

Jan Cremers

In search of cheap labour in Europe

Working and
living conditions
of posted workers

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Executive summary: Posting and the search for (cheap) labour in Europe

Introduction

The concept of posting has fuelled lively debates and discussions in recent years. Partly this is due to the gradual weakening of this regulation by the ECJ in the last decade. In addition, the concept is still a source of confusion. Posting as such has nothing to do with undeclared labour or illegal practices. And posting is also not identical to migrant labour. One of the key characteristics of the genuine posting of workers is that the workers concerned are not seeking permanent access to the labour market of the host country. This report, commissioned by the European Federation of Building and Woodworkers, with underlying research financed by the European Commission has been written on the basis of earlier research of the CLR network and recent additional surveys in 12 EU/EEA countries. The final report comprising an analysis of the results and short versions of the country reports can be seen as an updated version of earlier reports and publications (Cremers and Donders, 2004).

Methodological hurdles

In our research we have pinpointed the effect of posting, be it genuine or non-bona fide, and we have tried to take stock of the disparities between the theory and the practice of the posting rules. Before we summarise our findings it is necessary to list a few methodological and practical problems that we had to face during this research:

1. Information on posting is scarce. Official figures are incomplete. In some countries registration is not mandatory or where notification of posting is obligatory, the enforcement of registration and notification rules is extremely weak or non-existent.

2. Even in countries where registration is organised systematically the authorities or institutions concerned admit the existence of fake registration and attempts to bypass registration.
3. Registration, monitoring and enforcement in the host countries are obstructed, or supposed to be obstructed, by the strong limitations formulated by the ECJ.
4. The definition of posting is not clear or not understood and, therefore, not consistently applied in the Member States.
5. Cooperation between sending and receiving countries is still in its infancy, though we have signalled improvements compared to the early 2000s.
6. Competences are widespread over several institutions, the division of labour in one country does not match the division in another country and national cooperation between different institutions involved (tax revenue, social security, labour inspectorate, social partners, just to name a few) is often lacking.
7. The registration of third-country workers is not uniform and the considerations in the Directive concerning these workers are neither implemented, nor enforced or applied, with some exceptions.
8. Administrative sanctions often do not stand up in an extra-territorial context and are, as a consequence, not observed. The result is that procedures are interrupted or terminated.

The effect of all these circumstances is that it is difficult to document the existence of posting of workers with reliable figures and data. In order not to rely on anecdotal evidence we have based our country reports on official data, national reports and publications, as well as on interviews with spokespersons and insiders.

Posting and the labour market

Apart from the fact that the circumstances described above make it complicated to come up with reliable figures, these circumstances also have a strong impact on the functioning of the posting rules. Posting has become one of the channels for the cross-border provision of (cheap) labour in the single market. Its use for the labour-intensive segments of our labour markets does not necessarily lead to a deterioration of working conditions, but it certainly has created an opening for new and unintended forms of recruitment. It is not a new phenomenon that a division of labour between different undertakings crosses borders. Posting of workers as part of a provision of services is not confined to the period after the introduction of the free movement principles in the EU single market. Production processes often take the shape of a chain of subcontracting/outsourcing and the work is split up into smaller segments and carried out via this chain of subcontracting, starting with the main contractor or central undertaking that 'delegates' part of the work to specialised official subcontractors. The decision to engage other undertakings can be motivated by different arguments: the search for expertise and know-how not belonging to the own core activity, labour shortages, efficiency seeking, a traditionally evolved division of labour, with partners based on mutual trust, routine or historical reasons. In the positive sense this

cooperation is based on, or results in stable relationships between a user undertaking or main contractor and specialised and preferred subcontractors. This can happen in a national context, and as a result of the single market, it happens more and more in the form of cross-border cooperation.

We know from the global and the national level that a production chain is complicated, that overall coordination is mostly weak and contract compliance difficult to organise. A chain based on commercial contracts can always end up in the grey zone; with the result that compliance is no longer guaranteed. The problem arises when cross-border labour-only subcontracting comes in and is presented as a provision of services. This is especially the case when companies transfer the recruitment of labour to small subcontractors, leading to multiple levels of recruitment and drive compliance even further by the use of agencies, gangmasters and other intermediaries. These agencies then become the go-between for the worker and the user undertaking or the specialised subcontractor. Distortion of the labour market is substantial as minimising labour costs may be very attractive by bringing in an undocumented element for part of the official work. The lower stratum is then an illegal supply of cheap labour via agents or gang masters. Groups of workers are recruited via letter box companies, advertising and informal networking. Illegal foreign work also appears. We are then far away from the genuine type of posting that was envisaged as the European legislator formulated Directive 96/71.

Practical functioning

In the report four different features of posting-related recruitment are distinguished.

- a. In our research we found normal posting with specialised subcontractors providing temporary services in another EU Member State with well-paid skilled workers or qualified staff both belonging to the posting companies' core workforce.
- b. We also found 'perfectly legal' posting where the calculation was made between engaging a domestic workforce and bringing in a workforce from abroad under the banner of the free provision of services. Here at first sight nothing is wrong. But, the calculation is simple: a subcontractor that can provide a basic workforce from a country with low social security payments is perhaps cheaper than a domestic subcontractor. The differences between the basic labour standards that are complied with is perhaps small. However, if this is combined with long working hours and poor living and working conditions one can question the legal character of the posting.
- c. We found questionable practices of 'legal' posting where the recruited workforce was confronted with deductions for administrative costs, for lodging and transport, tax deductions and the obligatory refunding (after the return back home) of (minimum) wage payments. These are practices that are in breach with the provisions of the Posting Directive.
- d. Finally we found different types of 'fake' posting, varying from the copying and distribution over a whole gang of E101/A1 forms, to recruitment of posted workers

who were already in the host country or workers turned into bogus self-employed, to posting via letter box companies and unverifiable invoices for the provision of services.

Surprisingly the cases that we could trace are to be found at smaller sites as well as at large sites, public works and projects that were tendered via public procurement.

Some examples of the non-respect of labour standards that we found:

- *Wages*
Wages were not corresponding with the working hours or the skill level. Unlawful deductions and systematic refunding after the return home. The cheapest collective bargaining framework was chosen. Unpaid overtime.
 - *Working hours*
Long working hours. Workers sign for 40 hours and are paid accordingly, but actually work 60 hours a week. Non-respect of daily and weekly rest periods.
 - *Health and safety*
Higher risks as a result of fatigue, no training provided, no translation of health and safety rules, lack of the necessary protective equipment. Inferior work environment.
 - *Housing and transport*
Living in barges for Hilton prices. Deductions for housing and food in breach of the provisions of the posting rules. Kept away from the local population and the colleagues.
-

In situations where individual cases came to the forefront and fraud or abuse was detected offences often turned out to be of a larger scale. However, recovery is the result of an arduous path by the route of individual lawsuits that can take years in an unknown constituency and jurisdiction.

Enforcement and good practices

Based on our research we have to conclude that monitoring is difficult and hampered by the ECJ limitations, enforcement lacks strong sanctioning, fines are weak in an extra-territorial context and in most countries there are no specific posting-related enforcement instruments.

Posting is not seen as a problem or ignored, given the size of the phenomenon or the estimated impact. A condition for a properly-functioning and genuine provision of services is, however, that actors and competent authorities involved take the compliance with contracts and posting rules seriously. Therefore, national and bilateral cooperation has to be improved, supervisory mechanisms have to be freed from the serious handicaps created by the European Court decisions and institutional coordination has to be guaranteed and strengthened.

We also found good practices that can serve as recommendations for the improvement of the posting arrangements.

- In some countries registration is reliable, also because the start date for the provision of services through the posting of workers has to be notified and the necessary information has to be handed to competent authorities in the host country. Experiences with e-registration are promising in this respect.
- Bilateral cooperation and operational contacts in the field (for instance in the framework of the Euregio-network) lead to more mutual trust and this contributes to transparency, the flow of information and improved cross-border compliance.
- Institutionalised joint action by all actors is a prerequisite for successful enforcement.
- The registration and the accreditation of recruitment agencies and temporary work agencies contribute to distinguishing between genuine and non-bona fide recruitment.
- Cooperation with cultural organisations and NGOs can be seen as a good practice that leads to mutual trust and as a channel to provide information on rights and standards.
- The integration of posted workers in the traditional labour market institutions (with real benefits even when they are there temporarily) increases awareness of their rights.

Recommendations

Considerable damage has been inflicted on the original thinking behind the Posting rules by a series of ECJ judgements. Partly this is the result of a clash inside the European Commission and/or related to the shift of power and priorities in the EU and the Member States (Internal Market rules versus Employment and Social Affairs) with primacy given to economic freedoms; partly it is because Member States did not dare to grapple with the fundamental questions behind the disputes. It is necessary to reinstate the aims and purposes of the Posting rules. There is an urgent need to repair this part of the Community Charter of Fundamental Rights of Workers. The following recommendations can be formulated.

- The respect for the regulatory framework (of labour standards and working conditions) in the host country has to be restored, namely,
 - a. the competence to define mandatory rules for posted workers beyond the hard core of minimum provisions has to lie in the hands of the Member State where the work is pursued;
 - b. collective bargaining has to be recognised as an important method for achieving labour standards at the place where the work is pursued, also for posted workers; this means that trade unions need to be able to approach local and foreign companies;
 - c. internal market rules cannot be an argument to block the necessary monitoring and enforcement; in case of a clash of rulings, workers' rights should prevail;
 - d. the host country defines whether someone is a worker.

- Written evidence, in the form of contracts and registration, must be obligatory in order to make it possible to distinguish between genuine and non-bona fide cross-border recruitment, which leads to the following recommendations:
 - e. the European legislator must unambiguously qualify prior notification and mandatory registration as appropriate means and instruments to check regularity;
 - f. the working conditions of a posted worker not in the possession of a written proof of a labour relationship (as defined by Directive 91/533/EEC) must be automatically governed by the law of the host country.

- Sanctioning has to be strengthened, therefore,
 - g. the legal force of administrative sanctions in the posting field has to be upgraded in order to be mutually respected and recognised in a transnational context;
 - h. cooperation between competent authorities in the checks on contract compliance and in the enforcement of posting rules has to be strengthened; mutual assistance between Member States in case of breaches has to be guaranteed;
 - i. a system of joint and several liability in the chain of subcontracting with extra-territorial competencies has to be elaborated.

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The cross border provision of services with posted workers is an integral part of the economic freedoms in the EU internal market. In the best case this provision is a logical part of a genuine division of labour at European scale between contractors and specialised subcontractors. In the worst case the cross border provision of services falsely can be used as a method to recruit cheap temporary labour.

The EU Posting Directive, established in the mid 1990s, tried to settle posting rules that could guarantee the rights of posted workers within the territory where the work was pursued. Starting point was that a foreign employer, who temporarily delivers services, with workers posted, had to respect a large part of the applicable labour standards in the host country.

CLR Studies 6 is dedicated to an analysis of the theory and practice of the functioning of the posting rules in 12 European countries. The experts' focus was on the practical experiences of compliance authorities, labour inspectors and other controlling bodies.

One of the main conclusions of this practical evaluation is that the use of the posting mechanism ranges from normal and decent long-established partnership between contracting partners to completely fake letter box practices of labour-only recruitment.