CONFERENCE:
EVALUATING APPLICATION OF THE DIRECTIVE ON THE POSTING OF WORKERS WITHIN THE FRAMEWORK OF THE PROVISION OF SERVICES

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HOW DO EMPLOYMENT LAW AND SOCIAL SECURITY LAW LARGE CONVERGE TO ENSURE THAT THE RULES RELATING TO POSTING OF WORKERS ARE EFFECTIVE?

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The 26th March is devoted to the actions of controlling bodies, i.e. the controls and sanctions of employment and social security administrations and the actions of legal disputes. The effectiveness of a rule of law is measured by the means of control and the sanctions ensuring it is respected. The best of rules may be completely ineffective of they can be circumvented.

Here we are dealing with a particular case: that of posting of workers for the provision of services. Now, the Treaties protect this freedom and the services directive also aims to facilitate posting. The latter expressly provides that in the event of a dispute, directive 96/71/EC and Regulation (EC) No 1408/71 (as from 1 May 2010 application of article 12 of Regulation 883/2004 for the matter in question) and their respective implementing regulations are to be given precedent.

My aim is therefore to check whether the disputes concerning directive 96/71, considered globally, and concerning Regulation No 1408/71 and its implementing regulation ensure that these rules are indeed enforced or whether, conversely, the free provision of services is given precedent over social rules and more specifically over their control methods. I will remain within the realms of common law, leaving it to today's other participants to expound on practical applications in national law.

We appear to be faced with a single operation which is governed by two sets of rules whose principles are diametrically opposed as the directive enables Member States, on whose territory the service is provided, to apply certain rules of their national employment law with all the reserves discussed yesterday, whilst for social security,

Community law has preserved the principle of the law of origin: posted workers remain affiliated to the social security scheme of the State in which their legal employer is established.
In terms of objectives, the directive expressly aims to fight against social dumping whilst the derogation authorized by articles 14 and 14(a) “aims in particular to facilitate the freedom to provide services for the benefit of employers which post workers to Member States other than that in which they are established, as well as the freedom of workers to move to other Member States. These provisions also aim at overcoming the obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications, especially for workers and undertakings.”
However, an analysis of Community case law on these two sets of rules results in the opposite conclusion: the freedom to provide services is used to undermine the controls of the employment administrations in the host Member State whilst social security disputes are focused on abuses as regards the freedom to provide services. Yet, abuses do not allow the use of the exceptions provided by the Regulation on posting.
Thus, the effectiveness of these rules is achieved via synergies between the two sets of rules and the administrations responsible for controlling them. **(I)**
In reality, the case law and the new regulations due to enter into force on 1 May 2010 have undermined both the power of employment administrations and that of social security institutions in the name of the principle of loyal cooperation and the legal security of the service provider. **(II)**
From there, Member States have entered into a growing number of bilateral agreements to provide efficiency there where Community law seems to have failed: all the most recent bilateral agreements aim at fighting against illegal employment, of which posting may be a form. **(III)**

I. The usefulness of synergies between employment law and social security law to provide a framework for the conditions of posting workers

There is no doubt that the combined reading and interpreting of these two sets of rules is useful, although the ECJ still refuses to do so. Directive 96/71 and social security regulations require that there be a direct relationship between the employee and the undertaking which posts him for the entire duration of the posting. Regulations confine the length of the posting (24 months in the new Regulation No 883/2004 apart from derogations (article 16) whilst the directive only mentions a “limited period" in article 2.

Furthermore, a closer study of the ECJ judgements on the interpretation of the directive or of the Regulation on the coordination of social security systems, appears to reconcile these two branches of law: one provision appears key which weakens the legal force of all others: the freedom to provide services in ex article 49 – now article 56 of the TEU.

The legal basis of article 49 is the best adapted provision to assess the compliance of national legislation with Community law on social matters. The Court of Justice refutes the application of directive 96/71 justifying that as the material content of these national rules had not been harmonized, national rules “can therefore be determined freely by Member States, in compliance with the treaty and the general principles of common law, thereby including, ------, article 49 EC”.

In employment law, the free provision of services is systematically used to contest controls implemented in the host Member State (A). In social security law, the cases deal with the reality of the service provider’s business in the Member State in which it is established, as only undertakings which do not use the freedom to provide services abusively can benefit from the derogation introduced by article 14 of the Regulation (B). In other words, the freedom to provide services is used in one case to weaken the controls deemed necessary to fight against social dumping and in the other to prevent undertakings from using the freedom to provide services abusively.

A. Weakening the controls of employment bodies in the name of the freedom of the service provider

The freedom to provide services implies that discriminations against the service provider established in another Member State cease to exist, i.e. the abolition all national provisions “but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a service provider established in another Member State where it lawfully provides similar services” [1].

In this regard, any measures leading to “ additional administrative and economic expenses” are also prohibited.

“It is true that the obligation thereby imposed constitutes a restriction on the freedom to provide services in that it involves additional expenses and an additional administrative and financial burden for undertakings established in another Member State, so that those undertakings do not find themselves on an equal footing, from a competitive point of view, with employers established in the host Member State and may thus be dissuaded from offering services in that Member State”.

The Court, by stating the principle of equality, from a competitive point of view, dismisses the fact that service providers already benefit from considerable advantages due to the application of the principle of the country of origin on social security matters. It is significant that all the cases submitted to the ECJ oppose undertakings established in Member States in which social security schemes impose much lower social security contributions, against States trying via controls to preserve conditions of fair competition with undertakings established in the host Member State and consequently their social model.

Only imperative requirements in the general interest allow the freedom to provide services to be derogated from. Whilst the protection of workers is an imperative requirement in the general interest, everyone knows that the leeway here is very limited.

[1] ECJ 23 11 1999, C-369/96 and C-376/96, Arblade, ECJ 18 07 2007, op cit , point 63

Indeed, requirements imposed by the host Member State are subject to several prerequisites:
1st rule: **proportionality:** the measure must be proportional to achieving the aim pursued and must not go beyond what is necessary to achieve it.
2nd rule: facilitating the control authorities' task is not enough: they must be unable to carry out their controls efficiently without these requirements *"it is not sufficient, for the purposes of justifying such a restriction on the freedom to provide services, that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task. It must also be shown that those authorities cannot carry out their supervisory task effectively unless the undertaking has, in that Member State, an agent or representative designated to retain the documents in question. "* [2]
3rd rule: they must not **duplicate identical or similar rules** which the service provider is already subjected to in the Member State in which it is established.
4th rule : **the requirements must be specific** allowing the undertaking to identify its obligations.[3]

Several cases dismiss the requirements of the host Member State by referring the supervisory bodies to those of the State where the undertaking is established.
The authorities and the courts of the host Member State "before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State", they must verify "that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State."[4]

In fact to simplify matters, the administrations of the host Member State can only require

- **Prior declarations** and not prior authorisations, whose sole aim is " to report, before the posting, to the local authorities the presence of one or more workers to be posted, the anticipated duration of their presence and the provision or provisions of services justifying the posting "[5] COM v Republic of Austria 21 September 2006

- The social documents required are limited to **making available**, during the entire duration of the provision of services, **of documents enabling the relevant authorities** of the host Member State, to carry out the **necessary controls to ensure the national provisions for protecting workers are complied with**. (Com v Federal Republic of Germany 18/07/2007)

[2] ECJ 19 06 2008, C-319/06, Com v Grand Duchy of Luxembourg, point 90
[3] ECJ 19 06 2008, C-319/06, Com v Grand Duchy of Luxembourg, point 81 and 82
[4] ECJ of 23 November 1999, C-369/96 and C-376/96, Jean-Claude Arblade, point 65
[5] ECJ of 21 09 2006 , C-168/04, Com v Republic of Austria

- These documents include the **employment contract, salary slips and documentary evidence of working hours and payment of remuneration** (Com v Federal Republic of Germany 18/07/2007)
- The obligation to provide these documents in the **language** of the host Member State is admitted (Com v Federal Republic of Germany 18/07/2007)

To conclude, the freedom to provide services implies that the service provider's freedom must be ensured and that the administration of the host Member State has to contact the administrations of the State where the undertaking is established to verify any elements which are not necessary for controlling the applicable rules of its social legislation. This is where social security law comes into play.

B. The freedom to provide services governed by social security law

ECJ social security case law creates requirements for service providers specifically there where Community employment law aims to abolish obstacles to the freedom to provide services while not granting employment administrations the means to control the legality of the service provided.

All social security law cases show disputes as to the reality of the service provider's activity in the State in which it is established, making such reality conditionnal to the use of the principle of origin for social security issues, i.e. the right to evade the payment of social security contributions imposed in the State where the service is provided.

It is worth recalling that article 14 introduces an exception to the fundamental rule which requires the worker to be affiliated to the social security scheme of the Member State in which he is actually working. In that respect, it is strictly interpreted. Hence "an undertaking [---] may benefit from the advantage afforded by that provision only if it **normally** carries on its activities in the Member State in which it is established.*"* (FTS)

In the Barry Banks case, the Court ruling on the conditions of posting of an independent worker, pointed out "that Article 14a(1)(a) of Regulation 1408/71 imposes the preliminary requirement that the person concerned be "normally" self-employed in the territory of a Member State. That obligation assumes that the person concerned habitually carries out significant activities in the territory of the Member State where he is established. Thus, such a person **must already have been carrying out his activity for some time** at the moment when he wishes to take advantage of the provision in question. Similarly, during the period in which he works in the territory of another Member State, that person must **continue to maintain, in his State of origin, the necessary means to carry on his activity** so as to be in a position to pursue it on his return." FTS, Barry Banks

The FTS and J. Plum cases, reiterate this very principle and go further still:

Social security rules as regards posting are applicable "**if the undertaking observes the conditions governing that freedom to provide services***"*. However this is not the case of "a construction company, established in one Member State, which sends its workers to the territory of another Member State in which it performs all its activities, with the exception of purely internal management

activities."[6] It cannot therefore rely on Regulation No 1408/71 as regards posting of workers.

These rules were formulated in the new Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems and its implementing regulation No 987/2009: article 12 of Regulation 883/2004 states the need for both the employer and the self-employed person to "normally" carry out their activities in the Member State from which the posting is carried out. The implementing Regulation is even more specific as it reiterates the case law above. **Article 14.2**. **requires the employer to perform "substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established**." This takes into account "all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out."

The self-employed person who wishes to post himself is bound by similar requirements: the person must "have already pursued his activity for some time before the date when he wishes to take advantage of the provisions of that Article and, during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return."

But the parallel must be drawn between these principles and the rules and possible penalties.

II. The dogma of cooperation or inefficiency as a rule

The principle of cooperation is stated in ex article 5 of the Treaty and in article 4, paragraph 3 of TEU.
Directive 96/71 and the Regulations on the coordination of social security systems have created or indeed strengthened the rules of cooperation between institutions. In the name of these principles, any effective control carried out by the institutions of the host Member State are now thwarted, be it the control of employment administrations (A) or social security institutions (B).

A. Case law out of touch with the reality of cooperation between employment administrations

In 1999, the ECJ validated supervisory measures pointing out that "in the absence of an organised system for cooperation or exchanges of information ---, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules."
In 2007, 11 years after the posting directive was adopted, the European Commission deemed the obligations set up by the Member States to supervise the posting of workers as questionable or indeed condemned by the ECJ as unjustified and/or disproportionate to the objective of supervising the working conditions of posted

[6] ECJ of 9 November 2000, C-404/98, J. Plum, point 19-22

workers, when the information can be obtained within a reasonable time via the employer or the authorities of the Member State of origin.
It also highlighted article 4 of the directive and the cooperation obligations by which the Member States are bound:

- to set up a monitoring authority organised and equipped in such a way as to function effectively and to be able to deal promptly with requests regarding working and employment conditions within he framework of the Directive.
- to make the information on working and employment conditions of employment available, not only to foreign service providers, but also to the posted workers concerned.

The Commission stated that the measures taken were disappointingly insufficient.
In 2008, the Commission repeated this point, underlining the virtually total lack of administrative cooperation.
Yet, the ECJ condemned the Grand Duchy of Luxembourg stating that " the organised system for cooperation and exchanges of information between Member States provided for in Article 4 of Directive 96/71 renders superfluous the keeping of such documents in the host Member State after an employer has ceased to employ workers there". To justify these measures the Grand Duchy of Luxembourg had to "justify by arguments other than mere doubts as to the effectiveness of the organised system of cooperation or exchanges of information between the Member States provided for in Article 4 of Directive 96/71."

B. Cooperation on social security matters

As early as 2000[7], the Court of Justice stated the evidential value of certificate E 101*:* *"*the authenticity of an E 101 certificate is limited to the competent institution's declaration as to the legislation applicable*".* However "th*e* principle of sincere cooperation, laid down in Article 5 of the EC Treaty" requires the competent institution "to carry out a proper assessment of the facts relevant for the application of the rules" and, consequently, to guarantee the correctness of the information contained in an E 101 certificate*.*
This same principle of cooperation implies that host Member State institutions are bound by the certificate, failing which the principle of a single applicable law and the legal security offered thereby become defunct. Consequently the certificate retains its authenticity until it is withdrawn or declared invalid. If the host Member State institution has doubts as to its authenticity, the issuing institution should reconsider the foundations of the issued certificate. If the parties continue to disagree either party may refer to the Administrative Commission responsible for reconciliation. Failing that, the host Member State may introduce an infringement procedure without prejudice to any recourse existing in the issuing institution's Member State.

The ECJ has thereby rendered ineffective the basic principles which it created for availing of the derogation. In fact, by giving precedent to the evidential value of the E 101 certificate over the reality experienced by the host Member State authorities and by admitting that the certificate can be delivered a posteriori, it prevents the abusive use of posting from being curtailed.

[7] ECJ 10 February 2000, C-202/97, FTS,

The host Member State institutions must contact the issuing institutions to obtain the withdrawal of the certificate.

The principle of cooperation is provided for and reinforced by the new Regulation No 883/2004 (art 76). Pursuant to paragraph 4 the institutions “shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation”.
In this regard, they “shall respond to all queries within a reasonable period of time". Article 2 of the implementing Regulation No 987/2009 sets out the scope of this obligation.
This Regulation also expressly repeats the case law by specifying in article 5 the legal value of the documents and supporting evidence issued in a Member State: they shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. " Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it. "
The Administrative Commission, in a decision dated 12 June 2009 described the dialogue procedure on the validity of documents as regards the applicable law, which is suspended in the event of administrative or legal recourse. This procedure is launched before the issue is referred to the Administrative Commission and is limited to a period of 3 months renewable once if so justified by the complexity of the case or if the replies require the intervention of other institutions. If at the end of this first phase, no agreement has been reached, the institutions may opt for a conciliation procedure via a third party or refer the matter to the Administrative Commission.
One is but baffled by the length and complexity of these procedures which appear completely disproportionate given the length of posting operations.

It is therefore not surprising that Member States faced with illegal situations of posting currently seek other ways to combat this issue.

III. Member States seek alternative methods to combat illegal employment

Some argue that posting operations are systematically linked to the question of illegal employment, in other words posting is systematically suspected of fraud. However, both Community action and Member States action show that posting of workers is one type of illegal employment.
As early as 1999 the Council resolution of 22 April 1999 on a Code of Conduct for improved cooperation between authorities of the Member States on combating fraud, identified 3 types of fraud : transnational social security benefit and contribution fraud, undeclared work, and the transnational hiring-out of workers.

However the current state of Community law and case law in fact blocks the efforts of employment administrations and those of social security institutions, as each administration has to deal with the administrations in the State where the undertaking

is established in compliance with the principle of cooperation. Yet everyone is aware that in reality this cooperation is inefficient, despite being part of the Treaties, the directive and the social security regulations.
Inefficient cooperation, which is ignored by case law, leads Member States to react more and more by toughening national legislation on the one hand (A) and by multiplying bilateral agreements on the other (B).

A. Tougher rules to combat illegal employment

Under French legislation illegal employment includes a series of practices which may be used when posting workers: undeclared work, undeclared use of employees, improper subcontracting and illegal labour leasing.

The French legislator has decided to impose toughen penalties in order to combat illegal employment, but also to make the developer or the principal contractor responsible for ensuring themself that the service provider and its employees are properly declared.

Failure to do so will result in him being held jointly and severally liable together with the party responsible for undeclared employment for the payment of **taxes due to the Inland Revenue and to the social security system**, social security contributions, for refunding money they have received as a public subsidy, as well as for the **payment of remuneration and compensation to undeclared workers**.
The same applies to the service provider who uses foreign workers without work permits (payment of special contributions and the flat-rate contribution representing the cost of returning the worker to his country of origin).

The logic is to strengthen the joint efforts of the employment and social security administrations, which is exactly what is now paralysed by Community law.

B. The development in bilateral agreements: rules are increasingly incomprehensible

The number of bilateral agreements which have been signed or are in the process of being so are on the increase and they cover a wide range of matters. Some seek purely to set up a supervision procedure for the E 101 certificate to improve the response time between administrations when determining the validity of the data provided in the certificate. This is the case for example with the administrative arrangement entered into on 9 October 2008 by France and Germany.

Others aim to facilitate mutual assistance on social security matters and specifically to ensure "compliance with all posting conditions, including all elements indicating the legal nature of the employment relationship." Others reach beyond the realm of social security and aim towards " administrative cooperation to combat illegal employment and compliance with employment law in cases of cross-border employment and provision of services."

Analysing the most recent cooperation administrative agreement signed by France and the Netherlands[35] proves particularly interesting, as instead of simply introducing an exchange procedure between social security institutions with shorter response times, this agreement aims to “fight against illegal employment and comply with employment law in cases of cross-border employment and provision of services”

between the two Member States. The efforts involved aim to ensure compliance with directive 96/71 and Regulation 1408/71, and to fight against undeclared work resulting from an abusive use of these two legal instruments. The agreement introduces cooperation between employment administrations and social security institutions. It is perfectly in line with the French provisions adopted recently on undeclared work. The aim is clearly to reinforce the coordinated force of these institutions namely via close collaboration between employment administrations and social security institutions. However, this cooperation is limited to the exchange of information.

These agreements reflect a clear intention to cooperate and to improve efficiency.

Assuming the number of these agreements continues to increase, including with States with whom it is currently particularly difficult to cooperate, what would be the true benefits?

Firstly each agreement has its own material scope:

- the entire coordinating regulation of social security systems which therefore includes the posting of workers: France - Luxembourg,
- social security and social assistance: Czech Republic, France, Belgium
- purely controlling the E 101 certificate: France - Germany,
- illegal employment and transnational posting: France - Netherlands

Each agreement has many objectives of its own which complicates the legal landscape. These global agreements cover all realms of regulations or specific points but they all aim to combat fraud, based on applicable rules, by introducing procedures for exchanging information, installing tight time frames for queries and responses, appointing resource institutions, and formalising exchanges.

For some (France - Belgium, France - Luxembourg, France - Czech Republic), the main aim is to organize a cross-border recovery procedure of contributions due under the social security legislation of one Member State by an undertaking established in another Member State, party to the agreement, and namely because Community legislation on exequatur expressly excludes social security from its scope of application. But that presupposes that the contested certificate must first be withdrawn, as it is difficult to imagine the enforcement of a recovery decision by the French social security institutions if the E 101 certificate had not previously been withdrawn by the institutions of the Member State where the undertaking is established.

But will efficiency be achieved by the multiplication of these agreements : 27 Member States each signing an agreement with all the other 27 MS = 729 agreements.

Conclusion: things look bleak for those who are responsible for supervision and who may have the impression that the effectiveness of their efforts will not be provided by Community law which has endorsed ECJ case law.
Will the Commission be able to impose a computerized system of data exchange between administrations without using coercive measures?

Perhaps I am just pessimistic and I hope that the upcoming debates will help change my mind.