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The background of the lower half of the page is a black and white photograph. It features a wireframe globe in the foreground, with a large, dark, semi-transparent gear shape overlaid on its right side. In the background, a person is walking, their figure slightly blurred. The entire page is framed by a lime green border on the left and right sides.

Employment Newsletter

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Cross-border postings

Preamble

The EU Directive 96/71 provides for specific rules governing cross-border postings in Europe.

This Directive has been implemented in most European member-states now. Indeed, it was incorporated in the United-Kingdom where such implementation required only minor legislative changes¹ as UK legislation was already mainly consistent with the EU Directive. The EU Directive was subsequently incorporated, in German law as per the so-called “Arbeitnehmer-Entsendegesetz” implementation Act of 26 February 1996, in the Netherlands in 1999 (Law dated 2 December 1999), in Italy (Legislative Decree of 2 February 2000) and in Belgian Law in 2002 (Law dated 5 March 2002)

In France, a comprehensive bulk of rules has been implemented since many years now to deal with all social security issues arising in cross-border postings situations.

However, pure employment law aspects were so far quite mistreated as legal rules were only focusing on these social security issues. In practice, this was often a source of trouble for many European employers willing to post employees across Europe.

This deficiency is now solved.

Indeed, French law just finished the full implementation of the 96/71 Directive

relating to cross-border postings. This resulted in the enactment of a new set of rules, which has many practical consequences in particular with respect to two major issues: the governing law and the terms and conditions applicable to the posted employees, keeping in mind that the whole purpose of this new legislation is to avoid any dumping practices.

New rules

In accordance with the principle of the Freedom of movement of persons and services, a major principle of the Treaty of Rome, the 96/71 European Directive of 16 December 1996 provides for a set of rules governing the posting of workers in the framework of the provision of services.

The Directive envisages various situations where employees of a company, located in the European Union, are temporarily sent to another Member State to perform work in the context of the provision of services.

Cross-European postings raised real issues relating to the determination of the applicable rules and regulations to these posted employees in terms of working conditions, compensation, working time...

In this respect, the 96/71 Directive provides for the following distinctions:

! The posting, on the account of and under the direction of the company

making the posting, as per a contract concluded between said company and the party to whom the services are intended;

! The posting made within the same group provided the initial employment relationship between the company making the posting and the worker remains in force;

! The posting of temporary workers provided the initial employment relationship between the temporary agency making the posting and the worker remains in force.

The purpose of the Directive is to provide for a “hard core” of clearly defined protective rules applicable to the posted employee in the territory of the Member State where the services are provided.

Indeed, the Directive states that, whatever the law applicable to the employment relationship, the posted employee shall benefit from the employment conditions applicable in the hosting Member State, which are laid down by law, regulation or administrative provisions and/or by collective agreements insofar as they concern maximum work periods and minimum rest periods, minimum paid holidays, minimum rates of pay, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women, equality of treatment between men and women, and other provisions

1 The UK relevant legislation includes, for example, the Working Time Regulations 1998, the National Minimum Wage Act and Regulations 1998, various discriminations acts and regulations, the Health & Safety at Work etc Act 1974 and the Employment Relations Act 1999.

on non-discrimination (Article 3 of the Directive).

Therefore, posted employees shall benefit from rights equivalent to those applicable to the employees with whom they will be working in the hosting company.

In France, the Act of 2 August 2005 totally renewed the provisions applicable to cross-border postings in the light of the EC Directive. As a consequence, as of today, Articles L. 342-1 to L. 342-6 of the labor Code set the legal framework applicable to the posting in France of workers employed by a foreign company within the framework of the provision of services.

The 2005 Act provided that these new provisions would be applicable on the publication of a Decree and in any case on 1 January 2007 at the latest. Said Decree has only been published on 11 December 2007.

It should be underlined that, contrary to the European provisions, the scope of the French rules is not limited to postings occurring in the European Union. Indeed, French rules on cross-border postings are applicable to any posting made in France by foreign companies, located in or outside the European Union.

These new rules can be examined under three aspects: the employer, the posted employee and the posting itself.

Conditions relating to the employer

! The employer of the posted employee must be really and regularly established outside France.

Prior to the execution of the service contract, the employer of the posted employee must have duly complied with all rules relating to the implementation and incorporation of his company which are in force in his country.

Moreover, the employer of the posted employee must be really implemented outside France, which supposes that a genuine business is duly performed outside France.

Said condition has the purposes of ensuring that the foreign activity has not been organised with the sole purpose of posting employees.

! Excluded situations

Rules relating to cross-border postings are not applicable to foreign employers having an activity exclusively in France.

Said rule is intended to avoid transactions aiming at the settling of non-operating companies outside France with the sole purpose of avoiding the incorporation of said company in France and the application of French employment law.

Conditions relating to the posted employee

The employee must work a regular basis for the foreign employer posting him. This implies the following:

! Existence of a prior employment contract

An actual employment contract must exist prior to the posting situation. Moreover, said employment contract must not be entered with the sole purpose of posting the employee.

However, the French Labor Code does not provide for a specific minimum period of employment before posting. In this respect, before the 2005 Act, the French Labor Administration imposed a minimum period of one year of employment at the date of posting. But, as of today and so far, no administrative position has been taken further to the 2005 Act.

! Continuation of the initial employment relationship during posting

The employment contract with the foreign company continues to be enforceable during the posting.

As a consequence, the posted employee must remain under the exclusive subordination of his/her employer, i.e. the foreign company, throughout the period of secondment.

Conditions relating to the posting

▮ Possible posting situations

French Law envisages various posting situations: (i) a service contract entered into between 2 companies according to which the employee is posted in France in a third company (ii) a service contract according to which the employee is posted in an establishment of the foreign company located in France, (iii) a service contract according to which the employee is posted in a French entity belonging to the same group as the foreign company, (iv) a temporary activity in France or (v) the provision of services in France on behalf of the foreign company.

By extending the possibilities of posting to intra-group posting, French law finally recognises a common practice that has been so far ignored from a legal standpoint.

▮ Temporary nature of the posting

The posting must be temporary and limited to the period of provision of services.

However, the French Labor Code (as well as the EC Directive) does not provide for a maximum duration. Nevertheless, the temporary nature of the posting shall be supremely appreciated by the judges on a case by case basis, taking into account the importance of the services to be rendered and the parties' intention.

▮ Compliance with the "hardcore" of rules

Employees employed by foreign companies and posted in France benefit from all individual rights applicable to workers employed under French law, in addition to the minimum rules provided by the EC Directive (working time, minimum compensation...). This constitutes the common base of the legislation of the Member States applicable to all cross-border secondments.

Likewise, employees posted in France benefit from all extended collective bargaining agreements applicable in the French company provided that their initial employer performs the same activity as the French entity.

As a consequence, throughout the period of posting in France, the employee will in particular benefit from French regulation relating to minimum wages, working time, paid holidays, working conditions (health, safety, protection against the risks of accident...).

However, these principles do not apply to all rules and regulations relating to the conclusion and the termination of the employment contract, which remain subject to the legislation chosen by the parties.

Are also excluded, rules that logically cannot be applied to employees of a company incorporated outside France (e.g. professional training, employee representation...).

▮ Mandatory prior declaration

In addition to immigration formalities, employers posting personnel in France must file a declaration with the Labour Inspector. This declaration must be filed before the commencement of the provision of services and the competent Labour Inspector is the one where the services are to be provided. This mandatory declaration replaces all declarations that are usually required by the French Labour Code, except those specifically governing posting situations.

Sanctions

In case of non-compliance with these conditions, the service provider, i.e. the foreign company, loses the benefit of all French rules governing cross-border posting. In this case, notably, the ordinary legal provisions governing laws in conflicts become fully enforceable again (i.e. the rules set by the Rome Convention). As a result, and as the case may be, all rules of public order provided for by French law, and in particular those relating to termination will be applicable and not only the hard-core of rules mentioned above.

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