



Cross-border Impact Assessment 2016

Dossier 6: Proposal for a Directive amending Directive 96/71/EC (COM (2016) 128 final)



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Maastricht University

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ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise and Innovation on Demographic Changes (NEIMED), Zuyd Hogeschool, the City of Maastricht, the Meuse-Rhine Euregio (EMR) and the Province of Limburg (NL).



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1. Introduction

Cross-border posting of workers is a phenomenon that appears to be increasingly popular.

It is governed by the following regulations regarding labour law and its enforcement: Directive 96/71/EC (hereinafter: 'Posting of Workers Directive')¹, Directive 2014/67/EU (hereinafter: 'Enforcement Directive')² and Regulation (EC) 593/2008 (hereinafter: 'Rome I Regulation')³.

This contribution focuses on the proposed revision of the Directive on the Posting of Workers Directive and the potential ensuing legal changes for the Netherlands. More specifically, the report addresses the possible consequences on Dutch labour law of the proposal to amend the Posting of Workers Directive. A study of German, Belgian and Luxembourg labour law and the possible consequences of the proposed directive on these legal systems is beyond the scope of this document.

The absence of empirical data makes it difficult or even impossible to predict the extent to which the proposed changes will carry specific consequences for the border regions. Data from the European Commission shows that 87.817 posted employees were active in the Netherlands in 2014. These data are skewed, however, as they are based on the number of A1 certificates. Firstly, not all Member States are able to provide the requested information. Secondly, posting has a different meaning in Directive 96/71/EC (hereinafter: Posting of Workers Directive) and Regulation (EU) No. 883/2004. Thirdly, not all changes in the country of employment are communicated. All these factors affect the available data.⁴ In addition, the Netherlands still doesn't have a notification obligation for cross-border service providers, and government plans suggest that this will not be in place before 1 January 2018.⁵ It is impossible to make any more concrete statements about the effects on the border region until there is clarity on the number of businesses, i.e. segments, service providers and posted employees willing to cross the border to temporarily provide services in the Netherlands.⁶

¹ DIRECTIVE 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJEC L 18/1.

² DIRECTIVE 2014/67/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJEU L 159/11.

³ REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJEC L 177/6.

⁴ Jozef Pacolet & Frederic De Wispelaere, 'Posting of workers: Report on A1 portable documents issued in 2014' (report on behalf of the European Commission, December 2015), p. 9.

⁵ *Kamerstukken II (Dutch Parliamentary Papers II)* 2015/16, 34 408, No 6, p. 4.

⁶ See the Terms of Employment Posted Workers in the EU Act (WAGWEU) and the planned introduction of the notification obligation as of 2018.

2. Research Objectives, Definitions, Themes and Indicators

2.1 Ex ante

This study focuses on signalling any positive and negative effects of the proposed revision of the Posting of Workers Directive. As a result, the main topic of this report is assessing the potential consequences of the Directive for Dutch labour law. This is speculative because it is not as yet certain whether, and if so, when the revision will be adopted by the EU legislator. Moreover, it is still unclear whether the proposal will be adopted in amended form by the EU legislator.

Since this is an ex-ante legal study into a change that has not taken effect yet, it is not possible to assess whether the Dutch legislator has sufficiently taken into account the potential interests of its border regions. It can be relevant, however, to notify the Dutch legislator if the border region is disproportionately affected.

2.2 Effects on Dutch labour law

The section below outlines the potential consequences of the proposed revision on Dutch labour law. It successively discusses the Posting of Workers Directive and the proposed amendments to it (see paragraph 2.2.1).

2.2.1 The Posting of Workers Directive⁷

EU law includes two legally distinguishable forms of mobility of workers. Based on the free movement of labour, Union workers have the right to move from one Member State to another to work or seek employment there, and they are protected against discrimination on grounds of nationality (Art. 45 TFEU). Cross-border workers fall under the free movement of labour. Another option is to use cross-border posting, as laid down in the Posting of Workers Directive 96/71/EC, which is based on the free movement of services (Art. 56 TFEU). Cross-border posting of workers is based on the principle of equal treatment or non-discrimination of the employer; employees only have a derived right. Moreover, entrepreneurs who post from a country with lower levels of taxes, social security, pensions and wage costs enjoy a lasting benefit

The principle of posting is that businesses provide employees on another Member State's territory as part of transnational service provision. There are three types of posting: (1) subcontracting (mainly in construction), (2) intra-group posting and (3) secondment in the sense of temporary agency work (Art. 1, paragraph 3, a through c). For the Posting of Workers Directive to be applicable, an employment contract must be in place between the service provider and the employee for the duration of the posting. In addition, the posting should take place 'for a limited period' and in a Member State 'other than the State in which [this employee] normally works'

⁷ From: M. Kullmann, 'De handhaving van het arbeidsrecht in grensoverschrijdende situaties', *TRA* 2016, afl. 1, pp. 9-12. See also M.S. Houwerzijl & M. Kullmann, 'Werknemersmobiliteit binnen de EU', *ArbeidsRecht* 2010/52, afl. 11, pp. 27-32.

(Art. 2 (1)). A third possible (mixed) form is temporary agency work, which falls under both the free movement of labour and the Posting of Workers Directive.⁸

The substantial difference in (wage) costs and living standards between old and new Member States plays a significant role in cross-border labour mobility. In March 2015 labour costs varied between EUR 3.80 and EUR 40.30 per hour.⁹ In line with this, the monthly legal minimum wage diverges vastly as well: in July 2015, employees in Bulgaria were entitled to EUR 194; their counterparts in Luxembourg to EUR 1,923. Such differences may explain the attractiveness of temporarily working in a high-wage country, thus using the existing comparative advantages.

The amount of protection under labour law in the country of temporary employment differs according to the aforementioned EU legal basis on which employment in another Member State takes place.

For Union workers who, for instance, moved from Portugal to the Netherlands and entered into an employment contract with an employer based there, the Netherlands can be designated as the country in which the work usually takes place. As a result, Dutch labour law can be designated as the objectively applicable law. Employment contracts between Union workers and Netherlands-based employers are, contrary to posting, entirely governed by the Rome I Regulation.¹⁰ Nevertheless, both parties' choice of law can reveal that the employment relationship is governed by another law. This choice concerns the objectively applicable law but not the mandatory provisions that cannot be derogated from by agreement, as stipulated in the law which would have been applicable by default, i.e. without any choice of law (Art. 8 (1) Rome I Regulation'). In addition, overriding mandatory rules may require the application of another law (Art. 9 Rome I Regulation).

Posted workers are only partially protected by the mandatory rules applicable in the country of temporary employment. The extent of that protection is limited to a hard core of employment conditions (Posting of Workers Directive, Art. 3 (1) a through g).¹¹ These employment conditions are generally qualified as rules of priority under Art. 9 of the Rome I Regulation.¹² This implies that this hard core, as effective in the country of temporary employment, must be guaranteed for the duration of the posting regardless of the law applicable to the employment relationship. It is up to the receiving country to monitor the compliance with this hard core. In addition, the Rome I Regulation assumes that the applicable law does not change if the work temporarily takes place in

⁸ ECJ 10 February 2011, Case C-307/09 t/m C-309/09, ECLI:EU:C:2011:64 (*Vicoplus*), *Vicoplus*.

⁹ See Eurostat, 'Wages and labour costs', March 2015, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Wages_and_labour_costs#Labour_costs>, accessed on 27 October 2015.

¹⁰ M. Kullmann, 'Tijdelijke grensoverschrijdende detachering en gewoonlijk werkland: over de verhouding tussen de Rome I-Verordening en de Detacheringsrichtlijn en de rol van de Handhavingsrichtlijn', *NIPR* 2015, afl. 2, p. 207. Despite the presence of a country of habitual employment, a connection can be sought to the country with which a closer bond exists: ECJ 12 September 2013, Case C-64/12, ECLI:EU:C:2013:551 (*Schlecker/Boedeker*), JAR 2013/250 (Jurisprudence on Labour Law), annotated by F.G. Laagland.

¹¹ That this is about minimal and simultaneously maximal protection follows from: ECJ 18 December 2007, Case C-341/05, ECLI:EU:C:2007:809 (*Laval*).

¹² Kullmann 2015, p. 207.

another country (cf. Art. 8 (2)). Work is considered to be temporary if employees are expected to resume work in their country of origin after completion of their tasks abroad, even if they conclude a new employment contract with the original employer or an employer belonging to the same group of companies (cf. recital 36 of the Preamble to the Rome I Regulation). The Posting of Workers Directive not only requires a posting that is limited in time, but also the presence of a country of 'habitual' employment to which the posted worker will return after completion of the posting. Whether workers have actually returned can only be established after their return. In the Rome I Regulation, unlike in the Posting of Workers Directive, the mere expectation that the worker will return suffices (cf. recital 36 of the Preamble). The Posting of Workers Directive is not applicable if workers are only hired to be posted in another Member State. When it comes to posting, the country of 'habitual' employment must not be the same as the country of temporary employment. This is, however, possible for the free movement of labour.

Posted agency workers can enjoy more protection than posted employees. Section 3 (9) of the Posting of Workers Directive allows Member States to determine that service-providing employment agencies guarantee to their workers the same 'terms and conditions which apply to temporary workers in the Member State where the work is carried out'. Agency workers may thus receive a higher level of protection than 'regular' posted workers. Ensuing from the *Vicoplus* case, employment agencies can be designated as service providers in the sense of the Posting of Workers Directive, but their employees can (also) fall under the rules regarding the free movement of workers.¹³ Agency workers active in the Netherlands have a right to working conditions at least equal to those applicable to workers employed in the same or equivalent positions at the undertaking where the posting takes place (Art. 8 (1) Waadi). If a collective labour agreement applies to the hirer, it is possible to derogate from said sections of articles (see for example Art. 6 (1) b of the Collective Labour Agreement for the construction industry).

The proposal for the revision of the Posting of Workers Directive¹⁴

On 8 March 2016, the Commission announced its intention to amend the Posting of Workers Directive 96/71/EC on three important points: This proposal ensues from, among others, a joint letter from Belgium, Germany, France, Luxembourg, the Netherlands, Austria and Sweden. The European Commission itself also aims to create a deeper and fairer internal market. 11 Member States, including Poland, Bulgaria, Romania, Estonia and Denmark issued a yellow card on this proposal, claiming that it constituted ultra vires and was thus not in line with the subsidiarity principle. On 20 July 2016, the European Commission announced that it would ignore the yellow card.¹⁵

¹³ *Vicoplus*, paragraph 46.

¹⁴ From: M. Kullmann, 'Detachering van werknemers: naar meer transparantie en een betere handhaving?', *TRA* 2016, afl. 6/7.

¹⁵ <<http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=2583&furtherNews=yes>>.

The three proposed amendments pertain to the following:

(a) Duration of the posting of 24 months

Primarily, the proposal aims to offer more clarity as to the duration of the posting.¹⁶ If the expected or actual duration of the posting exceeds 24 months, the Member State in which the worker has been posted will be considered the worker's country of habitual employment (new Art. 2bis). To prevent 'replacement constructions', the proposal stipulates that the replacement of a posted worker in the same location and for identical work is included in the total duration of the posting of employees, provided that those employees are being posted for a minimum of six months.¹⁷

This provision will be new to the Netherlands. Its introduction would imply that the term 'limited period', as used in the Posting of Workers Directive, would be set at 24 months, in alignment with the European coordination rules on social security. Two scenarios are distinguishable: the expected (ex-ante) and the actual (ex-post) duration. It follows from the preamble to the proposed amendment that the host country immediately, i.e. from the first day, becomes the country of habitual employment if exceeding of the 24-month period is clear from the onset of the posting. If the posting turns out to exceed 24 months at a later stage, the host country will become the country of habitual employment from the first day after this 24-month period. An interesting point which deserves closer investigation is what this means for the assumption of the Rome I Regulation that posted workers will return to their countries of habitual employment after the posting. Article 4, paragraph 3, section d of the Enforcement Directive stipulates that workers shall return to the Member State from which they were posted or where they are supposed to resume work after finishing their activities or after providing the service for which they were posted. This return needs to be either an actual return or an intention to return.¹⁸

Sometimes the duration of a service provision is not clear from the onset, or it is established halfway that it will require more time. This might lead to an exceeding of the 24-month posting period and a change in the employee's country of habitual employment. Employees who used to work in Germany might suddenly find themselves habitually employed in the Netherlands. In this case, employees change protection regimes, moving from initial protection under German labour law to protection under Dutch labour law, with all its consequences. This might be advantageous in certain cases but unfavourable in others. A case in point might be dismissal law in the Netherlands, Belgium, Germany and Luxembourg. In principle, the hard core of Art. 3 (1) sections a-g of the Posting of Workers Directive of the temporary host country is applicable during the

¹⁶ Van Hoek & Houwerzijl already established previously that the implementation, application and enforcement of the Posting of Workers Directive has its shortcomings in practice. A. van Hoek & M. Houwerzijl, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* 2011. This study was used during the creation of the Enforcement Directive, aimed at improving the enforcement of the Posting of Workers Directive (Art. 1 (1)).

¹⁷ On the duration of postings and the relationship between the Posting of Workers Directive and the Rome I Regulation, see: Kullmann 2015, p. 205-216.

¹⁸ Kullmann 2015, p. 214.

posting, under the condition that the host country's rules are more beneficial to the posted worker. If not, the law of the country of habitual employment remains applicable.

In order to establish to what extent posting companies adhere to this rule, the Inspection of Social Affairs and Employment (SZW) has to perform audits and impose administrative fines in cases of non-compliance. This amendment might create more legal certainty for companies and posted workers on which law is applicable to their employment relationship. Much will depend on the enforcement of this provision. As far as the applicability of the proposed 24-months regulation is concerned, the six-month threshold might elicit bypass constructions, whereby postings, and consequently the duration of service provision, will become limited to six months. Note that the duration of service provision need not be equal to the duration of the posting.¹⁹

(b) Term 'remuneration' to replace 'minimum wages'

Secondly, the proposal addresses one of the most disputed definitions: 'minimum wages' is being replaced with 'remuneration'. This broadens the concept of wage: the provisions on remuneration that apply to local workers and ensue from the law or collective labour agreements declared generally binding shall be applied to posted workers as well. Nevertheless, Member States do have to publicise all components of the remuneration on one website. This publication obligation already ensues from Art. 5 of the Enforcement Directive. The Netherlands should have complied with this provision of the Enforcement Directive as per 18 June 2016 but has not done so yet.

In line with this, Member States are able to oblige companies only to work with subcontracting companies that grant their workers certain remuneration conditions which the contracting party also has to grant. It is interesting that, according to the explanatory notes, these conditions can also be incorporated in collective labour agreements that have not been declared generally binding.

In the Netherlands, this amendment will mainly affect collective labour agreements that have been declared generally binding. Practice has shown that posted workers end up in a lower salary grade than comparable reference persons holding regular jobs in the Netherlands. If posted workers were to actually benefit in terms of remuneration, this might make them less attractive for the service recipient in the Netherlands as they would be more expensive, potentially taking away a comparative advantage.

(c) Equal terms for posted and regular agency workers

Thirdly and in line with Art. 5 of the Directive on temporary agency work, it is decided that the same conditions shall apply to posted agency workers as to domestic employment agencies, turning Art. 3 (9) of the Posting of Workers Directive into a legal obligation. In the Netherlands, this provision is already effective and the proposed amendment will not have any consequences,

¹⁹ Kullmann 2015, p. 211.

apart from potentially increasing the awareness of this obligation among cross-border service providers and their employees (see above).



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