

V European Labour Mobility Congress

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## **POSTING OF WORKERS: DISEASE OR SYMPTOM? DANNY PIETERS**

Ladies and gentlemen,

It is an honor and a pleasure to be able to take the floor at this conference. Many interventions promise to be of a high quality and tackle the important technical questions surrounding posting in a social security context. Discussing EU law technicalities is certainly useful, but we should also dare address more fundamental questions relating to posting as such, as well as relating to the social security mechanism developed to deal with trans-border activities within the EU, the co-ordination system as a whole.

Is posting really the problem or is it merely the symptom of a disease that is more fundamental: the inability of the European Union to define a clear common policy in social affairs, or if you prefer it in a more technical way the inability to reconcile the so often claimed sovereignty of the Member states in social security affairs, on the one hand, and the free movement principles on the other. Or to approach the problem from another angle, more focused on social security coordination: states define their own social security policy at a national level; the European Court of Justice when dealing with social security cases, focusses on the application of European law in individual cases. As we know European law takes precedence over national law and thus the danger is real that individual, often free movement related considerations, override collective, national social policy decisions.

Anyhow, we are confronted today with the above all political problem of establishing to what extent we accept that people may work in one member state and not being socially insured there; they remain socially insured in another country, often called the home country, but not necessarily being the country of the home of the social insured person or of his/her nationality. To what extent do we accept that this situation goes beyond an occasional work excursion over the border. Is it acceptable that it is the result of a systematic strategy to send people abroad with in their back pack the own social security coverage? Technically the latter question translates into questions such as:

- For how long should we accept posting? One year? Two years? Five years? On the basis of bilateral agreements even more years?

- What conditions are to be met by the sending employer or the 'self-sending' self-employed?
- What is 'posting in the interest of the worker'?
- How to proceed to an effective cross border contribution collection?
- How to establish effective control procedures e.g. relating to the payment of correct contributions when salary split techniques are used? How to create incentives for the social security administration of the posting state to control whether there is no letter box company construction present?
- Etc.

Most rules and conditions try to combine the felt necessity to allow someone to work for a while in another country to avoid him or her to continuously switch from one social security system to another, on the one hand, and the respect for the principle of *lex loci laboris*, the country where you work is also the country where you are socially insured. Let us look some closely at the two components of this sought for equilibrium.

Some contend that posting should only be possible to allow a worker, his company, or a self-employed person, to perform their tasks occasionally or temporarily over the border. It is the small painting enterprise accepting to go and paint a house in the neighboring village in another member state. Or if you prefer, the expert attending a conference in another member state, thus working there for a day or two, who otherwise would have to register for two days in the foreign social security system. So posting should be temporary or occasional; but what is temporary, what is occasional? Why accepting the posting for painting an house over the border, and not accepting it for building a bridge during a number of months or a big building complex for one or two years?

Moreover, one should also question what it means for a self-employed to be posted. When I still was a university assistant, that is in the eighties of last century, I asked myself this question and could get no answer in literature or case law. Asking the experts in coordination, they answered me that technically speaking it was possible because one forgot to adapt the relevant articles of the regulation when extending the scope of the coordination regulations to the self-employed, but that, of course, in reality applying the concept of posting to self-employed made little sense: by whom would they be posted? Since the Banks case and the massive flow of self-employed coming from the UK to work on the continent in the 90ies, we know better and we do apply posting rules to self-employed. Remains the question though whether that fundamentally makes sense.

The other principle, the *lex loci laboris* is considered under threat when posting would allow to work in the country for a longer period, while being socially insured in another. Again what is 'for a longer period'? But that is not so much the problem. It is the systematic use of posting, when one

organizes more or less systematically ways to avoid the application of the *lex loci laboris*, in order to maintain the social security system of the preferred country. In other words posting becomes a real problem when it sets aside the *lex loci laboris* principle in favour of an à la carte choice of social security system. So when discussing the issue of posting, we should also dare address the fundamental principle of the *lex loci laboris*.

In this respect, allow me to observe that the problem could already be reduced considerably by using a dual reference rule. Indeed, at earlier occasions I already had the opportunity to put question marks behind the application of the *lex loci laboris* principle to coordinate social security schemes which in nearly all member states are not linked to work, but to residing in the country. Many problems of the actual coordination would be solved if one accepted to coordinate the cost compensating benefits, say family allowances, health care insurance and alike on the basis of the country of residence and not on the basis of the *lex loci laboris*. Anyhow, I was not followed in this. Anyhow remains than also the issue of *lex loci laboris* for pensions, sickness benefits or unemployment benefits.

An alternative solution to avoid à la carte posting could consist in creating a separate European social insurance scheme for moving workers, which would be applicable to all workers who for a longer period would go and work abroad; this European system would then replace the national one. The idea was developed already twenty five years ago; it was then called the 'thirteenth state', as at that moment the EC consisted of 12 member states. I still believe in the merits of such an approach, but realise that for the moment there is no chance to see this idea politically break through.

Another creative way to solve the question of the abusive use of posting, would be to link the *lex loci laboris* principle to a rule similar to the 183 days rule used in international tax arrangements: if a person is for more than half of the working days of a year employed in a country: the social security of that country could apply also on the employment in other states. The problem with this approach is not only that it would imply a strict control of where one works when, but also that it would imply a set of recalculation and money transfers: indeed, social security works in real time, whereas taxation is ex post. Therefore this solution seems less suited.

Some say that the *lex loci laboris* as a criterion is no longer valid as the nature of the work performed has fundamentally changed. Where is someone working when answering telephone calls at home in country A for a client service center established in country B, servicing clients in country C? What about a person commuting every week between offices in country A and B, while also regularly visiting countries C and D for longer periods? What about the so-called digital nomads? I could go on. This is especially problematic for some self-employed, but also for the in many countries

emerging in-between-categories. New forms of work call probably for re-thinking the concept of 'place of work'.

Remains of course the possibility to abandon all together the high principle of *lex loci laboris*, and to replace it by the free choice of social security system. To many this will be sounding as a curse in the church. But at least intellectually we have to examine this option. Of course, it would to a large extent endanger the national sovereignty in organizing social security, as workers could run off to another national social security system. A kind of competition between social security systems may result out of it, this in order to attract the best risks and avoid the attraction of bad risks.

One could also consider the lesser radical option and apply the free choice principle only for allowing the choice between countries the worker has a connection to (i.e. where he/she works or lives). But even then there will be a competition between member states and thus there will be the need to establish fair competition rules. These may e.g. consist of the fact that the competing national systems should not artificially be subsidized by state.

I think however that the free choice option takes us too far away from what is realistic and may complicate the situation even more. On the other hand, the intellectual exercise we did may point the direction we may have to follow in the posting debate.

Indeed, we see that the problem with posting is that it upsets the *lex loci laboris* principle. We all agree it is OK for occasionally allowing a person to work in another country, while keeping the own social security system: that is best and most practical both for him/herself and the concerned national social security administrations. Where problems arise is when posting is deliberately used to systematically avoid the application of the *lex loci laboris* principle and thus to organize a more or less free choice of national social security system. Why is this seen as problematic? We have problems with posting because it may introduce unfair competition between companies or self-employed in various member states. We have problems with posting because the worker may be forced to work with a social security coverage, not responding to the risks he incurs in the foreign country: so e.g. what about a worker getting temporarily ill in a country with a much higher salary and thus benefit level, than the one under which he / she is insured? We have problems with posting because of the equal treatment principle: two workers performing the same work on the same site, having other wages or at least other social security coverage.

The issue of equal treatment is to be relativized as it depends of the point of reference: not accepting posting, could mean that two workers doing the same job for the same employer, would get different pay and in any case a different social coverage, due to the mere fact that one is working in country A and the other in country B. I know that this line of argumentation is questionable: but

if we look at it in the perspective of the single market with the four freedoms, it becomes less questionable.

Where the real problem lies in my opinion, is the falsification of fair competition and the subsequent social dumping which may be the product of the systematic use of posting. The extreme example: a company re-establishing itself in a cheap wage, cheap social protection country, possibly hiring former employees of the Western European country, to perform activities from the cheaper country, possibly being posted to the countries they previously were insured in. But it is also possible that a new or old company is established in a cheap wage/cheap social protection country and takes up tasks abroad, possibly mainly abroad and sends workers out via posting. Where is the problem? Do we not want that companies are active throughout the whole single market? Isn't competition one of the corner stones of the economic union? Yes, but what fails is the existence of a social union. So posting would be less of a problem when member states would accept a substantial minimum level of social coverage. Yet the discussion about these EU minima goes already for decades: should they be absolute or relative minima? Should the minima only affect the amounts of benefits or also the conditions to get access to these benefits? Etc. The very limited impact of the existing minimum standard setting instruments of the Council of Europe or the ILO illustrate that the road to minimum standards of social protection within the EU may be still very long and winding. But perhaps we could avoid this minimum standards issue, by concentrating not so much on the benefits side, but rather on the cost side: a way of looking at things very fashionable in the actual period of budget controls by Europe. Indeed, if we could agree on a European Union level about the very broad margins within which the financing of the national social security or national social insurance systems have to move, we could realise more than one ambition. Allow me to expand on this idea. Suppose we could within the EU agree that the social insurance schemes (which today are subject to the coordination on the basis of *lex loci laboris*) would be financed out of a contribution fork with a percentage between  $m\%$  and  $n\%$  of the professional income and for the remainder by the state, the state subsidy being a fork between  $x\%$  and  $y\%$  of the total social insurances budget.

Such a standard would leave full freedom to each state to organize its social security system according to the own preferences, but would establish fair competition margins: the burden for all employers would be similar and the state intervention would be kept within margins too. Of course the embarrassing consequence of such an approach could be that workers could establish better what value (in social protection terms) they get for their money. But I consider this to be positive, as states will have to explain the choices in social protection they make. Posting becomes less of a problem as the benefit in terms of social protection charges will be more or less equalized. Remains in such an approach the differences in wage levels; here a European minimum wage could intervene, but again that is a story by its own, a difficult story as minimum wages don't

necessarily tell us anything about variations in average wages. Falsification of competition is indeed not necessarily taking place at the bottom of the wage scales.

The fork approach could in my opinion help to take away the political focus on posting; but it would moreover, make clear what the commitment of the European Union, its states and companies will be for social protection; without imposing single social security approaches upon the member states, these being able to express their own preferences and priorities in social security. Economic comparative research should help us establishing the forks; national deviations from the fork should get closer scrutiny and could complement the budget control actions of the European Union.

Ladies and gentlemen,

We are discussing the technical problems of posting already for a number of decades: in the nineties of last century already a series of national conferences and an international conference on Crete organized by the European Commission were dedicated to the topic. Many of the technical questions relating to posting and social security which are today on the table, were already discussed then. The attitudes of some countries relating to these technical questions has sometimes changed over time, though, as the reality has changed since. To give only one example: Germany pleaded twenty years ago in favor of extending the posting periods to five years; today they plead for the principle of a limitation to one year. For me it shows not so much inconsistency, but rather that the issue of posting is in the first place related to the political issue to preserve fair competition. That is why I believe that only by addressing this fundamental issue, - how to make that some countries do not use posting to artificially provide their companies with an unfair competitive advantage-, we can come to satisfactory solutions. To that end, we have to discuss the posting issue in a broader context; that is what I tried to do in this intervention.