

Posting of workers -the concept of temporality in between intuition and reasoning

Kant describes time as a form of pure intuition.

Can the maximum duration of an assignment (from the perspective of labour law) be determined by legal reasoning?

In *Rush Portuguesa (C-113/89)* the act of birth of the Posting of Workers Directive, workers *return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.*

Completing work might last days, but might last years as well:

Thus, services within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building (Judgment of 11 December 2003, Schnitzer, C-215/01, EU:C:2003:662 paragraph 30).

Example: *Sagrada Familia (Barcelona)* will be completed in 2026, 144 years after construction was started. On March 19, 1882, when the construction was started, only unconscious intuition could have predicted completion in 2026.

Moreover : *No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty (Judgment of 11 December 2003, Schnitzer, C-215/01, EU:C:2003:662 paragraph 31).*

As regards gaining access to the labour market of the host Member State, it is accepted that making available of labour is specifically intended to enable workers to gain access to the labour market of the host Member State, and that regardless of the duration of the assignment.

Temporality in the meaning of the Directive 2008/104/EC on temporary agency work as interpreted by ECJ case law must be addressed distinctively.

To what extent Directive 96/71/EC as amended by Directive 2018/957/EU and its enforcement Directive 2014/67/EU are addressing the concept of temporality?

Directive 2018/957/EU addresses the concept of temporality from two perspectives:

- posted worker, and
- undertaking posting the worker (employer)

A long period of posting (in relation to a posted worker) determines a factual link to the labour market of the host Member State (vs situations of hiring out which determine link as of the first day of the assignment).

On the other hand, successive posting of workers replacing other posted workers to carry out similar tasks at the same place of work determine an equivalent situation from the perspective of the undertaking making the posting. Once that link has been established, any worker posted to

replace another posted worker is deemed to have a link to the labour market of the host Member State.

Directive 2018/957/EU introduces the concept of long-term posting where the effective duration of a posting exceeds 12 months/18 months, and the related replacement condition.

The 12 months period (eventually extended to 18 months) is deemed the effective cumulative duration of different posting periods (not necessary continuous periods), during which one or several posted workers carry out, on behalf of their employer, the same task at the same place of work.

The concept of long-term posting aims to guarantee posted workers an additional set of terms and conditions of employment that are applicable to workers in the Member State where the work is carried out (and not to determine a maximum duration of an assignment).

Article 4.3 of the Directive 2014/67/EU lays down criteria in order to assess whether posted workers temporarily carry out their work in a Member State other than the one in which they normally work.

Pursuant to Article 4.4, the failure to satisfy one or more of the factual elements set out in paragraphs 2 and 3 shall not automatically preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation.

It follows that the concept of temporality does not intrinsically constitute a point of law in determining the maximum duration of an assignment, but only its impermanence.

In any circumstances, there is no *ex-ante* maximum duration of an assignment.

Interested to further understand about the interpretation of the concept of temporality in the meaning of Directive 96/71/EC and its enforcement Directive 2014/67/EU?

Looking forward to meeting you at the ELMC Congress- 17-18.02.2025 KRAKOW-Poland.

<https://labourinstitute.eu/en/elmc2025/>

One of the Day 2 hands-on learning workshops will dive into the interpretation and analysis of that concept and provide further guidance to all parties concerned (authorities' representatives, lawyers and other labour mobility experts, representatives of companies posting or making use of posted workers).

By: Tanel Feldman