in a reasonable time" (Article 6 of the EDU Convention), a concept which doesn't translate into a precise quantification of time in either the EU legislation, or the Italian Constitution (Article 111, paragraph 2 requires the ordinary legislator to ensure "a reasonable duration" for any trial).

Finally – and not to be taken lightly – there is the problem of how to respond concretely to the Community input for a "proportionate" penalty, given that the respect due to the jurisprudence of the Court of Justice must be balanced against the peculiarities of the legal system of each Member State.

3. *Austrian legislation in the matter of transnational posting of workers and non-application as a (mandatory) tool of alignment with EU law*

The Austrian legislation submitted to the attention of the CJEU is objectively characterized by certain harsh points, because it links apparently formal

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[15] *Inter alios*, GOISIS, *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo*, Torino, 2018; GABBANI, *Legalità ed efficacia deterrente delle sanzioni amministrative. Riflessioni a partire da Corte costituzionale n. 5 del 2021*, in *Sistema pen.*, 2021, 10, 108 ss.; LEONE*, Sindacato di ragionevolezza e quantum della pena nella giurisprudenza costituzionale,* in *Osservatorio AIC,* 2017, 4, 20; INSOLERA, *Controlli di costituzionalità sulla misura della pena e principio di proporzionalità: qualcosa di nuovo sotto il sole?*, in *Indice pen.,* 2017, 176 ss.; MANES, *Proporzione senza geometrie*, in *Giur. cost.*, 2016, 2110 ss.; D'ALBERTI, *Peripezie della proporzionalità*, in *Riv. it. sc. giur.*, 2014, 279 ss.; GALETTA, *La proporzionalità quale principio generale dell'ordinamento*, in *Giorn. dir. amm.*, 2006, 1107 ss. As observed by the Constitutional Court n. 95/2022 cited above, "even if a wide margin of discretion must be acknowledged to the legislator in identifying the measure of the appropriate penalty for each administrative offence, such discretion can in no case become manifestly unreasonable and arbitrary as in the cases where the penalty levied is macroscopically inconsistent with the average levels of administrative sanctions envisaged for administrative offences of similar or greater severity".

infringements (i.e. failed, delayed or incomplete declaration of the posting of a worker and "failure to keep available" the documentation relating to the posting) to the administrative penalty "for each worker concerned" ranging from euro 1,000 to euro 10,000 in compliance with the applicable law and, in the event of repeated actions, from euro 2,000 to euro 20,000 (reduced by 50% in the event of existing documentation, but still applicable in the event of failed transmission).

In particular, any employer who "does not keep payroll records" in relation to more than three workers can be subject to a penalty "for each worker" that ranges from euro 2,000 to euro 20,000 each and, in case of repeated actions, from euro 4,000 to euro 50,000.

The Austrian legislator considered that it had complied with the EU Directive transposed nationally and that it did not need to change the regulation on the matter in light of the CJEU decree dated December 19, 2019, which clarified the EU-compliant interpretation of Article 20 of Directive 2014/67/EU where it requires "proportionate" penalties.

The Austrian judge in question, on the assumption of a misalignment between Community and national legislation, questioned the Court of Justice on the scope of the requirement of proportionality of the penalties, the primacy of EU law over the legislation of the single Member States and the powers of the national judge in the event of an inadequate alignment of national legislation with EU law.

The CJEU answered with a ruling by the Grand Chamber dated March 8, 2022, which is in some ways *tranchant*.

While it is true that each Directive leaves to the Member States a certain margin of discretion, more or less broad, regarding the implementation, such margin of discretion must be excluded with regard to Article 20 of Directive 2014/67/EU, because the adoption of "effective, proportionate and dissuasive" penalties does not allow for alternatives, resulting in "a precise and absolutely unconditional obligation of result as regards the application of the rule set forth therein".

The requirement of proportionality for the penalties to be imposed is "unconditional", does not require further clarification by the EU institutions and translates into a prohibition of "disproportionate" penalties even in a context in which EU law does not provide indications of a ceiling below which the penalty is deemed acceptable, and considers a variety of solutions compatible in each Member State, as long as this does not degenerate into an *ultra vires* or *extra legem* penalty.

The discretion granted to the national legislator – to be coordinated with the prohibition against imposing excessive penalties compared to the disvalue of the act – leads to a judicial review aimed at verifying whether the limits were exceeded in the exercise of the discretionary powers recognized by EU

law and, specifically, Article 20 of Directive 2014/67/EU. According to the CJEU, the national judge has a duty not to apply domestic legislation to the extent necessary to align it to the *dictum* of the EU Directive and, more specifically, the national judge shall "not apply the part of the national legislation from which any disproportionate nature of the penalty is derived, so as to impose proportionate penalties that remain, at the same time, effective and dissuasive".

When asked to do so, the Court of Justice confirmed two principles of law to be complied with by the judge. Article 20 of the Directive, where it requires penalties to be proportionate, is immediately subject to jurisdiction, as it can be invoked by individuals (workers or employers) before a court, petitioning the judge to remove any misalignment between domestic law and EU law. Secondly, the national judge is obliged to bring domestic legislation into line with the notion of "proportionality" (thereby reaffirming the primacy of EU law) by refraining from its application "only to the extent necessary to allow proportionate penalties to be imposed".

4. *Obligation of non-application and implementation criteria in the Italian legal system*

It is too soon to say whether – and to what extent – the Austrian judge will (or can) align to CJEU jurisprudence. It is legitimate to pose the question whether, all things being equal in factual and legal terms, the Italian judge reserves the faculty of refraining from the application of the pertinent ordinary law in pursuit of a personal (and reasoned) idea of proportionality.

The reference Italian legislation, represented in the past by Legislative Decree n. 72 of February 25, 2000, implementing legislative order n. 25 of February 5, 1999, is now contained in Legislative Decree n. 136 of July 17, 2016 (novated by Legislative Decree n. 122 of September 15, 2020).

In the current version, the penalty imposed in case of infringements of the regulations on the posting of workers is pecuniary and administrative in nature (Article 12 of Legislative Decree n. 136/2016, as amended), except for the instance of involvement of minors, in which case the legislator envisages a criminal penalty (contravention) (Article 3 paragraph 5).[16]

[16] In terms of penalties, Article 3 par. 5 of the Legislative Decree n. 136/2016 establishes that, in case of fake posting of workers, the posting undertaking and the user undertaking shall be sentenced to pay "an administrative pecuniary penalty of Euro 50 for each worker used and for each day of work. In no case shall the amount of the penalty be lower than Euro 5,000 or

The (permitted) option to apply different types of penalties does not change the terms of the question under examination, because, as the CJEU recalls, the nature of the penalty does not relieve Member States from complying with the principle of proportionality set out in Article 49(3) of the Charter of Fundamental Rights of the European Union, according to which the penalties imposed must not be disproportionate to the offence and "Article 20 of Directive 2014/67 /EU simply refers to" said principle as being of "imperative nature".

In the light of the foregoing, the Italian legislation on posting does not appear to be misaligned with the conclusions drawn by the CJEU, which already stated in a previous resolution that "Article 20 of Directive 2014/67 must be interpreted as precluding national legislation which provides – in the event of failure to comply with the obligations in the field of labour law relating to the declaration of workers and the keeping of wage records – for the imposition of high fines: – which may not be less than a predefined amount; – that are imposed cumulatively for each worker concerned and without a ceiling, to which a contribution is added to the costs of the proceedings in the order of 20% of their amount in case of rejection of the appeal brought against the decision imposing them".[17]

Having clarified that – under these premises – the problem of non-application in the court appears to be essentially theoretical, it should be noted that a case involving the (non)-application of penalties envisaged by the Italian legislator – and considered by the CJEU not in line with EU law – has already occurred with a very different outcome compared to that outlined by the CJEU.

The judgment in question supports the idea that the reduction of penalties to proportionality by means of non-application on a pro-rata basis would not be detrimental to the "principles of legal certainty, legality of crimes and penalties" (or, more generally, of penalties) "as well as of equal treatment".

The reasoning on this point is affected by the interpretation of the Court of Justice.

Arguing that, in this specific case, "the penalty imposed is lower than the penalty applicable based on the national legislation, due to partial non-application", and that "this cannot be considered to be in conflict with the principles of legal certainty, legality of crimes and penalties and the non-retroactivity of criminal law" implies an only apparent logic, which is, as such, unacceptable.

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higher than Euro 50,000". Giving evidence of even further strictness in punishing noncompliance with the EU legislation, where fake posting concerns underage workers, the posting entity and the user of the posted workers are sentenced to the criminal penalty "of arrest up to eighteen months and a fine of Euro 50 for every worker used and every day of work, which can be increased up to six times as much".

[17] The reference is to the order 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-645/2018.

The perpetrator of the offence, far from "knowing with certainty his rights and obligations and then behaving accordingly", will be pleasantly surprised by the imposition of a lower penalty than the one provided for by law, while the victim of the offence will perceive sympathy being expressed in favor of the perpetrator that the applicable law does not envision.

This is – in fact – not an affirmation of legal certainty, but exactly the opposite.

As for the assumption that the penalty applied by the national judge "remains adopted in compliance with the cited legislation", it should be noted that the amount of the penalty imposed following partial non-application is not *secundum legem* (because existing law requires higher penalties), is not *praeter legem* (because the judge does not act in the presence of a regulatory void), but is *contra legem* (because, through non-application, the judge acts in violation of a different expressed legislative intention).

It does not solve the problem maintaining that – at the end of the day – a milder penalty should be applied to the offender and that this is in compliance with the principle of retroactivity *in melius*. Here, the question does not refer to the availability of laws and the application of the most favorable *lex posterior*, simply because, before and after the intervention of the national judge, the law regulating the matter remains the same and its non-application *pro quota* does not configure any normative event.

The reference to the principle of equal treatment is completely out of context. It is true that the perpetrator of an offense faces a more lenient penalty than the one mandated by law, but the size of said reduction – there being no objective criterion of reasonable "proportionality" – will depend on the judge's discretion, highlighting a *tot capita*, *tot sententiae* that is the opposite of equal treatment before the law.

When considering the principle of law affirmed by the CJEU (also) in the matter of transnational posting of workers applied to the Italian legal context, it is necessary to recall the Italian epilogue of a previous CJEU statement regarding the obligation – for the national judge – to refrain from applying (i.e., not apply in the concrete case) an existing law, albeit expressed in a clear and precise form, but which the CJEU found to be in conflict with EU law.

The reference is to the CJEU judgment of September 8, 2015 in cause Taricco, which confirmed the configurability of an obligation for the national court to refrain from applying the statute of limitations in order to protect the financial interests of the EU.[18]

[18] The Court of Justice, with the sentence cited in the text, stated that article 325 TFEU makes it possible to identify the obligation for the national judge (in this case, the Italian one) to disapply, in the context of ongoing proceedings, the rules on statue of limitations in cases in which their application may prejudice the financial interests of the EU. See CAMON, *La torsio-*

The configuration of an essentially legislative power of the national judge was opposed by the Constitutional Court with Order n. 24 of January 26, 2017, according to which the recognized primacy of EU law cannot cancel the core upon which the Member State is based, with the result that EU law and the Court of Justice judgments that specify its meaning for the purposes of a standardized application cannot be interpreted with a view to imposing on the Member State the waiver of the supreme principles of its Constitution.

The fundamental and founding nature of the principle of legality in the Italian legal system is an obstacle to the recognition of a power the national judge is vested with, to apply directly the rule set forth by the CJEU. The potentially explosive[19] conflict between the Constitutional Court and the Court of Justice has, in the end, been resolved by the CJEU judgment that confirmed the obligation to refrain from applying domestic legislation in conflict with EU law, specifying that this must be done in compliance with the fundamental principles of the Member State,[20] and, especially, with judgment n. 115/2018[21] by which the Constitutional Court ruled that Article 101 paragraph 2 of the Constitution states that judges are subject to the law (*servus legum*), and not endowed with the power of non-application. A single judge cannot elevate him-

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ne di un sistema. Riflessioni intorno alla sentenza Taricco, in *Arch. n. proc. pen.*, 2016, 2; BARGI, *Il singolare funambolismo interpretativo dei rapporti tra diritto UE, diritto nazionale e tutela dei diritti fondamentali nella sentenza "Taricco" della Corte di giustizia dell'Unione europea*, *ivi*, 327 ss.; BERNARDI, CUPELLI, *Il caso Taricco e il dialogo tra le Corti*, Napoli, 2017; ESPOSITO, *I limiti costituzionali al dovere di ottemperanza alle sentenze interpretative della Corte di Giustizia*, in *Osservatorio AIC*, 2017, 1.

[19] Resolution n. 24/2017 of the Constitutional Court is extremely clear in recalling its duty to prevent the introduction of a rule contrary to the principle of legality into the Italian legal system and warns the EU Court of Justice that reiterating a direct obligation not to apply Italian legislation unconditionally attributed to the national judge would force the Constitutional Court to "declare the constitutional illegitimacy of the national law that has authorized the ratification and made the Treaties executive in the sole part in which it allows" the non-compliance with the fundamental principles of Italian law. On the conflict that has arisen between the Courts and its risks see, *inter alios*, FERRANTE, *L'ordinanza della Corte costituzionale sull'affaire Taricco: una decisione "diplomatica" ma ferma*, in *Diritti fondamentali*, 2017, 1; TEGA, *Il tono dell'ordinanza della Corte costituzionale n. 24/2017 e i suoi destinatari: narrowing the dialogue*, in *Forum Quad. cost.*, 2017, 3; RUGGERI, *Ultimatum della Consulta alla Corte di giustizia su Taricco, in una pronunzia che espone ma non ancora oppone, i controlimiti (a margine di Corte cost. n. 24 del 2017)*, in *Consultaonline,* 2017, 1; BASSINI, POLLICINO, in AA.VV., *The Taricco Decision: a last attempt to avoid a clash between EU law and the italian Constitution*, in *Verfassungsblog on matters constitutional*, 28 January 2017.

[20] See Court of Justice, Grand Chamber, 5 December 2017, C-42/17, *M.A.S. e M.B*.

[21] See Constitutional Court, 31 May 2018, n. 115, that acknowledges that the Court of Justice "understood the interpretative doubt" raised. See FERRANTE, *La sentenza n. 115/2018 con la quale la Corte costituzionale ha posto fine all'affaire Taricco: una decisione ferma ma diplomatica*, in *Diritti fondamentali*, 2018, 2 (also for other bibliographical references).

self to the role of legislator *ad tempus*, replacing a decision previously made by the legislator with one of his own. Non-application of the existing legislation in certain cases is forbidden to the national judge by the principle of legality, which is a fundamental principle of the Italian legal system. Lastly, verification of the compatibility of the jurisprudential rule is the task of the Constitutional Court, for this purpose addressed for the question of legitimacy.[22]

5. *Conclusions and prospects for the (emerging) Italian jurisprudence*

The aforementioned precedent can certainly be invoked also with regard to this CJEU judgment, which concerns the non-application of administrative penalties in the matter of transnational posting of workers.

When an Italian judge finds an excessive penalty in the Italian legislation contrasting violations in the field of posting of workers, pursuant to Legislative Decree n. 136/2016, on the one hand, he cannot ignore the principle of law affirmed by the Court of Justice and, on the other, he would have to follow the procedure indicated by the Constitutional Court, which excludes a do-it-yourself non-application of the penalty framework envisaged in labour law and requires a question of constitutionality to be examined with regard to the reasonableness of the choices made by the ordinary legislator (possibly preceded – as in the Austrian case – by a question of prejudice concerning the conflict between national legislation and EU law).[23]

However, as already mentioned, in light of the Italian legal system, the question is eminently theoretical, also due to the fact that jurisprudence on the subject is still quantitatively limited (and largely focused on social security issues).

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[22] Very clear (and comprehensive) is Constitutional Court n. 24/2017 on the necessary procedure to follow (or not) EU jurisprudence on an obligation of non-application in any sector: "The authority competent for the carrying out of the control urged by the Court of Justice is the Constitutional Court. This has the exclusive task of ascertaining whether EU law is in contrast with the supreme principles of the constitutional order and, in particular, with the inalienable rights of the individual. To this end, the essential role played by the ordinary judge consists in casting doubt on the constitutional legitimacy of the national legislation that encompasses the European norm giving rise to the alleged conflict".

[23] With regard to how the Constitutional Court should proceed after having ascertained the violation of the principle of proportionality between the penalty imposed by the legislator and the degree of disvalue of the offence, see Constitutional Court n. 95/2022, which underlines how its intervention in substitution of the penalty originally imposed does not diminish "the possibility for the legislator to identify another and theoretically more appropriate penalty framework that takes into account the specifics of the administrative offence".

This consideration appears to be only partially affected by the implementation of the 2018 Directive and its transposition in the Italian legal framework (with Legislative Decree n. 122 of September 15, 2020). Apart from any consideration regarding reduced performance linked to posting as a result of the pandemic (which reduced transnational mobility and favored the return of posted workers to their countries of origin), it should be noted that judges tend to opt for an evaluation of the factual elements from time to time brought forward by the posting or posted companies (in particular,[24] with regard to dual residence in Italy and abroad and the certificate of prior employment abroad) against the objections about the non-genuineness of the posting made by the Labour Inspectorate.

In other words, the motivations of the rulings examined reveal the existence of an articulated evidence-based support (also thanks to the demonstrated full operation of the IMI system and the "technological" collaboration between Labour Inspectorate offices from different countries),[25] which includes allegations that are not sufficient to exclude the legitimacy of posting in consideration of the prevalence of "documentary" elements offered by the companies – these are in the first place the certificate of residence (often momentarily shared between Italy and abroad); the completion of form A1 with registration with the social security system of the country of origin; the certification attesting to submission to medical examination in the country of establishment of the posting company, etc. – in addition to those provided by the supervisory bodies (in particular, statements made by the workers during the inspection, claiming that they had always performed their tasks in Italy).

It follows that the provision contained in Article 7 paragraph 2-*bis* of Legislative Decree n. 136/2016 aimed at regulating the relationships between insufficient or missing information and the determination of administrative penalties in terms of transnational posting has not yet been applied in the Italian legal system.[26] The norm introduced with the 2020 novation represents the only hypothesis expressly provided for by the Italian legislator that would legitimize a proportional (i.e. equitable) reduction of penalties when the publications and the website of the Ministry do not provide insights to clarify which

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[24] Among the few sentences pronounced by the courts of merit: Court of Appeal Milan, 20 September 2021, n. 981; Court of Appeal Milan, 19 October 2021, n. 1226; Trib. Lodi, 24 March 2022, n. 94.

[25] See CORDELLA, *Distacco transnazionale, ordine pubblico e tutela del lavoro*, Torino, 2020, 35; BANO, *Il distacco nella recente normativa europea: fra cooperazione e competizione*, in *Variaz. temi dir. lav*., 2021, 1, 20.

[26] CORSO, *Transnational posting and Protection of rights: Labour Law accompanies posted workers within the EU*, *ivi*, 44.

"working and employment conditions" and which "collective agreements" are applicable to posted workers.

Regardless of the doubts regarding the scope of its concrete application (by way of example, as to the burden of proof resulting from omitted declaration, the judgment on its relevance and degree of impact on the level of knowledge and potential awareness of the regulations by the subjects involved), this norm is meant to bring back into the sphere of proportionality the penalties imposed based on the limits specified in Legislative Decree n. 136/2016, but concurrently considered by the legislator "unjust" in its concrete application.

Portuguese Report on the Posting of Workers Regime

António C. da Frada de Sousa and *Milena da Silva Rouxinol*[*]

1. *Introduction*

More than a State of destination for workers posted by service providers from other States, Portugal has been typically a State of origin of workers posted abroad by Portuguese undertakings directing their provision of services to other States.[1] In effect, Portugal has been, for decades, a State with a

[*] Professor of private international law and European Union law at Catholic University of Portugal and Professor of labour law at Catholic University of Portugal.

[1] The circumstance that Portugal is not traditionally a country of destination of posted workers provides, at least in part, an explanation for the absence of Portuguese case-law concerning workers posted in Portugal by foreign undertakings. Differently, there are cases involving Portuguese workers posted abroad by their Portuguese employers. These cases, however, typically address the application of Portuguese Law governing the individual employment contract at hand and not the application of Directive 96/71 (or of the Portuguese legislation which implemented this Directive). See, for instance, Judgment of 22 January 2019 of the

traditionally large number of service providers directing their services to beneficiaries/clients located abroad. The Portuguese building industry is one good example. The European Union (EU) internal market, in particular, has always been regarded as offering a good opportunity for Portuguese undertakings to expand their economic activities by providing their services to clients in other Members States (MS). Such services are often provided with the use of employees which habitually perform their work in their employers' premises, in Portugal. Such employees have, therefore, their individual employment contracts subject to Portuguese law, according to article 8(1) and (2) of the Rome I Regulation, on the law applicable to contractual obligations. This will be so, even if the employer provides its services in another MS of the EU with temporary secondment (posting) of its employees in that MS.

It is well known, however, that the posting of workers poses significant challenges and difficulties, in particular as regards the finding of the provisions which, in the MS of destination, shall be mandatorily respected by foreign undertakings, irrespective of the law governing the individual employment contracts with the workers posted therein.

Such difficulties triggered the intervention of the EU legislator in the 90s and led to the adoption of Directive 96/71/EC, of the European Parliament and of the Council, of 16 December 1996, on the posting of workers in the framework of the provision of services (Directive 96/71).[2]

It is widely recognized that Directive 96/71 is not an instrument of substantive harmonization of MS labour law provisions applicable to posted workers.[3] It is an instrument of private international law that determines the mandatory provisions of the MS of destination of the posted workers which shall be applicable irrespective of the provisions of the MS of origin of such

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Tribunal da Relação de Lisboa (Court of Appeal of Lisbon) on case 20730/15.1T8SNT-E.L1-1, or Judgment of 22 May 2019 of the Tribunal da Relação do Porto (Court of Appeal of Porto), on case 4800/16.1T8MTS.P1 – even though this latter judgment dealt with the issue of application of the most favourable law to the posted worker, set forth in article 3(7) of Directive 96/71. To our knowledge, there are no published judgments of Portuguese Courts of Appeal or of the Portuguese Supreme Court involving Portugal as a State of destination of posted workers.

[2] For further developments, see A. FRADA DE SOUSA, *A Europeização do Direito Internacional Privado – Os novos rumos na regulamentação das situações privadas transnacionais na UE*, *Tese apresentada à Universidade Católica Portuguesa para obtenção do grau de doutor em Direito – Ciências Jurídicas*, Faculdade de Direito – Escola do Porto, Author's Edition, 2012, 782 ff.

[3] It contains, however, as we will see bellow, provisions, mainly of administrative nature, on duties to inform and setting forth MS' obligations to cooperate in the posting of workers. Such provisions were recently reinforced with the adoption of Directive 2018/957/EU.

posted workers governing their individual employment contract according to the choice of law rules of article 8 of the Rome I Regulation.[4]

The recognition of the existence of situations where certain undertakings have engaged in practices aimed at obtaining undue or fraudulent advantages from the free movement of service provisions of the Treaty on the Functioning of the European Union, namely due to the lack of conditions to ensure the proper enforcement of the provisions of the 96/71 Directive, triggered the subsequent intervention of the EU legislator. This led to the adoption, in particular, of Directive 2014/67/EU, of 15 May 2014, on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the

[4] According to ORLANDINI, *La disciplina comunitaria del distacco dei lavoratori fra libera prestazione di servizi e tutela della concorrenza: incoerenze e contraddizioni nella directiva n. 71 del 1996*, in *Arg. dir. lav*., 1999, 465 ss., 479, the 96/71 Directive "è correttamente qualificabile come fonte di diritto internazionale privato". See also CORTI, *Le decisioni ITP e Laval della Corte di Giustizia: un passo avanti e due indietro per l'Europa Sociale*, in *Riv. it. dir. lav.*, 2008, 27, 249 ss., 259, considering that the 96/71 Directive "funziona come un sofisticato strumento di diritto internazionale privato". In the same line, M. FALLON, *Le détachement européen des travailleurs, à la croisée de deux logiques conflictualistes*, in *Revue Critique de Droit International Privé*, 2008, 97, 781 ff., especially 816, acknowledges that the 96/71 Directive does not adopt substantive provisions, merely establishing a common conflict of laws regulation for MS. The 96/71 Directive is, therefore, "an instrument of private international law that uses the technique of conflict of laws or conflicts' rules". Similarly, according to W. SCHRAMMEL, *Dienstleistungsfreiheit und Sozialdumping*, in *Europäische Zeitschrift für Arbeitsrecht (EuZA)*, 2009, 2, 36 ff., 44, the 96/71 Directive "is a special rule of conflicts which has precedence over the conflicts' rules concerning individual employment contracts" ("ist eine besondere Kollisionsregel, die den Kollisionsnormen über Arbeitsverträge vorgeht"). In particular, it results from article 3(7) and (10) of the Directive that it contains a "Community law and definitive special conflict of laws regulation for work and employment conditions" ("gemeinschaftsrechtliche und abschließende kollisionsrechtliche Sonderregelung für Arbeits- und Beschäftigungsbedingungen"). For C.U. SCHMID, *From Effet Utile to Effet Neolibéral: A Critique of the New Methodological Expansionism of the European Court of Justice*, in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Org. RAINER NICKEL), Antwerp, Intersentia, 2010, 295 ff., 309, "technically the Directive does not aim at harmonizing substantive law, limiting itself to adopt a private international law solution". For Advocate-General P. MENGOZZI, in the Opinion delivered on 23 May 2007, in case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:291, paragraph 59, "the purpose of [Directive 96/71] is to coordinate MS' conflict-of-laws rules in order to determine which national law should apply to the provision of cross-border services where workers are posted temporarily abroad within the Community, without harmonising either the substantive rules of the MS as regards employment law and the terms and conditions of employment relating, in particular, to rates of pay, or the right to resort to collective action". Also according to Advocate-General V. TRSTENJAK, in the Opinion delivered in case C-319/06, *Commission v. Luxembourg*, ECLI:EU:C:2007:516, paragraph 36, Directive 96/71 "must be regarded primarily as a conflict-of-laws provision of Community employment law concerning the details and conditions of employment of posted workers".

provision of services and amending Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation") ("Directive 2014/67")[5] and, more recently, of Directive 2018/957/EU, of 28 June 2018, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Directive 2018/957 or Amending Directive).

It is important to underline that the definition, by each MS, of the mandatory provisions to be applied to employees posted therein by services providers from other MS might have the significance of protectionist national measures. Such protectionist measures were sometimes adopted by MS with higher average wages and were aimed at dissuading foreign undertakings to access such MS' markets to efficiently compete with domestic service providers. Protectionist measures adopted by MS of destination against competing foreign service providers may appear disguised as measures aimed at granting posted workers the highest level of protection.[6] Protectionism may wear many different masks, and one of such masks might be the protection of posted workers. Protectionist measures have sometimes burdened the cross-border operation of Portuguese service providers so heavily that directing services to some MS became virtually unbearable for Portuguese undertakings.[7] For Portuguese undertakings, this entailed not only the loss of market opportunities abroad, but also the loss of extra pay for employees – extra pay that they would typically earn while being posted abroad and would otherwise not receive while working in Portugal. These protectionist measures even led, in some cases, to the loss of jobs, due to the employers' inability to provide their services abroad and, therefore, to expand their economic operations internationally.[8]

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[5] Recital 7 of Directive 2014/67/EU expressly alludes to the need to "prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC".

[6] P. DAVIES, *Case C-346/06, Rüffert v. Land Niedersachsen [2008] IRLR 467 (ECJ)*, in *Industrial Law Journal*, 2008, 37, 293 ff., 293, points out that arguing that Directive 96/71 must be interpreted as aiming to confer the highest level of protection to posted workers in the Member State of destination is a "very curious argument […]: the more the posted workers are brought up the levels of terms and conditions applying in the host state, the less likely they are to be employed there at all, which is a dubious way of protecting their interests".

[7] Portuguese service providers have been often confronted, since Portugal joined the EEC, in 1986, with a vast number of national protectionist measures hindering their access to other MS' markets. The case, C-113/89, Rush Portuguesa, decided by the CJEU in 1999, illustrates this reality and the typical problems with which Portuguese service providers have been confronted since 1986.

[8] Posted workers will only benefit from higher labour standards if their employers are able to keep access to contracts in the State of destination. See P. DAVIES, *Posted Workers: Single*

It is well known that, in a significant number of cases decided by the CJEU, such national measures adopted by MS of destination aimed at hindering the free provision of services, have been considered incompatible with the internal market, even though the measures at hand aimed precisely at levelling up the rights of posted workers. Renowned Judgments of the CJEU in cases such as *Laval un Partneri* (C-341/05), *Rüffert* (C-346/06) and *Commission v. Luxembourg* (C-319/06) illustrate what we have just said and were generally applauded in Portugal, considering its traditional condition as a MS of origin of posted workers. This contrasts sharply with the strong criticism that these judgments have triggered in MS traditionally of destination of posted workers.

2. *The Portuguese transposition of the EU Directives on posted workers*

Directive 96/71/EC was implemented in Portugal by Act no. 9/2000, of 15 June (Act 9/2000), and entered into force a month later,[9] with a delay of half a year, since the transposition should have occurred until December 1999. This legal regime was then included in the *Código do Trabalho* approved by Act no. 99/2003, of 27 August – the Portuguese Labour Code (PLC of 2003).[10] Currently, the provisions implementing Directive 96/71 are enshrined in the Portuguese Labour Code of 2009,[11] approved by Act no. 7/2009, of 12 February (PLC), particularly in articles 6, 7, and 8. Directive 2014/67 was implemented at national level by Act no. 29/2017, of 30 May, which entered into force on 31 May 2017 (Act 29/2017).[12]

More recently, Directive 2018/957, of 28 June, was transposed to the national legislation by Decree-Law no. 101-E/2020, of 7 December (Decree-Law 101-E/2020),[13] which republished Act no. 29/2017, with some

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Market or Protection of National Labour Law Systems?, in *Common Market Law Review*, 1997, 571 ff., 574.

[9] Available at *https://dre.pt/pesquisa/-/search/288375/details/maximized*.

[10] Available at *https://dre.pt/pesquisa/-/search/632906/details/normal?q=Lei+n.%C2%BA%2099%2F2003%2C%20de+27+de+agosto*.

[11] Available, in English, at *https://dre.pt/application/conteudo/123169278*, although without the latest modifications.

[12] Available at *https://dre.pt/pesquisa/-/search/107094724/details/maximized*. To our knowledge, there is no English translation of this diploma.

[13] Available at *https://dre.pt/dre/detalhe/lei/29-2017-150570705*. To our knowledge there is no English translation of this diploma.

amendments aimed, precisely, at ensuring the transposition of Directive 2018/957.[14]

Prior to the implementation of Directive 2018/957, the provisions which, in Portugal, implemented Directive 96/71 were to be found exclusively in the PLC. However, the implementation of Directive 2018/957 left such provisions set forth in the PLC, which transposed Directive 96/71, unchanged. In effect, the Portuguese legislator surprisingly opted to include the provisions transposing Directive 2018/957 not in the PLC, but in the legal Act which contains the provisions transposing Directive 2014/67 – Act no. 29/2017. This means, in other words, that although Directive 96/71 was transposed into Portuguese Law through provisions of the PLC, the provisions operating the transposition of Directive 2018/957 are to be found not in the Code, but in a different legal act – Act 29/2017 – devoted to the transposition of a different Directive. This dubious option of the Portuguese legislator is likely to cause confusion and be a source of trouble and conflicts, since the provisions contained in the PLC that transposed Directive 96/71 remain in force, with no consideration for the amendments introduced by Directive 2018/957 to Directive 96/71.

3. *Scope of application of the Portuguese legal framework on posted workers implementing Directive 96/71*

3.1. *The notion of posted worker in the Portuguese Labour Code*

The PLC does not clearly define *posted worker*, and nowhere in articles 6 or 7 is it stated that the regime contained therein applies only to posted workers conducting their activity in the context of a *provision of services*. This is quite surprising, since Directive 96/71 expressly refers to the provision of ser-

[14] The most relevant of such amendments will be described and assessed below. The consolidated version of Act no. 29/2017 is available, in Portuguese, at: *https://dre.pt/dre/legislacao-consolidada/lei/2017-150546996.* In Portugal, the implementation of Directive 2018/957 occurred following a Government's request to the Portuguese Parliament for authorization to proceed with such implementation (since Parliament holds exclusive constitutional competence to legislate on this matter). Parliament conceded such authorization, on 21 July 2020, for the Government to adopt legislation concerning the posting of workers in the context of provision of services, implementing Directive 2018/957/EU of the European Parliament and the Council, of 28 June 2018 (available at: *https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45132.* This authorization, enshrined in Act no. 61/2020, of 13 October, determined a 180 days deadline for the transposition of the Amending Directive. Directive 2018/957 was eventually implemented in the Portuguese legal system by Decree-Law 101-E/2020, of 7 December 2020. The period of transposition had ended on 30 July 2020.

vices, both in its title and when it defines its scope of application and the notion of post worker in article 1(3)(a).

Be as it may, the Code attempts to provide a definition of posted worker in the context of article 6, which circumscribes the scope of application of the posted workers regime to workers posted in Portuguese territory. Article 6(1), while not focusing on the substantial characteristics of these workers, lists the three situations which "are considered to be subject to the posting regime".[15]

Such situations are the following three cases, "in which the employee, hired by an employer established in another State, provides his activity in Portuguese territory: *(a)* in performance of a contract between the employer and the beneficiary who carries out the activity, provided that the employee remains under the authority and direction of the employer; *(b)* in the establishment of the same employer, or company of another employer with which there is a corporate relation of reciprocal, do-main or group participation; *(c)* at the service of a user, at the disposal of which he was placed by a temporary employment agency or another company.

First type of posted worker – Article 6(1) considers the "posting regime" one "in which the employee, hired by an employer established in another State, provides his/her activity in Portuguese territory". This can be, as referred, a situation "in performance of a contract between the employer and the beneficiary who carries out the activity, provided that the employee remains under the authority and direction of the employer".

The reference to the requirement of existence of a contract between the employer and the beneficiary who carries out the activity opens the door to the inclusion, within the scope of application of the Portuguese regime on posted workers, of cases where the contract between the employer and the beneficiary is not aimed at the provision of services, or at least primarily at the provision of services.

Another feature of article 6(1)(a) is that it expressly requires that the employee "provides his activity in Portuguese territory", "in performance of a contract between the employer and the *beneficiary who carries out the activity*". This requirement is difficult to understand. It seems to imply that the foreign undertaking, posting its workers in Portugal, has entered into a subcontractual relationship with the beneficiary, the latter carrying out, in Portugal, precisely the same activity developed by the foreign undertaking. This is a too narrow understanding of posting that would not be acceptable in the light of Directive 96/71. It would exclude from its scope situations where the foreign undertaking performs services in Portugal for clients which carry out an

[15] Article 6(2) expressly provides that "the regime of posting in Portuguese territory does not apply to the navigating personnel of the merchant navy", in consonance with article 1(2) of Directive 96/71.

activity other than the one performed by the foreign undertaking. Nevertheless, an interpretation of article 6(1)(a) in conformity with Article 1(3)(a) of Directive 96/71 shall suffice to ensure this provision is in consonance with Directive 96/71, even if a clarification of the text of the provision of the Labour Code would be highly advisable.

It is true, in any case, that article 2(b) of Act 29/2017 (implementing Directive 2014/67) circumscribes the scope of application of this Act, including, for this purpose, in the definition of posted worker, the reference to "the situations of posting of workers to another MS, by service providers established in Portugal, covered by articles 6 to 8 of the Labour Code". Article 2(b) of Act 29/2017, refers, therefore, to the situations of posted workers in the context of a provision of services, but only in the case of workers posted in another MS of the EU by service providers established in Portugal.

Article 2(a) of Act 29/2017 provides that this Act is also applicable to "the situations of posting of workers in Portuguese territory", but, unlike article 2(b), it does not expressly mention that such posting shall involve service providers established in another MS. However, a contextual and teleological interpretation of article 2(a) in light of article 2(b) would lead us to conclude that Act 29/2017 is only concerned with situations of posting of workers from Portugal to another MS and from another MS to Portugal.

In conclusion, the provisions contained in Act 29/2017 constitute a sort of *lex specialis* vis-à-vis articles 6 to 8 of the PLC: they shall only be applied to workers posted in another MS of the EU by service providers established in Portugal, as well as to workers posted in Portugal by service providers established in another MS, whereas articles 6 to 8 of the PLC shall apply, more broadly, to undertakings established in Portugal posting workers in third-countries and to undertakings established in third-countries posting workers to Portugal, even outside the context of provisions of services.

Second type of posted worker – Article 6(1)(b) provides that another situation of posting of workers occurs when the employee provides his/her activity for the employer, established in another State, in Portugal, "in the establishment of the same employer, or company of another employer with which there is a corporate relation of reciprocal, control or group participation". A broad interpretation of the notion of establishment may allow us to conclude that in situations where a foreign undertaking performs, for a certain period of time, an activity in Portugal, for its own benefit – car tests, for example, or shooting scenes for a film – in premises, or in an infrastructure that such undertaking has, for that purpose, in Portugal, the legal regime for posting of workers is applicable. This appears in line with the idea that the regime for posted workers in Portugal may be applicable beyond the context of a provision of services.[16]

[16] It is also reinforced by the circumstance that article 6(2) of the PLC provides, with no

Third type of posted worker – The last situation of posting of workers is, according to Article 6(1)(c), the one in which the employee provides his/her activity in Portugal, for an employer established in another State, "to the service of a user [in Portugal], at the disposal of which he/she was placed by a temporary employment agency or another company". We shall consider this situation of temporary agency workers bellow, in more detail.

More on the notion of posted worker in Portuguese Law – Portuguese Law does not require the posted worker to have had a minimum period of time working for the undertaking in another MS intending to post him/her in Portugal prior to his/her posting in the country. The worker may, therefore, be hired by an undertaking of another MS with the purpose of being immediately posted in Portugal in the context of a provision of services. The employment relationship must logically exist before the posting and must continue – throughout the (temporary) duration of the posting and after the end of posting – in another State, different from Portugal, where the employee is supposed to habitually have to carry out his/her work in execution of the employment contract.[17]

Portuguese Law also does not require workers posted in Portugal by a foreign undertaking to obtain a work permit in Portugal to be considered and admitted as posted workers in Portugal.[18]

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reference, again, to a provision of services, that "such regime shall also apply to posting in situations referred to in subparagraphs [of article 6(1)(a) and 6(1)(b)] by a user established in another State under its national law, provided that the employment contract subsists during the secondment".

[17] For a worker to be considered posted in Portugal, it is required, on the part of the worker, the existence of an "animus revertendi" to his/her State of origin after being posted in Portugal, and the existence of an "animus retrahendi", on the part of the employer, when the posting reaches its end. In other words, as mentioned already, on the part of the employer, the employment relationship must also be regarded as subsisting in another State after the posting in Portugal has ended. Thus, the determination of a posting in Portugal depends on the existence of an understanding between the parties (employee and employer) as regards the location/State where the worker is supposed to carry out his/her activity habitually in performance of the employment contract after the temporary posting in Portugal has reached its end.

[18] This shall be so even if that worker is an employee of foreign placement agencies, or temporary employment undertakings, and is hired-out in Portugal, as posted worker, to a user undertaking established in Portugal. According to article 30-A of Decree-Law no. 260/2009, on the legal regime for the exercise and licensing of private placement agencies and temporary employment undertakings, the principle of mutual recognition shall be respected. There may be no duplication of conditions required for the fulfilment of the proceedings set forth in that Decree-Law for placement agencies and temporary employment undertakings established in Portugal, as regards placement agencies and temporary employment undertaking lawfully established and operating in other MS. As long as the requirements and controls to which such agencies and undertakings have been subject in their respective MS of origin have been ful-

The list of elements to be taken into account to identify workers posted in Portuguese territory was enlarged by Act 101-E/2020, which added new segments (*h* and *i*) to article 4(1) of Act 29/2017. However, it is doubtful that this amendment actually impacts on the definition of posted worker, leading to a larger number of workers in Portugal to be considered posted workers and thus subject to the pertinent legal regime applicable. In effect, that list of elements in article 4(1) is not exhaustive and, as provided both in article 4(4) of Directive 2014/67 and in article 4(3) of Act 29/2017, the failure to satisfy one or more of those factual elements shall not automatically preclude a situation from being identified as a situation of posting. Among that (long) list of elements, we now find, added to that list by Act 101-E/2020, "the existence of conditions of accommodation [in Portugal] when provided by the employer" and the "remuneration, allowances and benefits, inherent to the posting, being presumed that these allowances and benefits are paid as reimbursement of expenditures with travel, board and lodging when such elements paid as remuneration are not ascertained". In any case, this amendment does not necessarily affect the number of workers in Portugal that shall be considered as falling within the scope of the definition of posted worker under article 6 of the PLC.

With relevance for the understanding of the notion of posted worker in Portuguese Law, it is noteworthy that another amendment has been made to article 4 of Act 29/2017, namely by Decree-Law 101-E/2020, with the addition of article 4(4), providing that "if [the *Autoridade para as Condições de Trabalho (ACT)*] finds out that an undertaking, abusively or fraudulently, has created the impression that the situation of a worker might be considered as a posting, that undertaking shall ensure that such worker may not, in any case, be subject to working conditions less favourable than those applicable to posted workers". This last amendment implements article 5(4) and (5) of Directive 2018/957, complementing the provisions of Act 29/2017, transposing article 4 of Directive 2014/67. It is complementary, in particular, as regards the criteria set forth in article 4(2)(a) to (f) of Act 29/2017 to determine whether an undertaking genuinely performs substantial activities that go beyond purely internal management and/or administrative activities. Article 4(4), now added, apparently sets forth the legal effect ensuing from the finding of a situation where, according to article 4(2), a foreign undertaking *posting* workers in Portugal, or a Portuguese undertaking *posting* workers abroad, is considered not to be performing substantial activities in the State of establishment and, therefore, is acting abusively or fraudulently to create the impression that it is posting workers.

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filled and are equivalent or comparable to those applicable in Portugal, requirements or controls enshrined in Portuguese law shall not be demanded.

3.2. *The territorial scope of application of the Portuguese posted workers regime*

The Portuguese legal regime on posted workers has the peculiar feature, according to article 8 of the PLC, of being expressly applicable to Portuguese undertakings posting workers abroad.

While article 7(1) of the PLC, concerning employment conditions of workers posted in Portugal, provides that such posted workers have the right to the working conditions provided for by law and collective labour regulations of general efficacy [in Portugal], which respect to a set of subjects indicated therein, in line with Directive 96/71, article 8(1), concerning specifically the posting of workers by Portuguese undertakings to another State, sets forth that "[a] worker hired by a company established in Portugal and working in the territory of another State in a situation referred to in article 6 is entitled to the working conditions provided for in the previous article [article 7]". The provisions applicable to workers posted in Portugal by foreign undertakings are therefore applied equally to workers posted abroad by undertakings established in Portugal. The provisions are exactly the same as those set forth in article 7(1) of the PLC.[19]

Another peculiar feature of the Portuguese regime on posted workers is, as already alluded, that it is indistinctly applicable to workers posted in Portugal by undertakings established in an EU MS (or, as we have mentioned, to workers posted in another MS by Portuguese undertakings), as well as to workers posted in Portugal by undertakings established in a non-EU State (third country), and to workers posted in third countries by Portuguese undertakings.

4. *Employment terms and conditions applicable to posted workers*

Article 7(1) of the PLC implements article 3(1) of Directive 96/71, keeping the wording previous to Directive 2018/957, as alluded above. This article provides that "notwithstanding a more favourable regime established by law or employment contract, the posted worker has the right [in Portugal] to the working conditions provided for by law and collective labour regulations of general efficacy, which respect to: [...] *b)* maximum duration of working time; *c)* minimum rest periods; *d)* holidays; *e)* minimum remuneration and payment

[19] On the Portuguese legislator's option to extend the scope of application of Portuguese legal provisions on posted workers to workers posted abroad by Portuguese undertakings, see L. DE LIMA PINHEIRO, *Direito Internacional Privado*, *Volume II, Direito de Conflitos – Parte Especial*, Almedina, 3rd edition, 2009, 301-302.

of additional work; *f)* assignment of employees by a temporary employment agency; *g)* occasional hiring of employees; *h)* work safety and health; i) protection in parenthood; *j)* protection of minors' work; *l)* equality of treatment and non-discrimination".

The reference, in Article 7(1) of the PLC, to the circumstance that the provisions of Portuguese labour law and collective labour regulations with general efficacy shall be applied to workers posted in Portugal, "notwithstanding a more favourable regime established by law or employment contract", leaves no doubt that such national provisions shall be applied irrespective of the law governing the individual employment contract and the provisions of the contract itself. This will be so, of course, unless the law governing the individual employment contract of the posted worker, or the contractual provisions themselves, are more favourable to the posted workers than Portuguese Law provisions on the matters listed in article 7(1).

4.1 *Collective agreements with* erga omnes *effects in Portugal*

Even though article 7(1) of the PLC expressly refers "working conditions provided for by law and collective labour regulations of general efficacy",[20] we must point out that, in Portugal, collective agreements (and, of course, arbitration awards) do not, in themselves, have *erga omnes* effects, in the sense of having general efficacy for all the workers in Portuguese territory in a certain sector of activity/industry, comparable to the efficacy of provisions set forth by the legislator.[21]

Even if that provision must be interpreted as referring to collective agreements whose effects have been administratively extended to all undertakings in a particular sector, or sectors, of activity in Portugal, according to the recent case law of the Portuguese Supreme Court, uncontradicted by the courts of appeal, such extension shall not include employees who are affiliated to trade unions other than those that entered into the extended collective agreement.[22]

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[20] Portuguese collective agreements are published in *Boletim do Trabalho e Emprego*, available at *http://bte.gep.msess.gov.pt/*.

[21] See, for example, J. LEITE, *Subsídios para uma leitura constitucional da convenção colectiva*, in *Estudos de Direito do Trabalho em Homenagem ao Professor Manuel Alonso Olea*, Almedina, 2004, 397 ff., or J. GOMES, *Algumas questões sobre o âmbito pessoal de aplicação da convenção colectiva à luz do Código do Trabalho*, in *Revista de Direito e de Estudos Sociais*, 2016, 1-4, 37 ff.

[22] Judgment of the Portuguese Supreme Court (*STJ*) of 20 June 2018, available at *http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/8d92715a3e668f43802582b40030351c?OpenDocument*. On this point, with several references, see A.T. RIBEIRO, *Os desafios atuais à*

In this light, the possibility that workers in a particular sector in Portugal are not subjected to a collective agreement administratively extended to that sector through an Extension Ordinance may pose challenges to the application of the working conditions provided in such collective agreements to workers posted in Portugal. In effect, if collective agreements, even when administratively extended to a certain sector in Portugal, may not be applicable to all employees in that sector working in Portugal, imposing their contents to companies posting workers in Portugal may be regarded as deviating from the idea of ensuring posted workers the conditions of work provided for by law, or by collective agreements universally applicable, on the basis of equal treatment between Portuguese employees working in Portugal and (foreign) workers posted in Portugal.[23]

At a more general level, we would add that, in our view, the absence of a clear provision, in Directive 96/71, regarding the identification of the collective agreements that, in States deprived of a system for declaring collective agreements of universal application, might have to be respected by foreign undertakings posting workers in such States, is capable of giving rise to doubts and litigation.

The amendment introduced by Directive 2018/957 to article 3(8), paragraph 2, of Directive 96/71 – which now reads "[i]n the absence of, *or in addition to*, a system for declaring collective agreements or arbitration awards to be of universal application [emphasis added]" – has brought some change. However, the practical impact that this amendment may have in the MS is difficult to foresee at this moment. This amendment may lead to situations

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contratação coletiva – tese apresentada à Universidade Católica Portuguesa para obtenção do grau de Doutor em Ciências Jurídicas, Author's Edition, Porto, 2019, 291.

[23] The Judgment of the Court of Justice in case C-626/18, *Poland v. Parliament and Council*, ECLI:EU:C:2020:1000, confirms the view that equality of treatment as regards terms and conditions of employment of posted workers and workers employed by undertakings established in the host MS continues to be one of the main tenets of Directive 96/71. The Judgment of the Court of Justice in case C-346/06, *Rüffert*, ECLI:EU:C:2008:189, was not contradicted by the Court of Justice in its Judgment in case *Poland v. Parliament and Council*. See paragraphs 57 ff. and, in particular, paragraph 60, pointing out that "Article 1(2)(a) of the contested directive makes changes to Article 3(1) of Directive 96/71, referring to equality of treatment as the basis for the guarantee that must be given to posted workers in relation to terms and conditions of employment [...] extend[ing] the list of matters affected by that guarantee to [a number of other conditions in other matters, such as] conditions of workers' accommodation". See also paragraph 106 stating that the 96/71 Directive "has in no way the effect of eliminating all competition based on costs. The directive provides that posted workers are to be entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration *rendered mandatory in that Member State*. That directive does not, therefore, have any effect on the other cost components of the undertakings which post such workers" [emphasis added].

where the principle of equality of treatment between national workers (and their employer undertakings) and foreign undertakings and their (posted) workers is not respected. In effect, there is a risk that, in some MS, this amendment may be interpreted as allowing them to impose on foreign undertakings posting workers therein the obligation to respect conditions of employment set forth in collective agreements deprived of *erga omnes* effects in situations where not all workers are effectively subject to those collective agreements. This is likely to originate protectionist effects vis-à-vis service providers from other MS.

4.2. *Principle of application of the most favourable law*

The principle of application of the most favourable law to the posted worker, established in article 3(7) of Directive 96/71, is implemented in Portugal through article 7(1) of the PLC, which determines that, notwithstanding a more favourable regime established by law or employment contract, a worker posted in Portugal has the right to the working conditions provided for by Portuguese law, which we shall address below.[24]

In essence, for each of the matters listed in article 7(1), a case-by-case comparison has to be made between the provisions of the law governing the individual employment contract (according to article 8 of Rome I Regulation, or article 6 of the Rome Convention), the provisions set forth by the parties in the individual employment contract itself, and the provisions of Portuguese Law with *erga omnes* effects. The provision granting the most favourable result to the posted worker in the case at hand shall be the provision applicable. The assessment of what is the most favourable result for the posted worker in each case may not be an easy task, especially since Portuguese Law does not grant the posted worker the possibility to decide which result is the most favourable to him/her.

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[24] With the sole exception of the Judgment of 22 May 2019 of the Tribunal da Relação do Porto (Court of Appeal of Porto) on case 4800/16.1T8MTS.P1, mentioned above, there is an absence of relevant case law in Portugal, concerning the application of the principle of the most favourable law provided by article 7(1) of the PLC. There is also limited analytical development in Portuguese literature devoted to the interpretation of this provision. See, in this regard, addressing, however, the principle of the application of the most favorable law as provided in article 7(3) of Directive 96/71, A. FRADA DE SOUSA, *A Europeização do Direito Internacional Privado* ..., cit., 822 ff., *maxime* 830 ff. See also, in Portuguese literature, E. GALVÃO TELES, *Sobre o critério da "lei mais favorável" nas normas de conflitos*, in J. MIRANDA, L. DE LIMA PINHEIRO, D. MOURA VICENTE (org.), *Estudos em Memória do Professor Doutor António Marques dos Santos*, Almedina, 2005, 193 ff.

4.3. *Terms and conditions of employment applicable to posted workers according to the PLC – the problem of "remuneration"*

As alluded, article 7(1)(e) of the PLC sets forth that workers posted in Portugal have the right to benefit from the legal regime concerning "minimum remuneration and payment of additional work". It is surprising that, in Portugal, this provision remained unchanged after the transposition of Directive 2018/957, which no longer refers to "minimum rates of pay, including overtime rates", as the original Directive 96/71 did, but to "remuneration, including overtime rates" instead.

It is in article 4(1)(i) and article 5(3)(e)(ii) of Act 29/2017 that we now find references to "remuneration", instead of "minimum remuneration". The first of these two provisions states that "[i]n order to verify the status of a worker temporarily posted in Portuguese territory, providing his/her activity in the conditions set forth in article 6(1) and (2) of the PLC, the competent authority [*ACT*] shall consider the following elements, which characterize the situation of the employer: [...] remuneration, the subsidies and benefits inherent to posting, assuming that these are paid as reimbursement of expenses for travel, food and lodging, when it is not possible to determine the elements paid as remuneration". The second provision states that "access shall be provided, gratuitously, to detailed information concerning the working conditions applicable to workers posted in Portugal, namely in matters concerning: [...] (ii) remuneration, including its constituent elements, according to the law or applicable collective labour regulation of general efficacy". However, Article 4 concerns the ascertaining of a situation of posting by the *ACT*, while Article 5 relates to the duty to provide access to information on the working conditions applicable to posted workers in Portugal by the ACT. It is, therefore, quite farfetched to argue that article 5 of Act 29/2017 (on the *Access to information*) and, especially, article 4 (on the *Assessment of a situation of posting*) may constitute a legal basis for imposing an obligation on service providers from other MS posting workers in Portugal to respect all legal provisions and collective labour regulations of general efficacy concerning remuneration and its constituent elements, and not only "minimum remuneration" provisions.

This, in our view, constitutes an incorrect transposition of Article 3(1)(c) of Directive 96/71, as amended by Directive 2018/957.

Moreover, Portuguese law does not provide significant concretization of the notion of minimum remuneration when it sets forth, in article 7(1)(e), that posted workers have the right to benefit from the application of the provisions of Portuguese law concerning "minimum remuneration and payment of additional work". This provision includes the mandatory "payment of additional work" within the scope of the remuneration to which the worker posted in Portugal shall be entitled to, unless the foreign law governing the individual

employment contract provides a more favourable regime. The express inclusion of the payment of additional work, by Portuguese Law, as a mandatory benefit for posted workers obviously represents a form of concretization of the notion of remuneration.

Moreover, according to Article 7(2)(a) of the PLC, "[t]he minimum remuneration includes the allowances or benefits allocated to the worker on account of the posting that do not represent reimbursement of expenses incurred, namely travel, accommodation and meals". This latter densification of the concept of remuneration constitutes an almost literal transposition of article 3(7) of Directive 96/71 (prior to the changes introduced by Directive 2018/957, when that provision set forth (in its original version) that "[a]llowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging".

Another point to consider is that article 7(2)(b) of the PLC establishes that "minimum remuneration and additional work pay shall not apply to the secondment of a qualified worker by an undertaking supplying the goods in order to carry out the initial assembly or installation necessary for its operation, provided that it is integrated in the supply contract and its duration does not exceed eight days in a period of one year".[25] Again, this provision almost literally transposes article 3(2) of Directive 96/71 in its original version.[26]

4.4. *The inclusion of provisions concerning "job security" among the terms and conditions applicable to posted workers – a Portuguese peculiarity*

With respect to the working conditions mandatorily applicable to posted workers – either workers posted in Portugal by foreign undertakings or workers posted abroad by Portuguese undertakings – listed in Article 7(1) of the PLC, such list diverges from the list in Article 3(1) of the 96/71 Directive in one significant way, in addition to the already alluded divergence

[25] The same regime applies to "minimum paid annual holidays", according to Article 7(1)(d) of the PLC, implementing Article 3(1)(b) of Directive 96/71, which now refers, as amended by Directive 2018/957, to "minimum paid annual leave".

[26] Article 7(3) adds, in any case, that this exclusion of application enshrined in article 7(2)(b) "does not include the secondment in construction activities that aim at the realization, repair, maintenance, alteration or elimination of constructions, namely excavations, embankments, construction, assembly and disassembly of prefabricated elements, installation of equipment, transformation, renovation, repair, maintenance or maintenance, namely painting and cleaning, dismantling, demolition and sanitation".

concerning "remuneration" matters. In effect, article 7(1)(a) includes "job security" among the conditions to which a worker posted in Portugal by a foreign undertaking is entitled to benefit from.[27]

This inclusion results from the fact that the Portuguese Constitution, in its article 53, provides that "workers shall be guaranteed job security, and dismissal without fair cause or for political or ideological reasons shall be prohibited".

Some Portuguese commentators argue that this provision is a mandatory overriding statute that shall be applied irrespective of the fact that the law applicable to the employment contract is a foreign law (by application of the choice of law rules which grant competence, in principle, to the law of State where the worker's activity habitually takes place). According to that literature, if the employee has been dismissed without a fair case, as understood by Portuguese law, the immediate and autonomous application of Article 53 of the Portuguese Constitution shall occur, as long as the employee is a Portuguese national or habitually resides in Portugal and the employer is Portuguese.[28]

The Portuguese legislator considered that when a worker is posted in Portugal, even if the law governing his/her individual employment contract is a foreign one, such worker shall benefit, while posted in Portugal, from the protection granted to all Portuguese workers, in Portugal, and to Portuguese workers working abroad for a Portuguese undertaking, unless the law govern-

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[27] Article 7(1)(i) of the PLC evidences another difference worth mentioning to the extent that it includes, in general, "protection in parenthood" among the conditions mandatorily applicable to posted workers in Portugal, whereas article 3(1)(f) refers, more narrowly, to "protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth". The reference to mandatory measures concerning the protection in parenthood reflect a concern of the Portuguese legislator in ensuring a higher level of equality of treatment between men and women, since such mandatory measures also include measures applicable to men who are either going to be, or have recently become fathers.

[28] See, for all, RUI MOURA RAMOS, *Da lei aplicável ao contrato de trabalho internacional*, Almedina, 1991, 791-792, who was the first author to propose, in Portugal, such characterization of article 53 of the Portuguese Constitution as an overriding mandatory provision. In this sense, in a transnational individual employment contract, even if governed by a foreign law, as long as there is a strong connection with Portugal, employees that have been dismissed without fair cause may claim the protection of article 53 of the Portuguese Constitution and of the legal provisions on workers' dismissal of the PLC, which densify the prohibition enshrined in article 53 of the Portuguese Constitution. This understanding of Article 53 of the Portuguese Constitution as an overriding mandatory provision with a peculiar scope of application vis-a-vis the applicable law according to the rules of relevant choice of law has been followed in several judgements of Portuguese Courts. See Tribunal da Relação do Porto (Court of Appeal of Porto), judgment of 25 November 1991, *Coletânea de Jurisprudência* V, 232-234, *STJ*, judgment of 30 September 1998 (Proc. 98S131); Tribunal da Relação de Lisboa (Court of Appeal of Lisbon), judgment of 5 July 2000 (Proc. 0079374).

ing the contract or the provisions of the contract themselves are more favourable to the worker than Portuguese provisions on this matter.

4.5. *New terms and conditions mandatorily applicable to posted workers after Directive 2018/957*

Article 3-A(1)(a) of Act 29/2017 was added by Decree-Law no. 101-E/2020. As alluded, it provides that posted workers in Portugal shall be entitled to the "conditions of workers' accommodation, where provided by the employer". Consequently, undertakings established in other MS posting workers to Portugal shall defray, as set forth by Article 194(4) of the PLC, "the expenses of the worker as a result of the increase of the costs of accommodation [...], in case of temporary transfer". When accommodation is not provided by the employer, the posted worker, according to Portuguese law, shall be entitled – as it would happen in the case of temporary transfer of the place of work of any employee within the Portuguese territory – to receive an amount to cover the expenditures resulting from the additional costs related with accommodation as a consequence of his/her posting to Portugal. It must be noted, however, that the right to such amount "may be excluded by a collective labour regulation instrument", as provided by Article 194(5) of the PLC.

The posted worker shall benefit, in any case, from the regime which is more favourable to him/her in this matter, resulting either from the law governing the individual employment contract concluded between the worker and the undertaking posting him/her in Portugal, or from the provisions of such individual employment contract.

The worker hired by an undertaking established in Portugal performing his/her activity in the territory of another State has the right to the conditions we just described as well.

Also article 3-A(1)(b) of Act 29/2017 was added, providing that workers posted in Portugal by undertakings of other MS shall be entitled to the "grants, allowances or reimbursements purporting to cover exclusively the expenditures with travel, board and lodging incurred by posted workers where they are required to travel to and from their regular place of work in the MS to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work".

Again, the posted worker shall benefit from the regime which is more favourable to him/her.

Similarly, and still with the exception that a more favourable regime is applicable, a worker hired by an undertaking established in Portugal and performing his/her activity in the territory of another State also has the right to

the conditions just described concerning grants, allowances or reimbursements purporting to cover exclusively the expenditures with travel, board, and lodging.

5. *Long duration posting – implementation of new article 3(1a) of Directive 96/71*

The new Article 3-C(1) of Act 29/2017, as amended by Decree-Law 101-E/2020, transposes almost literally article 3(1a) of Directive 96/71, as amended by Directive 2018/957, which provides that "[w]here the effective duration of a posting exceeds 12 months, MS shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory [...] all the applicable terms and conditions of employment which are laid down in the MS where the work is carried out: – by law, regulation or administrative provision, and/or – by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8".

The Portuguese legislator made a copy-paste transposition of the subsequent section of article 3(1a) (2nd subparagraph) of Directive 96/71, which provides that such general application of all the terms and conditions of employment of the State of destination, after the 12-month period, shall not apply, *inter alia*, to "procedures, formalities, and conditions of the conclusion and *termination* of the employment contract" [emphasis added].

The Portuguese legislator evidently forgot that, as mentioned above, among the working conditions mandatorily applicable to workers posted in Portugal by foreign undertakings, listed in Article 7 of the PLC, we find "job security". It must be stressed that the Portuguese legislator included job security as a mandatory condition applicable to workers posted in Portugal, under the public policy provisions referred by article 3(10) of Directive 96/71, although that matter is not included in the list of Article 3(1) of Directive 96/71. This oversight from the Portuguese legislator is rather unfortunate, since it excludes the application of national provisions concerning the conditions of termination of the employment contract following the 12-month period, when such provisions, as expression of the principle of protection of job security, were already applicable to the contract before the termination of such period.

Lastly, the new sections (3), (4) and (5) of article 3-C of Act 29/2017 adequately transpose the remaining paragraphs of Article 3(1a) of Directive 96/7. Section (3) determines that "where a motivated notification is submitted to the *ACT* indicating the reasons that explain the extension of the duration of the

posting [after 12 months], the conditions mentioned in Article 3-C(1) are applicable after 18 months of effective duration of the posting". According to section (4), "in those cases where the anticipated duration of the posting is inferior to 12 months, the already alluded motivated justification shall be submitted with the minimum anticipation of 30 days regarding the end of that period of anticipated duration of the posting".

Finally, subparagraph 5 of article 3-C provides that "where a posted worker is replaced by another posted worker, the duration of the posting shall correspond to the accumulated duration of the posting periods of all those workers, as long as they have been posted to perform the same task, at the same place, taking into consideration the nature of the service to be provided, the work to be performed, and the address(es) of the workplace".

6. *Temporary agency workers hired out by temporary work agencies as provided by new article 3(1b) of Directive 96/71*

Article 3-B(1) of Act 29/2017 provides that "[n]otwithstanding a more favourable regime established by law or employment contract, or what is provided in article 7 of the Labour Code [and the relevant provisions of Act 29/2017], the posted worker has the right to all the labour conditions applicable to temporary workers hired out by temporary employment agencies established in Portugal". This provision implements article 3(1)(b), paragraph 1, of Directive 96/71 in Portugal with the wording given by the Amending Directive.

It must be pointed out that article 3-B(1) of Act 29/2017 refers to cases of posting of workers in Portugal by temporary employment agencies of other MS. However, the Portuguese legislator, in consonance with what is provided by article 8 of the Labour Code, extends the application of the provisions applicable in Portugal to temporary employment agencies established in Portugal posting workers to other MS.

In essence, the labour conditions applied to temporary workers posted in Portugal cover all the provisions of the PLC that either set conditions or limit the use of temporary workers by user undertakings (articles 175 and 176), as well as all the other provisions that govern the contracts for the use of temporary work and, in some way, constitute an expression of the constitutional principle of job security in Portugal (for instance, articles 177 to 179). The labour conditions applied to temporary workers posted in Portugal shall also include those provisions of the PLC that regulate the regime for the provision of temporary work (articles 185 to 192).

Article 3-B(2) adds that "the user undertaking shall inform the temporary

employment undertakings of the labour conditions that it applies, including remuneration". This provision implements article 3(1b) (2nd paragraph) of Directive 96/71 quite literally in Portugal. Similarly, to implement article 1(3) (c) (2nd paragraph) of Directive 96/71 with the wording given by the Amending Directive, a new provision was added to Act 29/2017 by Decree-Law 101-E/2020. We refer to paragraph 4 of the new article 3-B. This provision sets forth that, when a worker hired out by a temporary employment undertaking to a user undertaking is to carry out work in the framework of the transnational provision of services in the territory of a MS other than the State where the worker is posted (working for the temporary employment undertaking or for the user undertaking), the user undertaking shall, before the beginning of the work activity [i.e. "in due time", as literally set forth in article 1(3)(c)(2nd paragraph) of the Directive], inform the temporary employment undertaking which hired out that worker of that fact.

Article 3-B(5) further provides that, in the case of an illegal hiring out of the worker, in violation of the aforementioned article 3-B(4), the worker shall be considered to be posted by the temporary employment undertaking with whom the worker is in an employment relationship in the territory of the State where he/she carries out the work.

This provision does not correctly implement Article 1(3)(c) (1st paragraph) of Directive 96/71 (after the Amending Directive). In effect, that article provides, very clearly, that "[w]here a worker who has been hired out by a temporary employment undertaking [...] to a user undertaking [...] is to carry out work in the framework of the transnational provision of services [...] by the user undertaking in the territory of a MS other than where the worker normally works for the temporary employment undertaking [...], or for the user undertaking, the worker shall be considered to be posted to the territory of that MS by the temporary employment undertaking or placement agency with which the worker is in an employment relationship". It adds, only subsequently, (in the 2nd paragraph, as mentioned above), that "[t]he user undertaking shall inform the temporary employment undertaking or placement agency which hired out the worker in due time before commencement of the work".

According to the Directive, the absence of provision of such information by the user undertaking is, quite obviously, not the triggering event the worker to be considered posted by the temporary employment undertaking in the territory of the State where he/she is effectively carrying out work for the user undertaking. However, that is precisely what the provision of Portuguese law – article 3-B(5) of Act 29/2017, with the wording given by Decree-Law 101-E//2020 – sets forth. This provision creates a perverse incentive for user undertakings in Portugal – an incentive to remain silent and not inform the temporary employment undertaking that the posted temporary worker is going to

carry out his/her work in a different MS. If the Portuguese user undertaking wants to avoid having a worker considered as its posted worker, all it has to do is say nothing to the foreign temporary employment undertaking.

In other words, the infringement, by the Portuguese user undertaking, of the duty to inform the temporary employment undertaking that the worker is to carry out the work in a different State is what triggers the worker to be considered posted to the territory of that different State by the temporary employment undertaking. This constitutes an incorrect implementation of the Amending Directive, and it is not easy to tackle this incorrect transposition through consistent interpretation of Portuguese Law in the light of EU law.

7. *The transposition of Directive 2014/67/EU (after Directive 2018/957)*

As explained above, Directive 2014/67/EU was implemented at national level through Act 29/2017. As the transposition period had ended on 18 June 2016, there was a delay of approximately one year.

The transposition was made correctly. Indeed, in general terms, the diploma reflects the sequence of subject matters followed in the Directive.

Despite the recent rulings of the CJEU in cases C-33/17, *Čepelnik*, and C-645/18, *Bezirkshauptmannschaft Hartberg Fürstenfeld*, Act 29/2017 requires no amendments, since it contains no prescriptions similar to those under analysis.

Furthermore, the national regime implementing Directive 2014/67 has remained almost unchanged after Decree-Law 101-E/2020, which transposed Directive 2018/957. As already said, although this diploma republished Act 29/2017, the main amendments therein contained did not affect the rules of transposition of Directive 2014/67. In fact, if we analyse the Amending Directive, we conclude that it addresses the *material* regime of the protection of posted workers set forth by Directive 96/71/EC, at European level, and originally by the PLC, at national level.

However, some minor amendments have been introduced to the *enforcement* regime, to keep it in line with the material modifications brought by the Decree-Law. Even if not imposed by Directive 2018/957, those few changes are suggested in its Preamble and they result from the concerns expressed therein, such as the reinforcement of the tools to identify situations of posting or the improvement of the information given to posted workers. The following paragraphs provide a brief overview of those amendments.

Firstly, regarding administrative cooperation between MS, Act 29/2017 provides time limits for information requested by other MS to be provided: ar-

ticle 7(1) sets forth that the competent national authority shall provide the information requested by other MS or the European Commission, electronically, within the following deadlines: a) up to two working days from the date of reception of the request, in urgent cases, duly substantiated, that require consultation of records; b) up to 25 working days from the date of reception of the request, for all other requests for information, except when a shorter period is mutually agreed. A new paragraph has been introduced to article 7, by Decree-Law no. 101-E/2020, which provides the measures to be taken by the *ACT* in case of persistent unjustified delay (measures that have also been reinforced in accordance with the new wording of article 6(3), amended on the same occasion).

Secondly, Decree-Law 101-E/2020 amended article 8 of Act 29/2017 by adding a new subject – possible cases of unlawful activities, such as transnational cases of undeclared work and bogus self-employment linked to the posting of workers – to the list of information on service providers or services provided by them that shall be disclosed by the ACT in the context of administrative cooperation.

It is also worth mentioning article 12 of Act 29/2017, which refers to liability in cases of subcontracting. According to this article, the contractor to whom the service is provided is jointly responsible for the payment of the wages due by the service provider to the posted worker, although that responsibility only refers to the rights acquired within the context of the contractual relationship between the contractor and the service provider as a direct subcontractor. Before Decree-Law 101-E/2020, the regime of article 12 was merely applicable when posting to Portugal, excluding postings to foreign countries, a situation that, according to some literature, might constitute unjustified discrimination.[29] However, the new wording of article 12, in force since Decree-Law 101-E/2020, clarifies that the situations of posting to foreign countries are also included in that provision of joint liability.[30]

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[29] D. CARVALHO MARTINS, *Mobilidade de trabalhadores no âmbito da UE: lei aplicável, destacamento e competência internacional*, *Documentación Laboral, Ejemplar dedicado a: La recepción del Derecho de la Unión Europea en los ordenamientos laborales de España y Portugal*, 2018, 113, 104.

[30] The national legislator did not use the optional provisions of the Directive (article 12(1) *in fine*) to allow joint or alternative liability for the payment of "contributions due to common funds or institutions of social partners", determining such liability only in the field of wage payment. He also did not take advantage of the possibility to limit contractors' liability when due diligence obligations were undertaken (Article 12/5, of the Directive). Furthermore, while under article 12(2) of the Directive it is possible to circumscribe the contractor's liability regime to the construction sector, the Portuguese legislator has extended it to all sectors of activity. See KÁTIA COSTA E SILVA, *Mobilidade transnacional de trabalhadores e empresas: algumas considerações práticas sobre o destacamento de trabalhadores*, 328.

8. *Conclusion*

Overall, the legal framework adopted in Portugal for the implementation of Directive 2018/957 can be considered adequate, although the transposition of the Directive was made, in general, in a literal way and, from a formal and systematic point of view, the model of transposition adopted is unfortunate.

In fact, the transposition of Directive 96/71 was made through provisions of the PLC, whereas Act 29/2017 was the piece of legislation that implemented Directive 2014/67, which was not amended by Directive 2018/857. Still, the transposition of the provisions of Directive 2018/857 was made through the amendment of Act 29/2017 by Decree-law 101-E/2020.

The provisions of the Portuguese Labour Code on the posting of workers were surprisingly left unchanged, with no consideration for the amendments introduced by the Amending Directive. This questionable option of the Portuguese legislator is likely to be a source of trouble and uncertainty, giving rise to contradictory interpretations of the legal provisions contained in the PLC and the now diverging legal provisions contained in Act 29/2019, as amended by Decree-Law 101-E/2020, which implemented the Enforcement Directive and now also implements the Amending Directive.

We identified, as described above, two instances of incorrect transposition of Directive 2018/957 – the transposition of Article 3(1b) of Directive 96/71, as amended, dealing with temporary employment undertakings in the context of chain posting, and the transposition of the Article 3(1)(c) of the 96/71 Directive, as amended, which now refers to "remuneration" and not, as in the original 96/71 Directive, to "the minimum rates of pay".

The absence of transposition, in Portugal, of Article 3(1)(c) of Directive 96/71, as amended by Directive 2018/957, must, in our view, be tackled by the Portuguese legislator as soon as possible, since it can hinder the effective application of the European legal framework on posted workers in the country with respect to one central provision of that framework.

We also identified the unfortunate transposition of the new article 3(1a) of Directive 96/71, concerning the long duration posting of workers. Although not infringing Directive 2018/957, the transposition of said article does not contribute to increase the effective application of the European legal framework on posted workers in Portugal either. In effect, it introduces an accrued level of uncertainty concerning the application of the Portuguese legal provisions on job security, particularly (but not only) in cases of long duration postings, to workers posted in Portugal.

In what concerns the legal provisions that transposed Directive 2014/67/EU, it is doubtful that Directive 2018/957 and, obviously, Decree-Law 101-E/2020 have addressed all the problems. For example, the *ACT* considers that, despite

its advantages, the IMI does not entirely solve the difficulties inherent to the cross-border application of the rules concerning the posting of workers, namely those stemming from the diversity of languages: many official documents are uploaded in the original language and the translation is, in some cases, very burdensome. Directive 2018/957 and Decree-Law no. 101-E/2020 did not provide any measure to help solve these difficulties.

On the other hand, one may wonder if the Portuguese regime should be adjusted to situations of very short-term posting, as permitted, at least to some extent, by article 3(3) to (5) of the 96/71 Directive: according to Portuguese law, even in cases of very short-term posting, the service provider has to accomplish several obligations, namely the declaration referred to in article 9(1) of Directive 2014/67 and also in article 9(1) of Act 29/2017. Realistically, though, it is not easy to conceive inspection actions to take place in such cases (*e.g.*, workers posted for periods of 3 or 4 days).

Cooperation between labour inspectorates in the enforcement of European labour mobility legislation

Manuel Velázquez[*]

1. *The regulatory framework for the enforcement of European labour mobility legislation*

European labour mobility is governed by the freedoms of movement of persons under EU treaties which include the freedom of movement to work in

[*] EU Labour Mobility Unit, National Anti-Fraud Office (ONLF), Labour and Social Security Inspectorate State Agency (OEITSS), Ministry of Labour and Social Economy.

States other than that of origin, the freedom of establishment of undertakings in any State of the Union and the freedom to provide services temporarily in other States for undertakings, professionals and, indirectly, workers who are posted by such undertakings or professionals to provide services.

In 2019, the European Labour Authority was created by Regulation 2019/1149 (hereinafter the ELA Regulation) to assist the Commission and the States in their tasks of administrative control of intra-European labour mobility.

ELA's scope is defined in Art. 1.4, covering the legal rules on four subjects:

1) **posting of workers in the field of the provision of services** regulated by Directives 96/71 and 2014/67;

2) **free movement of workers** in accordance with Regulation 492/2011, Directive 2014/54 and also Regulation 2016/589 governing the European network of EURES. However, ELA's scope does not include in this area the relevant Directive 2004/38;

3) **coordination of social security systems**, mainly the Basic Regulation 883/2004 and the Implementing Regulation 987/2009 covering the freedoms of movement of workers, establishment and provision of services;

4) **mobility rules for international road transport**, in particular Regulation 1071/2009 on the occupation of road transport operator, Regulation 561/2006 on driving time and Directive 2006/22 on the control of working time in this sector. Rules governing other types of transport such as maritime, inland waterway or air transport are not included.

In addition to the rules laid down in Article 1.4 of the ELA Regulation, Directive 2018/957 amending Directive 96/71 and Directive 2020/1057 laying down specific rules for road transport (lex specialis) in respect of Directives 96/71 and 2014/67 on posting and Directive 2006/22 on the control of working times should be added in the current context.

European labour mobility is in fact only intra-European labour mobility and leaves outside its scope the mobility of third-country nationals which would only be implicitly contemplated in the postings made by persons legally established under the case law of the CJEU in case Vander Elst (09.08.1994, C-43/93) and explicitly in the mobility of highly qualified workers holding the Blue Card governed by Directive 2021/1883 who can move freely in all Member States except Ireland and Denmark.

2. *Monitoring European labour mobility and the role of the European Labour Authority*

Monitoring of European labour mobility should ensure the freedom of movement of persons laid down in TFEU and protect the right to equal treat-

ment between nationals of all Member States in accordance with the Treaties (Art. 9 TEU).

The role assigned to the European Labour Authority (ELA) is to assist the Commission and the States in monitoring the rules on European labour mobility (Art. 1.2. ELA Regulation) which are all covered by the Authority's scope of action provided in Art. 1.4 of the ELA Regulation described above.

The tasks assigned to the Authority is regulated by ELA's Regulation as follows:

– support for the Member States' and the European Commission's labour mobility information systems (Art. 7.1. and 7.4);
– support for intercommunication systems between States (Arts. 7.2 and 7.3);
– support for concerted and joint inspections (Art. 8 and 9);
– support for the transnational enforcement of administrative decisions (Art. 7.1.).

We will then examine each of these actions, as well as the possibility of filling the gaps in the current regulation by recourse to some mechanisms provided for in the Authority's own Regulations (Art. 11) and in other *lege ferenda* criteria.

3. *Information systems to monitor European labour mobility*

Information systems for monitoring European labour mobility are currently articulated around three systems.

1) Declaration of posting to the authorities of the host States regulated by Article 9 of Directive 2014/67.
2) Forms on applicable social security legislation (PDA1) regulated by Articles 15 and 16 of Regulation 987/2009.
3) A specific system established by Article 1 of Directive 2020/1057 for the posting of employed persons in the road transport sector.

3.1. *Posting Declaration*

Communications or declarations of posting are established by Article 9 of Directive 2014/67 on a voluntary basis for the Member States, but its real implementation predates that directive and was already carried out by approximately half of the EU Member States.

By means of this declaration, undertakings which are posting workers have to communicate the content and scope of their activities to the authorities of the host country, always prior to their commencement. These statements are similar to those which in some Member States have to be made by companies to the labour authorities when a new workplace is opened, especially for the purpose of monitoring the conditions of safety and health at work.

Declaration of posting is currently mandatory in all EU States because this has been freely decided by national laws despite the Directive did not oblige them to do so. However, in some States the obligation is imposed only for certain sectors (e.g. Germany) or derogations are made on account of activity (e.g. Belgium) or because of the short duration of posting (e.g. in Spain, activities with a duration for not more than 8 days need not be reported).

Its initial basis was to facilitate the monitoring of the working conditions of posted companies in terms of the so-called hard core of applicable rules, which is essentially composed of the rules on wages, working hours and occupational safety and health. These were, in any case, aspects that had a local dimension and only concerned the labour authorities of the place where the services were provided.

However, over time these communications have served as a basic tool for monitoring the legality of postings, an aspect that necessarily takes on a State wide dimension or may even become interstate, since they can detect e.g. situations of posting fraud or non-compliance with the new time limits laid down by Directive 2018/957 of 12 months which may be extended by another six months.

The content of those declarations may be that defined in Article 9 of Directive 2014/67 itself, but this article does not contain an exhaustive and closed content. There is therefore no complete harmonisation of the content of these communications and there are States which have added other information to those already provided for in Article 9 so that it can be disputed since it may in some cases be regarded as constituting a disproportionate limit to the freedom to provide services.

Most States have developed information systems with such communications, which are normally accompanied by the possibility of electronic reporting.

3.2. *Certificates of social security legislation applicable to mobile workers*

Another information system is based on the issuing of forms or certificates on applicable social security legislation through the form PDA1 (which re-

places the former documents E-101 and E-102) in accordance with the provisions of Art. 15 and 16 of Regulation 987/2009.

The scope such certificates covers not only the posting of workers within the freedom to provide services but also the temporary free movement of workers and not only for employees but also for self-employed persons. Consequently, its scope covers more cases of intra-European mobility than Directive 96/71.

In addition, the use of this document affects all movements which take place whatever their duration, without the exceptions contained for the declaration of posting in national legislation for certain activities or short-term posting.

It is also a certification governed by common European standards and not by the national rules of Member States, which also allows a homogeneity in the treatment of information and prevents particularities due to information requirements of each State.

This certificate provides a tool for the control of undeclared work by Labour Inspectors. However, the issuance of this document could also in fact serve to exercise control of labour mobility between EU States, since the person who has obtained the certificate is considered to have been authorised by the authorities of his home State to exercise such mobility by fulfilling the requirements of the regulations on the coordination of social security systems.

The competent authorities to issue PDA1 are the social security institutions of each Member State and their request and issuance is usually made by electronic means. Article 6 and Annex I of Regulation 2018/1724 of Single Digital Gateway requires to do so at the end of 2023.

In the current discussion of the reform of the regulations it is proposed that the application for PDA1 form should be prior to the posting with exceptions of force majeure, but all the attempts to reform the regulations have so far been unsuccessful.

However, there is already the possibility of electronic transmission of PDA1 forms from the issuing State to the recipient via the EESSI system. The problem is how to redirect the PDA1 transmitted by EESSI by RINA application to national databases in order to set up an information system similar to that of posting declarations.

If authorities of the Member States had access to social security data of mobile workers within a European information system, the creation of labour mobility databases, both national and European, could be achieved to facilitate the monitoring of movements. However, so far only the possibility of creating national databases with such information, such as that created in Belgium on the basis of the GOTOT application, is currently envisaged.

It is also worth highlighting the attempt to create a European social secu-

rity number that identifies companies and mobile workers. This idea was based in 2017 on a Commission report which was later stalled and that the 2021 action plan of the European Pillar of Social Rights has resurrected with the possibility of creating a social security identification card containing a European identification number (Social Security Pass or ESSPASS). There is currently a pilot project to create such a card which is still in the pilot project phase.[1]

The ESSPASS would allow the State Labour Inspectorates to quickly check the status of a person in the social security system of his or her country of origin through a QR code.

3.3. *European Posting Communication System for International Road Transport*

Finally, Directive 2020/1057, the so-called "lex specialis" in labour mobility for international road transport, regulates for the first time a European communication system for intra-European transport.

According to Article 1(2) of that directive, this special system is to apply only where services are provided for a contractor provided for in Article 1(3)(a) of Directive 96/71, leaving unanswered what happens in case of posting within a group of companies or through temporary-work agencies.

Cabotage operations (Article 1.7 of the Directive) and non-bilateral international transport operations (paragraph 13 of the preamble) are clearly included in the concept of posting, and cases of bilateral transport of goods (Art. 1.3) or passengers (Art. 1.4) and cases of mere transit through Member States without loading or unloading (paragraph 11 of the preamble) are not considered as posting.

Posting communications must be made in advance by means of a public interface connected to IMI System, which also allows direct communication between enforcement authorities and transport undertakings in order to require them some specific documents (Art. 1.11).

The implementation of this system has required the adoption of the European Commission Executive Regulation 2021/2179.

However, the communications system established on the basis of that regulation is not the same than that regulated by Article 9 of Directive 2014/67, since undertakings may submit the declaration for a period (a maximum of six months) irrespective of whether the posting takes effect or not, without speci-

[1] Available in *https://ec.europa.eu/social/main.jsp?catId=1545&langId=en*.

fying the transport routes and the consignor, freight forwarders or contractor and subcontractors for which the services are provided.

All of this makes these posting declarations play more as a register of road transport companies than as a posting communication or declaration to carry out a specific provision of services. The posting has to be afterwards verified through road checks or other fiscal communications from consignors, freight forwarders or contractors. Therefore, the communication made by the public interface connected to IMI will serve to identify the company and then establish with it communications and information requirements by the competent transport and labour authorities.

3.4. *Assessment of the current functioning of mobility information systems*

Nowadays European institutions can obtain data on posting and temporary mobility between Member States, however, there are no real data on persons migrating to other states in exercise of the right to free movement of workers and, as a result of intra-European labour mobility studies, the proportion of these movements is between five and six times that of workers who only move temporarily. The last information is, in any case, relevant in order to ascertain the state of the situation and to draw up risk assessment strategies to undertake measures to monitor and inspect working conditions.

Moreover, it must be borne in mind that the communications of posting and those of the applicable social security legislation do not use homogeneous concepts either, since social security communications distinguish between occasional posting (Article 12) and mobility caused by normal and continuous activities in two or more states in the manner provided for in Article 13 of Regulation 883/2004.

However, a number of "*lege ferenda*" approaches can be made for future legislative harmonisation which would simplify the bureaucratic burden on business travel and improve the possibilities of monitoring intra-European labour mobility by the Commission and the Member States' authorities.

a) *Harmonisation of posting declarations*

An informal proposal has recently been put forward by the European Commission for the voluntary and informal harmonisation by the Member States of the posting declaration (E-Declaration) regulated by Article 9 (1) of Directive 2014/67 currently in open terms and on a voluntary basis for Member States and even for a possible unified application at European level to make such a declaration as it has been done by Directive 2020/1057 for the transport sector.

The SMET committee is currently examining this aspect from the perspective of removing obstacles to the freedom to provide services without taking into account the perspective of the protection of labour rights of posted workers provided by Directive 2014/67.

However, the Commission's power under Article 9 (5) of that directive is limited to monitoring the application of the posting declaration and assessing its conformity with EU legislation. That is to say, the Directive does not confer on the Commission the power to lay down harmonisation rules on this point and its establishment would therefore necessarily require the amendment of Directive 2014/67.

b) *Creation of social security databases*

What does seem to be within the reach of States is the creation of national databases of PDA1 forms issued by the competent authorities and those received from other States.

However, only a few States have achieved to set up these electronic databases by their own means, on which there would also be no harmonisation that would make them accessible and manageable for the exchange of information between States.

Such harmonisation, however, would not require legislative instruments but merely technical ones. The sharing of information would depend upon the willingness of States to agree through bilateral or multilateral agreements.

4. *Communication and information systems on labour mobility between States*

In addition to labour mobility information systems, there are also systems that allow the exchange of information between State authorities.

The best-known system is IMI (Internal Market Information System) but there are also other systems and mechanisms whose operation is not as advanced as the EESSI. Let's analyse each of these systems below.

4.1. *IMI information system*

IMI is an information system that has a secure legal basis, Regulation 1024/

2012. The functioning of IMI system can be described as quite effective but the main problem is that its legal scope, as regards labour mobility, is limited only to Directive 96/71 on posting of workers and does not cover the rest of cases of labour mobility which mainly concern regulations on the coordination of social security systems, the freedom of movement of workers and the road transport mobility.

Nevertheless, IMI questionnaires frequently include questions regarding compliance with these other legal instruments, such as the finding that posted workers carry PDA1 forms since this issue is often inextricably linked to the practice of posting control by Member State inspections.

Another important limitation of IMI is that communications between authorities are necessarily bilateral and the system does not allow for multilateral communications between more than two States. This makes it difficult to communicate when the facts being investigated are linked to more than two states and the information needs to be checked.

4.2. *Social Security Information System (EESSI)*

Electronic exchange of information between social security institutions takes place through EESSI (Electronic Exchange of Social Security Information) system. Unlike IMI, this system lacks a clear and specific legal basis in the Social Security Coordination Regulations. Although its creation dates back more than 10 years ago, the first transaction was made in 2019.[2]

Some of its applications are currently underdeveloped and information exchanges only concern social security management and not the inspection of fraud and non-compliance in this area.

For the exchange of information on possible irregularities, it only exists the Fraud and Error Platform, which is not based on the use of an application such as IMI but on the establishment of a network of national contact points whose communication is made via e-mail.

Some Commission reports still point out the frequent use of personal and informal channels between social security institutions for the exchange of information.[3]

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[2] Decision E7 of the Administrative Commission for the Coordination of Social Security Systems of 27 June 2019 on practical arrangements for cooperation and data exchange until the electronic exchange of social security information (EESSI) is fully implemented in the Member States.

[3] Fraud and error in the field of social security coordination. Reference year – 2018 (December 2019).

Communications between State authorities concerning fraud and social security error can only be based on the powers conferred on them by their respective national laws to communicate with each other and these powers are not currently regulated by European Union legislation or by any multilateral agreement.

4.3. *Other means of information exchange*

There are also other ways of exchanging information electronically between institutions, either through bilateral agreements between some States that normally are using e-mail or through systems agreed in the framework of some committees such as the SLIC (Committee of Senior Labour Inspectors) which makes use of the KSS (Knowledge Sharing System) in the European Commission CIRCA site for the exchange of unprotected information between occupational safety and health inspections or the Employment Services information network of Member States.

4.4. *Assessment of current intercommunication systems between authorities*

As it can be seen, there are large gaps and shortcomings in the intercommunication systems between State authorities. IMI system is currently the safest legally and the best-functioning system, however, has significant limitations in terms of its legal scope.

In the area of social security, electronic exchanges are still scarce and poor, and the institutions lack the same sound legal instruments to do so.

Other systems have no legal basis and could only serve for the exchange of unprotected information with little legal value for administrative control procedures.

5. *Inspection actions on labour mobility*

5.1. *Inspection models on labour mobility in EU Member States*

Monitoring of labour mobility by the Member State inspection bodies is not uniformly structured and it could be said that, in general terms, each country has a model with its own characteristics. Among them there are some similarities, and these are some examples:

– a labour inspection model covering only labour issues related to Directive 96/71 on posting such as the French inspectorate of DIRECCTE, or the Portuguese Working Conditions Authority (ACT);

– another model of social security inspection which only covers the scope of regulations on the coordination of systems 883/2004 and 987/2009, such as the French URSSAF or the Portuguese Social Security Inspectorate;

– a tax or financial inspection model covering labour mobility aspects of wage control and A1 certificates, as in the case of Germany and Austria;

– there are also mixed models such as the Spanish and Italian Inspectorates where there is a single body with powers to enforce the labour matters under Directive 96/71 and the social security rules under the regulations on the coordination of systems.

Full information on the competences and powers of inspection systems can be consulted on the SLIC website at the European Commission on the electronic handbook on cross-border control.[4]

5.2. *Concerted and joint inspections*

Concerted and joint inspections are covered by Articles 8 and 9 of ELA's Regulation. In the former, each Inspectorate carries out its work and then shares the information obtained and the Authority contributes to the logistical and translation costs if there is an agreement between the parties.

Joint inspections agree to carry out visits by inspectors from two or more States with the possible presence and support of the European Labour Authority if there is agreement between the parties.

Guidelines have been drawn up by ELA[5] with the agreement of the Member State authorities according to its capacity building competences laid down in Article 11 of ELA's Regulation.

However, there is still no legal regulation of such inspections at European and state level. As the guide shows, some legislation does not expressly include the carrying out of such inspections and even according to some of them their practice is not possible.

In Spain, Royal Decree-Law 7/2021 recently amended Article 13(2) of

[4] It is available on the SLIC website at the European Commission in the official language of each State. Go to *https://ec.europa.eu/social/main.jsp?catId=148&intPageId=685&langId=en*, then go to Documents for access to the official SLIC documents see the SLIC document library, and then go to *13. E-Handbook – Cross-border Enforcement on Occupational Safety and Health by SLIC Inspectorates.*

[5] Available at *https://www.ela.europa.eu/en/concerted-and-joint-inspections.*

Law 23/2015 on the Labour and Social Security Inspection System to include the possibility of carrying out joint inspections with officials from other States and the European Labour Authority.

In any case, setting-up these joint inspections is based on the principle of the voluntary basis by the Member State authorities and there are still important regulatory gaps to be filled, beyond the role that bilateral agreements may have in each case, in terms of the role and powers of the visiting Inspectors in other States other than their own and the transmission of data and information during inspections.

We shall now examine a number of cases in which concerted and joint inspections are required.

5.3 *Business fraud on labour mobility*

On the one hand, fraud on labour mobility may affect employment aspects as regards non-compliance with the provisions of Directive 96/71 and, in particular, the requirements for companies and employees laid down by Article 4 of Directive 2014/67.

The direct consequence is the full application of the labour legislation of the State of employment but, in fact, the provisions of the so-called hard core of the legislation of the country of employment (Article 3 of Directive 96/71) which mainly include wages, working hours and the prevention of occupational risks must be applied.

In other words, the consequences of labour fraud would be partial and of little relevance since the most important provisions would apply, in any event.

On the other hand, fraud could also affect social security applicable legislation. In this case, fraud entails a change in the applicable legislation and is therefore always more relevant. However, applying this change of legislation requires the prior withdrawal of the document A1 issued by the social security institution of the country that issued it (Article 5(2) and (3) of Regulation 987/2009) which must always act under the principle of sincere cooperation in accordance with the case law of the ECJ judgment of 06.02.2018 C-359/16, in Altun case.

Social security fraud affects different situations of posting under Article 12 of Regulation 883/2004 and multi-activity situations in two or more States regulated by Article 13 of that regulation.

The main difference between both articles is that in the first case it is an occasional posting for the purpose of carrying out a temporary activity in another Member State (either to provide a specific service or to carry out any

other type of temporary activity in the exercise of the right to free movement of workers) whereas Article 13 refers to a "normal" or usual activity of each worker (not of the undertaking or undertakings that hire him) in two or more Member States.

However, the difference between what is occasional or usual is often diffuse and in order to prosecute it, it is necessary to take into account not only the fixed or temporary nature of the relationships but also other factual circumstances. In no case is it permissible to describe as mobility situations when works only take place in a single State (ECJ Case Format) or are carried out in a purely marginal manner in a Member States (Article 14 (5) (b) Regulation 987/2009).

The control of both situations is very different. In case of posting (Article 12) a check must be carried out on the activity of the undertaking in the country of origin, which must be substantial, and a check on the activity or stay of each worker in the country of origin, which must be prior to posting (in this case, it does not need to be normal or usual in that country as required by Article 2(a) of Directive 96/71 and Article 4(2) of Directive 2014/67).

That is to say, there are similar requirements in the Regulations on Social Security Coordination and Posting Directives as regards the undertaking, but considerably laxer as regards the worker in Social Security Regulations, since Directive 96/71 requires a normal work activity in the Member State of origin whereas Article 14(1) of Regulation 987/2009 only requires that social security legislation of the State of origin be applicable just before the posting.

On the other hand, in case of fraud under Article 13 Reg. 883/2004 referring to multiactivity in two or more States, enforcement must be carried out mainly over the place of residence and activity of each worker in the country of origin (Art. 13(1)(a)) and secondly over the place of the company's headquarter in order to check if it as a real centre of management according to Article 14(5)(a) of Regulation 987/2009 regardless the activity of the undertaking in the Member State of the head office.

In other words, the control of fraud in situations of multi-activity always requires an initial analysis of the individual situation of each worker, since this consideration takes precedence over the place of the undertaking's main activity (which applies only in the cases of Article 12 of Regulation 883/2004) or the place of the company's headquarter (which is a subsidiary criterion under Article 13(1)(b) of Regulation 883/2004), whether it is the undertaking which formally hired the employees and the undertaking which de facto assumes this function, as interpreted in the judgment of CJEU 16.07.2020 C-610/18 in AFMB.

5.4. *Fraud in wages, working hours and social security contributions*

Most frequent situations of travel fraud are those involving jointly the payment of lower wages than those due in the implementing collective agreement or the legislation of the host country, the lack of registration of the hours and days worked by the company and the consequent fraud in the social security contributions of the country of origin resulting from both situations.

It is therefore a fraud affecting compliance with labour law in the host Member State and compliance with social security legislation in the Member State of origin.

The purpose of the joint or concerted inspection is to verify the amount of wages actually paid by ensuring that there is no double documentation of the payment in each Member State, to verify that the working hours are recorded in the country of employment and also to verify that the social security contributions made in the country of origin correspond to the wages and working hours due in the host country.

That is to say, through the inspection of the same facts, aspects related to the applicable legislation of both States can be covered at the same time.

5.5. *Fraud in occupational safety and health provisions*

Fraud to the provisions on safety and health at work usually involves the following aspects.

5.5.1. *The control of obligations carried out in the State of origin*

There are certain legal obligations laid down in the occupational safety and health directives which can be fulfilled by undertakings in the State of origin before posting. These include training, health surveillance through medical examinations and risk assessment. All three are contained in the official IMI questionnaires on usual questions between national authorities in the States on posting, which were included in the questionnaire by the European Commission at the proposal of SLIC in 2016.

It has been commonly understood by States that in these obligations undertakings have to comply with the legislation of the host Member State in terms of content, but they can also be implemented in the Member State of origin before the posting.

Difficulties in control may arise when the application of legislation on these obligations varies from one State to another. For example, where a pre-work medical examination is considered to be voluntary in one legislation and in another legislation might be mandatory. Or, where the legislation of the two

countries is similar, but the conditions required for preventive training in the collective agreements can vary, as it usually occurs in collective agreements of the construction industry.

5.5.2. *Direct control of working conditions*

There is usually no problem in is the monitoring of the conditions of safety and health at work, since the Inspectorate of the State of employment can exercise this control directly.

Moreover, there is usually a direct or joint liability of the contractor with regard to the conditions of safety and health at work and this fact mitigates the problems of cross-border enforcement.

5.5.3. *The control of accidents at work and occupational diseases of posted workers*

The most controversial issue is the control of accidents at work for a number of reasons.

Firstly, due to the possible lack of medical care for workers who suffer injuries at work. The European Health Insurance Card (EHIC) does not serve professional contingencies but only for common contingencies and only for situations of need and urgency.

The system established by the Administrative Commission for the care of workers suffering from work-related accidents and professional diseases is the extension of Form E-123, which in most of the Member States has already been replaced by its current version of Form DA1 so that the worker can be cared for by health institutions equivalent to the Spanish Mutuality.

The second issue is the lack of notification of work-related accidents by posted companies or even the complete lack of legislation on this obligation by many Member States.

Article 9(1)(d) of Framework Directive 89/391 provides for the need for States to establish an obligation on all undertakings "draw up, for the responsible authorities and in accordance with national laws and/or practices, reports on occupational accidents suffered by his workers".

Currently companies always report accidents to social security institutions so that workers can obtain social security benefits in the country of origin but do not have the same motivation regarding communication to the labour authorities of the host country.

The third question concerns the difficulty of the labour inspectorate's investigation of labour accidents, because they often give rise to the fact that the company has already returned to its place of origin and the cooperation of the inspectorate of that State is essential in order to verify the

facts. IMI questionnaire on the safety and health of posted workers addresses this situation.

6. *Transnational notification and enforcement of administrative decisions*

Finally, we examined the aspects relating to the notification and implementation of administrative acts on the control and surveillance of legislation in cases of labour mobility.

These mainly concern two issues: administrative penalties imposed on undertakings with mobile workers and social security claims against those liable, whether they relate to contributions or benefits. The two issues are then discussed.

6.1. *Transnational enforcement of administrative penalties in case of posting*

Transnational enforcement of administrative penalties is only laid down in cases of posting provided for in Article 13 et seq. of Directive 2014/67.

In other cases of mobility under Article 1.4 of the ELA Regulation, there is no European legal instrument allowing the transnational enforcement of administrative penalties.

However, the transposition of this directive is not exempt from controversy because some Member States, such as Germany, have interpreted the application of Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties to be sufficient in such cases.

However, the legal framework of this Framework Decision is different since it falls under the third pillar of justice and home affairs policies and there are Member States such as Spain that consider it to be applicable only to fines imposed by criminal courts, as stated in the current Law 23/2014 on the mutual recognition of criminal decisions in the European Union, and not to administrative sanctions.

Moreover, transposition of Directive 2014/67 on this aspect has not yet been completed in some Member States. In Spain transnational enforcement of fines is provided by Law 45/1999 but its implementation is still pending of regulatory development.

In addition to these legal difficulties, the real use of this mechanism by Member States is still very scarce and there are several reasons that can explain this inaction.

On the one hand, the money collected is for the administration that exe-

cutes the fine and not for the claimant administration and on the other hand transnational enforcement by another administration entails the extinction of the penal liability and no longer allows its execution when the company returns to the host country. Therefore, governments prefer that debts remain in force in order to be able to enforce it at a later stage if this possibility arises.

6.2. *Transnational enforcement of decisions in the field of social security*

The transnational enforcement of financial claims in matters of social security is laid down in Article 84 of Regulation 883/2004 and Articles 76 to 85 of Regulation 987/2009.

However, there are no decisions of the Administrative Commission to implement them, but only bilateral agreements between the States on very partial aspects, without there being any multilateral agreements that can fill these gaps. All this makes it impossible in practice to trans-nationally enforce these resolutions.

7. *Legal loopholes and* lege ferenda *proposals*

Finally, let us recall the main legal gaps that we have already pointed out throughout this study.

1) *Lack of harmonisation and coordination of information systems on labour mobility monitoring*

At present, there are three information systems on labour mobility control: declarations of postings to national authorities, PDA1 certificate on social security applicable legislation and road transport posting declarations via an IMI interface. None of these systems covers the free movement of persons to work as an employed or self-employed person in other States.

The first is part of the national information systems and their harmonisation and possible unification into a single European system should entail a reform of Directive 2014/67, while the other systems are part of a European information system managed directly by EU institutions and their possible coordination would depend therefore on executive decisions adopted by them. Moreover, it should also be considered the future relevance of ESSPASS as another source of information on labour mobility.

The unification of all these systems in a single information system at Euro-

pean level for the control of labour mobility would result in a considerable reduction of bureaucratic burdens for companies and mobile persons who could see their obligations reduced to one and would also be an obvious advantage for all the authorities involved in the control of labour mobility.

2) *Lack of intercommunication mechanisms between State authorities on situations other than posting*

It is essential to extend the existing mechanisms of intercommunication between the authorities of the States, in particular IMI, to other issues such as the control of the applicable legislation on social security and the free movement of workers.

In other words, so that the possibilities of intercommunication by IMI have the same scope as the rules which make up the scope of Article 1(4) of the ELA Regulation.

3) *Lack of harmonised rules on joint and concerted inspections*

Thirdly, there is a need for an European legal standard regulating concerted and joint inspections on vital issues such as the powers and powers of inspectors in other states and transfers of information between persons conducting inspections and making such inspections applicable to all Member States under the same conditions without any exceptions or special regimes.

Current guidelines of the European Labour Authority under article 11 of ELA's Regulation on capacity building can help to meet this objective but they are insufficient to remove the current obstacles in some national legislation.

4) *Transnational implementation of administrative acts on labour mobility*

Finally, it is necessary to regulate the transnational enforcement of all administrative decisions imposing penalties and claims for social security debts relating to labour mobility, going beyond the current framework of penalties which only affect posting and developing the current social security regulatory framework to make it truly operational.

Lege ferenda's proposals to fill these gaps could consist of the use of these instruments:

– on the one hand, implementing legal instruments to amend regulations and directives provided for in Article 1(4) of the ELA Regulation to include the provisions that have made these objectives possible;

– failing this, it would be possible to draw up conventions or treaties capable of filling, in a single act, all existing legal gaps, otherwise reforming all the rules listed in Article 1(4) of the ELA Regulation would have to be undertaken.

This solution has a background such as the Rome Convention (1980), the Convention on Mutual Assistance in Criminal Matters (2000) and the Prüm Treaty or Agreement (2006) on law enforcement cooperation;

– in a subsidiary and complementary manner, the elaboration of non-binding guidelines of the European Labour Authority (Article 11(a) of Regulation 2019/1149) to harmonise the practice of States in the handling of information, exchanges, joint and concerted inspections and the transnational enforcement of sanctions and complaints in cases of mobility.

These guidelines and guidelines have already been approved for joint and concerted inspections and their practice could be extended to other areas.

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