

POSTED WORKERS IN THE TRANSNATIONAL PROVISION OF SERVICES – TREATMENT AND OBLIGATIONS OF EMPLOYERS

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Abstract

This study aims to clarify some issues concerning the rules applicable to posted workers within the framework of the transnational provision of services and obligations incumbent upon employers, both of those the post and the provision of services to beneficiaries, issues raises a number of practical problems with regard to the distinction in regulating the notion of posting, relative to the internal regulation of the Labour Code (Act 53/2003 - republished) on the one hand and the European legislation by the other hand. Thus, the contractual relationships between the employer post their workers to perform work for the benefit of its contractual partner, must be very defined very clearly the relationships between employees and employer posted in Romania and that to which they are posted abroad and the obligations each of them. In preparing this paper were used qualitative and quantitative research methods specific depth research of legal sciences, the sociological method, deductive method on regulations, concepts and theories, comparative method. Expected results of the study consist of a summary of the main regulations, solutions and doctrinal views on the development of an suggestions of law, clarification of the regulations with significance implications for business, citizens in their capacity as workers and also for legal practitioners.

Keywords: *Posting, posted workers, employers, Directive, conditions of work and employment.*

JEL Classification: *K31*

I. Preliminary

Conditions of posted workers in the transnational provision of services and obligations of employers, both of which post of the beneficiary and the provision of services in practice raises a number of issues, most times, so knowing the law and the lack thereof helping to make approaches and conduct activities contrary to law and in violation of the rights of persons seconded. Given the distinction in regulating the notion of posting, follow the regulations of the Labour Code (Law no.53/2003 - republished) and legislation to clarify the rules applicable in terms of deployment as it is regulated by the Labour Code, internal posting and posting in the provision of transnational services - Community legislation transposed into Romanian legislation. Therefore, in establishing contractual relations between employer posting workers to perform work for the benefit of its contractual partner must be very clear relationships between employees and employer posted in Romania and that to which they are posted abroad and the obligations each of them.

Arrangements for which the two parties agree to opt in fulfilling their obligations in carrying out the contractual relations must consider the relationship of subordination of employees, each of the obligations of employers, especially determining the applicable law, taking into account the provisions on the coordination of social security systems by reporting both internal and legal regulations in the EU, namely Regulation nr.883/2004 on the coordination of social security systems.

It should be considered that in order to guarantee the rights and working conditions of a posted worker and avoid "social dumping", while the service providers can provide services cheaper than local suppliers - due to lower cost of labor work - the European Community through its legislative instruments, established a nucleus of mandatory rules concerning the terms and conditions of employment of labor will be applied to workers posted to work in another Member State. These rules reflect the standard of local workers host Member State in which the employee is sent to work as referred to in Article 3 of Directive 96/71/EC under the heading "Conditions of Work and Employment".

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II. Investigated the basis - novelty in relation with existing doctrinal approach

In the absence of express provisions of law in our country to be governed by the secondment of workers in the transnational provision of services in Romania in the territory of another Member State, and insufficient provisions on the posting of workers belonging to the European Union Member States European Economic Area in Romania remains monistic theory (not the dual) that the relationship between international law and domestic law, international law rule holds, as is enshrined solution Court of Justice of the European Union (formerly Court of Justice) emphasizing the primacy of Community law over domestic law, thus being able to achieve the objectives of the European Economic Community and thus regulating the relationship between national law and Community law.

With the integration into the European Union and the transposition of the *acquis communautaire* in all segments of the labor market in Romania interferes the labor market in the Community, spoke of the need for harmonization Directive 1996/71/EC default, prompting the issuance of regulations transposing into national law. Unfortunately transposition of Directive 96/71/EC by Law 344/2006 concerning the posting of workers in the transnational provision of services and the implementation of HG104/2007, does not meet the needs of labor market actors entirely in Romania. When posting Romanian workers in EU countries remain priority requirements of Directive 96/71/EC.

In this context, we consider useful a brief analysis of the Community rules and to submit proposals for amending them, and a brief analysis of the existing provisions in Romanian law.

On the need and usefulness of the topic under review, it is reported that so far has not been explored in the literature independently and thoroughly, to make an important contribution to the legislative process, but only incidental in the context of direct application of Community law, Council Directive 96/71/EC and to come so to meet those who make use of its enforcement tools.

The research paper was based on the European legislation together with relevant national legislation and the study of documents and reports by the European Commission and the International Labour Organization, European Court of Justice and the existing studies in the literature. Also, in carrying out the research has contributed and use different means of storing information in electronic databases that include domestic and European legislation and case law.

III. Legal regulatory framework posting at European level

Legal framework governing the posting is the European Parliament and Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the provision of services², nr.1408/71 EEC Regulation on the application of social security schemes to employed persons and their families moving within the Community. The procedure for applying this Regulation was established by Council Regulation EEC nr.574/72, the subsequent EC nr.883/2004 on social security systems, which implement the procedure established by Regulation EC No .987/2009 the European Parliament and of the Council, entered into force on 1 May 2010 and amended in turn by Regulation nr.465/2012.

Directive 96/71/EC lays down very clearly in art. 1 para. (1), Scope "that its provisions apply to undertakings established in a Member State within the transnational provision of services, post workers, in accordance with para. (3) within Member State", and in par. (3) shall specify in what circumstances these rules are applicable, namely:

"(a) post workers in the company or under their direction, in the territory of a Member State under a contract concluded between the undertaking making the posting and the party for whom the

² Published in the Official Journal of the European Communities (OJEC) No. L 018 of January 21. 1997 - The document can be found online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML>

services operating in that Member State, if there is a employment relationship between the undertaking making the posting and the worker during the period of posting

or

(b) post workers to the territory of a Member State or an undertaking which belongs to the group, if there is an employment relationship between the undertaking making the posting and the worker during the period of secondment

or

(c) posting, as temporary employment undertaking or enterprise which provided a worker of a worker to a user undertaking established or operating within a Member State, if there is an employment relationship between the temporary employment undertaking or organization that has made and the worker while deployed .

(4) Enterprises of a member state can not enjoy more favorable treatment than undertakings established in that Member State".

The concept of posted worker to the Directive Article 2 para. (1) is defined as that, the thing that, for a limited period, carries out his work in a Member State other than that in which they normally work". Therefore, for the purposes of posting about a European law must be fulfilled the first condition, that the work they perform employee in another Member State than where usually work out to be temporary.

Regarding the duration of the posting and the applicable legislation, Regulation (EC) 883/2004 (directly applicable in our country since 1 May 2010), on the coordination of social security systems, defines employee seconded under Article 12 para. (1) as: (1), self - employed in a Member State for an employer which normally carries out its activities in that State, and who is posted by that employer to another Member State to work for the employer continues to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed twenty-four months and that he was not sent to replace another posted person"³.

Therefore, Community legislation specific for transnational posting of workers, they continue to obey the law of the origin of the posting, provided that:

- anticipated duration of the activity in question does not exceed 24 months and
- the person is not sent to replace another posted person.

Determination of the applicable law. According to the Regulations nr.883/2004⁴, self-employed person in a Member State of the European Union, subject to the law of that State under the principle of *lex loci laboris*. But there are exceptions to this rule, one of them being the case worker sent by his employer to carry on an activity in another Member State, but for the employer sent the purposes referred to in Article 12 of the Regulation. Thus he will remain under the protection of the social security system of the state on whose territory the employer that posted.

Therefore, when posting according to European legislation, the worker performs the work in the interest of that posted, it was still an employee, the employee's individual employment contract shall not be suspended, but only on certain elements changes arising from the way execution of the contract, namely, the place of work, shall be entitled to rights because of their work abroad, possibly during work and other work in accordance with the laws of the State of destination. Relationship of subordination remains from the seconding employer and will continue to pay the obligations incumbent on him as the employer of the seconded employee.

To determine the law applicable to the employee seconded to the transnational provision of services, the competent authority of the sending State in the Romanian National House of Public Pensions (CNPAS) , issued on demand portable form A1 which turns the law of the employee's membership of reference and hence the its social security system.

³ Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, corrigendum OJ L 200, 7.6.2004, amended by Regulation (EC) no. 987/2009, OJ L 284,30.10.2009

⁴Art. 12 para. 1 of Regulation (EC) no. 883/2004 of the European Parliament and of the Council, consolidated version, available on-line at: <http://ec.europa.eu/social/main.jsp?catId=857&langId=en&intPageId=983>

In terms of getting A1 Portable Document remain within the provisions of the Community Regulation and Regulation nr.883/2004 nr.987/2009 establishing the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems, Romanian authorities have adopted as official regulations establishing the conditions for obtaining this document. Currently, the conditions for obtaining Portable Document A1 are set according to the two Regulations (EC) 883/2004 and 987/2009, based on practice guidelines and instructions developed at national and Community level and based on the interpretation of decisions issued by European bodies⁵.

Regarding the legislation applicable to posted workers, the European Commission issued in August 2012 Practical Guide, legislation applicable to the European Union (EU), European Economic Area (EEA) and Switzerland" guide posted on the portal of the European Commission, the Employment, Social Affairs and Inclusion⁶. The guide was updated in November of the same year, but to date is only available in English version.

The guide is structured in two parts: Part I the PWD and Part II of the conduct of activities in two or more Member States and aims to provide a useful tool to support institutions, employers and citizens to various practical and administrative levels involved in the application of specific Community provisions regarding the establishment of the Member State whose legislation is applicable in certain circumstances.

Directive Nr.1996/71 of the European Parliament and of the Council of Europe represent the regulatory framework in the posting of workers in the supply of services.

Scope of the Directive nr.1996/71 is represented by:

1. posted workers considered to be employees who for a limited period of time operating in a Member State other than that in which they usually work⁷, and
2. undertakings established in a Member State within the transnational provision of services, post workers in another Member State, being in one of the following cases, except for commercial shipping services:
 - a) posting an employee on behalf of the company and / or under their direction, in the territory of a Member State under a contract concluded between the undertaking making the posting and for whom the services operating in that Member State, whether there is a work between the undertaking making the posting and the worker during the period of secondment;
 - b) posting of an employee in a Member State or an undertaking owned by the group, if there is an employment relationship between the undertaking making the posting and the worker during the period of secondment;
 - c) posting by a temporary employment of a temporary employee to a user undertaking established or operating within a Member State, if there is an employment relationship between the temporary employment company and employee while deployed.

Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings which post workers in another Member State guarantee workers

⁵ See "Instructions on determining the law applicable to persons covered by Regulation 1408/71 and Regulation 574/72" on, 1. Legal framework:

a) Regulation 1408/71 (Articles 13-17) and Regulation 574/72 (Articles 10 ter - 14).

b) Decision of the Administrative Commission of the European Communities on Social Security for Migrant Workers no. 181 of 13 December 2000 concerning the interpretation of Articles 14, paragraph 1, 14a 14b paragraph 1 and paragraphs 1 and 2 of Regulation no. 1408 to 1471 on the law applicable to employed and self-employed workers posted temporarily exercising an activity outside the competent State.

c) practice guide posting of workers in the Member States of the European Union, European Economic Area and Switzerland.

d) Decision of the Administrative Commission of the European Communities on Social Security for Migrant Workers no. 148 of 25 June 1992 on the law applicable to use of the certificate (E 101) where the deployment does not exceed three months.

e) "Court of Justice" - available online at: <http://www.cnpas.org/content/cnpas/others/integration/INSTRUCTIUNI%20REF%20REGULAMENT%201408.doc>.

⁶ *Practical_guide_workers_EU_aug_2012_RO[1]* <http://ec.europa.eu/social/main.jsp?catId=868>

⁷ Article 2 of the Directive Nr.1996/71 of the European Parliament and of the Council of Europe

posted to their territory and working conditions of employment on the following matters set out in the Member State in which activities are performed⁸ :

- By laws, regulations and administrative and/or
- By collective agreements or arbitration awards of general application to the extent that they

relate to activities listed in the Annex:

- a) maximum work periods and minimum rest periods;
- b) minimum paid annual holidays;
- c) the minimum rates of pay, including overtime (does not apply to supplementary pensions). For the purposes of this Directive, the concept of minimum wage is defined by law and / or practice of the Member State in which the employee is seconded;
- d) the terms of the availability of employees , especially by temporary work agencies;
- e) health, safety and hygiene at work;
- f) the protection of health and safety at work especially women who are pregnant or have recently given birth, of children and youth ;
- g) Equality between men and women and other provisions on non-discrimination.

For employees who performed the initial assembly and/or first installation of goods, which is part of a contract for the supply of goods necessary for taking the goods supplied and to be executed by qualified employees and / or specialist company provided, if the period of posting does not exceed eight days, the provisions on minimum paid annual holidays and the minimum wage, including overtime pay does not apply⁹. These provisions of the Directive does not cover construction activities listed in Annex part of it. Construction activity relating to construction, repair, maintenance, alteration or demolition of buildings excluded from the Directive are mainly works: excavation, earthworks, construction, installation and dismantling of prefabricated elements, fitting out or installation, alteration, renovation, repair, dismantling, demolition, maintenance, painting and cleaning works improvements .

After consulting the social partners, Member States may decide on the usages and customs of the Member States not to apply the provisions on minimum wage if the posting period not exceeding one month¹⁰ in the following cases :

- 1) posting of an employee in a Member State or an undertaking owned by the group, if there is an employment relationship between the undertaking making the posting and the worker during the period of secondment;
- 2) posting by a temporary employment of a temporary employee to a user undertaking established or operating within a Member State, if there is an employment relationship between the temporary employment company and employee while deployed .

In this sense, in such cases Member States may, under the laws and or practices, to derogate from the provision on minimum wage and the decision of the Member State through collective agreements of general application relating to a or more sectors, if the duration of posting does not exceed one month.

Also in these cases, Member States may provide for a derogation from the provisions relating to maximum work / minimum rest periods and minimum paid annual holidays, if the work done is not significant. If this option Member States must establish criteria that must be met to be considered work performed "insignificant"¹¹ .

Article 3 (6) of Directive 96 /71 (EC) on the duration that the posting, posting duration is calculated based on a reference period of one year from their start date and "on calculation, be taken into account already done by the worker during deployment to be replaced"¹², they have taken place new provisions entered into force on 1 May 2010 EU legislation applicable to workers moving

⁸ Article 3 par. (1) of the Directive Nr.1996/71 of the European Parliament and of the Council of Europe

⁹ Article 3 par.(2)of the Directive Nr.1996/71 of the European Parliament and of the Council of Europe

¹⁰ Article 3 par(3)of the Directive Nr.1996/71 of the European Parliament and of the Council of Europe

¹¹ Article 3 par.5.of the Directive Nr.1996/71 /EC

¹² Article 2 par.6of the Directive Nr.1996/71 /EC

within the European Union, contained in Title II of Regulation (EC) 883/2004 (Articles 11-16) and Title II of the implementing Regulation 987/2009 (Articles 14-21).

The new provisions are extended (art. 12) the maximum duration of the secondment of twelve (12) months to 24 (twenty four) months. In cases where the length of the posting, which was originally scheduled for 24 months, be extended for special reasons, it may require the application of Article 16 of Regulation (EC) No 1408/1971.

In December 2012 as part of a technical cooperation project of the International Labour Organisation and the International Labour Office, was developed Explanatory Report¹³ on Regulation (EC) no. 883/2004 and Regulation (EC) its implementation No. 987/2009, aim of the report is to provide an overview of the new social security coordination by explaining the key provisions of the regulations.

In the introduction to the report in section 1.3. are listed, main changes in the new Regulation", specifying initial period of secondment extension from 12 to 24 months.

Item 3. the Report refers to the applicable legislation, "Determination of the applicable law is regulated under Title II of Regulation (EC) no. 883/2004 in Articles 11-16 and Articles 14-21 of the Implementing Regulation. Details are set out in the decisions of the Administrative Commission for the Coordination of Social Security Systems."

With regard to posted workers 3.2. Report explains the main exception to the general rules, covered by Article 12 "Special Rules". The novelty is that employees and self-employed can be posted for a maximum of two years and can not be replaced by someone who was already detached (Regulation (EEC) no. 1408/71 provides 1-year period can not be extended for another year)."

A person operating within a Member State may be sent by his employer in another Member State and to remain subject to the social security legislation of the first State, due to the fact that the duration of the work to be performed will not exceed 24 months, and the employee is not sent to replace a person who has completed the posting (Article 12 of the new Regulation).

Clarification on the application of Article 12 are established by Implementing Regulation and Administrative Commission decisions for the coordination of Social Security (Administration Commission). The work to be undertaken for the employer normally requires the existence of a direct relationship between employer and employee. Determining the condition of the existence of organic link is included in A2 of the Administrative Commission Decision of 12 June 2009.

Employer may employ a worker to poste it, if that person was already subject to social legislation of the Member State where the employer is established (Article 14 of the Implementing Regulation), at least one month (A2 of the Administrative Commission Decision of 12 June 2009, Section 1).

To remove the workers, the employer must normally operate in the State where they are established. You must have a substantial activity, other than just administrative (Article 14 of the Implementing Regulation). Factors that determine whether or not there are conducted substantial activities listed in A2 of the Administrative Commission decision of 12 June 2009 (paragraph 1.13 last paragraph). There must have been at least two months between two periods of secondment of the same employee and the same company in the same state (Decision of the Administrative Commission A2)¹⁴. "Decision was published in the Official Journal of the European Union, no. C106 of 24 April 2010, and communication and information".

Therefore a new posting period authorization may only after a period of 2 months from the date of termination of the maximum previous posting.

¹³ Coordination of social security systems in the EU: Explanatory Report on the Regulation (EC) no. 883/2004 and Regulation (EC) No its implementation. 987/2009, International Labour Office, ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe. - Budapest: ILO, 2010 – Document available online at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_166999.pdf

¹⁴ Decision. A2 of 12 June 2009 on the interpretation of Article 12 of Regulation (EC) no. 883/2004 of the European Parliament and of the Council on the law applicable to seconded employees and self-employed workers temporarily working outside the competent State, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:106:FULL:RO:PDF>

Incumbent on the rights of posted workers Directive 96 /71(EC) provides that Member States the possibility to derogate from some provisions in the situations presented not prevent application of working conditions and employment more favorable to employees such art. 3, paragraph 1 of Directive 96/71/EC concerning the posting of workers for the provision of services in order to guarantee workers posted to the territory of an EU Member State, employees coming from another EU Member State, the same working and employment conditions as those accorded local workers in the state that provides activity , determined as the construction sector (for which typology is listed in Annex special works the same direction) posted workers should apply not only conditions imposed by laws , regulations and administrative provisions issued in the state where work is performed benefits , but also the provisions in collective agreements and arbitration rulings of general application which relate to matters listed art.3, paragraph 1, letters a) to g) of Directive cited .

Allowances specific to the posting shall be considered part of the minimum wage, to the extent not paid in reimbursement of expenditure actually incurred for posting, such as expenditure on travel, accommodation and meals¹⁵.

Collective agreements or arbitration awards declared to be of general application are those mandatory provisions to be observed by all undertakings in the sector of activity or profession of the jurisdiction of their application.

Member States may provide that the undertakings that post workers on territorial limited period of another Member State when providing services to ensure temporary employees with individual contract conditions for employees on fixed-term work in the Member State in which the work is carried out.

In the absence of a system for declaring collective agreements universally applicable employment or arbitration awards, Member States may, if they so decide, base themselves on:

- Collective agreements or arbitration awards which are generally applicable to all similar undertakings in the profession or industry concerned and are included in the territorial scope thereof and / or

- Collective agreements concluded by the most representative employers' and labor organizations at national level and which are applied throughout national territory if their application undertakings that post workers to the territory of another state in the provision of services shall, by law, the regulatory and administrative equal treatment of those undertakings which are in a similar situation.

Equality of treatment, the purpose of this Article, where national undertakings in similar situations:

- Are subject, in the place of business or sector, the same rules, by laws, regulations and administrative, as well as posting undertakings and shall impose such obligations with the same effects.

Directive 96/71/EC does not prevent Member States from imposing, under the Treaty, to national undertakings and those of other states equally:

- Conditions of work and employment on matters other than those specified, to the extent that it is public policy provisions¹⁶;

- Conditions of work and employment determined by collective agreements or arbitration awards on activities other than those mentioned in Annex¹⁷.

Member States shall take appropriate measures for non-compliance with this Directive. Member States shall ensure that employees and/or their representatives adequate procedures for enforcement of obligations under this Directive¹⁸.

¹⁵ Article 3 para. (7), (8) of Directive nr.1996/71 (EC)

¹⁶ Article 3 para. (9) of Directive nr.1996/71 (EC)

¹⁷ Article 3 para. (10) of Directive nr.1996/71 (EC)

¹⁸ Article 5 of Directive nr.1996/71 (EC)

In the implementation of Directive 96/71/EC, Member States are required to designate one or more liaison offices or competent national authorities in accordance with national legislation and/or practice, if this authority is Labour Inspection Romania.

On 21.03.2012 the European Commission Proposal for a Directive¹⁹ of the European Parliament passed the enforcement of Directive 96/71/EC concerning the posting of workers in the provision of services and is on the list of priorities of the European Commission to be taken under consideration.

Its objective, as shown in the Explanatory Memorandum refers to reconcile the exercise of the fundamental freedom to provide cross border services under Article 56 EC, so that the rights of workers temporarily posted abroad to provide such services to enjoy insurance adequate protection. To this end, the final Directive should establish a set of binding rules for each state of the European Union rules to be followed in the host state to posted workers. These rules relate to working conditions and employment, which clearly defined, to be followed by the service provider in the host country to provide minimum protection for workers. The Directive thus provides a level of protection for workers who may be vulnerable given their situation (temporary employment in a foreign country, difficulty in being represented properly, lack of local laws, institutions and language).

Directive has also a key role in promoting a climate of fair competition between all service providers (including those from other Member States), ensuring equal conditions and legal certainty for providers and users of services and posted workers for the provision service.

The essential elements of Directive 96/71/EC.

Directive is intended undertakings which post workers temporarily in a Member State other than the one whose law governs the employment relationship. Directive covers three border situations:

- Posting in a contract between posting undertakings and the services which they are intended (contracting / subcontracting);
- Posting to an establishment or undertaking which belongs to the territory of another Member State ("intra-corporate transfers");

Provision of workers through a temporary employment firms or placement agencies within a user undertaking established in another Member State, provided that in all three cases to be a while deployed employment contract between posting undertakings and workers.

Fundamental conditions of work and employment to be observed, as defined in Article 3 (1) of the Directive include: maximum work periods and minimum rest periods, minimum paid annual holidays, minimum wage, including overtime pay (this does not apply to supplementary pensions) provided conditions for workers, especially by temporary employment firm, health, safety and hygiene at work, protective measures with regard to working conditions and employment of pregnant women or women who have recently given birth, of children and young people, equality of treatment between men and women and other provisions on non-discrimination.

If these conditions of work and employment are established by law, a regulation or administrative provision, Member States must apply to workers posted to their territory. Member States should also apply to posted workers, where they are set by collective agreements or arbitration awards of general application within the meaning of Article 3 (8) insofar as it relates to the activities listed in the Annex to Directive (construction). In respect of other activities left to Member States to enforce the conditions of work and employment established by such collective agreements or arbitration Article 3 (10), second indent. Also, they may, in accordance with the Treaty, to enforce the conditions of work and employment in areas other than those specified in the Directive, where it is public policy provisions [Article 3 (10) first Line].

¹⁹ Proposal on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Bruxelles, 21.3.2012 COM(2012) 131 final 2012/0061 (COD), document available online at: <http://european-employers.eu/ro/proponere-de-directiva-parlamentului-european-si-consiliului>

The Directive it does not require Member States to set minimum wages. At the time of its adoption, the Council and the Commission said: "In relation to Member States whose legislation contains no provision for minimum wages, Article 3 (1) first and second subparagraphs shall not impose any obligation to make provision for such wages".

Although the Directive is not directly in companies based in third country, in accordance with Article 1(4), undertakings established in third countries should not apply more favorable treatment than that accorded to enterprises established in a Member State. This means that Member States should not give undertakings established in a third country a more advantageous competitive position compared with undertakings established in a Member State, in particular with regard to working conditions and labor costs.

Therefore, the Directive sets a minimum indirect protection for their workers. In addition, the Directive contains Articles 4, 5 and 6, the provisions on access to information, administrative cooperation, law enforcement and jurisdiction.

Even before the adoption of the PWD, the question whether and to what extent national rules on employment could be applied to foreign service workers led to many controversies, as can be seen in the European Court of Justice (ECJ). The Commission has assessed the implementation and application of the Directive and adopted a report in 2003. This report has identified a number of deficiencies and problems related to the implementation and/or effective implementation of the Directive in some Member States.

Also, in 2006 the Commission adopted guidelines to clarify to what extent certain national control measures could be justified and proportionate, taking into account EU legislation as interpreted in the Court. In a second communication in 2007, have been highlighted several shortcomings of how the checks were carried out in some Member States and a poor quality of administrative cooperation and access to information.

Commission referred to in the document to the European Court of Justice in the Viking - Line, Laval, Ruffert and Commission/Luxembourg, which triggered many debates within the European institutions, academia and among the social partners, in particular on two issues: the first is to establish a balance between the exercise of their right of trade unions to take collective action, including the right to strike, and economic freedoms enshrined in the Treaty on European Union, in particular the freedom of establishment and freedom to provide services and the second issue concerns how to interpret certain provisions of Directive 96/71/EC, such as "the concept of public policy, the material scope of working conditions and employment requirements of the Directive and nature of binding rules, in particular the minimum wage".

IV. Posting regulatory in national law vs posting regulatory in the European Union law

Posting according to European standards has a different character to the rules of national law, namely Article 45 of the Law n.53/2003 - Labour Code, as how it is defined *strictu sensu*.

Thus, as noted above, according to art. 1 point 3 of Directive 96/71/EC about the following measures:

- a) post workers on behalf or under the direction of this enterprise in the territory of a Member State under a contract concluded between the undertaking making the posting and for whom the services operating in that Member State, if there is an employment relationship between the firm's own making the posting and the worker during the period of secondment;
- b) post workers to the territory of a Member State to an undertaking owned by the group or if there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
- c) posting, as temporary employment undertaking or enterprise which has provided a worker of a worker to a user undertaking established or operating within a Member State, if

there is an employment relationship between the undertaking with employment agencies or companies who made and the worker while deployed .

Therefore, if the transnational posting rule, the worker remains under the authority of his employer, the benefit of which continue to operate. The situation is different from those covered by our internal law under which the employee secondment involves passing under the authority of another employer on whose behalf they operate.

The Law no.53/2003 - Labour Code, re-posting is defined in art. 45 as the "The act of the temporary change of employment from the employer's disposal to another employer for the execution of works exceptionally. Interest by posting may change type of work, but only with the written consent employee"²⁰.

When posting regulated by the Labour Code, the employee's individual employment contract concluded with the employer posting, shall be suspended during deployment in terms of the critical effects being temporarily ceded employer who made the posting. From the point of view of the legal nature of the posting is a partial assignment of the individual employment contract clause retrocession posting effectively represents a temporary and partial assignment of the individual employment contract between two employers, relying on the existence of a working relationship, a convention, agreement, etc., also posting can take place in a vacant or whose owner is temporarily absent.

Posting the purposes of the Labor Code requires temporary change of job, the employer's disposal, to another employer, the employee rendering to work on secondment to the seconding employer, as is apparent from the art. 45 para. 1 and art. 47 para. 1 of the Labour Code. Therefore, unlike the regulation of the Labour Code, in the posting in the transnational provision of services, as it is defined in accordance with art. 12 para. 1 of Regulation (EC) 883/2004 employee during the period of posting, continue to work for the employer seconding.

Posting may be ordered according to article 46 par. (1) of the Labour Code for a period of one year. Exceptionally, the posting period may be extended for objective reasons which require the presence of the employee to the employer seconding to the agreement of both parties of 6 in 6 months. Posting employer ordered the employee may be refused only in exceptional circumstances and only for serious personal reasons, as required by art. 46 para. (3) of the Labour Code.

The employee posted abroad is entitled to per diem (allowance posting) pursuant to Art. 46 para. (4) of the Labour Code. The employer will reimburse all travel expenses and accommodation will also provide per diem payment.

From the administrative point of view, each employee is seconded to prepare a decision under Article posting 45 of the Labour Code, which will include identification of the seconded employee, the employer will be posted, subject to deployment, deployment location, duration and any other provisions with respect to changes in the individual employment contract.

Article 47 (1) of the Labour Code provides that "the rights due seconded employee shall be granted to the seconding employer". Thus, if the employee seconded to the Labour Code, seconded employee pension rights are granted to the seconding employer and only in if it will not fulfilld its obligations will arise the seconding employer to meet them.

If transnational posting, posting throughout the payment obligations of the employee with timesheets preparation, to payroll, to pay the taxes and social contributions will continue to be performed by the seconding employer Romanian . Given these considerations that the entire period of this type of deployment, the employment of the employee is not suspended, it appearing further in the General Register of the Romanian employees at the seconding employer.

During the deployment of employee benefits which are more favorable rights or the rights of the seconding employer or the employer's rights that is breakable. Employer posting shall take all necessary measures as to the seconding employer to fulfill all obligations in full and on time to the seconded employee. If the seconding employer who fails to fulfill its obligations in full and on time to the seconded employee, they will be met by employer seconding. Where there are differences

²⁰ Law no. 53/2003 - Labour Code, published in Official Gazette no. 345 of 18 May 2011

between the two employers or none of them does not fulfill the obligations of the seconded employee, he is entitled to return to his job at the employer that posted and to act against any of the two employers and request enforcement of unfulfilled obligations.

As for posting the transnational provision of services, Article 21 of the Implementing Regulation provides that the employer has its registered office or place of business outside the Member State shall be posting will fulfill all obligations under applicable law employees in particular the obligation to pay contributions under the legislation, such as your office or place of business in the competent Member State. It also mentions the possibility of an employee and an employer has no place of business in the Member State whose legislation is applicable and the employee may agree to meet the employer for it, in terms of contributions without prejudice to the employer. Employer shall notify such an arrangement the competent institution of that Member State²¹.

Regarding the protection of posted workers in the EU, the Commission reiterated the contents of the proposed Directive on the enforcement of Directive 96/71/EC, special importance should be given to implementation of legislation applicable to posted workers, their rights, liability and penalties applicable to infringements posted workers 'rights, specifically joint and several liability in the protection of workers' rights.

A seconded employee within the meaning of Regulation EC 883/2004 and Directive 96/71/EC is also an employee delegated legislation in Romania purposes. Delegation is, according to art. 43 of the Labour Code, the temporary exercise of the employer's disposal by the employee works or tasks appropriate to their job duties outside his workplace. So exercising delegated employee temporarily works for the same employer or appropriate tasks duties outside his workplace, which corresponds to the posted worker used by EC Regulation 883/2004. Therefore, if the employee is delegated individual employment contract shall not be suspended but its effect and duration of the delegation.

Regarding activity abroad, apply the provisions of art. 18 of the Labour Code requirement information. If the employee is to work abroad, the employer is obliged to communicate in good time before departure, a number of information such as the time to perform work abroad, the currency will be paid the remuneration and payment method - option is that while transnational posting the salary to be paid by the employer who ordered such a deployment, but this should be specified in the amendment of the employment contract. Even if this option is chosen, this does not exempt the employer seconding Romanian to fulfill their obligations preparation states, taxes and their filing and payment to the tax authorities, benefits in cash and / or kind for conducting business abroad, all this information must be included in the content of the individual employment contract, or its addendum. The climatic conditions, the main labor law regulations in that country, local customs breach of which would endanger the life, liberty and personal security, the conditions for repatriation of the worker, respectively. From this point of view will be considered individual employment contract need to change to meet these conditions.

From a fiscal standpoint, be considered modifications of OG 8/2013 tax treatment in terms of per diem wage tax and social security contributions mandatory since 1 February 2013, becoming, at the employe came assimilated wages subject to payroll taxes and compulsory social contributions exceeding 2.5 times the legal level established by Government decision for staff in public institutions, regardless of the tax regime applied to the employer.

²¹Explanatory Report on the Regulation (EC) no. 883/2004 and Regulation (EC) No its implementation. 987/2009” International Labour Office, ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe. - Budapest: ILO, 2010 – available on line at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---srobudapest/documents/publication/wcms_166999.pdf

V. Conclusions

Conditions of posted workers in the transnational provision of services by Law no. 344/2006, transposing into national law the European Parliament and Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the provision of services, according to art. 293 of the Labor Cod.

The provisions of this law shall apply to undertakings established in a Member State of the European Union or European Economic Area, which the transnational provision of services, post workers in Romania that have established relationships. So the Law 344/2006 does not apply to individual employers, they do not have the quality of enterprise.

The seconded employee means the employee who normally works in a State other than Romania, but for a limited period operating in Romania (Article 3 of Law no. 344/2006)

The specific procedure for assigning employees in the provision of transnational services in Romania is regulated by Government Decision no. 104/2007. It should be noted that unlike the expression used by the legislature in Law nr.344/2006, which uses the term "employee" and "worker" seconded the application procedure the term used is "foreign person", using this terminology being one of the happiest, because it could cause confusion between employees assigned to the transnational provision of services, this is about citizens of the European Union and European Economic Area, the term "foreign person" when using workers / employees do not belong to this space, ie third country nationals who are subject to other legislation.

Law 344/2006 is in itself almost a translation of Directive 96/71/EC, which refers only to the posting of workers belonging to Member States in Romania, and enforceable " undertakings established in a Member State of the European Union or the European Economic Area that, in the transnational provision of services, post workers in Romania that have established working relationships." In the Report's Executive²² European Commission Directive implementation in Romania is considered to Law 344/2006 provides generally satisfactory transposition provisions, with two exceptions: incomplete transposition of Article 4 (2) of the third part, on administrative cooperation and Article 4 (3) the appropriate measures to ensure that information on terms and conditions of employment referred to in Article 3 are generally available.

A bill ferend refers to regulation in accordance with European legislation a procedure Romanian posting of workers in the European Union and European Economic Area, a popular sources of information more effective on posting that guides and other documentation to support those who post and those who are posted since the Law 156/2000 on the protection of Romanian citizens working abroad does not refer to the rules applicable to posted workers. Therefore it is imperative to develop a formal document governing the posting of Romanian workers in transnational provision of services.

Ways to exploit the research results are achieved through dissemination of information at conferences and seminars, publishing articles resulting from research in journals specialized, transmission representatives suggestions of law legislative power, especially implementation within the business as a clerk Labour Inspection public, information and findings drawn from the research.

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