

MEASURING THE IMPACT OF FISCAL POLICY OF POSTING FROM ROMANIA TO EUROPEAN UNION

Professor PhD **Elena HLACIUC**

"Ștefan cel Mare" University of Suceava, Romania
elenahlaciuc@gmail.com

PhD Student **Daniel RAȚĂ**

"Ștefan cel Mare" University of Suceava, Romania
addratadaniel@gmail.com

Abstract:

Despite the heated debate on the negative consequences of posting in host countries, the profile and impact of this phenomenon have not yet been mapped in detail. For example, to date there is no further breakdown of the sub-sectors in the industries where the workers are posted. The question is also whether posting causes a shift in internal jobs in each sub-sector. At the same time, information on economic entities using posted workers' services, which is the profile of internal labor force companies vs. the profile of those who prefer posted workers. The European Union has developed employment protection or job creation policies but it has not yet been possible to harmonize fiscal policies with a view to the application by all Member States of a unified fiscal policy on direct taxation. Tax reforms differ from one Member State to another in scope and depth, but their main objective is to reduce the tax burden, especially for low wage staff. In this paper is highlight the necessity of a harmonization regarding the posting in EU, and I hope that this study will help the company and its accountants to understand better the fiscal interpretation of posting from Romania in another country from European Union.

Key words: fiscal harmonization, fiscal policy, posting, fiscal treatment, international mobility

JEL classification: O15, J62, J63

1. INTRODUCTION

Delegation and posting are forms of manifestation of labor mobility but, within the framework of the synergy between European regulations in the field and national law, confusion can arise in relation to the interpretation of concepts, which alters legislative development and has a negative effect on taxing and accurately accounting for the remuneration of delegated or seconded employees. Thus, the present research aims the identifying the numerous interpretations of these concepts and first clarifying, in terms of terminology, the essence of these types of mobility. Considering the scale of the phenomenon at the level of the European Union and the need to limit labor mobility between developing countries to the developed ones in such a way as to ensure the provision of services in fair conditions of competition, I consider that it is very important, conceptually, to delimit the concept "mobility of personnel", to know the national and European legislation and regulations that regulates this phenomenon as well as the social and economic effects of staff mobility.

Posting within the European Union is the context in which the present research aims to identify its multiple meanings at the Romanian national level through an attempt to clarify the essence of the concept. In the context of regulatory synergy between the Community and national, determined by the status of EU Member State, the slightest consequence of confusion with the substantive legal notions alters any legislative development that needs a solid foundation.

On the other hand, the diverse and novelty issues for the Romanian legal system and the Romanian tax system, especially due to the differences in content of the above-mentioned notions, as well as the problems or confusions in practice, were factors determined in the choice of the theme.

The issue of mobility at national and European level has been the subject of research to a small extent in the legal, accounting and especially fiscal fields, and research has often been incomplete or tangential.

From the fiscal point of view, the problem of posting has become a very disputed topic, especially since 2014, when the National Agency for Tax Administration implemented a pilot program aimed at increasing tax compliance in the field of payroll taxation (taxes and social contributions) and the fairness of the fiscal treatment of posting allowances. As a result of the checks carried out at the economic entities carrying out the transport activity, it was concluded that is needed a clarification on the tax treatment of the delegation and posting allowances in the case of drivers, which is why, until clarification of the fiscal aspects suspending controls in this area.

In this paper is highlight the fiscal treatment of posting from Romania to European Union and we tried to give one solution to solve this issue.

European regulations in the field are shaped by the interaction between the European Union, the host country and the country of destination, as well as the specific nature of the industry or the decisions of the European Court of Justice, which often allow divergent national reactions to a certain extent. Most studies in the field have focused on analyzing the impact of European regulations in the field, especially in the Nordic countries, Germany or the Netherlands, as they were the main destination countries for posted workers, and less focused on analyzing the impact of European regulations on the national legislative framework of the countries of Eastern Europe.

The information sources underlying the study is represented by books and articles from Romanian and foreign literature, legislative acts (laws and other national regulations and European regulations in the field), official documents and press releases, websites specialized web site.

2. THE NECESSITY OF FISCAL HARMONIZATION IN POSTING FIELD

The population mobility in the European Union can be considered as a social phenomenon, generated by individual and economic interests; this phenomenon is a characteristic of all EU Member States, because of the legacy and liberty of freedom inside European Union (Rață and Hlaciuc, 2018).

The tax controversy concerning the posting of workers in the European Union is centered on the following two issues (Corraza and Rapp, 2018):

- Existence of unfair practices regarding social conditions;
- European regulations that are ambiguous and have given birth to abusive forms of cost-cutting measures, for example: the existence of economic entities with a mailbox, undeclared work.

These issues, presented by Corraza and Rapp (Corraza and Rapp, 2018), are rather a consequence of the weakly fragmented single market regulations, fragmented from an institutional point of view.

Apart from the aspects presented, I also complete with different practices regarding the calculation of the remuneration of the posted worker. There is no clear regulation on the methodology, and so, depending on the inspector who checks compliance with the transnational posting framework, either additional net payments or net salary deductions are set.

Directive (EU) 2018/97 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71 / EC on the posting of workers in the framework of the provision of services, published in the Official Journal of the European Union no. L173 / 16 of 9 July 2017, intervenes in posting at the level of the European Union in the following aspects:

- Remuneration of posted workers is under the principle of equal pay for the same work. In according with article no. 3, posted worker must be provided with the conditions of employment which are established in the host Member State in whose territory the work is carried out. The legislator makes a clear distinction between the employee's remuneration and the posting allowance. The employer must reimburse the travel expenses (transport, accommodation, meal, etc.) and, if the posting allowance covers these expenses, is not considered an integral part of the employee's remuneration. It is important to note that workers are protected by this directive because

Article 7 allows the application of more favorable working and employment conditions to employees.

- Remuneration of employees in the event of long-term postings. If the posting exceeds 12 months, under Article 3 (1a), host Member States should ensure that undertakings posting workers on their territory guarantee to those workers an additional set of working and employment conditions applicable in a compulsory for workers in the Member State in whose territory the work is carried out.

Another important aspect is that the European Union does not intervene in regulating the rules of remuneration or reimbursement of the costs of posted workers, stating in Article 3 (1) from that "the concept of remuneration is determined by national law and/or national practices of the Member State in the territory of which the worker is posted and shall be all constituent elements of remuneration which are binding on national law, laws, regulations or administrative conventions or collective agreements or arbitration awards which have been declared to be of general application" (Directive (EU) 2018/97 of the European Parliament and of the Council of 28 June 2018).

From the tax point of view, it is not only the establishment of the level of remuneration which is of interest, but also the correct fitting of the personnel's operations into the category of posting or delegation, or whether these expenses are deductible or not.

The tax implications on staff mobility target areas such as:

- Social security. The issues that concern are: where the state is staffed during the posting and where these contributions are paid;

- Services. In the absence of agreements with various Member States, there is the possibility of transforming delegation/posting into a service provision from a tax point of view, which implies various payment taxes;

- The risk that the posting employer is placed as a permanent establishment in the country of posting;

- Income tax and avoidance of double taxation. The employer must bear the costs of declaring and paying the taxes normally due to seconded personnel;

- Compliance with the labor law in which the worker is posted from the first day or after a certain period of time, when the worker is posted at another Member State.

Upon accession to the European Union, Romania had to align national legislation on labor and human resources with European rules and regulations as a result of the implementation of the *acquis*.

With a view to harmonizing the national social security legislation of posted workers, European regulations provide that social security are in the responsibility of the employing entity in the State of origin of temporarily posted workers.

In conclusion, depending on the type of delegation/posting, the applicable law is the following (table no. 1):

Table no. 1. The legislation applicable to European personal mobility

European personal mobility			
	<i>Bussiness travel</i>	<i>Posting</i>	<i>Cross – border worker</i>
Salary and working conditions	The law of the country where the employee is employed is enforced.	The legislation of the country where the worker is working applies	The law of the country where the employee is employed is enforced.
Social contributions	The law of the country where the employee is employed is enforced.	The law of the country where the employee is employed is enforced.	The law of the country where the employee is employed is enforced.
The residence	In the country of origin	< 3 months, usually in the country of origin > 3 in the country in which they operate	In the country of origin

Source: processing of the authors according to the national normative framework and the European regulations

The question arises whether, beyond the European regulations or national legislation, is if the responsible national institutions can take the initiative and assume the creation of transnational regulations on cooperation, especially in the field of human resources, because European integration is a process that has taken emerging from the desire of national states to create a transnational level of action. Bosh (Bosh, 2011) said that transnationalization means "economic, cultural, political, and social relations beyond the borders of national states, but they are not primarily maintained between the states themselves and their governments". So, establishing collective bargaining agreements that allow the creation of standards within the national autonomy seems to be the optimal starting point for setting transnational standards.

However, due to the considerable wage gap, the different interest between the Member States in the South and, in particular, Central and Eastern Europe and the other Member States, and the fragmentation of the industrial relations between Romania and Central Europe where they are the most important host countries for workers detached, the conclusion of transnational agreements is virtually impossible.

3. FISCAL LEGISLATION FRAMEWORK REGARDING THE POSTING FROM ROMANIA TO EUROPEAN UNION

Posted workers or delegated staff to the Member States of the European Union receive a specific allowance to cover the inconveniences created by the posting. Regarding the tax treatment of the delegation/posting indemnity, pursuant to Article 76, paragraph 2, point (k) (Law 227/2015 on the updated Tax Code), the allowances received by the staff delegated or posted to another locality, both on the territory of Romania and abroad, performed in the interest of the service are not taxable within the limit of 2.5 times the legal level established by the Government Decision for the personnel in public institutions, as well as those received to cover travel and accommodation expenses. In the light of the same law, the travel expenses, accommodation and allowance for delegation / posting are included as travel expenses.

The daily non-taxable ceiling is granted only to the extent that the journey time exceeds 12 hours, considering every 24 hours one day of travel in the interest of carrying out the activity.

In accordance with the legislation in force, diurnal allowances are granted on a calendar day. The number of calendar days in which the person is in the delegation is counted from the date and time of departure until the date and time of the return of the means of transport to and in the locality where he / she has his / her permanent place of work, every 24 hours being considered one-day delegation (Tulcan et al., 2017).

In the case of a delegation for one day, the delegation allowance shall be granted only if the duration of the delegation is at least 12 hours. For time fractions that together do not add up to 24 hours, the delegation allowance is granted as follows:

- 50% for up to 12 hours;
- 100% for the period exceeding 12 hours.

The delegation / posting allowance can be received by (Law 227/2015 regarding the Tax Code):

- Employees;
- Administrators, appointed by the constitutive act or by a management contract respectively mandate;
- Directors, who carry out activities under the mandate contract;
- Members of the directorships of dual-account companies and of the supervisory board;
- Managers who operate under the management contract.

According to Law 16/2017 on the posting of employees in the framework of the provision of transnational services, the allowance specific to the posting is, in accordance with Article 2 (h), the allowance intended to ensure the social protection of employees granted to compensate for the disadvantages caused by the posting, consisting in the removal of the employee from his usual

environment" in addition to the items listed by Law 227/2015 regarding Tax Code, the food expenses for posting are also added.

According to Article 3 of the European Parliament and Council Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71 / EC on the posting of workers in the framework of the provision of services published in the Official Journal of the European Union L 173/16 of 28 June 2018, Member States shall ensure that, whatever the law applicable to employment relationships, economic entities in the country of origin guarantee to workers posted to their territory, subject to the principle of equal treatment, the working and employment conditions are established in the Member State in whose territory the work is carried out, this it means that posted workers who are temporarily posted from their normal place of employment in another Member State or in another job, should have at least the same indemnities or the same level of reimbursement of travel, accommodation and board expenses workers in that Member State.

This provision is also transposed into the Romanian legislation by Article 2, paragraph (f) of Law 16/2017 on the posting of employees in the framework of the provision of transnational services, which states: "the minimum wage applicable in the territory of a Member State or within the territory of the Swiss Confederation for the posted worker on the territory of Romania is that defined by the legislation and / or practice of the Member State other than Romania or the Swiss Confederation , on the territory of which the employee is posted".

Allowing a posting allowance equal to the minimum wage in the country where the worker is posted will have a negative impact on the economic entity (from Romania) that sends the employee to the host country because the tax burden also increases with the increase in the gross salary paid to the worker.

As can be seen in table no. 2, the minimum wages set by different national regulations is different from one Member State to another, which is why it is impetuous to know if the economic operators provide transnational services. Romania has among the lowest monthly minimum monthly wages on the economy, at the level of the European Union (407 euro / month), along with Bulgaria (261 euro), Lithuania (400 euro) and Hungary (418 euro).

Table no. 0. The minimum wages in UE

Country	Minumum wage (euro)								
	2015		2016		2017		2018		2019
	S1	S2	S1	S2	S1	S2	S1	S2	S1
Belgium	1.502	1.502	1.502	1.502	1.532	1.532	1.563	1.563	1.594
Bulgaria	174	184	194	215	215	235	235	261	261
Czech Republic	310	332	340	366	365	407	420	478	469
Germany	-	1.440	1.440	1.440	1.440	1.498	1.498	1.498	1.498
Estonia	355	390	390	430	430	470	470	500	500
Ireland	1.462	1.462	1.462	1.546	1.546	1.563	1.563	1.614	1.614
Greece	684	684	684	684	684	684	684	684	684
Spain	753	757	757	764	764	826	826	859	859
France	1.445	1.458	1.458	1.467	1.467	1.480	1.480	1.498	1.498
Croatia	398	396	399	408	414	433	442	462	466
Latvia	320	360	360	370	370	380	380	430	430
Lithuania	290	300	325	350	380	380	380	400	400
Luxembourg	1.921	1.923	1.923	1.923	1.923	1.999	1.999	1.999	1.999
Hungary	328	333	341	351	350	412	413	445	418
Malta	718	720	720	728	728	736	736	748	748
Netherlands	1.495	1.502	1.508	1.525	1.537	1.552	1.565	1.578	1.594
Poland	404	410	422	434	417	453	473	503	480
Portugal	566	589	589	618	618	650	650	677	677
Romania	205	218	238	232	276	275	319	408	407

Slovenia	789	791	791	791	791	805	805	843	843
Slovakia	352	380	380	405	405	435	435	480	480
United Kingdom	1.301	1.379	1.525	1.512	1.443	1.393	1.414	1.401	1.467

Source: Eurostat ([earn_mw_cur])

There are many situations where the share of travel expenses in the total operating costs is significant (entities carrying out transport, construction, etc.) and the complexity of taxation in respect of this category of economic operations requires clarification of how the indemnity of delegation during posting but is important also to classify the process in one of three situations:

1. Transnational posting;
2. Delegating outside of Romania;
3. Delegation into Romania.

It is very important that the delimitation of these concepts is done correctly because, from a fiscal point of view, the implications are numerous, especially since the level of taxes and contributions differs depending on the type of delegation/posting.

There is no fiscal difference between the posting allowance for transnational services and the delegation allowance, or the daily subsistence allowance. The structure of the minimum wage and its constituent elements are those of the country in which the activity is carried out and the applicable tax rules are those in Romania. Regarding the facilitation of relations with the authorities of the Member States, the recording in the labor contract on the granting of allowances for transnational services is recommended but not sufficient or useful in the relationship with the Romanian tax authorities (National Agency for Financial Administration).

The tax interest for posting derives from the fact that this phenomenon is an exception to the principle that social contributions must be paid in the country where the worker is working (the *lex loci laboris* principle), since, in this situation, the social security legislation of the Member State of origin continue to apply for up to 24 months. Consequently, the person posted to Belgium, for example, is not subject to Belgian social security. This also means that the person pays social security contributions in the sending Member State (at the minimum wage - € 1,563 in our case) and these amounts differ from those applied in Belgium. In addition, there is a core of terms and conditions of employment to be respected in the home country. This means that Belgian salaries and working conditions (including minimum wages) must be respected when employees are posted to Belgium.

As can be seen in the table no. 2, the Romania-Belgium salary is significant and the need for the Romanian economic entity to ensure the minimum wage in Belgium will lead to an increase in the temptations to fraud the state system if not even an increase in tax evasion.

Tax evasion, in our case, is the illicit mechanism by which the economic entity "hides" or ignores the payment of social contributions and income tax on salaries and assimilated to them, respectively paying lower taxes and duties than those that would be had to pay them.

The most numerous examples of tax evasion in the area of transnational staff mobility are the declaration of a minimum wage without complying with European regulations, which implies the payment of social contributions or a lower income tax.

The Romanian employer's concerns to reduce costs (at the limit of the law or even outside it) will have negative effects on the continuity of its economic activity in the long run and implicitly on the national economy.

However, according to art. 7 of Law no. 16/2017 on the posting of employees in the framework of the provision of transnational services, the task of verifying the classification in posting or not posting belong to the Territorial Labor Inspectorate on the basis of criteria specified by the Romanian legislator. One of these should be avoided: Exclusive contracts with a partner (services are provided to a single foreign sender) and monthly invoicing to that service partner (Agud, 2019).

CONCLUSIONS

From a fiscal point of view, the issue of mobility at the European Union level has become a very controversial topic, especially since 2014, when the National Agency for Tax Administration implemented a pilot program aimed at increasing tax compliance in the field of payroll taxation and social contributions and the fairness of the fiscal treatment of posting and posting allowances.

Practical compliance with the applicable rules on posting and effective protection of workers' rights in this respect is a particularly important issue and should be ensured through appropriate measures in accordance with national law and/or practice and in accordance with Union law.

Such measures may include, in consultation with the social partners concerned, the direct liability of the subcontractor, in addition to, or in place of, the employer's liability in respect of any unpaid net remuneration corresponding to the minimum rates of remuneration and / or contributions to funds or institutions jointly managed by the social partners and regulated by law or by collective agreements in so far as they fall within the scope of Article 3 (1) of 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, published in the Official Journal of the European Communities no. L18 / 1 of 21 January 1997.

The rules on posted workers have been transposed into the legislation of the Member States, which is why the national legislative framework in each country in this field is quite similar. However, transposing European regulations in the individual European Union countries have an important impact. The cause of such a different impact is justified by the fact that although the harmonization of the national legislation with the European regulations has been achieved, there is a normative framework according to the industry in which the worker is employed.

The specificity of the transposition of European regulations is that there are differences in salary, working conditions and employee protection which will affect the benefit of posted workers by providing appropriate social protection or may have a less beneficial effect due to legislation in quite vague matter.

However, Member States remain free to lay down stricter rules on liability in national law or to go further in the context of this right in a non-discriminatory and proportionate manner.

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