Spreading the best practices in implementation of EU-Law on posted workers

Posting of Workers Comparative Report:
The Czech Republic, Italy, Poland, Slovakia, Spain

Marek Benio

Part I. Review of the implementation of the UE law on the posting of workers in the Czech Republic, Italy, Poland, Slovakia and Spain.

1. The scale and directions of posting of workers

The selection of the Member States for this comparative study is driven by the idea of showing the perspective of both (mainly) sending and (mainly) receiving Member States, as well as to narrow the analysis to a few Member States only instead of ranking 27 Member States.

The Member States presented in the following report are the Member States from which the partners of Synergy project come. They are the Czech Republic, Italy, Poland, Slovakia and Spain.

Based on the number of Portable Documents A1 issued by competent institutions they could be ranked as follows (in absolute numbers):

Sending MS
1. Poland
2. Spain
3. Italy
4. Slovakia
5. Czech Republic

Receiving MS
1. Italy
2. Czech Republic
3. Slovakia
4. Spain
5. Poland

Table 1. Sending and receiving Member States

But when the same numbers are cross referenced with the size of the working population we could understand the importance of the posting of workers and freedom to provide services to the economy of a given Member State. In such ranking Slovakia would come first as a sending Member State and second as the receiving Member State and the Czech Republic would come first as a receiving Member State. It is fair to say that posting of workers has biggest relative influence on the economies of these two Member States.

The following figure represents the dynamics of the posting of workers in the years 2012 – 2019, but only when comparing the number of PDs A1 issued by the competent institution of each Member State. It is worth noticing that Spain and Slovakia have noted significant slow down of the number of workers posted from these countries in 2019. There is some data from the Member States competent institutions showing that the drop in the number of PDs A1 due to Covid-19 was smaller than expected. For Poland it was only 4,3 %. However the slow down in Spain and Slovakia are showing a tendency to intentionally reduce the posting of workers from these two Member States prior of the pandemic.

YEAR	PL	ES	IT	SK	CZ
2012	341100	76960	52237	48924	24162
2013	385422	101705	59114	56442	30912
2014	428405	111557	74431	89494	31675
2015	463174	125711	91740	98368	37174
2016	513972	147424	114515	112028	47578
2017	573358	191148	152528	112978	67933
2018	605785	248532	169774	135151	63693
2019	648032	252270	215628	127706	80973

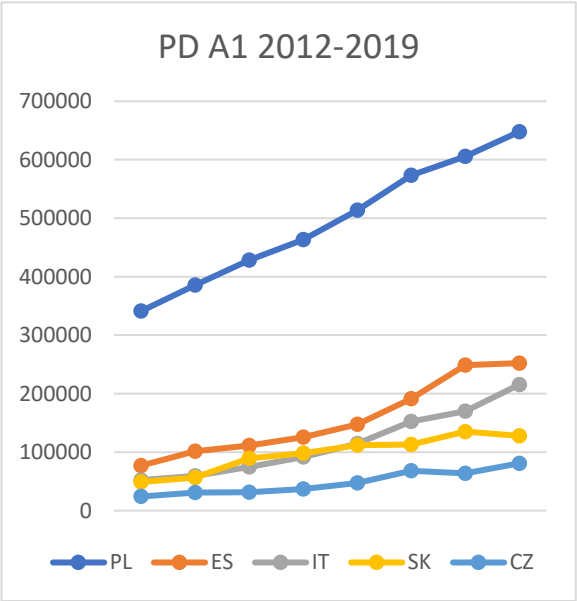

Fig. 1. PDs A1 issued be competent social security institutions

The explanation why Poland and Spain have very little inflow of posted workers could be the inflow of third country nationals from Ukraine and South America respectively. Third country nationals play also important role in the economies of Slovakia – Serbians and Ukrainians and Italy – Serbians. The Czech Republic has relatively restricted immigration policy, i.e. obtaining the work permit and worker's visa is subject to economic conditions on the Czech labour market. Thus there is a growing number of third country nationals who are employed in another Member State (mainly in Poland) and then posted to the Czech Republic.

For more qualitative analysis in Part II of this report the following simplified classification is offered:

Predominantly sending MS: **Poland, Slovakia**

Sending and receiving MS: **Spain**

Predominantly receiving MS: **Czech Republic, Italy**

The dominant directions of posting workers from the compared Member States are the following:

- From the Czech Republic – to Germany, Austria, Slovakia
- From Italy – to Germany, Austria, France
- From Poland – to Germany, France, Belgium
- From Slovakia – to Austria, Germany
- From Spain – to France, Germany

The dominant sectors in which workers are posted are:

- construction sector
- international transport
- live-in sector (specifically from Poland and Slovakia)
- manufacturing
- other

2. Implementation of the revised directive

The directive 96/71/EU concerning the posting of workers in the framework of the provision of services as revised by the directive 2018/957/EU is addressed to the governments of the receiving Member States. Apart from the provisions concerning the cooperation between Member States, all the provisions put obligations on the receiving Member States – its government and control authorities. Specifically, Art. 3 – the one which lists 9 areas of employment term and conditions – requires from the receiving Member State to ensure that employers from other Member States who post workers to their territory will apply a set of employment terms and conditions from its legislation and not from the legislation of the sending Member State. Unless, of course, the terms and conditions of the sending Member State are more favourable for the posted worker.

There are two critical problems resulting from such legislative construction. The first one is that the control authorities of the receiving Member State have no formal control over an employer registered in another Member State and yet they are responsible for ensuring that this employer will obey the rules set out in the legislation of the receiving Member State. The second one, more serious, is that the control authorities have neither competence (power) nor are they qualified to compare their own provisions with the provisions of another Member State in order to apply the favourability principle. As a result the sending Member State control authority is able to control only their law compliance and the receiving Member State control authority is able to control only the compliance with local legislation of the receiving Member State.

Without regular thorough cooperation of the control authorities of two Member States, the proper enforcement of the directive is impossible to execute. As a result employers who post workers comply to the rules of a Member State in which the probability of control and the level of the penalties is the higher. – Instead of applying the rules which are more favourable for the worker.

The way the directive has been implemented in the country legislations of all 5 Member States is similar. The specific provisions demanding foreign employers to comply with the 9 areas of the local law have found their place either as a part of the labour code or as a separate legislative act (e.g. the case of Poland). The biggest difference in the implementation of the directive lies in the role of social partners, both in setting the rules and in monitoring them. In Italy and Spain, where collective agreements play a vital role in the shaping of employment conditions, there is statutory delegation of power to social partners. In Poland, Slovakia and the Czech Republic the labour codes allow the social partners to set out collective agreements with the provisions equal or more favourable to generally

binding laws and decrees. Italy is the example of predominantly receiving Member State with no system of proclaiming collective agreements as generally applicable. In such case Italy is entitled to demand the application of the collective agreements which are most representative for a region, sector or profession. This solution is problematic, because personal scope of application of local collective agreements in Italy is clear only to the parties of such agreement, whereas there is doubt if such agreement is the most representative for the region, sector or profession.

3. Single national web sites, registration and notification

If the provisions of the receiving Member State are to be obeyed by employers from other Member States, they must be clear and easily accessible. To this end the enforcement directive 2016/67/EU has introduced an obligation for each Member State to publish all terms and conditions applicable to posted workers on a single national web site. 6 years after the implementation deadline the single national web sites are far from providing all the information necessary to comply with the legislation of the receiving Member States. With the revised directive which introduces the concept of long term posting and extended set of terms and conditions of employment applicable to posted workers, it will prove impossible to publish complete information on the single national web site, especially in the Member States with significant number of collective agreements and no system of declaring them as generally binding. But as the Slovak case shows, even with as simple notion as 'remuneration' there may be no country legal definition of remuneration or a list of mandatory elements thereof. Additional complication stems from the fact that in most Member States where there is an obligation to notify the receiving Member State authorities of the arrival of a posted worker or of the extension of posting period over 12 months, it is usually a different web site as the single national web site envisaged in Art. 5 of the enforcement directive.

The single national web sites and addresses of the liaison institutions of the 5 Member State of our interest are presented in Appendix 1 at the end of this report.

Part II. Problems and questions resulting from the revised directive.

From the comparative analysis of problems most frequently noted by the experts in the project, five seam to be of utmost importance and need further clarification: the principle of favourability, the elements of remuneration, allowances specific to the posting, calculation of the posting periods and extended catalogue of terms and conditions of employment.

4. More favourable conditions – the heart of the directive

Contrary to a widespread opinion the core of the directive on the posting of workers is not the list of minimum terms and conditions envisaged in Art 3(1) as amended by the Revision Directive 2018/957/EU, which now lists 9 areas of employment conditions where the law of the receiving Member State should apply, regardless of which legislation applies to the labour contract of a posted worker. In reality, the provision which protects the rights of posted workers the most is the principle of favourability envisaged in Art. 3(7) of the Posting of Workers Directive 96/71/EU. Before explaining the practical significance of this provision, it is worth noting that the first sentence of paragraph 7 has not been altered by the Revision Directive 2018/957/UE and since 1996 it reads as follows:

> *7. Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers.*

So the directive imposes the application of the law of the receiving Member State in nine basic areas listed in Art. 3 (1) but only if their provisions are not less favourable for a posted worker. Moreover it imposes all the applicable terms and conditions of employment (with three exceptions) to long term posted workers Art. 3 (1a) but only of their provisions are not less favourable for a posted worker.

This principle can be explained with a simple example of remuneration: A posted worker should receive the remuneration regulated in the legislation or collective agreements applicable in the receiving member State only when it is more favourable for him or her then the remuneration due under the legislation applicable to the labour contract by default, i.e. usually that of the sending Member State. As a result, if a person from high wage country is posted to low wage country, he or she is eligible for a higher remuneration of the two systems. The same applies to the duration of paid annual leave, maximum periods of work and minimum periods of rest, health and safety regulations, non discrimination provisions, etc. For long term posted workers the principle of favourability applies to all working terms and conditions.

This simple rule has one serious practical disadvantage: it requires constant comparison of all terms and conditions of employment of the two labour law systems. Unfortunately, not all the employment terms and conditions are as easy to compare as were the good old “minimum rates of pay”.

5. Comparing remuneration

The revised directive requires that a “remuneration” applicable in the receiving Member State is paid. Such remuneration consists of *all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards(…)* The elements of remuneration awarded to posted worker must therefore be:

- constituent,
- mandatory,
- more favourable.

When comparing which terms and conditions of remuneration are more favourable we should not only compare the amount of particular element of remuneration but also conditions of eligibility. Some elements of remuneration may be subject to additional conditions like low absence record, or minimum work record. On top of that the function of particular elements of remuneration may be different in different systems. For instance, sick pay in Germany takes the form of continued payment of remuneration but it is clearly considered part of the social security system, although an employer is responsible for paying it, while in Poland sick pay is clearly part of the labour law, constitutes employers contractual obligation stemming from the Labour Code and thus must be considered a constituent and mandatory element or remuneration. If a posted worker gets sick, we should not compare the 100% German sick pay wth the 80% Polish sick pay. Instead we must determine first if this payment is part of the remuneration or a social security benefit. In the latter case, the applicable legislation in social security may be different than the applicable terms and conditions of employment. In the worst case a sick posted worker will have no right to sick pay under labour law nor under social security law. In another scenario, he or she will be eligible both for sick pay (labour law) and for sickness benefit (social security).

6. Allowances specific to posting

The odd placement of the provision explaining which allowances specific to the posting may be included and which must be excluded from the notion of remuneration should not diminish the clarifying effect thereof. The said provision has been placed in paragraph 7 of Art. 3. – the same which imposes the favourability principle described above. Such placement is odd because the provision is directly related to the understanding the distinction between remuneration which is an economic equivalent of human work and allowances specific to the posting which is a financial support of a posted worker aimed at covering the costs of travel, board and lodging when being posted. Such provision has a basic function of preventing posted workers from being victims of contemporary economic slavery. In extreme cases contemporary slavery means that the worker earns less than he or she would owe to the employer for travel board and lodging. The revised provision clarifies that such allowances specific to the posting can be treated as part of the remuneration (i.e. included in the remuneration) only if they were not paid in reimbursement of expenditure actually incurred on account of the posting. In practice, if a posted worker receives reimbursement of the costs on the basis of bills and invoices for hotels, tickets, meals presented to employer, such amounts may not be included as part of the remuneration. If however, allowances are paid notwithstanding the condition of providing evidence of costs actually incurred, they may be considered to be a part of remuneration.

> *[old] Allowances 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.*

> *[new] Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker*

for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.

7. The posting period

Effective duration of posting

After the introduction of long term posting, the duration of posting must be carefully calculated for each individual posted worker, as it has an influence on the applicable terms and conditions of employment. When does it start? When does it end? Do breaks and intervals count in or out of the duration of posting?

The word "effective" implies calculation of days (hours) during which a worker has actually performed his/her work obligations. With such strict language interpretation only work days should be counted in. Any intervals at work, irrespectively of where a worker physically is should be subtracted. However, if such was the will of the legislator, the effective duration of posting would have been given in the number of (working) days, and not as a 12/18 months. This suggests, that the notion of "effective duration of posting" is to be interpreted similarly to the "effective duration of employment". In such a case weekends, sick leaves, other short breaks and intervals are to be counted in. There are some breaks in the duration of posting which could not be applicable *per analogiam* to the duration of employment. Certainly, a break in the posting period during which employee carries out his/her work in the sending Member State counts as the duration of employment but does not count as the duration of posting. A worker cannot be working at his/her home MS and be posted simultaneously. The same goes for the situation when a worker is posted to a third Member State. The period of posting to a third Member State may not be calculated as effective period of posting in the second Member State.

Jan is employed by a Polish service provider and posted for 9 months to Germany, then for 3 months to Belgium and then returns within the same service contract for 3 months to Germany. His effective duration of posting in Germany would be 12 months within 15 month period.

The analogy to the duration of employment is useful and justified because posting of a worker requires existence of the employment contract throughout the entire duration of posting. The most problematic will be the paid annual leave, which is a break employees obligations always included in the duration of employment. But should it be included in or excluded out of the "effective" duration of posting? And should the answer depend on whether the paid leave is granted while being posted or after the posting assignment is completed?

When implementing the revised directive, most of the Member States have not gone beyond the translation (or mere transcription) of Article 3 (1a) into their legislation.

Cumulative duration of posting

When it comes to cumulative calculation of the posting periods of more than one worker posted by the same employer to the same place for the same task, the interpretation is relatively easy. The aggregation of the posting periods has been introduced as a safeguard against a possible abuse of the long term posting by sending posted workers with a fresh account one after another. This way individual effective duration of posting would never exceed 12 months. This safeguard is criticised due to unequal treatment of workers. The reason for introducing the long term posting is clearly expressed in the Preamble of the revised directive.

> *(9) (…)in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out.*

The link between the labour market of the host Member State and the worker who is posted for just a few weeks but whose colleagues have been carrying out the same task in the same place for the same employer before him long enough, that the cumulative duration of posting exceeded 12 months is too weak to cover him with additional set of terms and conditions of employment. Nevertheless the EU legislator has decided that this worker's rights present a lower value than the safeguard against possible abuse of the long term posting.

If Jan, while in Belgium, was replaced in Germany by Stanislaw, his effective duration of posting to Germany would amount to 12 months within a 12 months period, assuming the employer, the place and the task of both workers were the same.

The cumulative calculation of posting periods forces unequal treatment of workers doing the same job for the same employer. It creates a strange situation whereby calendar months do not overlap with the months of posting. The puzzle of which terms and conditions of employment apply at which moment of the posting assignment to which employees seams to introduce chaos and uncertainty that make the protection of workers' rights more difficult.

According to the interviews with the employers such cases are not rare. Asked for the best practice in how to calculate posting periods for individual workers, they answered *"We are not. Whenever possible the service contract does not exceed 12 months period. If this proves impossible, we change the employer, so that the duration of posting of two workers will not be cumulative. In practice, to avoid charges of unequal treatment depending on the duration of posting, the long term posting should never occur."*

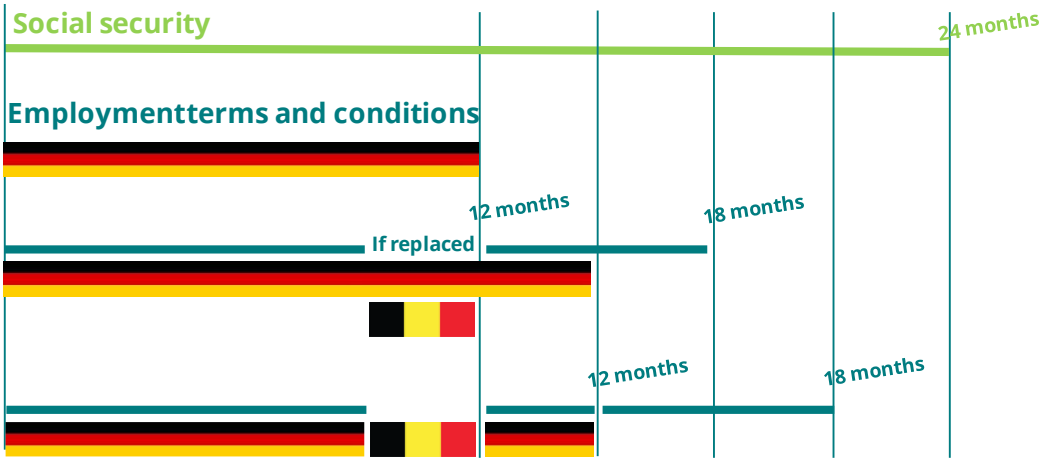

Fig. 1. Problems with equal treatment when calculating periods for long term posting – worker's rights depend on other workers' records.

8. All the applicable terms and conditions of employment - extended catalogue

Both the receiving and sending Member States in the analysis had problems with determining the extended catalogue of terms and conditions of employment applicable in the case of long term posting. The reasons of concerns were however twofold.

In the case of receiving Member States the interviewees claimed that the applicable terms and conditions of employment take their sources from different level legislation or from collective agreements. At times it is difficult to determine which collective agreement is binding even for local workers, not to mention workers posted to such Member State. The experts from the receiving Member States claimed that after the revision of the basic directive, it is impossible to comply with the obligation envisaged in Art. 5 of the Enforcement Directive, i.e. to publish all applicable terms and conditions of employment for posted workers on the single national web site. The collective agreements are a dynamic source of terms and conditions of employment, there are too many of them, and even if they were published on the single national web site, which some Member states attempted to do, it is still not clear which collective agreement is applicable in a specific case. This is problematic especially in the Member States which have not introduced a mechanism of announcing collective agreement as generally binding and which have decided to apply the privilege of collective agreements which are most representative for a branch of industry, for a region or profession.

The employers from the sending Member States on the other hand have claimed that the level of uncertainty as to which provisions apply combined with the necessity to compare them with the more favourable provisions of the sending Member State make the legal environment for posting of workers extremely uncertain. Asked why not applying all terms and conditions of the receiving Member State, the employers claim that this does not liberate them from the obligation to apply more favourable

working conditions of the sending Member State. In case of control thay always have to prove that they did not apply local law, because of favourability principle. But when controlled by home labour inspection, they have to prove the reverse.

In conclusion – the most important rule when it comes to the posting of workers is to compare provisions and apply more favourable ones. The problem is that not all of them re easy to compare. The study has revealed that the provisions for posting of workers are far from clear and far from being easily applicable. The representatives of the posting companies were uncertain of which rules apply and when do they change. It is to early to show the long term effect of such legal uncertainty on the protection of rights of the posted workers. With the exception of one clarifying provision regarding the allowances specific to the posting of workers, the new rules are more complicated than the old ones. The law is complex and therefor not easily accessible for workers. Each employee in the European Union has the right to know if he or she is covered by collective agreement(s) and if so by which one. The obligation to inform the employee stays with the employer. In case of posted workers however, such information provided with legal certainty may prove to be difficult. On the other hand, a low risk of being liable for non compliance may tempt employers to skip the burdensome red tape and send workers ‘under the radar’.

APENDIX 1 – List of the single national web sites and liaison institutions

CZECH REPUBLIC
http://www.suip.cz/vysilani-pracovniku/posting-of-workers/
Ministerstvo práce a sociálních věcí
Na Poříčním právu 1
CZ-128 01 Praha 2
Tel: +420 22 19 22 25 25 3

ITALY
https://distaccoue.lavoro.gov.it/en-gb/
Ministero del Lavoro e delle Politiche Sociali
Direzione Generale dei rapporti di lavoro e delle relazioni industriali
Via Fornovo, 8
IT-00192 Roma
Tel: +39 06 46 83 40 45 45
Tel: +39 06 46 83 74 1
E-mail: DGRapportiLavoro@lavoro.gov.it

POLAND
https://www.biznes.gov.pl/pl/portal/00194
Państwowa Inspekcja Pracy - Główny Inspektorat Pracy
Barska 28/30
PL 02-315 Warszawa
Tel: +48 22 39 18 29 6
Fax: +48 22 39 18 29 7
E-mail: kancelaria@gip.pip.gov.pl

SLOVAKIA
https://www.ip.gov.sk/general-information/
Národný inšpektorát práce
Masarykova 10
SK-040 01 Košice
E-mail: meno.priezvisko@ip.gov.sk

SPAIN
https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm
Dirección General de Empleo Subdirección General de Ordenación Normativa
Pío Baroja, 6
ES-28009 Madrid
Tel: +34 91 36 31 82 5
Fax: +34 91 36 32 03 8

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9. M. Kiełbasa, *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego,* Warszawa 2017;
10. M. Madrak, *The Favourability Principle under the Posting of Workers Directive: Minimum Rates of Pay*, Il Diritto in Europa Oggi, Roma 2019.
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13. 'Synergy' Country Report – Italy (unpublished)
14. 'Synergy' Country Report – Poland (unpublished) – Benio, Marek
15. 'Synergy' Country Report – Slovakia (unpublished)
16. 'Synergy' Country Report – Spain (unpublished) - Lozano Hidalgo, Ángel
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